

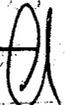
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COURT OF APPEALS
DIVISION II

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

STATE OF WASHINGTON
BY  DEPUTY

GLOBAL HORIZONS, INC.,

Respondent/Cross-Appellant,

v.

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

Appellants/Cross-Respondents.

RESPONSE BRIEF OF RESPONDENT/CROSS-APPELLANT

Kathleen D. Benedict, WSBA No. 7763
Sally Gustafson Garratt, WSBA No. 7638
FREIMUND JACKSON TARDIF &
BENEDICT GARRATT, PLLC
711 Capitol Way S., Suite 605
Olympia, WA 98501
(360) 236-9858

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I. INTRODUCTION

Global Horizons Inc. (“Global”), the Washington State Department of Labor and Industries (“L&I”), and the Employment Security Department (“ESD”) (collectively the “Departments”) entered into an enforceable contract on September 22, 2005, to resolve and settle issues associated with an administrative appeal of alleged violations of state agricultural labor program laws and regulations. That contract was in the form of a settlement agreement (“Agreement”) and it resolved all issues between Global and the Departments regarding the proposed revocation of Global’s 2005 farm labor contractor (“FLC”) license. The Agreement also imposed new requirements on Global and designated the conditions under which Global’s FLC license could be revoked in the future.

This matter involves the Departments’ breach of that Agreement and their subsequent actions to avoid admitting their breach. A specifically negotiated term in the Agreement, which was the only term in the Agreement favorable to Global, protected Global from the Departments revoking Global’s FLC license without a pre-revocation hearing by requiring L&I to give Global two weeks notice and opportunity to cure any alleged violations of Agreement. The Departments breached the two-week notice and opportunity to cure requirement by providing only 10 days notice before summarily revoking Global’s license. The Departments sent Global a letter on December 20, 2005, stating Global had to cure a short list of violations by December 30, 2005. When Global was unable to provide an independent audit report by that deadline, the

last required “cure,” the Departments sent Global a letter on December 30 stating Global’s FLC license was immediately revoked. Providing Global the two-week notice and cure opportunity were a condition to the summary revocation of Global’s license. The Departments failed to meet this crucial condition.

The Departments have attempted to avoid liability for their breaches by first claiming that Global received the required two-week notice because L&I “technically” changed the notice period to two weeks from the date of the actual license revocation – December 30, 2005. Second, the Departments allege the Agreement did not include an opportunity to cure provision, even though that assertion is contrary to well-established basic contract law. Both the *Restatement (Second) of Contracts* and case law recognize that a notice provision provides nothing to the breaching party without a concurrent opportunity to cure those alleged deficiencies. Indeed, as both the Superior Court Judge and the Administrative Law Judge noted, it is implausible that Global would have given away all of its due process rights for nothing more than two weeks notice without a corresponding opportunity to cure.

The Departments did not afford Global the contractual and due process rights that Global negotiated into the Agreement and it cost Global its FLC license and its business in Washington State. The Departments chose not to correct their deficient notice and opportunity to cure, even though they knew that if the notice and cure period had been extended or provided anew, Global would likely have been able to timely make this

last cure. Instead, the Departments decided to create a new “technical” two-week notice period that commenced December 30, 2005, and continued through January 13, 2006. The Departments never communicated the new dates to Global because Global’s FLC license had already been revoked. All of Departments’ correspondence and actions were absolutely consistent with their revocation of Global’s license on December 30. This transparent attempt by these state agencies to cover up their mistake should not be condoned.

The Departments further claim that even if they are found to have breached the Agreement, their breaches were not material, and Global therefore is not entitled to damages. The superior court agreed that the Departments had breached both the Agreement’s notice and cure provision, but adopted the Departments’ claim that their breaches of the Agreement were not material and dismissed Global’s complaint and “returned” the matter back to the Office of Administrative Hearings. The law does not support the superior court’s order. A material breach allows the non-breaching party to terminate the contract, while a non-material breach limits the non-breaching party’s remedy to compensatory damages. Thus, even if the Departments’ breaches were held to be immaterial, Global is nevertheless entitled to recover its damages.

Nor could the superior court remand Global’s declaratory judgment and breach of contract case to the Office of Administrative

Hearings. Global had no administrative action before the superior court.¹ The court simply confused these two different types of cases and legal forums. In contrast, the Department's alleged breach by Global, the failure to submit the independent audit report by the December 30 deadline, was not a material breach and the Departments could not therefore revoke Global's FLC license and terminate the Agreement. This minor deficiency would likely have been "cured" within a week, and did not affect any other substantive part of the Agreement, workers in the farm labor program, or any other aspect of Global's operations in Washington.

This Court should affirm the superior court's order that the Departments breached the Agreement and remand this case to the superior court for a determination of Global's damages.

II. ASSIGNMENTS OF ERROR

Pursuant to RAP 19.3(g), Global sets forth the following errors it contends were made by Thurston County Superior Court Judge Gary R. Tabor (the "court") in this matter:

1. The court erred in entering its Order on Plaintiff's Motion for Partial Reconsideration dated November 7, 2008, denying Plaintiff's Motion for Reconsideration. CP 1126-1132.

2. The court did not err in entering its Findings of Fact, Conclusions of Law, and Order dated March 14, 2008, granting

¹ The concurrent administrative appeal had been stayed pending the outcome of the breach of contract action and has now been dismissed without prejudice.

declaratory and summary judgment that the Agreement contains a two-week notice and opportunity to cure provision and that the Departments breached the Agreement's two-week notice and opportunity to cure provision, but did err in denying Global's motion for partial summary judgment. CP 1022.

3. The court erred in entering Finding of Fact 1.4 finding the Departments' breach was not material. CP 1020.

4. The court erred in entering Finding of Fact 1.7 finding the public interest was not impaired by enforcement of Global's due process waiver. CP 1021.

5. The court erred in entering Conclusion of Law 2.2 finding the Departments breached the Agreement but their breach was not material. CP 1021.

6. The court erred in entering Conclusion of Law 2.4 finding the Departments breached the Agreement but their breach was not material. CP 1021.

7. The court erred in entering Conclusion of Law 2.6 finding the public interest was not impaired by enforcement of Global's due process waiver. CP 1022.

8. The court erred in entering Conclusion of Law 2.7 denying Global's motions for partial summary judgment. CP 1022.

9. The court erred in entering Order 3.3 denying Global's motions for partial summary judgment. CP 1022.

10. The court erred in entering Order 3.6 ordering that this matter be returned to the Office of Administrative Hearings for further proceedings in accordance with the court's findings. CP 1023.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Global restates the issues as follows:

1. Whether the Departments breached the two-week notice provision set forth in Section IV.L.5 of the Agreement by providing Global only 10 days notice between December 20, 2005, and December 30, 2005, prior to summarily revoking Global's license.

2. Whether the Departments breached the condition contained in Section IV.L.5 of the Agreement by not providing Global two weeks notice prior to summarily revoking Global's FLC license. Only "[b]y providing the notice, [did] Global agree[s] that L&I is not required to provide a hearing or an opportunity for Global to be heard prior to the revocation."

3. Whether the Departments breached the two-week notice and cure provision in Section IV.L.5 of the Agreement by providing Global only 10 days notice and opportunity to cure several alleged violations of the Agreement prior to summarily revoking Global's license.

4. Whether the Departments' failure to cure their violations of Section IV.L.5 of the Settlement Agreement were material entitling Global to its damages.

5. Whether the Departments' failure to cure their violations of Section IV.L.5 of the Settlement Agreement, choosing instead to create an

alleged new notice period between December 30, 2005, and January 13, 2006, was contrary to and impaired public policy and not in good faith.

6. Whether Global's failure to provide the independent audit report by December 30, 2005, after the Departments had been advised the report would be submitted within a week, was a slight breach that did not justify the Departments' termination of the Settlement Agreement.

7. Whether the court erred in attempting to return Global's declaratory judgment and breach of contract civil case to the Office of Administrative Hearings for further proceedings consistent with the court's findings.

IV. COUNTER STATEMENT OF THE CASE

A. Global and the H-2A Program.

Global's business is to provide legal local and foreign farm workers to agricultural clients in the United States and becomes their employer of record. Operating under certain provisions of the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act of 1986 (8 U.S.C.A. § 1101(a)(15)(H)(ii)(a)) ("H-2A program"), Global allows farmers throughout the country to obtain critically needed skilled farm laborers on a temporary or seasonal basis. By hiring Global to supply their needed farm labor, farmers also realize great savings on the costs of the implementation and management of the H-2A program. CP 88.

In order to recruit the best and most suitable workers, Global employs individuals who know the H-2A program requirements and are

familiar with the workers' resident foreign countries to assist with the recruiting process. These individuals meet with the foreign worker candidates; coordinate with independent recruitment contractors working with the company; interact with local authorities in the foreign countries and U.S. consulates and other officials; and obtain all the necessary visas and permits from those local authorities and governments. CP 88. Once the workers are hired, Global provides them with free round-trip transportation to the United States, all ground and flight transportation while in the states, and free housing, which must meet the strict regulations of the United States Department of Labor and local authorities. Global then manages and supervises the workers using bilingual supervisors in the United States, by opening bank accounts, providing ATM cards and, at times, social security numbers, instituting payroll services, supplying training required by state and federal authorities, and obtaining Workers' Compensation benefits for the workers. CP 88. Global further deals with all federal, state, and local inspections and cures any deficiencies. CP 88-89.

The H-2A program is legally complicated and often brings about various legal and political challenges. In the morass of legal, social, and political challenges associated with farm laborers, Global provides a valuable and needed service. Farmers are extremely pleased to have a steady, reliable, and legal work force to harvest crops and perform other agricultural work. H-2A program workers are likewise pleased with the arrangement because they can earn far higher wages than in their home

countries. These higher wages allow the workers to return to their native countries with earned wages that better their lives. Consumers also benefit from the availability of legal foreign workers by keeping the costs of farm products and goods low while maintaining the quality of produce. CP 90.

B. Global's Issues with the State of Washington.

In early 2004, Global recognized that farmers in Washington State were eager to have a reliable source of farm labor to harvest their crops. Accordingly, Global's President and Chief Strategic Officer, Mordechai Orian, entered into contracts with two farmers in eastern Washington to provide workers. Global, which at all applicable times was licensed under the federal H-2A program, obtained a Washington State Uniform Business Identification number and began bringing foreign workers into this state. Before doing business in the state, a Global employee called L&I to inquire about compliance with the state's requirements. However, a misunderstanding during this call led Global to erroneously believe it was not required to have a farm labor contractor ("FLC") license to do business under the federal H-2A program in Washington State. When Global learned that it was required to have a Washington FLC, it applied for the license (in August 2004) and was granted the license on October 7, 2004. CP 91.

Washington FLC licenses are renewed at the end of each calendar year. At the end of 2004, Global attempted to renew its FLC license, but L&I denied the renewal, citing a variety of reasons. CP 91. Global appealed the December 30, 2004, denial of its license on January 14, 2005,

and consistent with the provisions of the Administrative Procedure Act, chapter 34.05 RCW (“APA”), its FLC license was renewed and remained in effect while Global pursued its appeal. During the appeal period, L&I continued to audit and investigate Global, and on June 3, 2005, L&I and ESD, the agency that recruits and refers local workers for farm labor positions and oversees the workers and their living conditions, issued a Notice of Violation (“NOV”). The NOV alleged numerous violations and assessed penalties. Global appealed the NOV and the two cases were consolidated for an APA hearing scheduled for September 26, 2005. CP 91-92. By the end of August 2005, Global had corrected all health, safety, and housing violations relating to workers. CP 92.

C. The September 22, 2005, Settlement Agreement.

In August 2005, Global, L&I, and ESD began settlement talks in an effort to resolve all the issues and matters between Global and the Departments. CP 92; *see also* CP 97-123 and CP 145. The settlement negotiations were handled by the Departments’ Assistant Attorney General (“AAG”) Amanda Goss, assisted by AAG Bruce Turcott, and Global’s then counsel, Ryan Edgley, assisted by attorney Natalie Brouwer. A lengthy settlement agreement was signed on September 22, 2005. CP 92-93; CP 145. The first part of the Agreement contained three sections of obligations (Sections I-III) that Global had to meet by September 22, 2005, including the payment of penalties and taxes, signing stipulations, and the payment of certain air fares and wages. Global was also required, on an on-going basis, to meet several requirements

regarding workers' housing and conditions, and payment of L&I taxes. CP 97-101. These obligations were followed by a "General Terms" section which required Global, among other things, to pay for an independent auditor to audit its quarterly premiums and wages and certify the accuracy of the payments due L&I, ESD, and the Department of Revenue, starting with the third quarter of 2005. CP 102-108.

The Departments also required Global to agree to several waivers and stipulations. CP 97-108. These included the stipulation that if L&I determined "in its sole discretion" that any future violation of the conditions of the Agreement or the law occurred, such violation would automatically be an immediate threat to the public health, safety, and welfare and would be a sufficient basis for L&I to summarily revoke Global's FLC license, i.e., Global would not be provided a hearing before its license was revoked as would otherwise be required by the APA (a "summary revocation"). CP 99, 101; *see also* CP 107. Global was also required to stipulate that if L&I revoked the FLC license, ESD could immediately cease providing referral services and Global waived any right to stay the revocation of its license during the post-revocation appeal. CP 107.

Article IV, Section L.1 of the Agreement was entitled "Revocation and Remedies" and stated that the Agreement could only be enforced "in Thurston County Superior Court as a contract action" and Global had no right to seek superior court injunctive relief. CP 107. Because these stipulations and waiver of rights were onerous, Global had vigorously

negotiated for a 28-day notice and opportunity to cure provision so that it would have satisfactory time to cure any deficiencies before the FLC license was revoked. CP 92, CP 145-149. The Departments insisted upon a more limited two-week notice and cure provision. That more limited two-week notice and cure provision was eventually accepted by Global after lengthy negotiations and appears in Section IV.L.5 of the Agreement. That Section required L&I to give Global two weeks notice and opportunity to cure before revoking its FLC license and only if Global received this two-week notice would Global be required to waive its right to a license revocation without first being afforded a hearing. CP 145-149.

D. Post-Agreement Actions Taken by the Departments.

After the Agreement was signed on September 22, 2005, Global made efforts to timely complete all its numerous obligations under the Agreement. CP 92-93, CP 179-181, CP 466-473. However, L&I imposed additional obligations on Global that had not been included in the Agreement. CP 468, 470, 472, 1091. Despite Global's efforts to meet its obligations, the Departments sent Global a letter dated December 20, 2005 (the "December 20 letter"), asserting that Global had committed six violations of the Agreement and listing five "cures" to be performed by December 30, 2005. CP 125-128. The letter also stated that if any of the cures were not completed by 3:00 p.m. on December 30, L&I would immediately revoke Global's FLC license and ESD would immediately discontinue its referral services. CP 127. Although the 10-day notice and cure period the Departments selected was over the Christmas and Jewish

holidays, Global was nevertheless able to cure all of the asserted violations except one. CP 93-94. The independent auditor, John T. Fisher, could not complete the certified audit report by the December 30 deadline because, first, Global's quarterly tax reports, which were necessary for the audit, were not completed until November 2005; second, the form for the audit had to be pre-approved by L&I; and third, L&I's AAG, Ms. Goss, added additional tasks that she required to be included in the report. CP 469-470, CP 1041-1042.

On December 30, 2005, at 11:30 a.m., Ms. Goss called Mr. Fisher to ask whether the audit report would be completed and submitted that day. CP 1040, 1042. Mr. Fisher advised Ms. Goss that for a variety of reasons, the report would not be completed that day. Ms. Goss did not advise Mr. Fisher that there was any extension or new completion date for the submission of the audit report. CP 1040. The Departments then electronically delivered Global a second letter which now listed nine violations that Global allegedly had failed to abate (the "December 30 letter") and stated that since Global had failed to cure only one of the listed violations, "[s]pecifically, the certified audit report was required to be filed with L&I and ESD no later than 3:00 p.m. today,"² Global's FLC

² For the first time in this matter, the Departments assert (in the "facts" section of their brief) that as of December 30, Global remained in violation of several provisions of the settlement agreement and of legal requirements. Appellants' Brief, p. 12. This is simply untrue. The Departments' deposed staff, the contemporaneous correspondence, and the press release issued by the Departments indicate the only violation that remained on December 30, 2005, was the independent audit report. This new claim that other "cures" were not completed by Global on December 30 is yet another change in their version of the facts and theories they have raised at various levels of Global's appeals.

license was immediately revoked and the ESD referrals terminated. CP 130-132; *see also* CP 94-95. The Departments also sent several emails to state and federal employees and others with the December 30 letter attached, and after the New Year's holiday, issued a press release stating that the Departments had revoked Global's FLC license and terminated ESD referrals on December 30, 2005.³ CP 910-930.

On January 4, 2006, Global applied to L&I for the annual renewal of its license.⁴ *See* CP 135. In reviewing Global's application, L&I Manager Richard Ervin apparently discovered that the Departments had not provided Global the two-week notice required under the Agreement. On January 5, 2006, Mr. Ervin sent Global a letter in which he advised Global that its 2006 FLC license would not be renewed because L&I had revoked Global's license under the terms of the Agreement and then stated this revocation was now "technically effective" on January 13, 2006. CP 135-136; *see also* CP 94. Global appealed the December 30 license revocation in a letter from Global's then counsel, Natalie Brouwer, to the Director of L&I, Gary Weeks, on January 27, 2006 (the "January 27

³ Although Global's license had been revoked, in March 2006, Global entered into an agreement with the United Farm Workers Union ("UFW") to resolve problems inherent in the H-2A program with unionized workers. Through this agreement, Global and UFW provide the workers mechanisms for seniority, an issue resolution procedure, and additional benefits beyond those required by the regulations. CP 89.

⁴ Contrary to the Departments' assertion, Global was not late in renewing its annual license. An FLC license is valid for one year (January to December 31) and can be obtained at any time during that year, depending upon when the licensee plans to begin implementing its worker contracts in the state. Global had no workers in Washington on January 4, 2006.

letter”). CP 95, CP 466-473. Director Weeks responded in a letter dated February 23, 2006 (the “February 23 letter”), that Global’s license had been revoked on December 30, 2005, because Global had not cured the list of violations in the December 20 letter by the December 30 deadline. CP 94, CP 138-140.

E. The Administrative Appeals of Global’s Summarily Revoked License.

Global’s FLC license remained in effect during the pendency of its first APA appeal regarding the denial of its 2005 FLC license (which ultimately resulted in the Agreement). *See* CP 97-123. However, when L&I revoked Global’s FLC license on December 30, 2005, the Departments took the position that Global had waived its APA rights to a hearing prior to its license being revoked, based on the terms negotiated in the Agreement. Thus, although Global appealed its license revocation, it did not have an FLC license during the course of the post-revocation appeal proceeding. CP 130-132.

Global filed a motion for summary judgment or, in the alternative, for stay of the administrative action based on the Departments’ breach of the Agreement’s two-week notice and opportunity to cure provision. *See* CP 159-170. The Departments also moved for summary judgment asserting they had met the notice requirement because the notice was “technically effective on January 13, 2006.” *See* CP 159-170; *see also* CP 135. The Departments further alleged that they were not required to give Global two weeks to cure deficiencies because the Agreement only

contained a notice provision and not a cure provision. The Departments then alleged, for the first time, that they had given Global 10 days to cure the alleged deficiencies merely as an act of discretion and that the December 30 letter was the “real notice.” *See* CP 159-170.

Administrative Law Judge (ALJ) Neil Gorrell scheduled and heard lengthy arguments on the summary judgment and related motions filed by the parties. ALJ Gorrell ruled that because the terms of the Agreement were at issue, and Article IV, Section IV.L.1 of the Agreement required those terms to be construed by the Thurston County Superior Court, the APA matter should be stayed until that court could interpret and enforce the Agreement. *See* CP 159-170. Nevertheless, ALJ Gorrell opined:

Despite the agencies’ assertions to the contrary, an opportunity to cure is central to any effective relief this tribunal can grant. ‘Notice’ is effectively meaningless without a corresponding opportunity to cure the alleged deficiency. Without deciding the matter, it is difficult to discern why counsel for Global would negotiate away the right to a pre-deprivation hearing without some opportunity to correct any alleged deficiency prior to the termination of legal authority to conduct business within Washington.

CP 166-167. Global remains unlicensed in the state of Washington.
CP 95.

F. Global’s Superior Court Action for Declaratory Judgment, Breach of Contract, and Covenant of Good Faith.

On January 25, 2007, prior to ALJ Gorrell’s ruling, Global filed in Thurston County Superior Court a Complaint for Declaratory Judgment and Complaint for Breach of Contract/Settlement Agreement and Implied Covenant of Good Faith. CP 5-70. On November 21, 2007, Global filed a

motion for summary judgment alleging that the Agreement's terms, as a matter of law, provided Global a two-week notice and opportunity to cure any alleged breach of the Agreement before the Departments could summarily revoke Global's FLC license. CP 182-206. The Departments filed a motion to dismiss Global's declaratory judgment claim (CP 211-213), a cross-motion for partial summary judgment (CP 207-210), and a response to Global's summary judgment motion, alleging that the terms of the Agreement did not provide Global an opportunity to cure; the December 30 letter was the real "notice" date; the license revocation was "technically effective" on January 13, 2006; and that the Departments had therefore not breached the two-week notice requirement (CP 386-411).

The Honorable Gary Tabor, Judge, heard arguments of counsel and ruled the Departments breached the Agreement because the Agreement provided Global both a two-week notice and opportunity to cure and Global had only been given a 10-day notice and cure opportunity between December 20 and 30, 2005. Judge Tabor, however, ruled that the breach was immaterial and dismissed Global's declaratory judgment and breach of contract complaint. Judge Tabor also ordered the matter "returned" to the administrative forum. CP 1018-1023. Global moved for reconsideration, which was denied. *See* CP 1126-1132.

V. SUMMARY OF ARGUMENT

Global negotiated a settlement agreement in good faith with L&I and ESD. An essential element of that Agreement was that Global agreed to waive its due process rights under the APA to a pre-revocation hearing,

but only if it was first given notice of any alleged violations of the Agreement and a two-week opportunity to cure those violations before its license could be revoked. Although the Agreement unambiguously required the Departments to provide Global two weeks notice prior to a license revocation, the Departments breached this requirement by providing Global only 10 days notice and then revoking the license without first affording Global an APA hearing. This 10 day notice period is indisputably documented in the December 20 and December 30 letters the Departments sent to Global. Despite their clear error in the number of days of notice, the Departments chose to create a “new” notice period rather than provide Global the two weeks notice to which it was entitled.

The Departments also breached the Agreement by providing Global only 10 days in which to cure the short list of alleged violations set forth in the Departments’ December 20 letter. Rather than correct this error, the Departments chose to take the position that the Agreement did not include a two-week opportunity to cure and that Global was only given the ten-day cure opportunity as an act of discretion. The Departments did not analyze contract case law or the *Restatement (Second) of Contracts* (“*Restatement*”) regarding opportunities to cure. Had they done so, they would have discovered that case law and the *Restatement* included a notice and opportunity to cure provision to be inherently included in every contract as a matter of public policy.

The Departments’ breach of the Agreement’s two-week notice and cure provision was a material breach that created substantial harm and

economic hardship for Global. Global is entitled to damages for the Departments' material breach. This is especially true since Global's failure to provide the audit report was not a material breach justifying the Departments' termination of the Agreement.

VI. ARGUMENT

The Departments are appealing Judge Tabor's ruling that the Agreement's two-week notice requirement was breached when the Departments provided Global only 10 days notice instead of the required 14 days notice; that the Agreement's Revocation and Remedies Section IV.L.5 gave Global a two-week opportunity to cure any breaches of the Agreement; and that the Departments also breached this two-week opportunity to cure provision. Each of these findings by the superior court are well-supported by the facts and law in this case. Additionally, Global is cross-appealing Judge Tabor's determination that the Departments' breaches were immaterial and his "return" of Global's declaratory judgment and contract action to the administrative forum. This Court's de novo review should affirm that the Departments breached the Agreement and that Global is entitled to have its damages claims heard by the court.

A. **The Notice Requirement - The Agreement Unambiguously Required the Departments to Provide Global Two Weeks Notice Before Revoking Global's FLC License; the Departments Breached that Requirement by Providing Global Only 10 Days Notice Prior to Revoking Global's License and Terminating ESD Referrals.**

Although the Departments' lead argument is that Section IV.L.5 of the Agreement does not contain a cure provision, the first issue this Court

must resolve is whether the Departments had already breached the Agreement's two-week notice provision before any issue of whether the Agreement contained a cure provision comes into play. The Departments do not dispute that the Agreement required the Departments to provide Global two weeks notice and that notice was a condition to Global's agreement to allow the Departments to summarily revoke its FLC license.

Section IV.L.5 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 107.

There are two promises contained in this language. First, L&I agrees it will provide Global at least two weeks notice before revoking Global's FLC license. Second, and contingent on the first, Global agrees to forego its APA right to a hearing prior to its license being revoked, if that two-week notice is given. *See* RCW 34.05.422(1). Unless the notification was properly provided, the Departments could not summarily revoke Global's license without breaching this second condition of Section IV.L.5.

1. **The Departments' December 20 and December 30 Letters Indisputably Evidence the Departments' Breach of the Agreement's Two-Week Notice Provision.**

As the superior court correctly found, the only conclusion supported by the facts in this case is that the Departments revoked Global's FLC license and discontinued ESD referrals after only 10 days notice, and that deficient notice constituted a breach of the Agreement's two-week notice provision. The facts are well documented and leave nothing to conjecture. First, the Departments delivered Global a letter dated December 20, 2005, which asserted Global had failed to satisfy a list of violations of the Agreement. CP 126-127. Following this list, the letter states, under the bold header "**Immediate actions to cure,**" that Global was to cure the violations by 3:00 p.m., December 30, 2005:

Immediate actions to cure. In 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. If any of these requirements is not fully satisfied by that time, the Employment Security Department will immediately discontinue recruitment and referral services to Global, and the Department of Labor and Industries will revoke Global Horizon's farm labor contractor license.

CP 127 (bold and underline in original). Ten days later, on Friday, December 30, 2005, the Departments delivered a second letter to Global. CP 130-133. This letter stated under the bold header "**Failure to cure**" that L&I "has revoked" Global's FLC license and ESD "has immediately discontinued" its referrals:

Failure to cure. The agencies provided Global with a last opportunity to immediately cure these violations by December 30, 2005. Because each of these requirements was not fully satisfied by that time, ESD has immediately

discontinued recruitment and referral services to Global and L&I has revoked Global Horizon's farm labor contractor license. Global failed to cure each of the violations demanded by the agencies. Specifically, the certified audit report was required to be filed with L&I and ESD no later than 3:00 p.m. today. It has not been filed. Global did not take the necessary steps to ensure the certified audit report would be completed and filed by the deadline.

CP 131 (emphasis added). The notice period between December 20 and December 30 is 10 days and 10 days is four days short of the 14 days to which Global was entitled under Section IV.L.5.⁵

The last paragraph of the December 30 letter also sets forth Global's APA appeal rights. The Departments advise Global that if it chooses to appeal the revocation of its license, it has 30 days to do so. CP 132 ("If you choose to appeal the revocation decision, WAC 296-310-160 provides that you may file an appeal with L&I within 30 days from the date of this notice by sending a written notice of Appeal to . . .") (emphasis added). Since Global's administrative appeal is governed by the APA's due process provisions for license holders, the Departments were required to provide Global this notice of its appeal rights. *See* RCW 34.05.010(3), .413, .419, .422(1). The Departments' inclusion of these APA appeal rights are essentially admissions by the Departments that they considered their December 30 letter the license revocation "order" that

⁵ While this four-day difference may not appear to be a significant deficiency, those four days represented nearly 30 percent of the notice period and occurred over the Christmas and Jewish holidays.

gave rise to Global's right to appeal. If Global had failed to appeal its license revocation within thirty days from the December 30 letter, the Departments would undoubtedly have moved to dismiss the appeal as untimely. These December 20 and December 30 letters alone are facts sufficient to grant summary judgment in favor of Global.

2. The Parties' Conduct Further Evidences the Departments' Breach of the Agreement's Two-Week Notice Provision.

In interpreting a contract, great weight is given to the intent of the parties, as expressed in the provision's plain language and understood by the average person. *Vehicle/Vessel LLC v. Whitman County*, 122 Wn. App. 770, 777-778, 95 P.3d 394 (2004). The courts will also consider extrinsic evidence of the circumstances surrounding the contract's formation, as well as the subsequent acts and conduct of the parties and the reasonableness of the parties' respective interpretations. *Save Columbia CU Comm. v. Columbia Comm. Credit Union*, 134 Wn. App. 175, 181-182, 139 P.3d 386 (2006). Here, any reasonable person reading the plain language of the December 20 letter would believe that the Departments' use of the future tense – “will immediately discontinue recruitment and referral services” and “will revoke Global Horizon's farm labor contractor license” – was notification of the start of the notice and cure period required under Section IV.L.5 of the Agreement. CP 127. Likewise, any reasonable person would read the December 30 letter as advising Global that the Departments “has revoked” (past tense) Global's

FLC license and ESD “has immediately discontinued” (past tense) referrals as of December 30, 2005. CP 131.

Even if the language in the Departments’ December 20 and December 30 letters could somehow be construed as unclear, the parties’ conduct associated with those letters and the revocation of Global’s FLC license confirm the Departments breached the Agreement by giving Global only 10 days’ notice. On January 3, 2006, immediately following the New Year’s holiday, L&I manager Carl Hammersburg and the Departments’ counsel, Ms. Goss, sent several emails to third parties advising them that “[a]s of Friday, Dec[sic] 30, 2005, Global Horizons has had their Farm Labor Contractor’s license revoked by L&I, and their recruitment and referral services from ESD discontinued” and attached a copy of the Departments’ December 30 letter to these emails. CP 910-920 (emphasis added). A day later, on January 4, 2006, the Departments issued a press release stating “[t]he Department of Labor and Industries on Friday, December 30, revoked the farm labor contractor license of Global Horizons Inc. after the company failed to . . . file a certified audit report . . .” CP 921; *see also* CP 922.

Global’s prior counsel, Natalie Brouwer, then sent a letter to L&I Director Gary Weeks on January 27, 2006 (the “January 27 letter”), to formally appeal Global’s license revocation and document the unfairness of the revocation decision. CP 466-473. Director Weeks, who personally signed both the December 20 and 30 letters, responded to Ms. Brouwer’s letter on February 23, 2006 (the “February 23 letter”), making several

references to the December 30 letter as the “revocation letter,” and stating “the Department stands by its December 30, 2005 revocation.”⁶ CP 138-140; *see also* CP 1070.

In subsequent depositions, ESD Director Karen Lee similarly testified:

Q And what’s your understanding of the date that ESD terminated those services?

A As of this contract. As of this contract. So the next working day, ESD would not have done recruiting and referral for Global Horizons.

Q When you say “as of this contract,” do you mean as of –

A As of this December 30th letter.

CP 1073.

Additionally, the Departments, as well as the Office of Administrative Hearings and the assigned ALJ, all accepted Global’s appeal as timely filed. None of these entities questioned whether the appeal had been filed prematurely or whether the December 30 letter was the final “agency order” for purposes of the appeal. *See* RCW 34.05.010(11)(a), .413, and .422.

The parties’ statements, letters, and conduct lead to only one conclusion - the Departments intentionally, but wrongfully, gave Global

⁶ In deposition testimony, the Departments’ AAG, Amanda J. Goss, testified that she not only reviewed the Director’s February 23 letter, she assisted in drafting the letter. CP 464. If indeed the Assistant Attorney General believed that notice had been given to Global on December 30, 2005, and Global never had any right to cure, she certainly did not so indicate in her drafting or review of the Director’s February 23, 2006, letter.

only 10 days notice prior to revoking Global's FLC license and discontinuing ESD referrals. Ten days does not satisfy the two-week notice requirement in Section IV.L.5 of the Agreement. The Departments strictly held Global to its obligations under the Agreement and summarily revoked Global's license when they decided a single violation had not been fully cured. Yet, the Departments did not hold their own actions and obligations to the same level of compliance.

3. The Departments Failed to Correct Their Deficient Notice, Choosing Instead to "Technically" Make Their December 30 Letter Their Notice Letter and then Claiming that the Two-Week Notice Period was December 30, 2005, Through January 13, 2006.

a. The Departments Chose not to Correct Their Breach of the Two-Week Notice Requirement When They Became Aware of the Error.

The Departments can not and do not dispute that the notice provision set forth in Section IV.L.5 of the Agreement entitles Global to two weeks notice prior to a license revocation. The Departments were therefore faced with a dilemma when they discovered their error in providing notice that was only 10 days in duration. The Departments, however, chose not to correct their mistake by providing Global a new 14-day notice period, extending the 10-day period, or properly communicating to Global some extended timeframe in which to cure the violations. Had Global been given the entire 14 days notice, Global would likely have been able to provide the independent audit report and cure this last breach. In fact, the Departments knew that the independent auditor, John Fisher, had experienced unavoidable delays and that his report would

be delivered within the week because Ms. Brouwer had so advised the Departments in her letter on December 29, 2005:

We expect that Mr. Fisher will have the audit completed within a week. The audit will be sent immediately to Messrs. Ervin and Hammersburg by overnight mail once completed. We apologize for this unavoidable delay. Global has made a good faith effort to comply with all of the requirements under the terms of the settlement agreement and the December 20 letter.

CP 180. By failing to provide Global the two-week notice to which it was entitled, the Departments took away from Global its opportunity to prove that it could have timely cured the audit report violation and retained its license.

This is troubling because the Departments have repeatedly claimed that since Mr. Fisher did not file the audit report until January 26, 2006, that proves Global would not have timely cured the breach. CP 245-246, 399. However, the Departments' own actions set the cornerstone for this self-serving assertion. Although Ms. Brouwer had advised the Departments on December 29, 2005, that Mr. Fisher "will have the audit completed within a week," and Global had cured all the other violations listed in the December 20 letter (CP 180), Ms. Goss called Mr. Fisher on December 30, 2005, and asked if the report would be filed that day. CP 1040, 1042. The Assistant Attorney General did not tell Mr. Fisher that the December 30 deadline for submission of the audit report was in error or that it had been extended to January 3, January 13, or any other date. *See* CP 1040; *see also* CP 1020. Accordingly, and upon the advice of

Global's counsel, Mr. Fisher did not cancel plans he had made to be out of town the second week in January and completed the audit report without any urgency upon his return. CP 1040. Although no one will ever know whether Global would have timely filed the audit report if the full two-week notice had been properly given on December 20 or after the error was discovered, the Departments' decision to not correct their error was intentional and any assertions by the Departments that Global would not have timely cured this breach should be given no consideration.

Moreover, after her call to Mr. Fisher, Ms. Goss immediately finalized the December 30 letter advising Global that its FLC license was revoked and ESD referrals discontinued because Global had failed to provide the audit report by the December 30 deadline. CP 464. Three days later, after the New Year's Holiday, Ms. Goss and the Departments sent emails to numerous persons advising them that "[a]s of Friday, Dec[sic] 30, 2005, Global Horizons has had their Farm Labor Contractor's license revoked by L&I, and their recruitment and referral services from ESD discontinued" (CP 910-920) and the following day, January 4, 2006, the Departments issued their press release announcing that Global's license had been revoked on December 30 because it failed to provide the independent audit report (CP 921-922). These actions by the Departments and their counsel show the Departments had no intention of correcting their deficient notice or allowing Global to complete its "cure" by filing the audit report within a new or extended 14-day notice period.

b. The Departments Claim Their December 30 Letter Was Global's Two-Weeks' Notice and that the Notice Period Continued Through January 13, 2006.

The Departments claim that their December 30 letter was only intended to inform Global of the Departments' decision to revoke its FLC license and terminate referrals and that the true notice period was December 30, 2005, through January 13, 2006, with the revocation occurring on January 13, 2006. Appellants' Brief, pp. 3, 13-14, 42-43. The Departments have pursued this defense despite the unequivocal statements in their December 20 and 30 letters, January 3, 2006, emails, January 4, 2006, press release, deposition testimony of ESD Director Karen Lee, and the February 23 letter of L&I Director Weeks, all of which state Global's license was revoked on December 30 for its failure to cure the audit report breach. This defense is further plagued by the fact that Global never knew about this "new" notice period until well into the discovery phase of its administrative appeal. During the administrative proceeding, the Departments developed this defense based on a letter dated January 5, 2006 (the "January 5 letter"), that was sent to Global by an L&I mid-level manager, Richard Ervin, in a response to Global's 2006 license renewal application. CP 135-136. In this letter, Mr. Ervin denies Global's license renewal application stating:

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, Global's farm labor contractor license automatically expired on December 31, 2005. Although this revocation is technically effective on January 13, 2006, Global does not have a valid 2006

Washington state farm labor contractor license. Accordingly, effective immediately, Global is no longer licensed to operate as a farm labor contractor in the State of Washington.

Yesterday L&I received a farm labor contractor application, dated January 3, 2006, from Global for 2006. . . . Regardless, under RCW 19.30.050(2), an application for a farm labor contractor license shall be denied when the farm labor contractor's license has been revoked within three years.

CP 135.

It is apparent that Mr. Ervin became aware of the Departments' violation of the two-week notice provision when Global sent in its 2006 license renewal application. The application posed a significant problem for Mr. Ervin because if the notice was defective, then the revocation was invalid and Global was entitled to the 2006 license renewal. Mr. Ervin attempted to simply solve the problem by "technically" changing the notice period dates from December 20 through 30, 2005, to December 30 through January 13, 2006. Since Mr. Ervin's focus was on preventing the renewal of Global's FLC license, his statements in his January 5 letter are markedly inconsistent with the Departments' December 20 and 30 letters and subsequent actions.

Indeed, Mr. Ervin's letter itself is internally inconsistent and difficult to comprehend. First, Mr. Ervin states he is not going to review Global's 2006 license renewal application on its merits because Global's FLC license has been revoked within the past three years and therefore RCW 19.30.050(2) requires the application to be denied. CP 135. Mr.

Ervin was asked to clarify this statement in his deposition testimony and he responded that the statement meant he did not process Global's application because Global's 2005 license had been revoked.⁷ CP 925-928. Second, according to Mr. Ervin's letter, Global's 2005 FLC license expired on December 31, 2005, even though he testified that Global's FLC had already been revoked on December 30. CP 135. Third, Mr. Ervin's letter later states that Global's FLC license "revocation is technically effective on January 13, 2006," which is again inconsistent with his prior two statements and deposition testimony. CP 135. Fourth, had Global's license not been revoked until January 13, the Departments would have been required to issue the 2006 license and then revoke it on January 13 pursuant to RCW 19.30.050(2). Finally, even if Mr. Ervin's January 5 letter could be construed as notice of a January 13 revocation date, that notice would have been six days short of compliance with the Agreement's two-week notice provision. The inconsistencies in Mr. Ervin's statements do not support the Departments' claim that they actually intended to revoke Global's license on January 13.

Nor should this Court review Mr. Ervin's January 5 letter in isolation. The Departments' letters and contemporaneous conduct must be viewed under a reasonableness standard. *See Vehicle/Vessel LLC v.*

⁷ In attempting to explain the "technically effective" revocation on January 13, 2006, Mr. Ervin stated in his deposition that the "effect" of this "technically effective" revocation date was "probably nothing" and when asked what "effective immediately" (*i.e.*, January 5, 2006) meant, he answered that Global was no longer a licensed FLC. CP 928.

Whitman County, 122 Wn. App. 770, 777-778, 95 P.3d 394 (2004), *see also Turner v. Gunderson*, 60 Wn. App. 696, 704, 807 P.2d 370 (1991). CR 56(a). Here, the Departments have never been able to explain why in their December 20 letter they used future tense language with their list of cures and used past tense language (“revoked,” “immediately discontinued”) in their December 30 letter. CP 127, 131. Nor have they ever been able to explain why they would include the 30-day APA appeal notice in their December 30 letter if the revocation actually took place on January 13, 2006. And, finally, the Departments have never been able to explain how their claimed notice period of December 30 to January 13 was ever communicated to Global when all their communications to Global, and the world, stated Global’s license had been revoked on December 30. When the entirety of the Departments’ letters and actions are viewed under a reasonableness standard, the only reasonable conclusion is that the Departments gave Global 10 days notice between December 20 and December 30 and thereby breached the Agreement.

What constitutes reasonable notice must be determined from the facts and circumstances of each case. *Lano v. Osberg Const. Co.*, 67 Wn.2d 659, 663, 409 P. 2d 466 (1966), *citing Black’s Law Dictionary* (4th ed.) p. 1211 (reasonable notice is “[s]uch notice or information of a fact as may fairly and properly be expected or required in the particular circumstances.”) Under the facts of this case, the Agreement required actual written notice for a change in the notice period to December 30

through January 13, and the Departments failed to provide that notice to Global. *See* CP 107, 108.

c. Case Law Requires Strict Compliance with Notice Provisions.

This Court, in *Community Investments, Ltd. v. Safeway Stores*, 36 Wn. App. 34, 671 P. 2d 289 (1983), adopted a standard of strict compliance with contractual notice provisions, even when the notice period has been substantially met. In *Community Investments*, a landlord brought an unlawful detainer action against its tenant, Safeway, and provided Safeway the 10 days notice required by the unlawful detainer statute. However, the lease agreement executed by the landlord and Safeway contained a 20-day notice and cure provision and the Court held the landlord had to comply with that 20-day notice provision prior to commencing its unlawful detainer action. Although the landlord had provided Safeway 19-days' notice, this Court held that notice was insufficient:

CIL did not give Safeway 20 days in which to cure its alleged default before bringing suit. The 20-day notice was received by Safeway on May 15, 1981. CIL filed its original complaint on June 3, 1981. An action is commenced by filing the complaint. CR 3(a). From May 15 to June 3 is only 19 days. CIL's later filing of an amended complaint could not undo the earlier commencement of the action. CR 15(c).

Id. at 37 (emphasis added and footnote omitted.) This case is essentially the same. Ten days notice was given by the Departments when 14 days notice was required under the Agreement. CP 107. The Departments

could not rectify this deficiency by creating a new notice period after they already revoked Global's license, any more than the landlord in *Community Investments* could undo its deficiency by amending its unlawful detainer complaint. The notice had to be given anew in order to comply with the Agreement's notice provision.

4. The Departments Breached the Agreement by Summarily Revoking Global's FLC License.

Since the Departments failed to give Global the two-week notice and opportunity to cure required under the Agreement, the condition that Global waive its right to a hearing before losing its license was never satisfied. Section IV.L.5 of the Agreement states "[b]y 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." CP 107. The Departments have not addressed this second condition of Section IV.L.5. The Departments' breach of the Agreement's two-week notice provision set in motion the Departments' second breach of the Agreement, the revocation of Global's license without first providing Global an APA hearing. Only by providing the required notice did Global's obligation, *i.e.*, agreeing to a summary revocation of its license, become activated.

Under the well-established standard for summary judgment, if there is no genuine issue of material fact, the moving party is entitled to judgment as a matter of law. CR 56; *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 12, 721 P.2d 1 (1986). Even though the Departments attempt to create an issue of fact with their claim that

January 13 became the license revocation date, those issues of “fact” can be disposed of through summary judgment if the facts are undisputed, the inferences are plain and inescapable, and reasonable minds could not differ. *Thompson v. Devlin*, 51 Wn. App. 462, 466, 754 P.2d 1003 (1988). The Departments’ letters and their subsequent actions, and even Mr. Ervin’s incongruous January 5 letter, do not create any genuine issues of material fact. The Departments twice breached the Agreement by failing to provide Global its two-week notice and summarily revoking Global’s license pursuant to this defective notice.

B. The Cure Provision – The Departments Breached the Agreement by Failing to Provide Global the Required Two Weeks Opportunity to Cure.

1. An Opportunity to Cure is Included in a Contract by Law.

Although the Departments acknowledge Global was entitled to two weeks notice, they nevertheless claim Global had no corresponding two-week opportunity to cure any violations of the Agreement. The Departments argue that because the word “cure” is not explicitly stated in Section IV.L.5, the section is unambiguous and Global was not provided an opportunity to cure prior to a license revocation.⁸ Accordingly, the

⁸ The language used by the Departments in Section IV.L.5 cannot be construed as unambiguous in any event because the last sentence of Section IV.L.5 is unclear. That sentence states that after receiving notice of revocation, Global may not undertake any new farm labor contracts or extend any existing contracts “unless L&I’s revocation decision is reversed or expires.” CP 107. This reference to the reversal or expiration of L&I’s revocation decision has to be read in the context of whether the breaches were cured. There would be no other reason for the Departments to reverse their notice of revocation or allowing the 14-day period to expire.

Departments argue the 10 days Global was given to cure its violations was done solely as an act of discretion. Appellants' Brief, pp. 34-35. The absence of the word "cure" in Section IV.L.5, however, does not mean the Agreement fails to provide a right to cure a breach before termination of the contract. Both the *Restatement (Second) of Contracts* and case law state a party breaching a contract provision has a right to a reasonable time to cure, whether or not a cure provision is expressly stated in the contract. *Rosen v. Ascentry Technologies, Inc.*, 143 Wn. App. 364, 177 P.3d 765 (2008). (*quoting Restatement (Second) Of Contracts* § 241 comment e (1981)) ("*Restatement*"); *see also Perry v. Wolaver*, C.A.1 (Me.), 506 F.3d 48, 54, 55 (2007). If the breaching party fails to cure its breach within a reasonable time, the injured party may sue for breach of the contract or, if the breach is material, terminate the contract and obtain restitution. *Id.*

The reason that a cure provision is considered part of a contract is well explained by Professor Farnsworth in his treatise on contracts:

It is in society's interest to accord each party to a contract reasonable security for the protection of his justified expectations. But it is not in society's interest to permit a party to abuse this protection by using an insignificant breach as a pretext for avoiding his contractual obligations. . . . Courts also encourage the parties to keep the deal together by allowing the injured party to terminate the contract only after an appropriate length of time has passed. They restrain abuse of this power to terminate by denying the injured party the power to exercise it hastily, so that not all delays will bring the contract to an end, and the party in breach will be afforded some time to cure his breach.

E. Allan Farnsworth, *Contracts*, 607 (1982). Thus, the fact that the word “notice” is not accompanied by the word “cure” in the Section IV.L.5 of the Agreement is insignificant under the *Restatement* and the law of contracts. This is entirely reasonable since, by its very nature, a “notice and opportunity to cure” provision only has meaning if the breaching party can remedy the deficiencies during the notice period so that the contract remains in effect. Thus, despite the fact that Section IV.L.5 does not specifically use the word “cure,” absent disputed facts, the construction of the Agreement can be determined as a matter of law on summary judgment, even with this purported ambiguity. *See Mountain States Construction Co. v. Tyee Electric, Inc.*, 43 Wn. App. 542, 545, 718 P.2d 823 (1986).

The Departments ignore the *Restatement* and established case law and instead argue that Global was given a right to notice merely to advise Global when it was in breach of the Agreement and thus, there was nothing Global had to do during this two-week period. CP 44. Global could not enter into new contracts, receive further referrals, or seek a stay. And, despite any alleged breach, it was allowed to complete its existing contracts so there was nothing to “wrap up.” It therefore made no difference whether the notice period was two weeks or two days prior to the license revocation unless that period of time was to be used for curing the alleged violations of the contract. The two-week provision included in Section IV.L.5 was the grace period to which Global was entitled by law.

2. The Parties' Negotiations for a Cure Opportunity and Their Subsequent Conduct Consistent with Those Negotiations Is Indisputable Evidence that the Agreement Gave Global the Right to Cure.

This Court may look to extrinsic evidence relevant to the parties' negotiations and subsequent actions if there is any doubt that the parties intended the Agreement to include a cure period. *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990). The courts have used the rules set out in *Berg* to define when it is appropriate to use extrinsic evidence: "[E]xtrinsic evidence is admissible as to the entire circumstances under which the contract was made, as an aid in ascertaining the parties' intent." *Id.* "Under *Berg*, interpretation of a contract provision is a question of law only when (1) the interpretation does not depend on the use of extrinsic evidence or (2) only one reasonable inference can be drawn from the extrinsic evidence." *Scott Galvanizing, Inc. v. Northwest EnviroServices, Inc.*, 120 Wn.2d 573, 582, 844 P.2d 428 (1993) (emphasis added). Thus, while the parol evidence rule would preclude the use of extrinsic evidence to modify or contradict the terms of a fully integrated written contract,⁹ under *Berg*, a party may offer such evidence to assist the court in interpreting a contract term and determining the parties' intent regardless of whether the contract's terms are ambiguous. *Berg* at 667-669. In this case, the parties' negotiations prior to executing the Agreement and their

⁹ A fully integrated contract is intended as a final expression of the terms of the agreement. *DePhillips v. Zolt Constr. Co., Inc.*, 136 Wn.2d 26, 32, 959 P.2d 1104 (1998).

subsequent actions in implementing the Agreement are well-documented in uncontroverted evidence. There is only one reasonable inference that can be drawn from this evidence and that is the parties intended Section IV.L.5 to be a notice and opportunity to cure provision.

Looking first at the parties' contract negotiations, Global aggressively negotiated for a notice and cure provision that would be long enough to provide Global a fair and reasonable opportunity to resolve any alleged violations of the Agreement. Global's prior counsel, Ryan Edgley, initially pressed for a 28-day notice and cure period, which was eventually negotiated down to two weeks. CP 147. In his declaration, Mr. Edgley states that he was particularly concerned about whether Global would be given an opportunity to cure any alleged violations because Global had a large operation, employees were working in the fields, complex state FLC and federal H-2A requirements "provided a mine-field of possible technical and inadvertent violations that could create future problems for Global," and "Global agreed to give up all of its due process rights to a hearing prior to any license revocation and/or termination of referrals." CP 146. Mr. Edgley also discussed many of these concerns in a letter he sent to Ms. Goss dated August 11, 2005. CP 146, 153-157. Thus, in Mr. Edgley's declaration, he states:

Although Ms. Goss readily agreed to include an "opportunity to cure" provision, we had a significant disagreement on the length of that opportunity to cure. I wanted the notice and cure provision to be twenty eight (28) days, but Ms. Goss initially insisted on a much shorter period of time. Our negotiations centered on how long the

notice should be in order to give Global an adequate opportunity to cure any alleged violations. In the attached negotiation letter, Exhibit A, I requested 28 days to cure, however, we ultimately agreed on a two-week notice and cure provision. That amount of time was thought to be at least enough time to make a good faith effort to cure anything that was identified as a problem by the state.

CP 147. In response to Mr. Edgley's declaration, the Departments claim Mr. Edgley's testimony is inadmissible but then point to Ms. Goss' testimony regarding the same negotiations and declare her testimony is admissible. Appellants' Brief, p. 28. The Departments further state, without cite to the record, that the "admissible testimony of AAG Amanda Goss . . . shows that the settlement agreement does not contain an opportunity-to-cure provision." Appellants' Brief, p. 28.

In fact, once the Departments agreed to allow Ms. Goss to be deposed and Ms. Goss was asked whether Mr. Edgley's declaration is accurate, she responded:

Q. In six, the last sentence in Paragraph 6 of Mr. Edgley's sworn declaration, he states, 'Ms. Goss agreed to Global's request to have a provision included in the settlement agreement that would give Global an opportunity to cure any alleged violation before regulatory action could be brought against it by either ESD or L&I.' Would you agree with that statement?

A. Well, as I said, Global could, during that 14-day time – they had an opportunity to cure, they had an opportunity to plead their case, or they had the opportunity to do nothing. They had that opportunity. What they did with that was theirs. The consequence of that is where I think the significant difference is, that it did not affect whether the departments still had the right to exercise discretion to revoke.

Q. Okay. Mr. Edgley says in that sentence, ‘before a regulatory action would be brought against it.’ And how would you interpret that?

A. Well, I can’t speak for Mr. Edgley, but what I can tell you is that the agreement that was signed and that we specifically discussed was that the 14-day notice was to provide this opportunity, but, at the end of the 14 days notice, that’s when the regulatory action could be brought. So they had that opportunity to cure, but they had the opportunity to do many things during those 14 days. He was concerned and Global was concerned that there would be – and he says this – ‘that there would be a minefield of possible technical and inadvertent violations.’

CP 462-463. Hedging aside, the Departments’ counsel who drafted the Agreement admits that a notice and cure provision was negotiated and intended to be a term of the parties’ Agreement.

The courts will also look to the objective manifestations of the parties’ intent in construing a contract. *Hearst Commc’ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 504, 115 P.3d 262 (2005). As stated, the objective manifestations of the Departments are well documented in the Departments’ December 20 letter’s list of “cures,” with the word “cure” in bold (CP 127) and the December 30 letter which states Global failed to “cure” the audit report violation, again with the word “cure” in bold. (CP 131.) Additionally, the numerous emails the Departments sent to third persons and its press release stated Global’s FLC license was revoked for failing to cure the breach of timely submitting the audit report. CP 910-922. Even L&I Director Weeks’ February 23 letter states the reason Global’s license was revoked was its failure to cure the breach of submitting the audit report by the deadline. CP 138-140.

Any reasonable person reading these letters, emails, and press releases would believe that Global had an opportunity to cure a breach of the Agreement. *See Thompson v. Devlin*, 51 Wn. App. at 466. All of the parties understood and acted consistent with a two-week cure provision in the Agreement. This was precisely the conclusion reached by the superior court: “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 . . . [t]he December 20, 2005 letter from the Defendants (Departments), indicated they were giving . . . (Global) an opportunity to cure until December 30, 2005” and this 10-day notice and cure period was in breach of the Agreement since the Agreement required the Departments to give Global 14 days notice and cure opportunity. CP 1020; *see also* CP 1021-1022.

3. The Departments Make the Unsupportable Claim that the Agreement Did Not Contain a Cure Provision because the Departments Had Complete Discretion to Revoke Global’s FLC License at Any Time.

The Departments attempt to defend their deficient opportunity to cure by claiming the Agreement gave the Departments complete discretion to decide whether a breach occurred, to provide a cure period, or just summarily revoke Global’s license. Appellants’ Brief, pp. 34-35. There are two problems with the Departments’ argument. First, if the Departments had complete discretion to summarily revoke Global’s license for the slightest deficiency, even the day after the Agreement was signed, the Agreement’s notice and cure provision would be legally

insufficient as unreasonable and invalid. The courts have simply been unwilling to find such broad discretion in contractual notice and cure provisions. See *Lano v. Osberg, Construction Co.*, 67 Wn.2d 659, 409 P.2d 466 (1966). *Lano*, a case factually similar to this case, involved a suit by a subcontractor, Lano, for damages for wrongful termination of a contract to clear and grub a state highway right-of-way. After several delays in performance and notifications of dissatisfaction, the contractor sent Lano formal notification of a list of five conditions that had to be cured within four days, or the contract would be immediately terminated. Lano did not satisfy the conditions and four days later the contractor terminated the contract. Lano brought suit for damages and the defendant cross-claimed for damages due to Lano's breach. *Id.* at 661-662.

The court held that while Lano was in default of its performance at the time the contractor terminated the contract, the contractor did not provide Lano reasonable notice prior to the termination. *Id.* at 662. The court held that whether notice is reasonable must be determined from the facts and circumstances of each case and that four days notice over a weekend and one business day was not reasonable. *Id.* at 663. As part of its holding, the court rejected the contractor's argument that Lano acquiesced in the termination of its subcontract by not protesting the reasonableness of the four-day period. The court stated: "Not having received a reasonable notice of termination, the plaintiffs could treat the contract as broken and desist from any further efforts to perform it." *Id.* at 664.

Notably, the contract at issue in *Lano* only contained a “reasonable notice” provision and, like the Agreement here, did not include opportunity to cure language. Yet, the omission of the word “cure” was never an issue for the parties or the court, all of whom treated the contract’s notice provision as a “notice to cure” provision. Lano’s limited ability to cure the list of breaches over a weekend was held to be an unreasonable opportunity to cure, just as the 10-day cure period given Global over weekends and the Christmas and Jewish holidays was unreasonable. Nor was Global required to protest the Departments’ deficient notice and cure period because once the Departments breached the Agreement (by providing only 10 days notice and summarily revoking the FLC license), Global could treat the contract as broken. Thus, Global was no longer obligated to perform by providing the independent audit report or otherwise complying with the Agreement’s terms.

The second problem with the Departments’ “complete discretion” argument is that it places a cloud of bad faith over the Agreement. The Departments argue that interpreting Section IV.L.5 to include a cure provision would have been “counterintuitive” since “Global stipulated that its breach of any terms of the settlement agreement is an ‘immediate threat to the public health, safety, and welfare.’” Appellants’ Brief, p. 22. This argument goes to a policy issue that is at the core of this case. If the Departments claim any future breach, regardless of the seriousness, is an immediate threat to the health, safety, and welfare of Washington’s citizens, then the Departments’ Agreement is outside the parameters of

fair dealing and good faith and likely outside the legal parameters of the APA. *See Felton v. Menan Starch Co.*, 66 Wn.2d 792, 405 P.2d 585 (1965).

The courts have declared contract provisions contrary to public policy when the provisions circumvent the legal requirements imposed on agencies. Thus, a consent decree's provisions will be held to supplant the law if the state agency does not have the authority to otherwise agree to or impose such a provision. *See Austin v. Alabama Check Cashers Association*, 936 So.2d 1014, 1038-1039 (2005), *citing Perkins v. City of Chicago Heights*, 47 F.3d 212, 216 (7th Circuit, 1995) ("While parties can settle their litigation with consent decrees, they cannot agree 'to disregard valid state laws' . . . and cannot consent to do something together that they lack the power to do individually"). *Id.* at 1039. Here, the APA's adjudicative proceedings provisions addressing license revocations are set forth in RCW 34.05.422, which contains only one exception to the APA's pre-deprivation hearing requirement. That exception is when an "agency finds that public health, safety, or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order." RCW 34.05.422(4) (emphasis added). *See also* RCW 34.05.479(2).

The Departments circumvented this APA provision by requiring Global to agree that for all future breaches of the Agreement, the breach will be "an immediate threat to the public health, safety, and welfare" and that "emergency action" is required no matter how insignificant the violation. Such a provision violates and disregards both the policy and

language of RCW 34.05.422, .479 and imposes an obligation that the Departments without the Agreement would not have had the power to impose. *Perkins v. City of Chicago Heights*, 47 F.3d at 216. In short, but for the Agreement's summary revocation provision, the Departments would never have been able to summarily revoke Global's FLC license based solely on their unfettered discretion. An interpretation of the Agreement's revocation provision as providing the Departments complete discretion to emergently and summarily revoke Global's license would shift the parties' Agreement into the domain of bad faith.

C. The Departments' Breach of the Agreement's Two-Week Notice and Cure Provision was a Material Breach and Global is Therefore Entitled to Damages.

Judge Tabor's only error in his decision was his finding that the Departments' breach was immaterial and his remand of Global's declaratory judgment and breach of contract action to the Office of Administrative Hearings. CP 1023. Whether a breach of a contract is material is an issue of fact that requires the trier of fact to look at the circumstances of each particular case. *Vacova Co. v. Farrell*, 62 Wn. App. 386, 403, 814 P. 2d 255 (1991); *Bailie Comm., Ltd. v. Trend Business Systems*, 53 Wn. App. 77, 82, 765 P. 2d 339 (1988).

In *Bailie Communications, Ltd. v. Trend Bus. Sys.*, 53 Wn. App. 77, 765 P.2d 339 (1988), the lead case on material breach, the court reviewed whether an investment company's failure to make the first payment under an installment contract was a material breach. The court held the breach was material based on the five factors for materiality listed

in the *Restatement (Second) of Contracts*: (1) whether the breach deprived the injured party of a reasonably expected benefit; (2) whether the injured party can be adequately compensated for the deprivation of that part of the benefit; (3) whether the breaching party will suffer a forfeiture by the injured party's withholding of performance; (4) whether the breaching party is likely to cure his breach; and (5) whether the breach comports with good faith and fair dealing. *Id.* at 83, citing *Restatement (Second) of Contracts*, § 241, comment b. A finding that any of these factors has been met will weigh heavily in the courts' determination of materiality. *See TMT Bear Creek Shopping Center, Inc. v. Petco Animal Supplies*, 140 Wn. App. 191, 209-210, 165 P.3d 1271 (2007).

The Departments' two breaches of the Agreement meet all five of the *Restatement's* factors: (1) the breaches deprived Global of a reasonably expected benefit – the retention of its FLC license; (2) the Departments could have been “compensated” for the breach by fining Global for the delay or undertaking their own audit and charging Global for the cost; (3) the Departments would not have suffered a forfeiture of the Agreement by the one-week delayed submission of the audit report; (4) there is no question Global was likely to cure its breach; and (5) the Departments' breaches, as stated above, did not comport with good faith or fair dealing. The Departments have never accepted or even acknowledged that they breached the Agreement. Even more troubling, the Departments have been less than candid about the Agreement's inclusion of a cure provision, which they negotiated, and the notice and

cure period they actually gave Global between December 20 and 30. Even if this Court could somehow find the Departments' breach was not material, the damages claim raised by Global remains an active part of its complaint. *See Colorado Structures, Inc. v. Ins. Co. of the West*, 161 Wn.2d 577, 588-589, 167 P.3d 1125 (2007). This matter should therefore, at a minimum, be remanded to the superior court for trial on the damages issue.

D. Global's Failure to Provide the Audit Report Was Not a Material Breach Justifying the Departments' Termination of the Agreement.

While the Departments' breaches of the Agreement were material, Global's failure to provide the independent audit report by the December 20 deadline was not. After the Agreement was signed on September 22, 2005, Global worked diligently to complete all its obligations under the Agreement's provisions. By December 20, only the five listed "cures" remained, all of which were administrative tasks that did not impact or place at risk any of the foreign workers.¹⁰ Moreover, by the date of Ms. Brouwer's letter, December 29, 2005, the only task that

¹⁰Pursuant to the list of violations, Global had to pay \$6,937 to ESD for unemployment taxes; \$23,042 to L&I for industrial insurance premiums; provide the independent audit report; complete a contract with the independent third party; and provide the Department copies of the cancelled settlement checks Global had already paid to workers. CP 127. Additionally, the Departments placed new demands on Global during the December 20 to December 30 notice and cure period. The Departments subjected Global's selection of the independent auditor and the report format to their approval, and as documented in Mr. Fisher's notes, items "brought up by the Attorney General," Amanda Goss, required the audit report "to include not only L& [sic], but ESD and wage review." CP 1041; *see also* CP 470.

remained uncompleted was the submission of the independent auditor's report. And, that audit report was merely a supplement to the Departments' own audits. *See* CP 470.

A finding of a material breach must be supported by substantial evidence in the record and must be viewed as of the time for performance and in terms of the actual failure. *See Panorama Village Homeowners Assoc. v. Golden Rule Roofing, Inc.*, 102 Wn. App. 422, 425, 10 P.3d 417 (2000). *Bailie*, 53 Wn. App. at 83, *citing Restatement (Second) Contracts*, § 237, comment b at 218 (1981). Looking at the situation at the time of Global's breach, the Departments cannot point to any harm that would have resulted from waiting a week for the independent audit report. Under these facts, Global's breach of the late submission of the audit report does not meet the test for materiality. Accordingly, even if the Departments had the discretion to summarily terminate the contract for any breach, the law did not allow the Agreement to be terminated based on this slight breach. *See Colorado Structures, Inc. v. Insurance Co. of the West*, 161 Wn.2d 577, 167 P.3d 1125 (2007). "If the breach is slight or insubstantial, it is called a partial breach, for which plaintiff's damages are restricted to compensation for the defective performance." *Id.* at 588-589. Only if a breach is material may the non-breaching party treat the breach as a failure of a condition that excuses further performance, and thus terminates the contract. *Id.* Global's breach cannot possibly be construed as a "total failure of performance." Since Global's breach was not material, the Departments' sole remedy was damages in the form of compensation, not

termination of the Agreement. The Departments, however, have never claimed to have incurred compensable damages as a result of the untimely filing of the audit report.

VII. CONCLUSION

Consistent with the superior court's decision, this Court should affirm the grant of Global's motion for summary judgment and further find the Departments' breaches were material. Accordingly, this Court should order this matter remanded to the superior court for a trial on damages.

Respectfully submitted this 24th day of June, 2009


Kathleen D. Benedict, WSBA No. 7763


Sally Gustafson Garratt, WSBA No. 7638
FREIMUND JACKSON TARDIF &
BENEDICT GARRATT
711 Capitol Way S., Suite 605
Olympia, WA 98501
Ph: (360) 236-9858

Attorneys for Respondent/Cross-Appellant

The undersigned declares under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the 24th of June, 2009, I caused to be served Response Brief of Respondent/Cross-Appellant on the following individuals in the manner indicated:

James P. Mills, AAG
Anastasia Sandstrom, AAG
800 Fifth Avenue, Suite 2000
Seattle, WA 98164-1012

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| <input checked="" type="checkbox"/> | U. S. Mail |
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Signed this 24 day of June, 2009, at Olympia, Washington.



Lorraine A. Kimmel