

NO. 38211-3

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

GLOBAL HORIZONS, INC.,

Respondent,

v.

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

Appellant.

**REPLY OF APPELLANTS/CROSS-RESPONDENTS
DEPARTMENT OF LABOR AND INDUSTRIES AND
EMPLOYMENT SECURITY DEPARTMENT**

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I. OVERVIEW

The Department of Labor and Industries and Employment Security Department (Departments) negotiated a settlement agreement with Global Horizon, Inc., despite a high likelihood of success on the administrative appeal and Global's poor track record in the state of Washington. In exchange for the ability to continue to operate as a farm labor contractor—despite its many violations of state law—Global was required to fully comply with the agreement or face immediate revocation of its farm labor contractors (FLC) license and discontinuation of ESD 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 agreement also provided in Section IV.L.5 (§ L5), now disputed on appeal, that in the event of such a violation by Global, (1) that L&I would give two weeks notice prior to the effective date the revocation of Global's FLC license, but (2) that ESD could discontinue services immediately. There is no dispute that Global breached the settlement agreement.

Despite the Departments' clear right to take action when Global breached the agreement, the Departments made an additional effort to allow Global to come into compliance and informed Global regarding its various breaches on December 20, 2005. Although L&I could have issued

a notice of revocation (to be effective on January 3rd) and ESD could have immediately discontinued services as part of the December 20, 2005 letter, they chose not to do so. Only after Global failed to meet this third deadline to submit a required audit did L&I and ESD send a joint letter on December 30, 2005 containing a notice of revocation for Global's FLC license from L&I and a notice of immediate discontinuation of recruitment and referral services from ESD.

While the language of the December 30, 2005 letter did not provide the effective date of L&I's revocation of the FLC license, the letter was clear that ESD was discontinuing its services "immediately." On January 3, 2006, after its license had already expired, Global applied for a 2006 FLC license. When L&I responded to Global's late FLC license renewal request, L&I also explained that the effective date of the revocation was intended to be January 13, 2005.

Despite its numerous breaches, Global now seeks damages based on the notion that the FLC license revocation could not become effective without a 14-day notice period, and therefore Global should have been able to continue to operate during the appeal period because the summary suspension did not become effective. But if the failure to provide the anticipated date of revocation in the December 30, 2006 letter was a breach because it constituted a revocation on that date, it was a minor

breach that L&I corrected five days later through the January 5, 2006 letter.

Global argues that L&I was required to provide it an opportunity to cure its breaches of the agreement. No such requirement, however, is found in the agreement. The notice provision simply requires an announcement by L&I of the revocation. Because § L5 does not require L&I to provide an opportunity to cure, even if L&I breached the agreement, Global did not suffer any prejudice.

Although the Departments do not agree with the trial court's interpretation of § L5 that there is an opportunity to cure, the Departments agree with the determination that any breach by the Departments was not material. Had the Departments given Global until January 3, 2006, rather than until December 30, 2005 to submit its audit and cure all its breaches, the evidence shows that Global could not and did not submit its audit by January 3, 2006. Global did not submit the audit by January 13, 2006 either. Global did not submit the audit until the end of January. Contrary to Global's assertions that it likely would have been able to provide the report on time, the evidence shows conclusively that if Global had received a longer cure period to have submitted the audit, it could not have done so. Therefore, Global was not deprived of an expected benefit and consequently suffered no prejudice.

Global was also not prejudiced because the Departments provided Global a reasonable opportunity to cure its breaches by providing not only a 10-day cure period, but also providing a previous extension to Global from November 30, 2005 to December 15, 2005 to file its audit. Moreover, if L&I is deemed to have revoked Global's license on December 30, 2005, thus lacking four days notice, the breach was also not material because Global's 2005 license expired on December 31, 2005, as a result of Global's failure to timely renew its license. Global's ability to conduct its farm labor contracting business in Washington was thereby cut off by only a single day. Global has stated that it was not providing H-2A laborers at the time of the revocation. Accordingly, no damages could have accrued during that one day period.

Finally, although Global has not distinguished between L&I and ESD, § L5 places no requirements on ESD, which retained complete discretion to discontinue services without notice immediately upon breach. Accordingly, regardless of what ruling is made regarding L&I, ESD is entitled to summary judgment because it did not breach the agreement.

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II. ARGUMENT

A. The § L5 Notice Provision Does Not Require L&I To Provide An Opportunity to Cure.

1. § L5 only provides for advance notice before Global's FLC license is revoked.

Global contends that the threshold issue should be “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.” Response Brief of Respondent/Cross-Appellant (RB) 20 (emphasis added). This is simply not the case. If § L5 does not contain a two week opportunity-to-cure provision, Global cannot show that L&I’s alleged breach was material because Global was not prejudiced if L&I did not give it the full two weeks before L&I revoked Global’s FLC.¹ Global was not prejudiced because at the time of the FLC license revocation there were no active contracts with growers and no workers in the state of Washington. CP 925. Therefore, Global did not lose any benefit by early revocation.

The provision that the trial court concluded is an opportunity-to-cure provision is contained in § 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

¹ Even if there is an opportunity-to-cure provision in the agreement that was breached, Global cannot show that such a breach is material as discussed below in Part II.D.

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. The words of this provision unambiguously do not provide a cure provision, nor does the term "notice" imply "cure."²

As discussed in Departments' Opening Brief, notice is not defined in the agreement, but under the contract case law its meaning may be defined through the 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 New Int'l Dictionary*, 1544 (2002). *Webster's* further states in the context of a lease agreement that it is "notification by one of the parties to an agreement . . . of intention of terminating it at a specific time" *Id.* Global argues that there is no purpose to the notice provision if there is not also an opportunity-to-cure provision. RB 37. But notice had several purposes that benefited Global: it allowed Global to avoid operating in violation of civil and criminal law after its license was

² While Global has previously admitted that the words of the agreement does not contain an opportunity-to-cure provision, CP 1124, Global now attempts to create ambiguity where none exists by suggesting that the language, "unless L&I's revocation is reversed or expires," contained in § L5 refers to L&I reversing its own revocation decision if Global cures its breach or "allowing the 14-day period to expire." RB 35 n. 8. The language "reversed or expires" does not refer to a cure provision, it refers to whether the revocation is reversed through the administrative appeal process or if the 3-year revocation period under RCW 19.30.050 expires

revoked; it allowed Global to avoid entering into new contracts once a revocation had occurred; it allowed Global to get its affairs in order before its license revocation went into effect; it allowed the businesses that Global had contracts with to decide whether, and if, a pending revocation would affect their interests. *See* Appellants' Brief at 26-27. Finally, it allowed Global to "plead its case" before the revocation became effective. CP 593. However, even if Global cured all of its defaults, L&I could still revoke its FLC license based on the breaches. CP 595-99.

2. Contract law does not require a "right to reasonable time to cure" when the parties omit it from the agreement.

Global argues that opportunity-to-cure provisions must exist in a contract even if the contract does not provide for it. RB 36. This is not correct. Washington law favors freedom of contract. David DeWolf & Keller W. Allen, 25 Wash. Practice, *Contract Law and Practice* § 5.31 (1998). Accordingly, courts do not have the power, under the guise of interpretation, to rewrite contracts which the parties have deliberately made for themselves. *Clements v. Olsen*, 46 Wn.2d 445, 448, 282 P.2d 266 (1955). The Restatement of Contracts (Second)³ explains that, "in general, parties may contract as they wish and Courts will enforce their

³ The Restatement (Second) of Contracts will be referenced as "the Restatement."

agreements without passing on their substance.” Restatement, Ch. 8, p. 2 (Introductory note). Based on general principles of contract law, parties can negotiate for a broad range of terms to suit their needs, including the omission of an opportunity to cure. Here, after significant legal advice and negotiation among the parties, Global entered into an agreement that intentionally omitted a “reasonable right to cure” provision.

The Departments’ clear rejection of the 28-day notice and opportunity-to-cure provision proposed by Global shows that the parties did not intend to include a cure provision in the final agreement. CP 592-94. Global’s initial settlement offer contained in its August 11, 2005 letter suggested the following opportunity-to-cure 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.

This provision, absent from the final agreement, has the elements of an opportunity-to-cure provision. It provides a mechanism for the Departments to notify Global of a “deficiency,” it provides a 28-day cure period, and it allows the Departments take action only after the 28-day period expires, and only if Global fails to cure its breaches. On the other hand, § L5 contains none of these elements. Instead of requiring both Departments to notify Global of a deficiency and to allow Global to correct that deficiency, § L5 only requires L&I to notify Global of L&I’s intent to revoke Global’s license “at least two weeks prior to revocation.” CP 30. The parties freely negotiated this provision. *See* CP 31. The agreement itself provides that if ESD or L&I issues a determination alleging a violation of law or breach of the 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. L&I’s ability to “immediately” revoke the license also shows that there is no implicit cure provision.

Global now asks the Court to rewrite the agreement, arguing that “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.” RB

36. It appears that Global relies on section 241 comment e of the Restatement. RB 36. This section addresses how to determine whether a failure to perform is material (factoring in whether the party is likely to cure the failure) and makes no mention of an inherent right to a reasonable time to cure. Restatement § 241. In particular, Comment e addresses whether a material failure by one party gives the other party the right to withhold further performance as security. Neither this section nor elsewhere in the Restatement is there a provision that a contract automatically includes a cure provision regardless of whether a party negotiated this away. Nor do the cases cited by Global provide this. RB 36 (citing *Rosen v. Asestry Tech., Inc.*, 143 Wn. App. 364, 177 P.3d 765 (2008); *Perry v. Wolaver*, 506 F.3d 48, 54, 55 (1st Cir. 2007)).

In *Rosen*, the court addressed whether a settlement agreement released the original claims in exchange for the promise to pay. 143 Wn. App. at 371-72. The issue of cure is not addressed in the case except for a brief parenthetical quote from *Bailie Commc'ns, Ltd. v. Trend Business Systems*, 53 Wn. App. 77, 81, 765 P.2d 339 (1988), cited for the proposition that a party is barred from enforcing a contract that the party has materially breached. *Rosen*, 143 Wn. App. at 369.⁴

⁴ Likewise, while both parties address *Bailie* in their briefing regarding materiality, *Bailie* does not stand for the proposition that a breaching party has a reasonable right to cure regardless of whether or not Global negotiated that right away.

Perry, cited by Global, ruled that a cure provision expressly provided for in a pledge applied to the related promissory note. 506 F.3d 54-55. In *Perry*, the court concluded that a promissory note contained a “right to cure” not because of an inherent right to cure. Rather, the court so ruled because the corresponding pledge specifically contained such a provision, because these documents must be construed together under Maine law, and because the note contained a default clause that stated “not cured within any applicable cure period.” And finally, the Court thought that it was illogical to find that there was no right to cure because “the only default that triggered the Pledge was the default on the Note, and the only way to cure the default under the Pledge was to cure the default under the Note.” 506 F.3d. at 55. No such corresponding second document exists here. While Washington case law favors the freedom for the parties to enter into any contract provisions that do not violate public policy (*infra* Part II.A.4), neither the Restatement nor case law can be shown to require an opportunity to cure where the parties have not done so.

To the extent the Restatement considers the factor of cure to determine if a breach is material (*see Bailie*, 53 Wn. App. at 83), it does not follow there is a two-week cure period in this settlement agreement. This settlement agreement provided for the immediate revocation of the

FLC license. Moreover, assuming some sort of reasonable cure period is required under contract law, a cure period was provided as discussed *infra* in Part II.D.4.

3. Notice was not a condition precedent to the revocation of Global's FLC license before providing a hearing.

Global asserts (1) that two weeks notice was a "condition" to L&I revoking Global's FLC license and ESD discontinuing recruitment and referral services and (2) that Global's contractual waiver of a pre-deprivation hearing was not invoked because the Departments violated the notice provision.⁵ RB 34. Global points to the second sentence in § L5 for this proposition. RB 34.⁶ Reading § L5 as whole, however, it is clear that the second sentence merely clarifies that "notice" does not mean a "hearing or opportunity to be heard." CP 30. That second sentence has no independent legal meaning without the first sentence.

Global appears to argue that the two weeks notice by L&I is a condition precedent to Global's waiver of hearing regarding the revocation

⁵ Global misstates the Departments' position when Global states that "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." RB 20 (emphasis added). L&I agrees that it was required to provide a two-week notice period. ESD was not required to provide notice. Neither agency agrees that notice was a condition to Global's waiver of a pre-revocation hearing.

⁶ "L&I agrees that it will notify Global at least two weeks prior to revoking Global's farm labor contractor license. *By providing notice, Global agrees that L&I is not required to provide a hearing or an opportunity for Global to be heard prior to revocation.*" CP 30 (emphasis added).

by L&I and discontinuation by ESD. RB 20, 34. A condition is defined as an act or event other than a lapse of time, which, unless it is excused, affects a duty to render a promised performance. 25 Wash. Practice at 149. The mere passage of time is not a condition precedent. “[A]ny duty which is based only on the passage of time is grounded on an independent promise and is deemed unconditional.” *Id.* at 151 (citing Calamari & Perillo, *Contracts* § 11-25, at 481 (3d ed. 1987); Restatement § 224 cmt. b (1981)). Passage of time is certain to occur; a condition, in contrast, is an event not certain to occur. *See* Restatement § 224. Because the only responsibility of L&I is to provide the two weeks notice, the notice period is a mere passage of time.

Conditions precedent are disfavored by the courts. *Jones Assoc., Inc. v. Eastside Prop., Inc.*, 41 Wn. App. 462, 470, 704 P.2d 681 (1985). Where it is doubtful whether words create a promise or a condition precedent, they are interpreted as creating a promise, the breach of which subjects the promissor to liability for damages. *Ross v. Harding*, 64 Wn.2d 231, 236-37, 391 P.2d 526 (1964); *see also State v. Trask*, 91 Wn. App. 253, 273-74, 957 P.2d 781 (1998). The following are words typically used to create conditions: “on condition;” “provided that;”⁷ “so

⁷ Note that “In providing” is substantially different from “provided,” because there is not a direct conveyance with the first construction as is required to create a condition.

that;” “when;” “while;” “after;” “as soon as.” *Ross*, 64 Wn.2d at 237.

Here, the two week notice provision is not a condition precedent to either waiver of the hearing before revocation or the revocation itself because the agreement nowhere shows an intention of the parties that the provision should be treated as such. *Ross*, 64 Wn.2d at 236. The agreement contains no words similar to those used to create conditions. Instead, the language creates a promise by L&I to provide two weeks notice, but nothing more. Indeed, viewing the language as a promise is the preferred method of the courts. *Id.* at 236-37.⁸

Finally, characterizing notice as a “condition” to revocation of Global’s FLC license misses the gravamen of the agreement. Global’s breach of the agreement is a condition precedent to license revocation. Global now asks this Court to ignore its breach and impute a condition precedent in § L5.

4. Sections I.C, IV.E.4, IV.M, and IV.L.2 give L&I sole discretion to revoke Global’s FLC license if Global breaches the agreement.

In contract interpretation, an interpretation that gives meaning to all terms is preferred over an interpretation which leaves terms unreasonable, imprudent, or meaningless. *Dickson v. United States Fid. &*

⁸ The promise to give two weeks notice was fulfilled, as illustrated by the January 5, 2006 letter, but even if the promise was not fulfilled, under contract law, such promises would be viewed as independent promises and therefore independent breaches.

Guar. Co., 77 Wn.2d 785, 790, 466 P.2d 515 (1970). Ignoring L&I's sole discretion to revoke Global's FLC license upon a breach of the agreement renders Sections I.C, IV.E.4, IV.M, and IV.L.2 meaningless. Under these provisions, L&I had sole discretion to revoke the license without a pre-deprivation hearing if there was a breach of the agreement or violation of law. Global suggests that if "the Departments had complete discretion to summarily revoke Global's license for the slightest deficiency, even the day after the agreement,"⁹ the agreement's notice and cure provision would be legally insufficient as unreasonable and invalid." RB 42. Global cites the dissimilar *Lano* case for this broad proposition. *Lano v. Osberg Constr. Co.*, 67 Wn.2d 659, 409 P.2d 466 (1966).

The facts of *Lano* are inapposite to the present case because the agreement in this case bears little resemblance to the performance contract in that case. In *Lano*, the performance contract was between a contractor and subcontractor and specifically stated:

in the event the CONTRACTOR shall at any time be of the opinion that the SUBCONTRACTOR is not proceeding with diligence and in such manner as to satisfactorily complete said work within the required time, then and in that event the CONTRACTOR shall have the right, *After reasonable notice*, to take over said work and to complete the same at the cost and expense of the SUBCONTRACTOR, without prejudice to the CONTRACTOR'S other rights or remedies for any loss or damage sustained.

⁹ The facts of this case are that the Departments took action only after Global's multiple serious breaches over the course of several months.

67 Wn.2d at 661 (emphasis added). The contract terms in *Lano* specifically provided for a reasonable notice provision. The question in that case was what time period was “reasonable.” The *Lano* court did not disagree with the contract provision, ruling only that the four days notice did not qualify as “reasonable” under the terms of the contract given that the four days included a weekend. 67 Wn.2d at 661-62.

Global also argues that if L&I invokes its rights under the agreement this violates good faith and fair dealing. RB 44-45. This position is unfounded. Global entered into a contract that allowed for immediate revocation of its FLC license if it breached the contract or violated the law. L&I acts in good faith when it enforces this contract. A party does not need to forgo rights established under a contract to act in good faith. *Goodyear Tire & Rubber Co. v. Whitman Tire, Inc.*, 86 Wn. App. 732, 740, 935 P.2d 628 (1997) (recognizing that there cannot be a breach of the duty of good faith when a party simply stands on its rights to require performance of a contract according to its terms).

Here if there is “violation of a condition of this agreement or provision of law,” it triggers L&I’s right to revoke the FLC license. CP 22. Global agreed to this provision and it agreed that it “voluntarily, intelligently, and knowingly and with opportunity for the advice of

counsel waives the due process right to a hearing prior to discontinuation of ESD services or revocation of the farm labor contractor license.” CP 30. In any event, while Global waived its ability to operate during appeal, Global is explicitly given the ability to appeal a revocation of its FLC license and discontinuation of ESD services to the administrative tribunal and operate on existing contracts in the meantime. CP 30. This allows it to challenge the license revocation and discontinuation of ESD services.

Global points to case law that says that a consent decree cannot agree to disregard state law and asserts that the Departments’ discretion to invoke summary suspension disregards the Administrative Procedures Act. RB 44-45. This is incorrect. Although Global argues that the Departments circumvented the summary suspension provision in RCW 34.05.479(2), Global ignores its choice to waive its APA rights. RCW 34.05.050 specifically states: “Except to the extent precluded by another provision of law, a person may waive any right conferred upon that person by this chapter.” RCW 34.05.060 specifically provides the authority for an agency and a private party to enter into informal settlements. By agreeing to the contract sections that provide for immediate revocation of the FLC license and to immediate discontinuation of ESD services (sections I.C and II.D), Global unambiguously chose to waive its APA pre-deprivation hearing right as it may do under RCW 34.05.050. CP 22-

23, 24. Moreover, while Washington courts have held that licensees have a property right in a license which cannot be taken away without according procedural due process, *Nguyen v. Dep't of Health Medical Quality Assurance Comm'n*, 144 Wn.2d 516, 520, 29 P.3d 689 (2001), even due process rights can be waived. *D.H. Overmyer Co., Inc. v. Frick Company*, 405 U.S. 174, 185, 92 S.Ct. 775 (1972).¹⁰ Global did this in section IV.L.7 of the agreement. CP 30.

The trial court also correctly concluded that the agreement did not violate public policy. CP 1119. While courts can void a contract that violates public policy, *Fluke Corp. v. Hartford Accident & Indemnity Co.*, 102 Wn. App. 237, 244, 7 P.3d 825 (2000), the courts do not strike down such a provision as void unless “. . . it seriously offends law or public policy.” *Keystone Masonry, Inc. v. Garco Constr., Inc.*, 135 Wn. App. 927, 933, 147 P.3d 610 (2006). In *State Farm General Insurance Company v. Emerson*, 102 Wn.2d 477, 481, 687 P.2d 1139 (1984), the Court held: “[w]e shall not invoke public policy to override an otherwise proper contract even though its terms may be harsh and its necessity doubtful.” *Id.* at 483.

Because the APA contains a specific provision allowing waiver

¹⁰ Although the Departments have previously briefed this issue to the trial court (CP 403-05), Global has not renewed its due process arguments in its cross-appeal and has waived them.

(RCW 34.05.050), it is hard to understand how a mutual agreement to waive APA rights can be construed to violate public policy. When considering whether to make such a determination, “[t]he test of public policy is not what the parties did or contemplated doing in order to carry out their agreement, or even the result of its performance; it is whether the contract as made has a ‘tendency to evil,’ to be against the public good, or to be injurious to the public.” *Goldberg v. Sanglier*, 27 Wn. App. 179, 191, 616 P.2d 1239 (1980). Global’s waiver here does not violate public policy under this standard.

B. If More Than One Inference May Be Drawn from the Extrinsic Evidence, This Case Should Be Remanded To Allow the Trier of Fact To Decide the Meaning of the Agreement Considering All the Available Evidence.

The general rule in contract interpretation is that summary judgment is not appropriate if extrinsic evidence is necessary to interpret the contract unless only one reasonable inference that can be drawn from the extrinsic evidence. *Scott Galvanizing, Inc. v. Nw. EnviroServices, Inc.*, 120 Wn.2d 573, 582, 844 P.2d 428 (1993). While the Departments assert that given the language of § L5, it is implausible that the parties agreed to an opportunity to cure, if this Court considers all the extrinsic evidence offered by both parties (meaning the inadmissible evidence as well as the

admissible¹¹), there would be an issue of material fact as to whether there is an opportunity-to-cure provision.

Contrary to Global's suggestion that Ms. Goss stated that there was an "opportunity to cure" (RB 40-41), Ms. Goss provided a nuanced explanation of what the parties actually discussed during the negotiations and how she explained § L5 to Mr. Edgley. CP 585-86, 591-94; Appellants' Brief at 39. "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 constitute a hearing." CP 585-86. Ms. Goss reiterates the same description of the conversation later in her testimony, "Global could do whatever they were going to do in that timeframe. They could cure it, they could plead their case, they could do nothing. None of that influenced the departments' right to exercise their discretion." CP 597. In contrast to Ms. Goss's recounting of the negotiation, Mr. Edgley's declaration (relied upon by Global at RB 39) gave his subjective version

¹¹ See Appellants' Brief at Part VII.A.3-4 (discussing Global's reliance on inadmissible evidence).

of the contract contents.¹²

In addition, if this Court considers Mr. Edgley's declaration, the Court should also consider the declaration of AAG Bruce Turcott, who also participated in the negotiations directly on behalf of ESD. He states it expressly: "The final settlement agreement did not require the agencies to provide Global with an opportunity to cure any violations of the law or breaches of the agreement before ESD and L&I could take action, respectively, to immediately discontinue recruitment and referral services and revoke Global's farm labor contractor license." CP at 616. Finally, the declarations of L&I's Gary Weeks and ESD's Karen Lee state that Global had no automatic opportunity to cure. CP 561-64, 565-68. This also would show that, if all of the extrinsic evidence is considered, there is a dispute of material fact as to whether the agreement contains an opportunity to cure provision.

C. Global's Breaches Were Material and Supported Immediate Action Under the Agreement by the Departments.

¹² Under *Hearst Comm., Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 509, 115 P.3d 262 (2005), Mr. Edgley's testimony is inadmissible to the extent that it contains statements of subjective intent. Similarly, any statement from Ms. Goss that were not said directly to Global's attorneys is inadmissible. However, it appears that her statements reflect conversations, CP 585-86, while Mr. Edgley's declaration and testimony appear to reflect subjective beliefs rather than specific statements by the parties. CP 854-55.

1. Global's failure to provide the audit was one of many material breaches that justified L&I's revocation and ESD's discontinuation of services.

Global argues that its breach was not material and therefore L&I should not have revoked the license nor ESD discontinued its services. RB 48. However, failure to raise an issue before the trial court precludes a party from raising it on appeal. *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983); RAP 2.5(a). Because it raises this argument for the first time on appeal, this Court should disregard this.

While Global now attempts to limit the discussion to the audit, RB 4, as of December 20, 2005, Global had numerous breaches that justified L&I's revocation of Global's FLC license and ESD's discontinuation of services. CP 55-58. Global failed to file complete and accurate reports identifying the number of hours and classifications to L&I; it continued to owe ESD \$6,937.95 in unemployment taxes, interest, and penalties; it underpaid by 32,025 additional hours in L&I premiums; it failed to execute a contract with the third party to provide oversight for the worker complaints for ESD; it failed to pay all the outstanding pay that was illegally withheld; it failed to submit its business entity disclosure by the October 15, 2005 deadline; and, it failed to provide cancelled settlement checks. CP 56-57. The Departments clearly indicated in their December 30, 2009 letter that the agencies' actions occurred not just because of

Global's failure to complete timely complete the audit, but because of all of the violations of the agreement. CP 60-61. The question is whether Global's multiple breaches were material.

In *Bailie*, the court used five factors from the Restatement to determine whether a breach is material: (1) whether the breach deprives the injured party of a benefit which he reasonably expected; (2) whether the breach deprives the injured party can be adequately compensated for the part of that benefit which he will deprived; (3) whether the breaching party will suffer 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. *Bailie*, 53 Wn. App. at 83 (citing Restatement § 241).¹³

An analysis of these factors shows that Global's breaches were material. First, Global's multiple breaches deprived the Departments of the expected benefit of reduced compliance costs and oversight that was negotiated in the agreement, and Global created new legal violations that forced the Departments to take additional action. Global's failure to

¹³ The pattern jury instructions similarly define breach as:

[A] breach that is serious enough to justify the other party in abandoning the contract. A 'material breach' is one that substantially defeats the purpose of the contract, or relates to an essential element of the contract, and deprives the injured party of a benefit that he or she reasonably expected." *Washington Pattern Jury Instr. Civ. WPI 302.3*, 6th Ed.

timely file reports created additional uncertainty about compliance; Global's failure to pay premiums and taxes deprived the public of both L&I and employment security funds. Global did not immediately make good on all payments to the Thai workers of illegally held funds, which deprived the workers of money for an additional period of time. This also created additional enforcement responsibilities for the L&I. In short, Global's multiple breaches deprived both Departments of expected benefits under the agreement.

Second, although the Departments can be adequately compensated for the late premiums through penalties and interest, the Departments do not have the authority to seek damages and other penalties outside of those agreed to in the agreement (or established under their statutory authority). Moreover, violations of the law that violate public interests cannot be compensated through monetary damages. Global incorrectly implies that because the Departments have never sought damages, RB 50, they never incurred compensable damages. The Departments have not claimed them because it is unclear whether they have the authority to do so. Nor did the agreement provide for fines outside of the Departments statutory authority, as suggested by Global. RB 47. Accordingly, the Departments' only remedy was to take action under the agreement. *See further discussion infra* Part II.C.2.

Third, the question of whether the breaching party will suffer forfeiture if the other party withholds performance does not fit neatly into this case. The Departments performed under the agreement by reinstating Global's FLC license and recruitment and referral services on September 22, 2005. The agency actions taken in late 2005 and early 2006 were not withholding a performance, but were specific agency actions in response to Global's breaches as provided under the settlement agreement. While Global suffers forfeiture by the loss of its FLC license, the forfeiture is not directly caused by a withholding of a performance by L&I. Although ESD did technically withhold performance by discontinuing recruitment and referral services, because there were no active recruitment and referral services at the time of the agency action, there was no immediate forfeiture. The forfeiture is more the loss of a future expectancy. In any case, the balance of the other factors supports that the public interests outweigh any forfeiture by Global.

Fourth, while Global cured all its failures by January 26th or 27th, 2006,¹⁴ including under the audit, given its history of failures and the multiple extensions, the late cure was of no consolation to the Departments. The Departments had little hope that Global would meet its

¹⁴ Although Mr. Fisher indicated that he completed the audit by January 24, 2006, he indicated that he submitted it a few days later after taking a few days to "wrap up some issues." CP 1040.

obligations in light of continued failings and in light of the incredible oversight that had been required since Global's entry into Washington state. *See infra* Part II.C.2 Appellants' Brief at 4-6.

Finally, the last factor is whether the behavior of the party failing to perform comports to standards of good faith and fair dealing. *Bailie*, 53 Wn. App. at 83. It is significant that Global breached the agreement only two months after the agreement was entered into and failed to comply with the first round of submissions. *Compare Bailie* 53 Wn. App. at 82-83 (failure to make a first installment payment was a material breach). Despite the Departments' willingness to provide multiple extensions,¹⁵ it is clear that Global made little effort to comply with the agreement between the time it signed the agreement in September 22, 2005 and the final flurry of activity starting December 20, 2005. By missing the first round of requirements of a three-year agreement, Global showed that it was not acting in good faith after the agreement was finalized.

2. **Global's failure to provide the audit report was a material breach because the agreement provides that any breach or violation of law constitutes a material breach.**

Failing to provide the audit was a material breach of the contract.

Failure to provide the audit deprived the Departments of a reasonably

¹⁵ The Departments' good faith attempts to work with Global to get them into compliance after early breaches of the agreement contradict Global's repeated accusations of bad faith by the Departments.

expected benefit under the first factor under the Restatement. *See Bailie*, 53 Wn. App. at 83 (citing Restatement § 241).

The audit was a critical document required under the terms of the agreement because it was a key monitoring mechanism to “be assured that the right premiums were being paid, that employees were being paid wages, that they were being paid correct wages, and they were classified correctly in determining the amount of risk that was covered by them.” CP 814. Considering Global’s egregious past violations and the resulting harm caused to workers by Global’s previous failure to pay workers the full amount of wages and reimbursements in amounts exceeding \$100,000, Global’s substantial underreporting of hours by more than 70,000 hours, and Global’s failure to pay industrial insurance premiums, as well as other violations, there is no doubt that Global’s timely submission of the independent audit was critical. CP 47-50 (Stipulations of the Parties Nos. 2, 3, 6, 7, 11, 12).

The independent audit was required under the agreement to provide independent oversight and accounting of Global’s compliance and to ensure that Global was no longer committing repeated wage and tax violations to the detriment of workers. Contrary to Global’s assertion that “audit report was merely a supplement to Departments’ own audits,” RB 49, the independent audit report was a critical provision of the agreement

that was meant to relieve ESD and L&I from the great expense of performing repeated quarterly audits and continuing enforcement actions for late payments.¹⁶ Moreover, Global was well aware of the importance of the audit, as evidenced by email sent by Attorney Brouwer to Global CEO Mordechai Orian on December 15, 2005, between the 2nd and 3rd audit deadline extensions. CP 614. The email shows that they knew the deadline was a material breach: “Motty, it is very important that Global meet this extension deadline. The agency will not grant another extension and we will violate the settlement agreement if we fail to comply.” CP 614.

Additionally, section IV.E.4 provides that “Global will promptly correct and reimburse for any pay or premium discrepancies as determined by L&I. If the audit reveals any violation, L&I may issue a determination of violation, notice of assessment, or other legal determination *and may take action under IV.L [the revocation provision] of this agreement.*” (emphasis added). In other words, this provision shows that the parties agreed that even minor violations discovered during the audit allowed the Departments to take action under the agreement and that the timely submission of the audit was critical.

¹⁶ The Departments do not regularly perform repeated audits on a single employer. It was only Global’s past behavior that made the regular audits necessary. State resources are finite and it not appropriate for one employer to require such an overwhelming use of resources in order to operate legally.

Under the second factor (*Bailie*, 53 Wn. App. at 83), the Departments can only be adequately compensated by fulfillment of the contract as stated above *supra* Part II.C.1. The agreement specifically provides that L&I and ESD could determine whether a breach merited revocation and discontinuation of services. Section I.C. provides that “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.” CP 22-23. Similarly, Section II.D specifically provides that “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.” CP 24.

The agreement allows for L&I to be “compensated” under the agreement by performance of the contract, namely revocation of the license, if there is a violation of the settlement agreement. Global has suggested that L&I could have done its own audit instead of waiting on the third party audit (RB 47), but Section IV.E specifically required Global to supply an independent quarterly audit of wages, premiums, and

taxes due, so L&I would not have to do so. L&I entered into the agreement only because Global agreed to reduce the overwhelming burden of enforcement that Global had previously imposed on the State. CP 561-64.

The Departments are entitled to take the remedies offered by the contract, namely revocation and discontinuation of services. As to the third factor under the Restatement (*Bailie*, 53 Wn. App. at 83) any forfeiture, as discussed *supra* Part II.C.1, is outweighed by the other factors. As to the fourth factor (*Bailie*, 53 Wn. App. at 83), L&I had specific knowledge that Global would not cure its failure to submit the report by the deadline. The auditor told Ms. Goss on December 30, 2009 that he would not be able to submit the audit on that day (the twice extended deadline). CP 1040. This shows that Global could not cure its deficiency in a timely fashion. As discussed *supra* Part II.C.1, completing the audit by January 26th or 27th, was of little consolation given the pattern of violations and given the resources and oversight expended by the Departments to achieve compliance.

Finally, the Departments acted in good faith by implementing the agreement and giving extensions to Global (*see* discussion *supra* Part II.C.1.). On the other hand, Global had a pattern of bad faith of repeatedly failing to comply with required statutory requirements and with provisions

of the contract. Global created the situation where the audit could not be finished under the timeline specified in the agreement or by the extended deadline. CP 794-99.

3. Although Global's breaches were material, the Departments did not terminate (or abandon) the agreement.

Global mischaracterizes the Departments' actions by asserting that the Departments summarily "terminated" the agreement. RB 49. Based on this mischaracterization, Global asserts that the law does not "allow the agreement to be *terminated* based on this slight breach." RB 49. Global provides lengthy quotes from contract cases about the rights of parties under the laws regarding total breach. RB 49. However, the Departments did not "terminate" the agreement. The Departments instead specifically invoked their rights outlined in multiple sections of the agreement, which allowed L&I to revoke the FLC license, and ESD to discontinue services prior to hearing. CP 61-62. In other words, it is not necessary for the breach to be material in order to allow L&I to revoke its FLC license. By invoking the agreement, L&I would have allowed Global to retain a limited license under IV.L. if there were ongoing contracts. CP 61-62.¹⁷ Nothing in the case law prevents a party from using its remedies under the agreement rather than declaring a total breach. In the present case, that is

¹⁷ Because Global did not have ongoing contracts to provide agricultural labor, Global did not use this benefit.

what the Departments did.

D. If L&I Prematurely Revoked Global's FLC License on December 30, 2005, It Was Not a Material Breach.

1. The December 30, 2005 letter was not intended to invoke immediate revocation by L&I.

Global argues that L&I provided insufficient notice under the agreement. RB 19. L&I did provide notice of the revocation on December 30, 2005 consistent with § L5's notice provision. L&I concedes that the December 30, 2005 letter could have been written more clearly. L&I did not intend for the FLC revocation to become immediately effective, but, read without the aid of the agreement, the letter implies that the revocation had occurred.¹⁸ L&I does not dispute that L&I made the decision to revoke on December 30, 2005, the question is when the revocation actually became effective. The reference to the "immediate" discontinuation of ESD services shows that unlike ESD, L&I did not intend to invoke immediate revocation.

¹⁸ Global suggests that the testimony of ESD Director Karen Lee supports that the L&I revocation actually was intended to occur on December 30, 2005 (RB 25), but it is clear Ms. Lee was only speaking of ESD's discontinuation of services, not L&I's revocation. CP 1073. ESD does not dispute that its administrative discontinuation of services occurred on December 30, 2005. As a practical matter, ESD was not actively providing recruitment and referral services to Global in December 2005 because Global did not have workers in the State.

The February 23, 2006 statement by L&I Director Weeks about the "December 30, 2005 revocation", referred to by Global at RB 25, occurred after the revocation became effective and did not obviate the effect of the January 5, 2006 letter that the revocation would have become effective on January 13, 2006. The February 23, 2006 letter is immaterial as to the objectively manifested intent shown at the time of the revocation notice as demonstrated in the January 5, 2006 letter.

While Global engages in unsupported speculation about L&I's deliberations (RB 30), the January 5, 2005 letter and Richard Ervin's testimony show when L&I objectively intended the revocation to be effective. L&I Employment Standards Program Manager, Richard Ervin testified that effective date was to be January 13, 2006. CP 925.¹⁹ Mr. Ervin explains the purpose and effect of the January 5th letter as it related to § L5 as follows:

Q And what was this letter to do relating to the 14-day notice?

A This letter is telling Global that we're not going to be processing their application for 2006 application. It's bringing them back up and reminding them that, you know, that their license has been revoked and that revocation becomes effective in 14 days or 14 days from the revocation date, and that although the revocation was technically effective on January 13th, because it expired, they don't have a valid 2006 license at this point and they're no longer licensed to operate as a farm labor contractor in the State of Washington

CP 925-926.

While the emails from Ms. Goss and Carl Hammersburg regarding the December 30, 2005 revocation decision to other state workers cited by Global refer to December 30, 2005 as the revocation date (CP 910-20), a complete reading of the record does not to support Global's assertions that

¹⁹ Global makes a number of uncited assertions about Mr. Ervin's actions that are simply not supported by the record. RB 30.

L&I announced to the public that the December 30, 2005 was the date of revocation. For example, Global specifically refers to Steve Pierce's press release on January 4, 2009 as evidence that the revocation occurred on December 30, 2009 twice in its brief (RB 14 and 24), but Global omits a critical statement from that press release: "[i]n Friday's Action, L&I gave Global a 14-day notice of its intent to revoke the license." CP 920-21.²⁰ The direct evidence of the January 5, 2006 letter and Mr. Ervin's testimony show that the revocation became final on January 13, 2006.

2. A shortened notice period would not be a material breach, because case law does not require strict compliance with notice provisions.

Assuming *arguendo* that L&I did not provide 14 days notice, any notice lacking did not prejudice Global because Global did not have any active agricultural contracts at the time of the notice of revocation and did not have any workers in the State of Washington. Moreover, as discussed above, any deficiencies were cured by the January 5, 2006 letter that clarified that the revocation was effective on January 13, 2006.

a. The case law does not require strict compliance with notice provisions.

Global incorrectly asserts that the case law requires strict

²⁰ On January 4, 2006, the Yakima Herald, Mr. Edgley's hometown paper, reported, "The company's license would have been revoked two weeks after Friday's letter, under state law. However, Global did not apply to renew its license for 2006 by the December 31 deadline, which means the company cannot legally operate in Washington state, L&I spokesman said Tuesday." CP 922.

compliance with notice provisions. Global cites the unlawful detainer action case, *Community Investments, LTD v. Safeway Stores, Inc.*, 36 Wn. App. 34, 671 P.2d 289 (1983), for its proposition and asserts the facts are essentially the same. RB 33-34. A close reading of the case narrows the holding to unlawful detainer cases: “Nineteen days was insufficient notice. The statutory unlawful detainer action is a summary proceeding unknown to common law The provisions governing the time and manner of bringing an unlawful detainer action are to be strictly construed.” *Community Inv.*, 36 Wn. App. at 37 (citations omitted). Strict compliance is appropriate in unlawful detainer cases because of strict statutory deadlines, but does not apply in a common law contract case.

Indeed, the case law provides that failure to give notice is not a material breach unless it actually prejudices the party. The Washington Supreme Court held in a case involving interpretation of an automobile insurance contract that, while the contract required that the insured give notice of settlement with a tortfeasor and that such failure to give notice was a breach of the policy, the failure to give notice would “give rise to a remedy only if the insurer is prejudiced by the lack of notice.” *Liberty Mut. Ins. Co. v. Tripp*, 144 Wn.2d 1, 16, 25 P.3d 997 (2001). Allowing a failure to give notice to automatically preclude coverage “could afford a

UIM insurer a windfall.” *Id.* at 17.²¹

Global would be impermissibly awarded a windfall if the revocation of its FLC license is declared ineffective simply because the notice was too short. There is no case law that supports Global’s assertion that notice provisions require strict compliance. The correct analysis is whether the failure to provide 14 days notice is a material breach under the Restatement factors outlined in *Bailie*. *Bailie*, 53 Wn. App. at 83.

b. Shortened notice is not a material breach.

As discussed above, the Restatement provides factors to use to determine whether a breach is material. The first factor to be considered is whether the breach deprived the injured party of a reasonably expected benefit. *Bailie*, 53 Wn. App. at 83 (citing Restatement § 241). An assumed shortened notice period before revocation did not deprive Global of a benefit because there were no ongoing agriculture contracts in Washington at the time, meaning that most of the benefits of notice were not necessary at the time, *supra* Part II.A.1: Global did not have to cease operations to avoid civil and criminal violations; Global did not need to make arrangements for its workers; and, early winter was too early to enter into new contracts for the next growing season. Global argues that it was deprived of its license because of the shortened time period. RB 47.

²¹ Prejudice is generally an issue of fact. *See Tripp*, 144 Wn.2d at 18. Here, there is no disputed material issue of fact as is shown in Part II.D.2.b.-c.

This is not correct, its license was revoked because of Global's breach; any shortened notice period deprived Global of only four days of its notice.²²

Moreover, Global did not have a valid 2006 FLC license to operate in Washington for reasons that had nothing to do with implementation of the agreement. On January 4, 2006, Global sent an incomplete and late license application. 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.

Despite Global's assertion that it could apply for a FLC license whenever it wanted, 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

²² If notice is calculated as of the December 20, 2005 letter, the notice period was shortened by four days.

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. Global cannot complain that it did not receive an expected benefit when its own actions precluded it from such a benefit.

The second Restatement factor is whether the injured party can be adequately compensated for the deprivation of that part of the benefit. *Bailie*, 53 Wn. App. at 83 (citing Restatement § 241). Because there is no prejudice from the shortened notice of four days, there is no compensation necessary for the breach that occurred. The third Restatement factor is whether the breaching party will suffer forfeiture by the injured party's withholding of performance. *Bailie*, 53 Wn. App. at 83 (citing Restatement § 241). L&I will suffer a forfeiture of its right to immediately revoke Global's FLC license.

The fourth Restatement factor is whether the breaching party was likely to cure the breach. *Bailie*, 53 Wn. App. at 83 (citing Restatement § 241). L&I did cure any breach on January 5, 2006 by explaining that the intended revocation was January 13, 2005, but for Global's license expiration. Even if this "technical cure" really had no intrinsic value to Global because of the lapse of the license, it was Global's own actions that deprived it of its full notice period.

Finally, the fifth factor is whether the breach comports with good faith and fair dealing. *Bailie*, 53 Wn. App. at 83 (citing Restatement § 241). L&I's assumed shortened notice comported with covenant of good faith because L&I corrected the confusion in the December 30 letter promptly on January 5. L&I also voluntarily provided two extensions of time for Global to meet its obligations under the agreement before L&I revoked Global's license. Contrary to Global's argument, L&I does not need to import a cure provision into the contract in order to act in good faith. *See also supra* Part II.A.4 (discussing that L&I acts in good faith and does not violate public policy by enforcing contract).

3. If § L5 contains an opportunity-to-cure provision, the trial court properly concluded that the breach was not material.

The trial court determined that the agreement contained an opportunity-to-cure provision and that notice and opportunity to cure was given on December 20, 2005. CP 1020. If this Court agrees with the trial court, then the Court should also find that the breach by L&I was not material. An analysis of the five factors in the Restatement shows that if that trial court was correct that § L5 contained an opportunity to cure then the trial court was also correct when it concluded that the breach was not material. These factors are discussed in detail above in Part II.D.2.b, which supplements the following discussion.

Under the first factor, Global was not deprived of a reasonable expected benefit. *Bailie*, 53 Wn. App. at 83 (Restatement § 241). The trial court found that “the Departments’ breach was not material because Global failed to cure its violation either by January 3, 2006, or by the January 13, 2006 extended deadline” CP 1020. The undisputed material facts show that if Global had until January 3, 2006 to cure, it could not and did not submit its audit by that date.²³ The trial court also concluded that had the period run until January 13, 2006, Global could not and did not submit its audit by January 13, 2006. Hence, Global was not deprived of an expected benefit of having until January 3, 2006 to submit its audit in order to cure its breach and avoid revocation, because Global could not and did not submit its audit by January 3rd. Therefore, Global suffered no prejudice and any failure by the Departments to provide four more days to cure, to January 3, 2006, was not a material breach.

Further, Global has failed to set forth any pertinent evidence to show that it could have submitted its audit by January 3, 2006 or January

²³ While Global implies that it was the Departments’ actions that discouraged Global from submitting the information in a timely fashion, Global admits that its legal counsel, Ms. Brouwer, told Mr. Fisher not to complete the audit at the earliest opportunity. RB 27. While Ms. Brouwer asserted it was so Mr. Fisher would not have his holiday ruined, it appears that he did not get materials from Global until after the holidays (January 3, 2006). Nothing the Department did prevented Global from turning in the audit at its earliest opportunity. AAG Goss contacted Mr. Fisher on December 30, 2005 and he provided a “timeline update.” CP 1042. She neither told Mr. Fisher of a different deadline nor discouraged him from submitting the audit at the earliest possible time. CP 1040.

13, 2006 and avoided revocation of its farm labor contractor's license. Ms. Brouwer's statement to the Departments in her December 29, 2005 letter that "we expect Mr. Fisher will have the audit completed within a week," CP 180, is unsupported by any testimony from Mr. Fisher. Moreover, the evidence shows that Global was not prejudiced by any shortened notice term, because the auditor's staff (Sally Smith) continued to work on the audit for Global from January 3, 2006 through at least January 24, 2006 and received additional information from Global needed for this audit as late as January 24, 2006. CP 783-87. The auditor needed far more than four days to complete the audit.

Although this Court should not consider the new evidence offered by Global in its motion for reconsideration to the trial court, CP 1024-1038,²⁴ even the new evidence shows that Global could not have cured its breach by either January 3rd or 13th. The new evidence submitted by Global as part of its reconsideration shows that the audit required substantial work after December 30, 2005.

Mr. Fisher received payroll sample information from Global via

²⁴ In contravention to purposes of reconsideration under CR 59(a)(4), Global provided new evidence, including the declaration of John Fisher and deposition testimony not previously offered, to support its position. Considering new evidence that was previously available, but was not offered prior to the entry of order, is not allowed under CR 59(a)(4) and LCR 59(a)(3).

Fed-Ex sometime between January 3rd and 5th.²⁵ He then requested additional information from Global concerning summary reports and sample selection after receiving the first set of sample information. On January 8th and 9th, Mr. Fisher finished the updated information and prepared *another* list of outstanding information. Mr. Fisher then held a conference call with Global on January 10th and “determined a solution in tying out cleared payroll checks through their bank accounts, documentation in supporting H2A deductions and clarification on a couple of the payroll samples.” CP 1042. Global sent Mr. Fisher yet another updated package on January 19, 2006 to address these problems. CP 1042. On January 22nd and 23rd Mr. Fisher reconciled all the new information, recommending an adjustment. CP 1042. While the issue of materiality of breach is generally reviewable as a question of fact (*see Supra II.B.*) in this case there is no genuine issue of material fact that Global could not and did not submit the required audit by January 3, 2006. *See Bailie*, 53 Wn. App. at 82; *see* further discussion at Part II.D.2.b.

Because there was no prejudice from any assumed shortened cure period, there is no compensation necessary for the assumed breach that occurred for the second *Bailie* factor. *Bailie*, 53 Wn. App. at 83

²⁵ Mr. Fisher testified he made a December 22, 2005 request to Global to provide information needed for the audit and did not receive the information from Global until January 3, 2006. CP 794.

(Restatement § 241). L&I will suffer a forfeiture of its rights for performance of the contract (third factor, *id.* at 83), i.e., immediate revocation of the FLC license upon Global's breach. *See* further discussion at Part II.D.2.b.

L&I cured any deficiencies (fourth factor, *id.* at 83) by the January 5, 2006 letter that listed the revocation date as January 13, 2006. In any event, the issue of cure should be given little weight given that Global never notified the Departments of the purported breach as required by Section IV.M. of the contract and Global's license lapsed before the end of any cure period. Finally, the cure period received by Global comported with good faith and fair dealing (fifth factor, *id.* at 83) because L&I had previously offered two extensions to allow Global to cure its breaches. *See* further discussion at Part II.D.2.b.

4. The Departments provided a reasonable time for Global to cure its breaches, despite clear language that none was required.

Despite the clear language of the agreement indicating that FLC license revocation was in L&I's sole discretion, discontinuation of services was in the ESD's sole discretion, and that only L&I was required to provide notice before it revoked Global's FLC license, the Departments provided Global 10 days to cure its default. CP 55-58. Given the facts in the present case, the final 10-day period was reasonable. Although Global

argues that 10 days was not reasonable given the proximity of the notice of breach to the holidays, Global did not engage a CPA until late November. CP 296. The deadline was extended twice by L&I. CP 296. The Departments and the AAGs took unprecedented steps to help Global maintain its business in Washington, despite Global's failure to follow even the most basic Washington laws.

Global gives three excuses for its failure to complete the audit by December 30. First, Global notes that the tax reports, which were necessary for the audit, were not completed until November 2005. RB 13. It was Global's responsibility to complete its tax reports in a timely fashion,²⁶ which it did not do. This contributed to the late audit at no fault by the Departments. Second, Global says the audit could not be done because L&I had to pre-approve the audit form. RB 13. There simply no evidence that the Department delayed approving the audit form. According to Mr. Fisher's records, Carl Hammersburg, L&I's representative, reviewed and approved the procedures on November 22, 2005. CP 1041.

Third, Global claims that AAG Goss added "additional tasks that she required to be included in the report." RB 13. The phrasing of this statement incorrectly implies that Ms. Goss made new and somehow

²⁶ The industrial insurance tax reports were due on October 31, 2005, as required by the Section I.F of the agreement. CP 100.

improper requests that were not originally contemplated by the parties. Global cites to CP 469-70 and CP 1041-42 for this assertion. RB 13. Global further asserts that L&I's counsel and L&I acted improperly by requiring "the audit report 'to include not only L&[I], but ESD and wage review.'" RB 48 n.10; *see also* RB 3. There is nothing improper about requiring the audit report to contain items specifically required by the settlement agreement. CP 25 ("Global will pay for independent quarterly audits of premiums to certify the accuracy of the wages paid, industrial insurance premiums due, unemployment insurance taxes due, and reports filed by Global to ESD and L&I for these purposes."). Global asserts there were new demands placed on it between December 20 and 30th. RB 48 n.10. This assertion is unsupported by any citation to the record and indeed there is no support for such an incorrect assertion. Moreover, it does not appear that either L&I or its AAG contacted Mr. Fisher directly between December 20, 2005 and December 30, 2005 until AAG Goss called Mr. Fisher on December 30, 2005 to learn whether the audit would be completed by the deadline. CP 1042.²⁷

Global is solely responsible for its breach occurring during the

²⁷ Global also appears to impugn Ms. Goss's motives for the December 30, 2009 phone conversation (RB 27) simply because she wanted to check with Mr. Fisher directly. CP 180. This brief conversation confirming that the audit would not be timely submitted hardly "set the cornerstone" for Global's failures, as Global now asserts. RB 27.

holiday period because Global did nothing to secure an auditor until just a few weeks before the audit was originally due on November 30, 2005. CP 296. The Departments acted in good faith by extending the deadline to December 15, 2005. CP 56. It was only after Global failed to meet the extended deadline on December 15, 2005 that the Departments demanded compliance by December 30, 2005 for Global to avoid revocation. CP 57-58. Hence, Global received an additional 30 days to provide the audit report, not just the 10 days provided by the December 20, 2005 letter.

E. If there is a Minor Breach By L&I, Global Is Not Entitled to Damages.

- 1. Global failed to allege breach as required by Section M of the agreement and therefore L&I cannot be required to provide a new notice period even if it breached the agreement.**

Global attempts to escape all responsibility for its own breaches and failure to follow the agreement, including its failure to allege a breach under the agreement in writing. Global now appears to demand a new 14-day notice period, RB 26, more than three years after the revocation.

Section M clearly states:

In the event of a breach of this 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 108.²⁸

On December 23, 2009 and December 29, 2009, Global attorney Brouwer sent letters to the Departments requesting clarifications. CP 749. Neither letter suggested either that the 10-day opportunity-to-cure period provided by the Departments breached the settlement agreement or that Global should be provided 14 days to cure its breaches. CP 749. On January 27, 2006, Global sent a lengthy correspondence appealing the revocation of its FLC license to L&I on a number of bases. CP 754-61. In that letter, Global did not assert that L&I had breached the notice requirement in § L5 nor did Global at anytime prior to the OAH litigation notify the Departments that it believed they had breached any of the provisions of the agreement. Global suggests that if L&I revoked early, Global could then terminate the agreement without doing anything further. Even if this were true, Global did not terminate the agreement. It continued to ask the Department for reinstatement.

If L&I breached by failing to provide 14 days notice, Global had the duty to inform L&I of its purported breach to allow L&I to provide a new notice period. Global now suggests that it should have been provided a new 14-day notice period after it failed to notify L&I that Global had not

²⁸ The unambiguous language of Section M provides a bilateral requirement for written notification of an alleged breach.

received proper notice.²⁹ CP 31, Section IV.M.

Global suggests that *Lano*, 67 Wn.2d 659, stands for the proposition the plaintiff was not required to protest any shortened notice period: “Nor was Global required to protest to the Departments’ deficient notice and cure period because once the Departments breached the agreement, 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.” RB 44. This position is not supported by the case law. The aggrieved party may only terminate the contract if the breach is material. *Jacks v. Blazer*, 39 Wn.2d 277, 284-85, 235 P.2d 187 (1951); *Vacova Co. v. Farrell*, 62 Wn. App. 386, 402-03, 814 P.2d 255 (1991) (trial court properly granted summary judgment to vendor in suit to terminate contract following buyer’s failure to make timely payment on 3-day note, since breach was material). *Lano* is also distinguishable because in *Lano* there was no specific bilateral requirement to provide written notice of a breach, 67 Wn.2d at 660-64, as is provided by Section M in the settlement agreement.

Global was required to provide written notice of breach in order to allege a breach. Global did not do so. It did not request a clarification

²⁹ It should be noted that even if the two weeks period began to run from January 5, 2009, Global still did not cure its breach within two weeks of the notice. So even if § L5 is interpreted to contain an opportunity-to-cure, restarting the notice period Global still cannot claim that it timely cured its breach.

regarding the effective date of the revocation. Failure to provide written notice of the alleged breach prevents Global from seeking remedies against the Departments years after the time in question.

2. L&I's assumed minor breach does not entitle Global to nominal damages because the suit is for damages only.

No damages are awarded when inadequate notice is given if the party could not have performed even with the notice. *Taylor v. Int'l Indus.*, 398 N.E.2d 501, 503 (Mass. Ct. App. 1979). Recovery is limited to damages actually caused by the defendant's breach and can only be for the loss that would have not occurred but for the breach. *Taylor*, 398 N.E.2d at 503 (quotations omitted). Here Global could not have provided the report by January 3rd or January 13th (*see supra* Part II.D.3.). Any defect in notice (which L&I does not concede) did not cause Global to fail to file the audit report on time.

Although the general rule in contract law is that for every breach a cause of action exists and a party is entitled to a judgment for nominal damages in order to symbolize vindication (25 Wash. Practice §14.2, *Colorado Structures, Inc. v. Ins. Co. of the West*, 161 Wn.2d 577, 16 P.3d 1125 (2007)), the courts have also held that a case should be dismissed if there is no proof of substantial damages. *Ketchum v. Albertson Bulb Gardens*, 142 Wash. 134, 139, 252 P. 523 (1927) ("This court has held

that, where the action is one for damages only, there being involved no property or personal rights having value in themselves, a failure to prove substantial damages is a failure to prove the substance of the issue, and warrants dismissal.”). The appellate courts have also frequently refused to reverse judgments for defendants on the ground that the trial court should have made an award of nominal damages to plaintiffs. *Lee v. Bergesen*, 58 Wn.2d 462, 466-67, 364 P.2d 18 (1961) (pursuant to contractual language, title to goods passed to contractor upon subcontractor’s failure to perform as promised); *Commercial Inv. Co. v. National Bank of Commerce*, 36 Wash. 287, 293, 78 P. 910 (1904) (even if customer proved that bank breached part of settlement agreement, in absence of actual damage trial court properly dismissed).

In the present case, even if the revocation occurred on December 30, 2005, the shortened notice period prior to revocation did not deprive Global of a benefit because there were no ongoing agriculture contracts in Washington at the time, meaning that most of the benefits of notice were not available at the time, *Supra* Part II.A.1: Global did not have cease operations to avoid civil and criminal violations; it did not need to make arrangements for its workers; and, it was too early to enter into new contracts for the next growing season. If there are not substantial

damages, this trial court correctly dismissed this case.³⁰

F. Because ESD's Notice of Immediate Discontinuation of Services on December 30, 2005 Did Not Breach The Agreement, Summary Judgment Should Be Granted to ESD.

Global asserts that the agreement “required the *Departments* to provide Global two weeks notice before revoking Global’s FLC; the *Departments* breached that requirement by providing Global only 10 day notice prior to revoking Global’s license and terminating *ESD* referrals.” RB 19 (emphasis added). However, § L5 only references L&I, not ESD. ESD is not required to give two weeks notice before discontinuing its services. Regardless of the interpretation of the December 30, 2005 letter regarding L&I, the action against ESD should be dismissed.

Section I.C allows L&I to revoke Global’s farm labor contractor license and further provides that if the farm labor contractor license is revoked, ESD has discretion to immediately discontinue referral and recruitment services. Global argued to the trial court that section I.C conditions ESD’s discontinuation of services upon L&I’s revocation of Global’s FLC license. CP 414. This argument ignores the two provisions that provide independent bases for discontinuation of services—Sections

³⁰ In addition, damages are limited by Global’s failings with other administrative agencies. The federal Department of Labor (DOL) debarred Global from the H-2A program for 3 years in November 2006, which ended Global’s ability to operate as an H-2A contractor anywhere in the United States. CP 346. Because DOL debarred Global, Global could not perform H-2A work in Washington State irrespective of the *Departments* actions.

II.D and IV.L.2.³¹ CP 24, 30. The agreement does not support the assertion that ESD's discontinuation depends upon L&I's revocation. § L5 patently does not apply to ESD and the case against ESD should be dismissed.

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G. Any Further Proceedings Would Properly Be Conducted at Office of Administrative Hearings

Finally, Global argues that the trial court erred when it "returned" this matter to the administrative forum. RB 3-4. Global requested and was granted a motion to stay the administrative case it initiated because an adjudication of the merits was not possible without the superior court's interpretation of the agreement. CP 376.³² The trial court simply provided what Global requested: an interpretation of the agreement and a resolution of its contract cause of action.

³¹ Section II.D. provides: "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.2 provides "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.

³² The administrative case was specifically stayed by the ALJ "because a full and complete adjudication of the merits of this controversy is not possible absent a binding interpretation of the Settlement Agreement at the origin of this dispute." CP 376. The ALJ specifically requested that the superior court provide an interpretation of the agreement because "[t]he Superior Court's ruling on the precise terms of the Settlement agreement will be binding on both the parties, and on this forum." CP 377.

If Global desires not to move forward with its administrative appeal it can elect to do so regardless of the trial court order. If the trial court erred, it is harmless error.

III. 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 for trial on the contract action.

RESPECTFULLY SUBMITTED this ____ day of September, 2009.

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**COURT OF APPEALS FOR DIVISION II
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.

**DECLARATION OF
SERVICE**

DATED at Seattle, Washington:

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I served the Brief of Appellants Department of Labor & Industries and Employment Security Department, Motion to File Over-Length Brief, and Notice of Unavailability to the following:

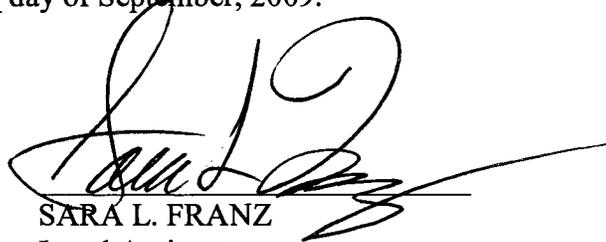
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DATED this 25th day of September, 2009.

A large, stylized handwritten signature in black ink, appearing to read 'Sara L. Franz', is written over a horizontal line.

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