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

STATE OF WASHINGTON
BY JW
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.

REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT

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I. INTRODUCTION

Despite the numerous arguments provided by the Washington State Department of Labor and Industries (“L&I”) and the Employment Security Department (“ESD”) (collectively the “Departments”) in their Reply, the resolution of this matter turns on whether the Departments, as a matter of law, breached the Settlement Agreement (“Agreement”) they negotiated, drafted, and signed with Global Horizons, Inc. (“Global”). The terms of that Agreement indisputably state that L&I agreed to give Global at least two weeks notice before it could revoke Global’s farm labor contractor (“FLC”) license. CP 107. The Agreement also states that only if L&I provides this notice, does Global agree “that L&I is not required to provide a hearing or an opportunity for Global to be heard prior to the revocation.” *Id.* Lastly, the Agreement states that if L&I provides the notice and thereafter summarily revokes Global’s FLC license, ESD could terminate its referral services.

The Departments were required to comply with this two-week notice and cure provision and they failed to do so. By failing to comply, they breached the Agreement and then wrongfully summarily revoked Global’s FLC license. The Departments attempt to divert this Court’s review with implausible factual interpretations and inapplicable general rules of law. However, the Departments cannot reconcile their actions with the requirements of the Agreement. They cannot explain:

- why they would send Global a letter on December 20, 2005, (“December 20 letter”) using future tense language stating

Global's FLC license "will be revoked and ESD services immediately discontinued" and then list deficiencies - labeled "cures" - that Global had to "cure" 10 days later on December 30, 2005 ("December 30 letter"). CP 127.

- why 10 days after the December 20 letter, the Departments would send Global the December 30 letter, using past and present tense language stating Global's FLC license "has been revoked and ESD services are immediately discontinued" because Global did not complete "all actions necessary to cure." CP 131.
- why the December 30 letter was sent at all if the notice period had been extended to January 3, 2006, or changed to December 31, 2005 through January 13, 2006. CP 130-132.
- why the December 30 letter included the Administrative Procedure Act's ("APA's") required 30 day appeal notice stating that the appeal period would begin from the date of the December 30 letter if the notice period was changed or extended. CP 132 ("If you choose to appeal the revocation decision . . . you may file and appeal with L&I within 30 days from the date of this notice by sending a written notice of appeal . . .")
- how the Departments communicated to Global that the 14-day notice period had been extended or changed when they did not inform Global verbally or in writing of a change or extension.
- why Global could not renew its license for 2006 on January 3, 2006, based on the Departments' position that Global's license had

been revoked during the three-year period immediately prior to that date if, according to the Departments, Global's FLC license was not revoked until January 13, 2006. *See* CP 135-136.

- why the Departments' Assistant Attorney General Amanda Goss ("AAG Goss") called the independent auditor on December 30 to ask whether he would have the independent audit report completed on that day and never advised him that the notice period was extended to January 3, or changed to the period December 31 to January 13, 2006. *See* CP 1040, 1042.
- why the Departments sent out press releases and emails on January 4 and 5, 2006, to the media, legal services, and others announcing that the Department had revoked Global's FLC license on December 30 because Global failed to "cure" the deficiency of submitting the audit report. CP 910-930.
- why L&I Director Gary Weeks stated in his February 23, 2006, letter to Global that Global's FLC license had been revoked on December 30 because it failed to cure the deficiency of the submission of the audit report. CP 138-140.
- why ESD Director Karen Lee testified that Global's license revocation became effective on December 30, 2005. CP 1073.

The reason the Departments have been unable to answer these questions is self-evident. They breached the Agreement by giving Global a 10 day notice and cure opportunity instead of the required 14 days, and then summarily revoked Global's FLC license. Their attempts to interpret

the right to cure out of the Agreement and to change the notice and cure period are implausible, inconsistent, and do not conform to the facts. Not only did the Departments not extend a cure period or change the dates of the notice, they have not been able to consistently argue which of their two purported “14-day” notice and cure periods this Court should apply. Further, the Departments never communicated to Global any such extended or changed notice and cure period so that Global could benefit from the new time period. The Departments cannot now revise facts which indisputably show that only a 10-day notice and cure period was all that was provided to Global, which is a breach of the Agreement.

II. ARGUMENT

A. The Departments Breached the Agreement’s Notice and Opportunity to Cure Provision.

1. Global and the Departments Negotiated a Two-Week Cure Provision even if the Word “Cure” Was Not Included.

The Departments claim for the first time that they intentionally excluded the word “cure” from Section IV.L.5 of the Agreement (“L.5”), even though a cure provision was admittedly negotiated by the parties. Depts. Reply, p. 8. (The Departments “intentionally omitted a ‘reasonable right to cure’ provision” when they drafted the Agreement.) Global’s prior counsel, Ryan Edgley, submitted a sworn statement that a cure provision was expressly negotiated as part of the settlement. In his statement, Mr. Edgley states Global had requested a 30-day cure period, but the negotiations resulted in the 14-day provision that is contained in

the Agreement.¹ CP 146-157. These negotiations are documented in the letter Mr. Edgley sent to AAG Goss on August 11, 2005. *Id.* Likewise, AAG Goss admitted that a cure provision was negotiated and that she understood Global wanted a cure period because of the many technical and complex compliance provisions. In her deposition, AAG Goss states:

. . . 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 (emphasis added)²

The Departments attempt to deal with AAG Goss's testimony by claiming she is merely providing a “nuanced explanation” of the parties' negotiations. Depts. Reply, p. 20. The “nuance” is apparently that Global “could cure it [the breach], they could plead their case, they could do nothing.” *Id.* This is not a “nuance” – this simply reflects the definition

¹ The Departments claim that “[i]n contrast to Ms. Goss's recounting of the negotiation, Mr. Edgley's declaration . . . gave his subjective version of the contract contents.” Depts. Reply, pp. 20-21. It is difficult to understand why Ms. Goss's recounting of these events is not subjective, but Mr. Edgley's is. In any event, Mr. Edgley's letter documents his negotiations with Ms. Goss and Ms. Goss's testimony confirms his concerns and why a notice and cure provision was important to Global.

² The Departments also cite to AAG Goss' co-counsel, Bruce Turcott's, declaration. Mr. Turcott, however, does not state that omission of a cure period was specifically discussed with Mr. Edgley or that Mr. Edgley, and Global, agreed to exclude a cure period. CP 615-616. Mr. Turcott is simply relaying his reading of the language contained in Section IV.L.5.1. CP 616.

of an opportunity to cure. A party in breach of a contract has the opportunity, whether taken or not, to cure the breach, to argue their case to the non-breaching party, or to decide to do nothing.

2. The Parties' Actions Conform to Reading L.5 as including a Notice and Cure Opportunity.

Although the Departments now contend that they intentionally omitted the “cure” language from L.5, Global does not believe the Departments would act deceitfully or intentionally by omitting language that Global fully understood was included. *See* Depts. Reply, pp. 8-9. A more believable explanation is that the Departments negotiated a 14-day notice and cure provision and now, in a misguided effort to avoid liability for their breach of that condition, attempt to explain it away by claiming they “intentionally” omitted the cure provision. It is also more believable that on December 20, 2005, the Departments erroneously remembered the required notice and cure period as being 10 days and did not check the Agreement’s provisions to confirm the accuracy of this assumption. The contemporaneous facts support this explanation as shown by the December 20 and 30 letters and other documents generated by both parties regarding the notice and cure period. These include:

1. The Departments’ December 20 letter includes a list of deficiencies they label “cures” in bold and state, in future tense, that these deficiencies must be cured by December 30. CP 127;

2. Global’s December 29 letter asking the Departments for clarification regarding the five conditions Global “must satisfy by

December 30, 2005 for compliance purposes with regard to the Settlement Agreement” and states “Global appreciates the opportunity to cure these deficiencies . . . “ CP 180 (emphasis added). The Departments do not respond to Global’s December 29 letter to advise Global the Agreement does not include an opportunity to cure provision;

3. The Departments’ December 30 letter states that Global was provided “a last opportunity to cure” deficiencies, Global did not comply with “all actions necessary to cure.” Global was provided “a last opportunity to immediately cure those violations,” Global “failed to cure each of the violations demanded of the agencies,” and lists under the bold header “Failure to cure” the submission of the independent audit report as the uncured violation. CP 130-131 (emphasis added);

4. The Departments’ press release and numerous emails to third persons state that Global’s FLC license was revoked for failing to cure the breach of timely submitting the audit report.³ CP 910-922; and

5. L&I Director Weeks states in his February 23, 2006, letter to Global that the reason Global’s license was revoked was because it

³ The Departments argue that the Departments’ press release includes the statement “notice of its intent to revoke the license” which they assert means Global’s license was not revoked on December 30. However, the first sentence of that same press release states: “The Department of Labor & Industries on Friday, December 30, revoked the farm labor contractor license of Global Horizons, Inc.” because Global failed to file the audit report by the December 30 deadline. CP 921. The first sentence of the press release is consistent with the Departments’ numerous emails and other statements issued to third parties on January 3 and 4, 2006.

failed to “cure” the breach of timely submitting the audit report on December 30. CP 138-140.

From these uncontroverted documents, a reasonable person would conclude that both the Departments and Global understood the Agreement included a notice and cure provision. Because their letters and other communications document that Global was given only a 10-day notice and cure period, the Departments developed an argument to explain their oversight. Their new position, which they now tenaciously argue, is that they extended the notice period to January 3 or changed the notice period to begin on December 31, 2005 and extend to January 13, 2006. The insurmountable hurdle that comes with this argument is the fact that the Departments never communicated this “new” notice period to Global.⁴ On December 30, Global was unequivocally told its FLC license was revoked and it had no reason to believe that the Departments had extended the notice and cure period to January 3, January 13, or any other time

⁴ Another problem with this argument is that Mr. Ervin, the mid-level manager who drafted the January 5, 2006, letter, testified in deposition that the letter actually had no effect.

Q And what would be the difference after January 13, 2006, what would be the change after January 13, 2006, that was different than what was the case after December 30, 2005?

A I’m not sure what you’re driving at.

Q Would there be any difference? I mean, you say it’s an effective date. What would be in effect after . . . January 13th that wasn’t in effect after December 30th? . . .

A Probably nothing. If you don’t have a license to operate to begin with and you don’t have a new license, probably no difference.

CP 1065 (emphasis added).

period. Simply stated, Global could not have received the required 14 days notice and cure period because the Departments never gave Global “notice” of this “new” notice and cure period.

Indeed, the Departments’ own briefing flounders on this issue. The Departments, at one point, state: “Had the Departments given Global until January 3, 2006, rather than until December 30, 2005 to submit its audit and cure all its breaches . . . evidence shows conclusively that if Global had received a longer cure period to have submitted the audit . . .” Depts. Reply, p. 3. The Departments similarly state later in their Reply that AAG Goss called the independent auditor on “December 30, 2005, to learn whether the audit would be completed by the deadline,” acknowledging that the notice and cure period ended on December 30, not January 13. *Id.* at 45. The Departments continue having difficulty keeping their story straight.

3. Case Law and the *Restatement (Second) of Contracts*, Provides that there is an Inherent Opportunity to Cure in a Contract.

The Departments continue to claim that L.5 did not include a two-week opportunity to cure provision because they had complete discretion to immediately revoke Global’s FLC license and terminate referrals. Therefore, they argue that the 10-day cure period provided to Global was solely an act of discretion. Depts. Reply, pp. 9, 15, *see also* Appellants’ Brief, pp. 34-35, 43. The absence of the word “cure” in L.5, however, does not mean the Agreement fails to provide a right to cure a breach before termination of a contract. As stated in Global’s response, the

Restatement (Second) of Contracts (“*Restatement*”) and case law interpreting contracts provide a breaching party a reasonable time in which to cure the breach, whether or not a cure provision is expressly included in the contract. *See Restatement* §241, cmt. e; *see also* Global’s Response, pp. 35-37. The Departments’ response is to cite to a completely different section of the *Restatement* for the general principle that parties may contract as they wish and the courts will enforce their agreements. Depts. Reply, pp. 7-8, *citing Restatement*, ch. 8, p. 2. This section, however, is not controlling because Global is not challenging the parties’ freedom to contract but is asking this Court to interpret an ambiguity in the Agreement’s revocation and remedies provision.

The Departments later argue that Global’s reliance on *Restatement* §241, (and comment e) is inapplicable because it makes no mention of an inherent right to cure but merely addresses when a material failure by one party provides the other party the right to withhold performance. Depts. Reply, p. 10. The Departments misread this applicable provision of the *Restatement*. In fact, three sections of the *Restatement* address the inherent opportunity to cure in contracts, *Restatement* §§237, 241, and 242. Those sections must be read together.

First, *Restatement* §237 expresses the rule that “[i]t is a condition of each party’s remaining duties to render performances . . . under an exchange of promises that there be no uncured material failure by the other party to render any such performance due at an earlier time.” (Emphasis added.) The considerations of whether a performance is

substantial under this section are the same as those listed in §241 for determining whether a failure is material. *See Restatement* §237, cmt. d. Second, five factors must be considered under §241 in order to determine whether a breach is material, the fourth of which is “the likelihood that the party failing to perform or to offer to perform will cure the failure.” *Restatement* §241. Lastly, in the comment following section §242, the cure opportunity is again acknowledged:

Ordinarily there is some period of time between suspension and discharge, and during this period a party may cure his failure. Even then, since any breach gives rise to a claim, a party who has cured the material breach has still committed a breach, by his delay, for which he is liable in damages.

These provisions of the *Restatement*, as well as case law and the treatises cited by Global in its Response, recognize that contracts inherently contain a period of time during which a breaching party must be given the opportunity to cure a breach. Global’s Response, pp. 35-37. The recognition of the inherent right to cure in contracts, as explained by Professor Farnsworth in his treatise on contracts, is based on society’s interest in having some security in contract expectations by according each party to a contract “some time to cure his breach.” *Id.* at 36, *citing* E. Allan Farnsworth, *Contracts*, 607 (1982).

Thus, by law, the Departments could not declare Global in breach of the Agreement and summarily revoke Global’s license unless it first provided Global an opportunity to cure. Further, the Departments could not declare the Agreement breached unless there was no uncured material failure by Global at the time of the Departments’ declaration. *See*

Restatement §237. Since on December 30, Global had four more days to cure, there was no uncured material breach by Global on that date.

4. The Agreement's Notice Provision Was Not a Meaningless "Announcement" of the Departments' Revocation of Global's FLC License.

The Departments argue that the Agreement's 14-day "notice provision simply requires an announcement by L&I of the revocation." Depts. Reply, p. 3. The Departments' support for this proclamation is a cite to a Webster's Dictionary definition of "notice." Depts. Reply, p. 6. Notice, however, must be determined from the facts and circumstances of each case and in this case, notice would have meant nothing to Global if it was only intended to be an announcement of a license revocation. *See Lano v. Osberg Const. Co.*, 67 Wn.2d 659, 663, 409 P. 2d 466 (1966), *citing Black's Law Dictionary* (4th ed.), p. 1211. Global reasonably expected that notice would not be a mere "announcement" but rather that it would commence the two-week cure period pursuant to the terms of the Agreement. As Mr. Edgley states in his Declaration, the laws governing farm labor contractors and the technical and complex conditions included in the Agreement put Global at risk of a breach. Global therefore had a reasonable expectation that the required notice would begin the time period for correcting any outstanding failures to perform. If, as the Department now asserts, notice was merely an "announcement," then the notice provision had no value to Global – an immediate revocation of its license or a revocation two weeks later would have made no difference.

The Departments attempt to find some meaningful reason for the Agreement's two week "announcement" provision if there was no corresponding opportunity to cure. First they claim the notice provision had meaning because "it allowed Global to avoid operating in violation of civil and criminal law after its license was revoked." Depts. Reply, p. 6. This argument makes no sense. Any regulatory agency revoking a licensee's license must notify the licensee of a revocation and of its right to appeal the revocation. *See* RCW 34.05.422(1). Otherwise, every licensee whose license had been revoked would unknowingly continue to operate in violation of the law.

Second, the Departments allege the notice provision had independent meaning because "it allowed Global to avoid entering into new contracts once a revocation had occurred." Depts. Reply, p. 7. But, the revocation had not yet occurred on December 20, when the notice was given, and once Global's license was revoked on December 30, it could not have legally entered into new contracts in any event. *See* CP 107. Indeed, Section IV.L.4 only allowed Global to continue to operate under a limited FLC license to complete its existing contracts. *Id.*

Third, the Departments argue that the notice provision had meaning because "it allowed the businesses that Global had contracts with [sic] to decide whether, and if, a pending revocation would affect their interest." Depts. Reply, p. 7. L.5's notice provision only provides notice to Global. The provision has no relevance to businesses who were not parties to the Agreement and who may or may not have decided to do

business with Global. The Departments fully understood this and issued press releases and emails to notify third parties of the revocation.

The Departments' final claim is that the notice provision allowed Global to "get its affairs in order" and "plead its case" before the revocation became effective. *Id.* at 7. Global did not have to "get any affairs" in order because it was allowed to continue under a limited FLC license to complete its existing contracts if its license were revoked. CP 107. Nor did the notice provision allow Global to "plead its case" since the only way it could convince the Department to continue its license was to cure the deficiencies that gave rise to the revocation. This argument simply circles back to the fact that L.5 is a notice and cure provision.

B. The Burden Is on the Department to Prove Global Could Not Have Timely Cured the Last Deficiency and They Cannot, as a Matter of Law Meet this Burden.

Without cite to any authority in the record, the Departments assert that "the evidence shows conclusively that if Global had received a longer cure period to have submitted the audit, it could not have done so" and that "Global could not have provided the report by January 3 or January 13." Depts. Reply, pp. 3, 49. The Departments' claims are based entirely on speculation. The Departments took from Global its right to a 14-day notice and cure period and now claim "no harm, no foul" because Global would not have been able to perform in any event.

The burden, however, is on the Departments to show Global would not have been able to cure its last deficiency if the full 14 days had been provided. It is not disputed that Global was entitled to either an additional

four days to cure the audit report filing, or if those four days were not timely added to the end of the 10-day period (by January 3), then a new 14-day period. Since Global still had at least four more days to cure on December 20, the Departments' summary revocation of Global's license on that date excused Global's obligation to further perform. *See Puget Sound Service Corp. v. Bush*, 45 Wn. App. 312, 724 P.2d 1127 (1986).

The courts holding in *Puget Sound Service* is instructive. In that case, a developer brought an action against purchasers of a condominium with boat moorage for breach of the sale contract. The sale contract required the developer to obtain certain financing for purchasers, as well as adequate moorage for their boat. The purchasers subsequently notified the developer that they were rescinding the sales contract because the moorage was too small for their boat. Although the developer offered to cure the moorage and still had time to obtain the required financing, the purchasers failed to close and the developer sued for breach of contract.

The trial court held the purchasers were premature in rescinding the sales contract since the developer offered to cure, but barred the developer from recovering damages since it had failed to provide the financing required under the contract. The court held this was an anticipatory breach excusing purchasers' further performance. *Id.* at 315-316. The Court of Appeals reversed this decision stating that because the developer still had time in which to comply with the financing condition, the purchasers had the burden of proving the developer could not have

done so. Thus, the court held the purchasers' premature repudiation of the contract excused the developer's performance:

This action of repudiation notified Puget Sound [developer] that nothing it could do would affect the Bushes's [purchasers'] decision to rescind. As stated in *McCormick v. Tappendorf*, 51 Wash. 312, 314, 99 P. 2 (1909), "[o]ne party need not perform a condition precedent if it appears that the other party cannot or will not perform." In light of the circumstances presented, to expect Puget Sound to investigate the financing situation and rectify any discrepancies prior to the closing date would be to require it to engage in a useless act. After such a repudiation, the law does not require tender of a useless performance. *Refrigeration Eng. Co. v. McKay*, 4 Wash.App. 963, 967, 486 P.2d 304 (1971); 4 A. Corbin, *Contracts* § 977 (1951); Restatement (Second) of Contracts § 255 comment a (1979). Since Puget Sound still had time to comply with the condition precedent, the Bushes' action excused Puget Sound's performance.

...

The trial court erroneously put the burden of proof on Puget Sound.

Puget Sound Service at 318-319 citing the *Restatement* §§244, 245 (emphasis added). Here, Global still had four days to submit the audit report on December 30, the day the Departments summarily revoked its license. That license revocation excused Global's continued performance under the contract. It is not Global's burden to show that it could have provided the audit report if it had been given the full 14-day cure period.

Additionally, the Departments have offered no evidence to contradict the documented fact that the independent auditor, John Fisher, was expected to provide the report "within a week." CP 180. Global advised the Department on December 29 that "[w]e expect that Mr. Fisher

will have the audit completed within a week.” CP 180⁵; *see also* CP 1059. The Departments have not met their burden of proof and therefore cannot avoid summary judgment on this issue. *See* CR 56 (an adverse party may not rest upon mere allegations or denials but “must set forth specific facts showing that there is a genuine issue for trial.”)

C. **L.5 Must Be Read as Conditioning Global’s Waiver of Its Right to a Pre-Deprivation Hearing on the Departments Giving Global the Two-Week Notice and Cure Opportunity.**

L.5’s notice and cure provision contains two promises: first, L&I will notify Global two weeks prior to revoking Global’s FLC license, and second “[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 assert that the phrase “by providing” does not create a condition precedent, but a promise. Depts. Reply, pp. 12-14. Although difficult to follow, the Departments appear to argue that because L.5 contains promises rather than a condition precedent, it must be read out of the Section.

Whether a contract provision is a condition precedent or a contractual obligation depends on the parties’ intent which must be

⁵ Mr. Fisher stated his office had been working hard to complete the report prior to December 30; that when Global’s license was revoked, he was advised by Global’s counsel, Natalie Brouwer, to complete the report in a timely but not urgent manner; that he therefore continued his previously arranged January travel plans; and that when he returned from his trip, he completed the report and submitted it to the Departments on January 26, 2006. CP 1039-1044. Consistent with Mr. Fisher’s statements, Ms. Brouwer testified in deposition that she advised Mr. Fisher he no longer needed to complete the report quickly after she received the Departments’ notification that Global’s license had been revoked on December 30. CP 1059-1060.

determined “from a fair and reasonable construction of the language used, taking into account all the surrounding circumstances.” *Tacoma Northpark, LLC v. NW, LLC*, 123 Wn. App. 73, 79, 96 P.3d 454 (2004). The courts have defined conditions precedent as facts and events, occurring subsequent to the making of a contract, “that must exist or occur before there is a right to immediate performance, before there is a breach of contract duty, before the usual judicial remedies are available.” *Ross v. Harding*, 64 Wn.2d 231, 236, 391 P.2d 526 (1964). The nonperformance of one party’s promise (the Department’s promise to provide a 14-day notice and cure period) excuses the performance by another party of a different promise (Global’s promise to waive its right to a pre-deprivation hearing) only when the performance of the first promise is a condition precedent to the performance of the second promise. *Id.*

In contrast, a promise is a contractual duty, the breach of which subjects the promisor to liability for damages but it does not necessarily discharge the other party’s duty to perform. *Tacoma Northpark*, 123 Wn. App. at 79. The promisor who made the promise or has the contractual duty to perform must prove it was impossible to perform in order to avoid liability. *Barrett v. Weyerhaeuser Co. Severance Pay Plan*, 40 Wn. App. 630, 635-36, 700 P.2d 338 (1985).

Applying these rules to the Agreement, Global submits that L.5 should be interpreted as a condition precedent. As the Departments correctly state (Depts. Reply, pp. 13-14), the courts have held words such as “provided that,” “on condition,” “when,” “so that,” “while,” “as soon

as,” and “after” suggest a condition precedent, not a promise. *Tacoma Northpark, LLC* at 80. The Courts, however, have recognized that this list is not exclusive but includes any language suggesting conditional intent. *Id.* Here, the phrase “by providing” is essentially the same as the phrase “provided that” or “on condition,” both of which have been recognized by the courts as indicating a condition precedent. *Id.*

If L.5’s notice and cure requirement is a condition precedent, the Departments must establish they made a good faith effort to satisfy that condition. The Departments’ failure to satisfy the condition precedent is not excused if their failure was the result of their misconduct or fault. *Barrett* at 635-636. Here, the Departments’ failure to meet the 14-day condition precedent was solely the result of their misconduct and fault. The Departments could have easily reviewed the Agreement’s provisions prior to setting the 10-day notice and cure period. Further, they could have in good faith rectified their error, once discovered, by immediately notifying Global that the period would be extended four days or that the 14-day period would start anew. The Departments did neither. They chose instead to try to manipulate the factual events and language in the Agreement to avoid liability. Since the Departments failed to meet the notice and cure provision’s requirements, Global was excused from performing the subsequent condition that Global waive its APA right to a

pre-deprivation hearing.⁶ Global was therefore entitled to retain its FLC license and renew it. The Departments' wrongful taking of Global's license entitles Global to damages. *See Tacoma Northpark* at 79.

If, as the Departments argue, L.5's provisions were promises, and therefore contractual obligations, the Departments must show that it was impossible to have provided Global the promised 14-day notice and cure opportunity. *Id.*, *see also Carpenter v. Folkers*, 29 Wn. App. 73, 77, 627 P.2d 559 (1981). The Departments cannot establish that it was impossible to perform this condition. Likewise, if L.5's provisions are promises, Global would not have been excused from performing its promise to waive its right to a pre-deprivation hearing. But, Global met this condition because it had no recourse against the Departments under the terms of the Agreement for the summary revocation of its license.⁷ *See* CP 107.

⁶ *See* RCW 34.05.422(1); *see also Ongom v. State, Dept. of Health*, 159 Wn.2d 132, 137-138, 148 P.3d 1029 (2006) (a professional license cannot be revoked without due process of law because such licenses "constitute[s] a lawful entitlement to practice one's chosen profession.").

⁷ While the Departments admittedly used the summary revocation to bar Global from renewing its license in 2006, they also claim Global's license was not renewed because its application was untimely. But, Global sent the Departments its renewal application on January 3, 2006, immediately after the holiday. CP 135-136. Further, RCW 34.05.422(3) provides that a licensee making a timely application for renewal of a license will not result in his license expiring until the application has been finally determined by the agency. Finally, FLC licenses can be issued any time an application is made, not just on January 1st of each year as the Departments disingenuously allege.

1. If the Departments Had the Complete Discretion to Revoke Global's License, the Agreement Would Have Been Illusory.

The Departments make the supercilious argument that they did not breach L.5 because they could, in their sole discretion, immediately revoke Global's FLC license and discontinue ESD referrals. Depts. Reply, pp. 9, 14. According to the Departments, this "complete discretion" shows there was no implicit cure provision included in Section IV.L. *Id.* If that were the case, the Departments' promise to provide the 14-day notice and cure period is meaningless and illusory. A supposed promise is illusory when it is so indefinite that it cannot be enforced, or where, as here, its provisions are such as to make the Departments' performance optional or entirely discretionary. *Metropolitan Park Dist. of Tacoma v. Griffith*, 106 Wn.2d 425, 433-434, 723 P.2d 1093 (1986).

If Global had no right to cure under the terms of the Agreement, the Departments would have had unfettered regulatory discretion to revoke Global's license and terminate referrals. Accordingly, the two-week notice provision would have offered nothing to Global except a 14-day delay in the Departments' "discretionary" revocation of Global's license and Global would have given up its right to an pre-deprivation APA hearing for naught. The statements in the Agreement that refer to the Departments' discretion must therefore be read in conjunction with L.5's "Revocation and Remedies" provisions if they are to have any meaning.

2. Whether the Department's Breach Was Material Is a Question of Fact that Cannot Be Decided on Summary Judgment.

The superior court erred in finding that the Departments' breach was not material because the determination of whether a breach is material is a question of fact. The courts must look at the circumstances of each particular case to make a determination of materiality and support that determination with substantial evidence in the record. *Vacova Co. v. Farrell*, 62 Wn. App. 386, 403, 814 P. 2d 255 (1991). The trial court therefore erred in finding on summary judgment that the Departments' breach was not material. The court further erred in making this finding because neither Global nor the Departments sought summary judgment on the issue of whether the Departments' breach was material.

D. Other Arguments Raised in the Departments' Reply.

1. The Departments allege that Global's failure to provide the audit report was only one of many material breaches that justified the Departments' revocation of Global's license. Depts. Reply, pp. 22-23. This argument is disingenuous. The only breaches that had to be cured were set forth in the December 20 letter and as admitted by the Departments in their December 30 letter, only the audit report submission remained uncured on December 30. The violations by Global that were resolved pursuant to the Agreement are not relevant to this matter.

2. The Departments claim Global was not prejudiced or harmed by the defective notice. Depts. Reply, p. 5. The issue of whether Global was prejudiced or harmed by the Departments' breach is irrelevant

under the rules governing breach of contract. To respond, however, Global was harmed by the Departments' actions because the defective notice and cure period led directly to the summary revocation of Global's FLC license which has precluded Global from being able to renew or obtain a new license since 2006. The Departments admit that the license revocation, by law, banned Global from receiving a license for three years. CP 135-136, *citing* RCW 19.30.050(2).

3. The Departments allege that it is "significant" that Global breached the Agreement only two months after signing on September 22, 2005, and that Global "made little effort to comply with the Agreement" after the Agreement was signed. Depts. Reply, p. 26. Letters between the Departments and Global's prior counsel, however, detail the numerous efforts made by Global to comply with the Agreement's onerous requirements between September 22 and December 20, 2005. CP 125-133, 173, 175, 177, 179-181. The Departments cite no facts or other authority to contradict these efforts by Global to comply.

4. The Departments state Global did not engage the auditor until late November to undertake the audit but does not deny that the independent auditor and the audit procedures had to be approved by the Departments, which was not done until November 22. Depts. Reply, pp. 43-44, CP 1041; *see also* CP 470 ("Mr. Fisher worked with . . . L&I's Program Manager . . . to ensure the audit was properly conducted, a good faith approach which added additional time to the process.") Additionally, during the three-month period following the signing of the Agreement,

Global conducted a wholesale change to its accounting system, which delayed the statements necessary for the audit. CP 469. Thus, the Departments' claim that Global unreasonably delayed filing the audit report is not only irrelevant, it is untrue.

5. The Departments state that "Global now appears to demand a new 14-day notice period . . . more than three years after the revocation." Depts. Reply, pp. 46-47. Global has never claimed that it should receive a new two-week notice and cure period. Consistent with its complaint, Global has only sought damages for the Departments' breach of contract.

6. The Departments state that "Global had the duty to inform L&I of its purported breach to allow L&I to provide a new notice period." Depts. Reply, pp. 46-47, *citing to* Section M of the Agreement (CP 108). Section M of the Agreement only requires notification to be provided in writing; it provides no time limitation for the notice to be given. Global appealed the termination of its license and raised these issues as part of that appeal and also filed this action for breach of contract. This notice satisfied the requirement. *See Fenton v. Contemporary Development Co., Inc.*, 12 Wn. App. 345, 349, 529 P.2d 883 (1974), *citing* 5A A. Corbin, *Contracts* § 1218 (1964) ("Furthermore, the commencement of suit to reclaim the purchase price is also sufficient notice of rescission"). Further, the Departments did not raise this argument in the trial court and are therefore precluded from raising it on appeal.

7. The Departments claim that ESD's notice of immediate discontinuation on December 30 did not breach the Agreement because

ESD had no obligation to provide Global notice and opportunity to cure. As stated, under the *Restatement*, an opportunity to cure is inherent in every contract. Further, the Agreement itself states “if its farm labor contractor license is revoked, ESD has the discretion to immediately cease providing services.” CP 99-100 (emphasis added). Thus, ESD can only terminate referrals if Global’s FLC license is first revoked.

8. The Departments allege the trial court properly remanded Global’s breach of contract and declaratory judgment action to the law judge for an adjudicative proceeding. Global’s breach of contract and declaratory judgment action is a civil action and the superior court has no jurisdiction to remand a civil action to an administrative forum.

III. CONCLUSION

This Court should affirm the grant of Global’s motion for summary judgment and remand the matter for a trial on damages.

Respectfully submitted this 20th day of November, 2009.



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STATE OF WASHINGTON

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

GLOBAL HORIZONS, INC.,

Respondent/Cross-Appellant,

v.

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

Appellants/Cross-Respondents.

DECLARATION OF SERVICE

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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 20th day of November, 2009, I caused to be served Reply Brief of Respondent/Cross-Appellant on the following individuals in the manner indicated:

James P. Mills, AAG
Anastasia Sandstrom, AAG
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Seattle, WA 98164-1012

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Signed this 20 day of November, 2009, at Olympia, Washington.



Lorraine A. Kimmel