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DEC 20 2012

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 309631

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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III

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DC FARMS, LLC, an Idaho limited liability company,

Appellant,

v.

CONAGRA FOODS LAMB WESTON, INC., a Delaware corporation  
doing business in Washington State,

Respondent.

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APPELLANT DC FARMS, LLC'S REPLY BRIEF

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## TABLE OF AUTHORITIES

	<u>Page</u>
<b>Cases</b>	
<u>Best Film &amp; Video Corp. v. Best Film &amp; Video Corp.</u> , 46 BR 861 (1985)	7
<u>Carlson Real Estate Co. v. Soltan</u> , 549 N.W.2d 376, 381 (1996).....	7
<u>Continuant, Inc. v. Buck Institute for Age Research</u> , 148 Wn. App. 1008 (2009).....	5, 6, 7, 8
<u>Desserault v. Yakima Chief Property Holdings, LLC</u> , 2010 WL 300411, *4 (E.D. Wash. 2010) .....	13
<u>Federal Signal Corp. v. Safety Factors, Inc.</u> , 125 Wn.2d 413, 886 P.2d 172 (1994).....	15
<u>Filmline (Cross-Country) Prods., Inc. v. United Artists Corp.</u> , 865 F.2d 513, 518 (2d Cir. 1989).....	5, 7
<u>Forest Mktg. Enter., Inc. v. Dep't of Natural Res.</u> , 125 Wn. App. 126, 132- 33, 104 P.3d 40 (2005).....	11
<u>Gray v. Gregory</u> , 36 Wn.2d 416, 218 P.2d 307 (1950).....	4, 5, 7
<u>Knisely v. Burke Concrete Accessories, Inc.</u> , 2 Wn. App. 533, 468 P.2d 717 (1970).....	13
<u>Larken, Inc. v. Larken Iowa Limited Partnership</u> , 589 N.W.2d 700, 702 (1999).....	7
<u>Leghorn v. Wieland</u> , 289 So.2d 745, 747 (1974).....	7
<u>LJL Transp., Inc. v. Pilot Air Freight Corp.</u> , 905 A.2d 991 (2006).....	7
<u>Moulden &amp; Sons, Inc. v. Osaka Landscaping &amp; Nursery, Inc.</u> , 21 Wn. App. 194, 584 P.2d 968 (1978).....	10
<u>Paulson v. Pierce Cy.</u> , 99 Wn.2d 645, 664 P.2d 1201 (1983).....	13
<u>Republic Inv. Co. v. Naches Hotel Co.</u> , 190 Wash. 176, 67 P.2d 858 (1937).....	4, 7
<u>Tacoma Rescue Mission v. Stewart</u> , 155 Wn. App. 250, 255, 228 P.3d 1289 (2010).....	4

**Other Authorities**

RCW 62A.2..... 12, 13, 14  
RCW 62A.2-104 ..... 13  
RCW 62A.2-712 ..... 9, 12, 14

**TABLE OF CONTENTS**

	<u>Page</u>
I. INTRODUCTION .....	1
II. REPLY ARGUMENT .....	3
A. LAMB WESTON IS NOT ENTITLED TO SUMMARY JUDGMENT ON THE ISSUE OF DC FARMS’ ABILITY TO “CURE” ALLEGED BREACHES OF THE JOINT VENTURE AGREEMENT. ....	3
1. Washington Cases Require Strict Compliance With Notice and Cure Provisions, Even Where Cure Is Purportedly Impossible. ....	3
2. Neither the Agreement Nor UCC-2 Entitle Lamb Weston to Judgment As a Matter of Law on the Issue of Whether Providing Replacement Potatoes Would Have Cured DC Farms’ Alleged Breach.....	8
i. The Joint Venture Agreement Allows DC Farms to Cure by Providing Replacement Potatoes. ....	9
ii. UCC-2’s “Cover” Provision Does Not Apply to the Joint Venture Between DC Farms and Lamb Weston. ....	12
3. Questions of Fact Preclude Summary Judgment on the Issue of Whether Additional Safety Precautions Would Have Cured the Alleged Breach.....	15
B. DC FARMS’ ADDITIONAL BREACH OF CONTRACT CLAIMS WERE NOT PART OF LAMB WESTON’S MOTION FOR SUMMARY JUDGMENT, AND THE TRIAL COURT ERRED IN DISMISSING THESE CLAIMS VIA PRESENTMENT HEARING.....	18
1. Lamb Weston is Liable for Expenses Accrued Between Automatic Renewal for 2010 and Termination of the Joint Venture Agreement. ....	20
2. Lamb Weston is Liable for Reimbursement of U.S. Bank Obligations. ....	21

3.	Lamb Weston is Liable for Accrued Expenses for the 2009 Crop Season. ....	23
III.	CONCLUSION.....	24
	APPENDIX A	
	APPENDIX B	

## **I. INTRODUCTION**

As outlined in Appellant DC Farms, LLC (“DC Farms”) opening brief, in November 2009, Respondent Conagra Foods Lamb Weston, Inc. (“Lamb Weston”) embarked on a course of extra-contractual conduct and corporate bullying against DC Farms, its joint venture partner, over the alleged discovery of two light bulbs affecting one out of seven potato storage cellars full of Joint Venture Potatoes to be processed by Lamb Weston.

This course of conduct included: (A) an illegal termination of the Strategic Supply Agreement (“Joint Venture Agreement”) between Lamb Weston and DC Farms; (B) refusing to allow DC Farms to continue to perform under the Joint Venture Agreement; (C) refusing to process Joint Venture Potatoes with no potential glass issues; (D) later purchasing these same potatoes when Lamb Weston had a need for them; (E) wrongfully withholding payment for processed Joint Venture Potatoes for approximately seven months while attempting to coerce a release for breach of the Joint Venture Agreement and liability for repayment of the U.S. Bank loan; and (F) refusing to meet its additional obligations under the Joint Venture Agreement, including repayment of the U.S. Bank loan.

Lamb Weston has made no attempt to dispute the circumstances and motivations under which it breached Joint Venture Agreement. Instead, Lamb Weston first relies on an erroneous legal theory based on distinguishable and inapplicable out of state cases to argue that it was not required to provide DC Farms with contractually-required notice and

opportunity to cure alleged glass contamination. This argument flies in the face of well-established Washington law requiring strict compliance with termination and cure provisions, even where cure is purportedly impossible. Under this authority, Lamb Weston breached the Joint Venture Agreement as a matter of law by failing to provide this notice and opportunity to cure. Lamb Weston's breach of the Agreement and subsequent failure to process even unaffected Joint Venture Potatoes caused significant economic damage to DC Farms.

Lamb Weston's remaining arguments relate to its assertion that its breach of the Agreement is irrelevant because DC Farms could not have cured the alleged breach as a matter of law by providing replacement potatoes or instituting additional safeguards for processing the Joint Venture Potatoes. Lamb Weston's argument is based entirely on erroneous legal arguments, inadmissible hearsay and/or disputed issues of fact. At the very least, DC Farms is entitled to a jury determination of whether DC Farms could have cured the alleged breach, and whether Lamb Weston should have processed the unaffected Joint Venture Potatoes.

DC Farms respectfully submits that Lamb Weston is not entitled to judgment against DC Farms as a matter of law on the issue of contract termination and was not otherwise entitled to dismissal of DC Farms' remaining breach of contract claims.

## **II. REPLY ARGUMENT**

### **A. Lamb Weston is Not Entitled to Summary Judgment on the Issue of DC Farms' Ability to "Cure" Alleged Breaches of the Joint Venture Agreement.**

Lamb Weston argues that it is excused from complying with the notice and cure provisions of the Joint Venture Agreement – which Lamb Weston drafted<sup>1</sup> – because DC Farms could not have cured the alleged breaches as a matter of law. Lamb Weston's argument is founded on erroneous legal arguments and a number of disputed questions of fact. As such, Lamb Weston is not entitled to summary judgment on the issue of contract termination.

#### **1. Washington Cases Require Strict Compliance With Notice and Cure Provisions, Even Where Cure Is Purportedly Impossible.**

Lamb Weston recognizes the well-established Washington cases cited by DC Farms requiring strict compliance with notice and cure provisions of a termination clause, even where cure is "impossible." However, Lamb Weston argues that this authority is limited to the termination of lease agreements, and thus, the Court should rely on outside authority to decide the issue. To the contrary, this clear line of authority is not limited to lease terminations and provides this Court with a clear basis to hold Lamb Weston in breach of the Joint Venture Agreement as a matter of law, regardless of any issues related to DC Farms' purported inability to cure.

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<sup>1</sup> CP 118.

As discussed at length in DC Farms’ opening brief, under Washington law, “powers of termination must be exercised strictly in the manner provided in the termination clause.” Tacoma Rescue Mission v. Stewart, 155 Wn. App. 250, 255, 228 P.3d 1289 (2010). A termination notice that fails to follow the terms of the termination clause is “ineffective.” Gray v. Gregory, 36 Wn.2d 416, 218 P.2d 307 (1950); see also Tacoma Rescue Mission, 155 Wn. App. at 25. In fact, Washington courts have held that if a contract allows the breaching party to cure a breach, an attempted termination that does not provide an opportunity to cure is not effective, even if (as Lamb Weston argues) cure was “**impossible**.” Gray, 36 Wn.2d 416, 418-19, 218 P.2d 307 (1950); Republic Inv. Co. v. Naches Hotel Co., 190 Wash. 176, 67 P.2d 858 (1937). Faced with this legal obstacle, Lamb Weston argues that this line of authority applies solely to lease cases.

Lamb Weston has not provided the Court with any basis to conclude that the reasoning of these cases – considerations of fairness and of enforcing the terms of contracts as written – should be limited to lease terminations. See e.g., Gray, 36 Wn.2d at 419; Republic Inv. Co. v. Naches Hotel Co., 190 Wash. at 182. This reasoning is just as applicable to other types of contract terminations.

Moreover, contrary to Lamb Weston’s assertions, this reasoning has been applied and approved outside of the lease context by Washington courts. Division II has used this line of reasoning and relied on Gray to require strict compliance with a notice and opportunity to cure provision

in a non-lease contract termination. See Continuant, Inc. v. Buck Institute for Age Research, 148 Wn. App. 1008 (2009)<sup>2</sup> (citing Gray, 36 Wn. App. at 25; Filmline (Cross-Country) Prods., Inc. v. United Artists Corp., 865 F.2d 513, 518 (2d Cir. 1989) (another non-lease contract termination)).

In Continuant, the Court considered whether it could excuse the defendant's failure to follow the 30-day notice and opportunity to cure provision in a telecommunications service contract (a non-lease contract). Continuant, Inc., 148 Wn. App. at \*1. The Continuant Court relied upon Gray to require strict compliance with the contract's notice and opportunity to cure provisions. Id. at \*6. Further, the Continuant Court cited another non-lease termination case with approval. See Filmline (Cross-Country) Prods., Inc. v. United Artists Corp., 865 F.2d 513, 518 (2d Cir. 1989), for the proposition that a notice of termination that provided no provision to cure, contrary to the explicit terms of the contract, is a breach of contract.

The Continuant Court rejected the defendant's argument (the very same argument made by Lamb Weston) that its communications terminating the contract<sup>3</sup> somehow provided contractual notice of the

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<sup>2</sup> See GR 14.1(a) (allowing for the citation of cases that have been published in the Washington Appellate Reports). This case is included at **Appendix B**.

<sup>3</sup> Like the termination notice in Continuant, Lamb Weston's communication clearly terminates the Joint Venture Agreement and provides no opportunity to cure the alleged default: "**Please take this as notice that ConAgra Foods Lamb Weston, Inc. ("ConAgra") hereby exercises its rights, pursuant to Section 7.2(c) of our Strategic Potato Supply Agreement dated January 29, 2009, to terminate that agreement with DC Farms....Please understand that ConAgra regrets to have to take the step of terminating this agreement but I will be reaching out to you to discuss post-termination concerns and the repayment of the above amounts to ConAgra by DC Farms....**" CP at 183 (emphasis added).

breach and triggered the plaintiff's opportunity to cure. See id. (communications stating that the defendant did not intend "to go forward in any way with this contract" did not provide notice of breach or provide an opportunity to cure: "The facts simply do not support the contention that this e-mail constituted notice and opportunity to cure, in compliance with the contract's termination provisions."). Lamb Weston's argument that its termination notice was actually a notice of default and triggered DC Farms' opportunity to cure is not only contrary to the language of the termination letter, but made all the more incredible by Lamb Weston's testimony that by the time it made the decision to terminate, it had no intention of accepting any more potatoes or allowing DC Farms to cure. See e.g., CP 305-06 ("by the time the meeting – the in-person meeting [before the termination letter was issued] took place, we had made a decision to – to not only reject all of the potatoes....").

Finally, the Court recognized that the plaintiff in Continuant had been damaged by the failure to provide notice of the breach: "the termination deprived [plaintiff] of its contractual right to fix the alleged default and continue the benefits of its two-year maintenance contract." Id. at \*6.

Thus, contrary to Lamb Weston's arguments, Washington courts have not limited the requirement of strict compliance with termination provisions to the termination of commercial leases.<sup>4</sup> Rather, consistent

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<sup>4</sup> Because there is Washington law directly on-point, the Court does not need to resort to the out-of-state authority cited by Lamb Weston (notably including a lease termination

with the collective decisions in Gray, Republic Investment Company, Tacoma Rescue Mission, and Continuant, and approval via citation and reliance on the non-lease decision in Filmline, Washington requires strict compliance with contractual termination and cure provisions, even when cure is purportedly “impossible,” and including terminations outside of the lease termination context.

Based on this clear authority, there is no question that Lamb Weston breached the Joint Venture Agreement as a matter of law by failing to provide written notice of breach under the Agreement and seven days’ opportunity to cure before terminating the Joint Venture Agreement, and in refusing to process the remaining Joint Venture Potatoes, particularly those with no potential glass contamination issues. See CP 137-38. Also, as was found by the Court in Continuant, Lamb Weston’s unequivocal termination of the Joint Venture Agreement in the November

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case that is clearly contrary to on-point Washington law) to resolve this issue. In any case, the cases cited by Lamb Weston are distinguishable based on the facts, or because they are based on specific state law issues not found in Washington. See e.g., Best Film & Video Corp. v. Best Film & Video Corp., 46 BR 861 (1985) (resting its argument on the fact that “New York follows the rule that a notice of a termination allowing a period of time shorter than stipulated in a contract becomes effective after the lapse of the fixed time”); Leghorn v. Wieland, 289 So.2d 745, 747 (1974) (language of the contract stating that one party “may give the defaulting party written notice to correct the default” did not create a legal duty to give such notice); Larken, Inc. v. Larken Iowa Limited Partnership, 589 N.W.2d 700, 702 (1999) (finding that there were numerous options for remedy, based on the specific language of the contract); Carlson Real Estate Co. v. Soltan, 549 N.W.2d 376, 381 (1996) (10-day cure provision in lease agreement did not apply to a continuing breach because the specific language of the lease would allow the tenant to continue prohibited conduct indefinitely, so long as there were intermittent 10-day cure periods); LJL Transp., Inc. v. Pilot Air Freight Corp., 905 A.2d 991 (2006) (basing its holding on the fraudulent conduct of the breaching party and holding that “some types of dishonest conduct are so egregious and of such a nature that the aggrieved party may terminate the contract immediately, even where a cure provision is specifically provided in the contract”).

19, 2009 correspondence did not qualify as “notice” under the Joint Venture Agreement, nor did it trigger DC Farms’ obligation to provide a cure. Finally, as in Continuant, DC Farms was damaged by Lamb Weston’s failure to allow DC Farms its contractual right to cure because DC Farms was not allowed to fix the alleged default, and Lamb Weston refused to process the Joint Venture Potatoes. The Court should find that Lamb Weston breached the Agreement as a matter of law.

**2. Neither the Agreement Nor UCC-2 Entitle Lamb Weston to Judgment As a Matter of Law on the Issue of Whether Providing Replacement Potatoes Would Have Cured DC Farms’ Alleged Breach.**

As discussed above, under Washington law, Lamb Weston breached the Joint Venture Agreement as a matter of law by terminating the Agreement and refusing to process Joint Venture Potatoes, without reference to whether DC Farms could have cured the breach in question. However, even if this Court is inclined to consider the issue of whether DC Farms could have cured its breach, Lamb Weston is not entitled to judgment as a matter of law.

Notably, Lamb Weston does not argue that accepting replacement potatoes of the same quantity and variety, without any potential glass contamination issues from DC Farms, would not have put it in the same position as it would have been had no breach occurred. Nor does it argue that it could not have continued to process Joint Venture Potatoes unaffected by potential glass contamination issues; indeed, Lamb Weston later processed these same potatoes outside of the Joint Venture

Agreement when it needed them. Instead, Lamb Weston makes the argument that it did not have to accept replacement potatoes as a cure based on language in the Joint Venture Agreement and in reliance on Washington's UCC-2 "cover" provision, RCW 62A.2-712. Both arguments fail.

*i. The Joint Venture Agreement Allows DC Farms to Cure by Providing Replacement Potatoes.*

Lamb Weston first argues that the language of the Joint Venture Agreement would allow it to reject replacement potatoes as a cure for the damage or loss of Joint Venture Potatoes. Specifically, Lamb Weston states that the parties contracted for certain potatoes from certain fields and agreed to provide only potatoes "suitable for storage and for processing into high quality frozen french fries,"<sup>5</sup> to argue that it would have had no obligation to accept replacement potatoes as a matter of law. *Response Brief at pp. 21-23.*

Under Lamb Weston's strained interpretation of the Joint Venture Agreement, it would never be possible to cure the loss or destruction of Joint Venture Potatoes because, necessarily, those potatoes had been lost or destroyed. This is completely contrary to the terms of the Joint Venture Agreement, which expressly allows for cure of such a breach. The Joint

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<sup>5</sup> Lamb Weston argues that all potatoes were required to be french fry grade. The actual contract provision actually states that "**Every attempt shall be made by the Parties** to produce the Crop in a manner that makes it suitable for storage and processing into high quality frozen french fries." CP 132 (emphasis added).

Venture Agreement's termination provision specifically allows DC Farms the opportunity to cure the breach alleged herein: negligence or misconduct of DC Farms that results in the "the loss of, or damage to, a material portion of the crop." CP 137. This cure provision does not limit how that cure may be effectuated. At least one reasonable and logical way for DC Farms to put Lamb Weston in the same position it would have been but for the loss of certain Joint Venture Potatoes, would be to provide replacement potatoes of the same quality and quantity as those contemplated by the Agreement, without any potential glass contamination issues. See Moulden & Sons, Inc. v. Osaka Landscaping & Nursery, Inc., 21 Wn. App. 194, 584 P.2d 968 (1978) (cure is designed to "place the nonbreaching party in the same position as he would have occupied had no breach occurred").

DC Farms has provided evidence that it was in a position to provide suitable replacement potatoes (CP 119-20, CP 670-71), as well as expert testimony that providing replacement potatoes would have been a reasonable cure for the alleged breach (CP 634).

To the extent that DC Farms' contractual right to cure this breach by providing replacement potatoes is rendered ambiguous by any other provision of the Joint Venture Agreement (*i.e.*, a contractual designation of certain potatoes from certain fields), that ambiguity must be interpreted against Lamb Weston, the party that drafted the Agreement.<sup>6</sup> See Forest

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<sup>6</sup> CP 118.

Mktg. Enter., Inc. v. Dep't of Natural Res., 125 Wn. App. 126, 132-33, 104 P.3d 40 (2005). When interpreted in DC Farms' favor, the cure provision allows DC Farms to cure loss of or damage to a material portion of the crop, without limitation. At a minimum, DC Farms is entitled to a jury determination of whether providing replacement potatoes would have been such a cure.

In any case, it is clear from Lamb Weston's own admissions that its sole motivation in not accepting replacement potatoes was to limit its losses on potatoes that it no longer "needed" or "wanted," given market conditions:

Q: Okay. Tell me what was your response to the replacement potatoes being offered.

A: During the January/February time frame, at that point in time, the contract would have been terminated, **and we did not want replacement potatoes.**

Q: And why not?

A: **It would have been because we don't need them.**

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Q: Okay. Assuming all those records [quality, records, water application, etc.] are kept, though, and they meet your standards, **would there be any reason not to accept the trade replacement?**

A: Other than what you – **no, probably not, other than we didn't need them at that point.**

CP 365 (Lamb Weston's Director of Agriculture Services) (emphasis added). Indeed, Lamb Weston has voluntarily accepted replacement potatoes from other growers when there are issues with a certain cellar. CP 74-75, 84-85. Thus, there are additional questions of fact as to whether Lamb Weston's termination of the Joint Venture Agreement and failure to allow DC Farms to perform by providing replacement potatoes was consistent with its prior practices and/or the covenant of good faith and fair dealing.

Lamb Weston has not established that the language of the Joint Venture Agreement precludes DC Farms' argument that providing replacement potatoes of the same quantity and variety would have cured the alleged breaches as a matter of law.

***ii. UCC-2's "Cover" Provision Does Not Apply to the Joint Venture Between DC Farms and Lamb Weston.***

Lamb Weston also relies on chapter 62A-2 RCW (sale of goods) to argue that allowing replacement potatoes as a cure was optional, despite contrary language in the Joint Venture Agreement allowing DC Farms the right to cure. Not only is RCW 62A-2, *et seq.*, inapplicable to the parties' joint venture arrangement, but RCW 62A.2-712's cover provision does not void contractual provisions requiring Lamb Weston to allow a party to cure.

RCW 62A.2, *et seq.*, applies to the "sale of goods" between merchants. See RCW 62A.2-104. However, the partnership and joint

venture arrangement between Lamb Weston and DC Farms was – under Washington law and by Lamb Weston’s repeated admissions of a joint venture<sup>7</sup> – not a contract for the sale of goods between merchants. Washington’s UCC-2, chapter 62A.2 RCW, does not apply to joint ventures. See Knisely v. Burke Concrete Accessories, Inc., 2 Wn. App. 533, 468 P.2d 717 (1970) (analyzing whether an arrangement was a sale of goods or joint venture in order to determine whether Washington’s former UCC-2 statute or joint venture law applied); Desserault v. Yakima Chief Property Holdings, LLC, 2010 WL 300411, \*4 (E.D. Wash. 2010) (same).<sup>8</sup>

The essential elements of a joint venture are: (i) a contract, express or implied; (ii) a common purpose; (iii) a community of interest; and (iv) an equal right to voice and right to control. Paulson v. Pierce Cy., 99 Wn.2d 645, 664 P.2d 1201 (1983).

First, there is no dispute that the Joint Venture Agreement constitutes a written contract between the parties.

Second, the joint venture arrangement between Lamb Weston and DC Farms had a common purpose and common goal; through the Joint Venture Agreement, the parties agreed to utilize DC Farms’ “expertise and

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<sup>7</sup> Lamb Weston claims that DC Farms “abandoned” its claim for breach of the joint venture relationship. To the contrary. DC Farms maintains that the joint venture relationship between DC Farms and Lamb Weston is a factual question and bears on numerous aspects of DC Farms’ claims and Lamb Weston’s defenses, including Lamb Weston’s UCC-2 defense.

<sup>8</sup> See GR 14.1(b) (allowing citation to cases, where citation is permitted in the jurisdiction where the case was issued). A copy of this case is provided in the **Appendix B**.

experience in growing potatoes,” to “work together in growing potatoes on [DC Farms’] Properties,” and to minimize farming risks. CP 130. The parties also agreed to share profits on a fifty-fifty basis. CP 136.

Third, the parties agreed that both parties would have an equal right to manage the operation. Under the Agreement, the parties agreed that representatives from Lamb Weston and DC Farms would both be “Managers” to be “responsible for managing the day-to-day business and affairs under this Agreement.” CP 133, ¶¶ 4.1, *et seq.*

In fact, Lamb Weston has repeatedly characterized its relationship with DC Farms as a “joint venture” or “partnership.” See e.g., CP 219, 222, 239-42. Thus, at the very least, there is a question of fact as to whether the contract and arrangement between the parties was a joint venture as opposed to a contract for the sale of goods under RCW 62A.2, *et seq.*, where the cover provisions under RCW 62A.2-712 might apply.

RCW 62A.2-712’s “cover” provision does not apply in any case. By its terms, it applies to a buyer’s option to purchase substitute goods **from a third-party**, not the seller. See RCW 62A.2-712(1). However, this provision does not purport to supplant a contractual obligation of a buyer to accept a cure by the seller. Further, it does it vitiate a buyer’s duty to mitigate a loss. See Federal Signal Corp. v. Safety Factors, Inc., 125 Wn.2d 413, 886 P.2d 172 (1994) (Washington incorporates common law mitigation requirements into the UCC-2). DC Farms has presented significant evidence that Lamb Weston was required to and could have processed the remaining Joint Venture Potatoes, as well as replacement

potatoes under the Agreement. RCW 62A-712 does not change that obligation.

In sum, Lamb Weston is not entitled to judgment as a matter of law on the issue of whether replacement potatoes would have cured DC Farms' alleged breaches.

**3. Questions of Fact Preclude Summary Judgment on the Issue of Whether Additional Safety Precautions Would Have Cured the Alleged Breach.**

Lamb Weston also argues that putting additional safety precautions in place to guard against glass contamination in potatoes to be processed would have been futile because the glass contamination was “pervasive,” and Lamb Weston maintains a “zero tolerance” policy against glass. This argument relies on number of inadmissible statements, mischaracterized “admissions,” and other disputed facts.

<b><u>Lamb Weston's Assertion</u></b>	<b><u>DC Farms' Response</u></b>	<b><u>Conclusion</u></b>
Up to 30 light bulbs were broken or missing in five of the cellars containing the Joint Venture Potatoes, which proves that “dozens of missing lights were unaccounted for,” and that the glass contamination issue was “pervasive”. <i>Response Brief at pp. 11, 12, 18, 20.</i>	The light bulbs in question were broken or missing <b>before</b> the growing season began. In fact, DC Farms had purchased replacement bulbs but was told by Lamb Weston to leave the inspected cellars sealed. CP 70, 250, 260-64.  Actual glass found was limited to <b>two bulbs</b> –	<b>There is a question of fact as to whether the contamination was “pervasive” or an isolated incident.</b>

<u>Lamb Weston's Assertion</u>	<u>DC Farms' Response</u>	<u>Conclusion</u>
	one encased in plastic — discovered in potatoes from one cellar, cellar seven. CP 121, 174-75, 177, 290-91.	
DC Farms admitted that “\$2 to \$2.5 million in potatoes ... <b>can't be sold</b> due to the broken glass.” <i>Response Brief at pp. 11, 17</i> (emphasis added), and that glass was “buried throughout the potato piles” <i>Response Brief at p. 18</i> .	These assertions are based entirely on information contained in a police report. <i>See</i> CP 480-81.	As “a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted” (ER 801(c)), this evidence is inadmissible under ER 802, and it should not be considered by the Court.
“ <b>DC Farms</b> filed insurance claims seeking to recover damages for “damaged potatoes from glass shards,” and received insurance payments based on a total loss. <i>Response Brief at pp. 11, 17</i> (emphasis added).	The insurance claim cited by Lamb Weston was made by <b>Golden Sunset Ranch Inc.</b> , a third-party entity. <b>Golden Sunset Ranch Inc.</b> , not DC Farms, received insurance proceeds for this claim. CP 398, 408, 486-87.  <b>Golden Sunset Ranch</b>	These alleged “admissions” can not be attributed to DC Farms.  As “a statement, other than one made by the declarant while testifying at trial or hearing,

<u>Lamb Weston's Assertion</u>	<u>DC Farms' Response</u>	<u>Conclusion</u>
	<p><u>Inc.'s insurer</u>, not DC Farms, titled the insurance claim "damaged potatoes from glass shards" for losses to Golden Sunset Ranch Inc. in correspondence to <u>Golden Sunset Ranch Inc.</u> CP 486-87.</p>	<p>offered in evidence to prove the truth of the matter asserted" (ER 801(c)), this evidence is inadmissible under ER 802, and it should not be considered by the Court.</p>
<p>Lamb Weston "relied" on the information DC Farms purportedly made to the police and its insurer (<i>i.e.</i>, the Joint Venture Potatoes "can't be sold," and the Joint Venture Potatoes were "damaged...from glass shards"), in making its decision to terminate the Joint Venture Agreement. <i>Response Brief at pp. 11-12.</i></p>	<p>Lamb Weston has admitted that it did not know the results of the criminal or insurance investigations at the time the termination decision was made. CP 308-09.</p>	<p>There is a question of fact as to whether Lamb Weston "relied" on information related to the insurance and police investigations in making the termination decision.</p>

<u>Lamb Weston's Assertion</u>	<u>DC Farms' Response</u>	<u>Conclusion</u>
<p>Due to safety and health regulations, Lamb Weston has “zero tolerance” policy for glass contamination and “Lamb Weston properly refused to accept raw potatoes from the subject storage facilities owned and operated by DC Farms, LLC.” <i>Response Brief at p. 18.</i></p>	<p>Lamb Weston has no such policy and was not prohibited from processing these potatoes. Lamb Weston has had a number of glass incidents over the years and has put additional safety precautions in place and utilized as much of those potatoes as possible. CP 317-24, 184-87, 280, 631.</p> <p>A third-party processor knowingly purchased and processed the Joint Venture Potatoes rejected by Lamb Weston for human consumption. CP 121.</p>	<p><b>There is a question of fact as to whether Lamb Weston has a “zero tolerance” policy for glass contamination, and whether Lamb Weston could have processed the potatoes with additional safety protocols in place.</b></p>

Lamb Weston is not entitled to judgment as a matter of law on this issue.

**B. DC Farms' Additional Breach of Contract Claims Were Not Part of Lamb Weston's Motion for Summary Judgment, and the Trial Court Erred in Dismissing These Claims Via Presentment Hearing.**

In addition to the breach of contract claim for improper termination of the Joint Venture Agreement, DC Farms' Complaint raised additional breach of contract claims against Lamb Weston for breach of the Tri-Party

Agreement between Lamb Weston, U.S. Bank, and DC Farms and for “improperly withholding and/or offsetting payments to the Farm and U.S. Bank under the Agreement and the Tri-Party Agreement with U.S. Bank.” CP 5-6.

These claims were not raised by Lamb Weston’s Motion for Summary Judgment, which focused solely on the issue of termination. See CP 329-42. Not surprisingly, the trial court did not resolve these claims through Lamb Weston’s Motion for Summary Judgment. See RP 53-54. Instead, the trial court improperly resolved these remaining issues at the hearing for presentment of an order on the summary judgment claims without the benefit of the summary judgment procedure or standard on these outstanding issues. See CR 56 (outlining the summary judgment procedure and standard). The trial court’s resolution of these claims was procedurally flawed and subject to reversal on that basis alone. Further, because these issues were summarily briefed in support of a presentment hearing, the record is not properly developed for this Court to resolve these remaining claims on a summary judgment basis.

Even if this Court is inclined to consider the merits of these remaining claims on the limited record available, DC Farms has established that it is entitled to relief on these claims.

**1. Lamb Weston is Liable for Expenses Accrued  
Between Automatic Renewal for 2010 and  
Termination of the Joint Venture Agreement.**

As outlined in DC Farms' opening brief, it is undisputed that Lamb Weston failed to give written notice of non-renewal for the 2010 crop season on or before October 1, 2009. 834-37. Thus, under the Agreement, the Joint Venture Agreement automatically renewed for 2010. See CP 137. It is also undisputed that DC Farms incurred expenses for the 2010 crop season before the Joint Venture Agreement was subsequently terminated on or about November 19, 2009. See CP 620, 671-72.

Lamb Weston responds that it terminated the agreement for the 2010 crop season when it terminated the Joint Venture Agreement. *Response at p. 27.* Thus, Lamb Weston argues, it has no liability for expenses incurred between the automatic renewal (October 1, 2009) and the improper termination of the Joint Venture Agreement (November 19, 2009). Lamb Weston relies on language allowing for "early termination":

This Agreement shall automatically extend for successive one-crop year periods on each October 1<sup>st</sup> unless LW provides written notice of non-renewal on or before October 1, 2009 or annually thereafter (collectively, the "Term"); provided, however, that this Agreement is subject to early termination as provided under section 7.2 or 7.3 below.

CP 419.

Lamb Weston misses the point. The issue is not whether Lamb Weston could terminate the resulting 2010 Agreement through its November 19, 2009 termination of the Joint Venture Agreement.

Rather, even assuming that Lamb Weston properly terminated the 2009 Agreement and 2010 renewal (a fact which DC Farms disputes), in November 2009, Lamb Weston is still liable for reasonable and necessary expenses that accrued under the Agreement between the automatic renewal and the termination date, which were incurred as a direct result of Lamb Weston's failure to provide timely written notice of non-renewal.<sup>9</sup>

**2. Lamb Weston is Liable for Reimbursement of U.S. Bank Obligations.**

Lamb Weston argues that its contractual obligation to pay the U.S. Bank loan terminated upon termination of the Joint Venture Agreement. However, the contractual language requiring repayment is not so limited, and it unambiguously requires Lamb Weston to repay the U.S. Bank loan in full, without limitation, in the event that crop proceeds are insufficient:

Section 6.7 Payment for Crop.

LW shall pay for the Crop ten (10) days after LW's fiscal month-end during which the raw product was delivered. FARM agrees that proceeds due to FARM for the Crop shall first be paid by LW directly to the Bank to retire Bank debt on the Loan (including all interest and related loan or service fees) until that debt is paid in full. All remaining Crop Proceeds from the Crop shall be distributed in accordance with Section 6.6 herein. **In the event that Crop proceeds are insufficient to repay Bank debt in full, LW shall pay Bank any remaining balance, including interest, so that Bank debt is paid in full.** The final note balance for LW's in-weight contracts, including

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<sup>9</sup> Moreover, if (as DC Farms has argued) the Joint Venture Agreement was not properly terminated, the 2010 renewal remained in place, and DC Farms has a claim for additional damages for 2010 lost profits.

interest, shall be paid by December 15, of each prospective Crop year. The final note balance for LW's out-weight/ Growers storage contracts, including interest, shall be paid 30 days after final delivery of all varieties, of each respective Crop year.

CP 418 (emphasis added).

Lamb Weston argues that this obligation terminated with the Agreement, and thus, Lamb Weston's obligation to pay the U.S. Bank loan somehow dissolved with the termination. Lamb Weston's argument is not borne out by the plain language of this provision, which does not limit Lamb Weston's obligation to pay to situations where the Agreement is carried out in full. Rather, the only limitation on Lamb Weston's obligation to repay the loan is that the crop proceeds are insufficient to do so. Here, the crop proceeds were insufficient to repay the loan because Lamb Weston improperly terminated the Agreement in the middle of the term. Again, any ambiguities in Lamb Weston's obligation to repay the loan as a result of the improper early termination of the Agreement must be interpreted against Lamb Weston, the party that drafted this Agreement.

Lamb Weston also argues that the crop proceeds were actually sufficient to pay the loan, and thus, it had no obligation to pay the remaining balance. However, in order to get to this number, Lamb Weston has improperly included payment under separate contracts, payment from third-party vendors, and insurance proceeds to Golden Sunset Ranch Inc. (at best for Lamb Weston, a collateral source).

*Response at p. 29.* A closer look at Lamb Weston's creative accounting

reveals that the crop proceeds under the Joint Venture Agreement were below the amount it concedes was needed to repay the U.S. Bank loan. *Id.*

DC Farms is entitled to a determination on a fully-developed record as to whether Lamb Weston was contractually obligated to pay the remaining balance of the U.S. Bank loan.

**3. Lamb Weston is Liable for Accrued Expenses for the 2009 Crop Season.**

In the event of termination, the Joint Venture Agreement required Lamb Weston to “approve all outstanding and unpaid Crop expenses properly incurred by FARM...for funding under the Loan within thirty (30) days from the date of notice.” CP 132. It is undisputed that Lamb Weston refused to approve payment for certain 2009 expenses, and that DC Farms directly absorbed these expenses. CP 620, 670-671, 834-37.

Lamb Weston argues that this provision only applies if it takes over the farming practices of DC Farms. *Response Brief at pp. 30-31.*

This is a patent misrepresentation of the Agreement:

Section 3.3 Farm’s Failure to Perform.

In the event that FARM is unable or unwilling to perform under the terms of this Agreement, consistent with the provisions of Article VII herein, FARM grants to LW the right, during the term of this Agreement, to enter on the Properties and conduct the Farming Practices thereon itself in any manner which LW deems necessary, including growing different varieties of potatoes on the Properties, provided that LW shall conduct the Farming Practices in accordance with any underlying lease agreements to the Properties.

**In the event that it is necessary for LW to terminate this contract and/or conduct the Farming**

**Practices, LW shall provide Bank written notice of its actions and FARM's failure to perform. In such circumstances, LW agrees to approve all outstanding and unpaid Crop expenses properly incurred by FARM in accordance with the terms and conditions of this Agreement for funding under the Loan within thirty (30) days from the date of notice.** Thereafter, upon assignment from Bank to LW of the Loan note and Bank's perfected first priority security interest in the Crop, LW agrees to immediately pay Bank any and all amounts, including interest, that have been advanced or have accrued under the Loan.

CP 132 (emphasis added). Under the plain language of this provision, Lamb Weston was required to approve all outstanding expenses for payment under the loan if one or both of the following occurred: termination of the Agreement "and/or" conducting farming practices. Lamb Weston's attempt to distort the Agreement's language to limit its obligation to approve expenses to the circumstance in which it takes over the farming practices is misleading, and it contradicts the unambiguous language of the Agreement it drafted.

DC Farms is entitled to a determination on a fully-developed record of whether Lamb Weston breached the Joint Venture Agreement by failing to approve payment of outstanding expenses after termination of the Agreement.

### **III. CONCLUSION**

Appellant DC Farms respectfully requests that the Court: (A) grant its appeal; (B) hold that Lamb Weston breached the Joint Venture Agreement by summarily terminating the Agreement; and (C) remand to the trial court for resolution of damages and unresolved claims.

Respectfully submitted this 20th day of December, 2012.

**LUKINS & ANNIS, P.S.**

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**Appendix A**

Not Reported in P.3d, 148 Wash.App. 1008, 2009 WL 73947 (Wash.App. Div. 2)  
 (Cite as: 2009 WL 73947 (Wash.App. Div. 2))

NOTE: UNPUBLISHED OPINION, SEE RCWA  
 2.06.040

Court of Appeals of Washington,  
 Division 2,  
 CONTINUANT, INC., a Washington corporation,  
 Appellant,  
 v.  
 BUCK INSTITUTE FOR AGE RESEARCH, a  
 California corporation, Respondent.

No. 36829-3-II.  
 Jan. 13, 2009.

West KeySummaryCourts 106  40.11(9)

106 Courts

106I Nature, Extent, and Exercise of Jurisdiction  
 in General

106I(B) Location of Forum; Forum Non  
 Conveniens

106k40.11 Proceedings

106k40.11(5) Determination and Dis-  
 position

106k40.11(9) k. Denial, dismissal,  
 or transfer. Most Cited Cases  
 (Formerly 106k28)

A trial court's orders dismissing a breach of contract action for forum non conveniens, giving little weight to a telecommunications maintenance company's choice of forum, was reversed. The trial court dismissed the case stating California would be the proper venue but contract negotiations took place in three states, each organization was domiciled in different states, the number of witnesses in California and Washington was roughly equivalent. Because the center of gravity of the case was not California and the transfer would merely shift the inconvenience from one party to the other, dismissal for forum non conveniens was not proper.

Appeal from Pierce County Superior Court; Honor-

able Rosanne Nowak Buckner, J.  
 Alan B. Bornstein, Attorney at Law, Matthew  
 Thomas Adamson, Jameson Babbitt Stites & Lom-  
 bard, Seattle, WA, for Appellant.

Thomas L. Dickson, Dickson Steinacker LLP,  
 Shane Lytle Yelish, Attorney at Law, Tacoma, WA,  
 for Respondent.

#### UNPUBLISHED OPINION

ARMSTRONG, J.

\*1 Continuant, Inc. appeals the trial court's orders dismissing its breach of contract action under the doctrine of forum non conveniens and awarding attorney fees to Buck Institute for Age Research. We reverse the forum non conveniens dismissal as well as the award of attorney fees.

#### FACTS

Continuant, Inc. is a telecommunications maintenance company based in Fife. Together with Telecom Labs, Inc., its Fife-based sister company, it employs about 100 people in Washington. Buck is a nonprofit corporation located in Marin County, California.

In August 2006, Buck contacted Continuant about maintaining its communications equipment. Continuant sales representative Gabe Grossman, who works in Continuant's Portland office, negotiated with Buck. On September 18, 2006, Buck and Continuant entered into a two-year maintenance contract. Buck's chief information officer, Alan Lees, and Doug Graham, Continuant's president, signed the contract.

The contract expressly provides that it applies to the Nortel Meridian telephone equipment and voicemail. The contract also requires Buck to provide 30 days' notice of any default by Continuant and the opportunity to cure the default.

Soon after entering into the maintenance contract, Buck asked Continuant to repair its Avotus

Not Reported in P.3d, 148 Wash.App. 1008, 2009 WL 73947 (Wash.App. Div. 2)  
 (Cite as: 2009 WL 73947 (Wash.App. Div. 2))

call-accounting equipment. Continuant sent a California subcontractor to Buck, but this technician could not fix the problem. Continuant employee Bryan Miles then worked on the issue remotely from his Fife office. His October 9 invoice states that after three hours of work with Avotus personnel, he ran the system for a couple of days and it tested "all clear." Clerk's Papers (CP) at 17.

On September 27, Lees sent Continuant an e-mail terminating the contract based on Continuant's nonperformance. Kitty Riddle, Continuant's contract manager, replied by e-mail that Buck could cancel the agreement without penalty if Continuant received written notice of its default and provided no cure within 30 days.

On October 3, Lees answered with an e-mail that served "as formal written notification that we regard Continuant to be in non-performance of the contract." CP at 21. Lees complained that the first Continuant subcontractor was unable to repair its system and that the second Continuant technician merely worked with Avotus, thereby leading Buck to conclude that Continuant did not have the in-house expertise claimed. Lees further wrote,

You will understand that we do not feel that there is a proper basis of trust, nor of technical expertise on Continuant's part, for us to go forward *in any way* with this contract. *We feel entirely within our rights therefore to cancel the contract without penalty of any kind* on the basis that false representation was made to us prior to signature and this false representation was highly material to our decision to sign the contract.... We have conferred with counsel in order to arrive at this position and we will defend this position, if necessary, to the fullest degree in a court of law.

\*2 CP at 21 (emphasis added). Also on October 3, employees from Packet Fusion, a California company, apparently worked on Buck's phone system.<sup>FN1</sup>

FN1. Although Buck claims that Packet Fusion repaired the Avotus system, the notations on Packet Fusion's invoice do not make clear the nature or scope of repair.

After Buck failed to pay invoices from Continuant for past due payments, Continuant filed suit in Pierce County Superior Court to collect the \$13,372.62 early termination charge. Buck responded by moving to dismiss on forum non conveniens grounds. The trial court granted Buck's motion, dismissing Continuant's claims without prejudice. The court explained its decision:

I believe the defendant has sustained its burden to prove that trial in this jurisdiction would not be as easy or expeditious as trial in California because of the location of the equipment there and the fact that the defendant company was located entirely there, and it appears that we will have witnesses, as well, from California, more from California than we will have in Washington. For those reasons, I will grant the motion.

Report of Proceedings (RP) at 12. After initially denying Buck's request for attorney fees, the trial court granted Buck's motion for reconsideration and awarded Buck \$7,392 in fees as the prevailing party.

#### ANALYSIS

##### I. Forum Non Conveniens Dismissal

We review a trial court's dismissal on forum non conveniens grounds for an abuse of discretion, reversing only if the trial court's decision is manifestly unfair, unreasonable, or untenable. *J.H. Baxter & Co. v. Cent. Nat'l Ins. Co. of Omaha*, 105 Wash.App. 657, 661, 20 P.3d 967 (2001). A trial court abuses its discretion if it erroneously interprets the law. *Sales v. Weyerhaeuser Co.*, 163 Wash.2d 14, 19, 177 P.3d 1122 (2008).

A plaintiff has the original choice to file his or her complaint in any court of competent jurisdiction. *Sales*, 163 Wash.2d at 19, 177 P.3d 1122. Courts generally do not interfere with this choice

Not Reported in P.3d, 148 Wash.App. 1008, 2009 WL 73947 (Wash.App. Div. 2)  
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where jurisdiction is properly asserted. *Sales*, 163 Wash.2d at 19, 177 P.3d 1122. The doctrine of forum non conveniens grants a court the discretionary power to decline a proper assertion of its jurisdiction, however, when the convenience of the parties and the ends of justice would be better served if the action were brought and tried in another forum. *Johnson v. Spider Staging Corp.*, 87 Wash.2d 577, 579, 555 P.2d 997 (1976).

The trial court should begin with the principle that a plaintiff's choice of forum is rarely disturbed. *J.H. Baxter*, 105 Wash.App. at 661, 20 P.3d 967; see also 20 Am.Jur.2d, *Courts*, § 116 at 496 (2nd ed.2005) (dismissal of action on forum non conveniens grounds is drastic remedy to be exercised with caution and restraint). This presumption enables lawsuits to get underway "without immediately floundering in argument about whether some other location would be preferable." *J.H. Baxter*, 105 Wash.App. at 661, 20 P.3d 967.

In deciding whether to decline its own jurisdiction in favor of another forum, the court must balance certain private and public factors. *Sales*, 163 Wash.2d at 20, 177 P.3d 1122. The private factors require the court to consider the convenience of litigation in the alternative forum, including

\*3 the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.

*Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508, 67 S.Ct. 839, 91 L.Ed. 1055 (1947).

The public factors also focus on litigation, including

[a]dministrative difficulties ... for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty ... imposed

upon the people of a community which has no relation to the litigation.... There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case.

*Gulf Oil Corp.*, 330 U.S. at 508-09.

The balancing analysis presumes the existence of an adequate alternative forum. *Sales*, 163 Wash.2d at 20, 177 P.3d 1122. "An alternative forum is adequate as long as a plaintiff can litigate the essential subject matter in that forum and recover if successful." *Sales v. Weyerhaeuser Co.*, 138 Wash.App. 222, 229, 156 P.3d 303 (2007), *aff'd*, 163 Wash.2d 14, 177 P.3d 1122 (2008).

Unless the balance of the *Gulf Oil* factors strongly favors the defendant, the plaintiff's choice of forum should prevail. *Myers v. Boeing Co.*, 115 Wash.2d 123, 128-29, 794 P.2d 1272 (1990) (quoting *Gulf Oil Corp.*, 330 U.S. at 508). Each case turns on its facts, with the trial court generally becoming entangled in the merits of the underlying dispute. *Van Cauwenberghe v. Biard*, 486 U.S. 517, 528, 108 S.Ct. 1945, 100 L.Ed.2d 517, 56 U.S.L.W. 4545 (1988); *J.H. Baxter*, 105 Wash.App. at 662, 20 P.3d 967. To examine "the relative ease of access to sources of proof" and the availability of witnesses, the court must examine the substance of the dispute to evaluate what proof is required, and determine whether the pieces of evidence the parties cite are critical, or even relevant, to the cause of action and any potential defense. *Van Cauwenberghe*, 486 U.S. at 528 (quoting *Gulf Oil*, 330 U.S. at 509). In examining the public interest factors, the court must consider the locus of the alleged culpable conduct and the connection of that conduct to the plaintiff's chosen forum. *Van Cauwenberghe*, 486 U.S. at 528.

#### A. Private Factors

Continuant does not contest Buck's assertion that California is an adequate alternative forum, so

Not Reported in P.3d, 148 Wash.App. 1008, 2009 WL 73947 (Wash.App. Div. 2)  
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we do not address this issue before turning to the *Gulf Oil* factors.

#### 1. Access to Proof and Availability of Witnesses

One reason the trial court gave for its dismissal was that there would be more California than Washington witnesses. Continuant disagrees with this assessment and also argues that when determining whether a particular venue is more convenient to witnesses, courts do not limit their investigation to reviewing which party can produce the longest witness list. *Aquatic Amusement Assocs., Ltd. v. Walt Disney World Co.*, 734 F.Supp. 54, 57 (N.D.N.Y.1990). Rather, courts should look to the nature and quality of the witnesses' testimony with respect to the issues in the case. *Aquatic Amusement*, 734 F.Supp. at 57.

\*4 In its original motion to dismiss, Buck maintained that no Continuant officers or employees needed to testify. Buck asserted that the case depended on the testimony of the unidentified subcontractor from California who could not repair its system. "Without the testimony of the technician who inspected Buck's phone system and the only individual who performed any services on behalf of Continuant, adjudication on the merits is impossible." CP at 32. Continuant responded that there was no need to call this subcontractor, as it did not dispute that his efforts failed. Continuant contended that former employee Bryan Miles had fixed the system from Fife and could not be compelled to testify in California. Buck then acknowledged Miles's work but said that he did not solve the problem and that it needed to hire Packet Fusion, a California company, to repair the system after Continuant could not.

Continuant argues that each side thus will need the testimony of one third-party witness who cannot be compelled to leave his home forum to testify. See *Myers*, 115 Wash.2d at 129, 794 P.2d 1272 (Washington courts have no power to compel the attendance of witnesses from other jurisdictions).  
FN2 In addition to Miles, Continuant's witnesses will include Graham and Riddle, its president and

contract manager in Fife, and Grossman, its Portland sales representative. Miles will testify about Buck's claim of nonperformance, Graham and Grossman will testify about the maintenance contract, and Riddle will testify about its termination.

FN2. Because Washington law applies to this contract dispute, the same principles regarding the compulsion of witnesses apply to both parties.

Buck responds that it will need the testimony of Lees, its chief information officer, and Kevin Kennedy, a technician with its office, to testify about its phone system. Packet Fusion will need to testify about its repairs, and the unidentified subcontractor may also need to testify. Continuant acknowledges that Buck will need the testimony of Lees, who negotiated the contract and terminated it, but asserts that he can be compelled to testify in Washington. See *Campbell v. A.H. Robins Co.*, 32 Wash.App. 98, 107, 645 P.2d 1138 (1982) (under CR 43(f)(1), nonresident parties and their managing agents may be compelled to attend trial in Washington). Continuant disputes the need to call Kennedy to testify about Buck's phone system, pointing out that Lees's supplemental affidavit contains the same information about the phone system as Kennedy's affidavit. Although Buck asserts that Kennedy accompanied the unidentified subcontractor as he attempted to fix the system, neither Kennedy's nor Lees's affidavits support that assertion. Continuant continues to maintain that the unidentified subcontractor from California will not need to testify.

Therefore, with regard to the availability of each party's proposed witnesses, Miles is a former Continuant employee and Washington resident who cannot be compelled to testify in California. Whether Grossman and Riddle are managing agents at Continuant who can be compelled to testify in California is unclear. See *Johanson v. United Truck Lines*, 62 Wash.2d 437, 440-41, 383 P.2d 512 (1963) (managing agent is one who has substantial part in managing affairs of particular department,

district, or locality of corporation). Although Continuant contends that Buck needs only Lees's testimony, Buck argues that it also needs testimony from Kennedy, Packet Fusion, and possibly the unidentified subcontractor. The latter three witnesses cannot be compelled to testify in Washington. It appears that the number of witnesses on each side is roughly equivalent and that there will be difficulty in requiring some of each party's witnesses to leave their home forums to testify.

## 2. View of Premises

\*5 Continuant argues that the trial court abused its discretion in holding that a viewing of Buck's phone equipment in California would be necessary. (The trial court referred to the location of the equipment in California as a reason for granting Buck's motion.) Continuant argues that the main issue is whether Buck properly terminated the contract by affording Continuant notice and an opportunity to cure, and that there is no need to view Buck's equipment to resolve this issue. Continuant asserts that a backup issue is whether the maintenance contract included the Avotus equipment that needed repair. There is no express reference to this equipment in the contract, but Buck contends that the Avotus equipment was one component of the Nortel Meridian system that the contract covered. Even if this is the case, Continuant asserts that having experts view the equipment is not relevant to determining whether the parties intended to include Avotus under the maintenance contract. It contends further that Lees and Kennedy are qualified to offer testimony about Buck's phone system. Buck replies that based on the testimony of Lees and Kennedy regarding the complexity of that system, it was reasonable for the trial court to infer that a view of the premises will be necessary.

If, as Continuant asserts, the key issue is whether Buck properly terminated the contract by offering notice and an opportunity to cure, viewing its phone system will be unnecessary. We address this issue more fully below.

## 3. Pierce County as Expeditious and Inexpensive

Continuant argues that the trial court abused its discretion by failing to assess which forum would be most expeditious and least expensive, and it asks us to take judicial notice that trial in Pierce County would be less expensive and more expeditious than trial in Marin County. Continuant points out that this case was eligible for mandatory arbitration in Pierce County. It argues that small companies that choose to make their home in Pierce County should be able to take advantage of efficient and less expensive procedures such as mandatory arbitration of small disputes where arbitrators are paid with local tax dollars and discovery is limited to keep costs down. Buck contends only that Continuant may not introduce facts on appeal regarding the expense of living and litigating in California that it did not introduce to the trial court. We find that this factor favors keeping this case in Washington.

## 4. Prima Facie Defense

Continuant also argues that the trial court erred in failing to require Buck to show a prima facie defense to this lawsuit. Although this is not one of the factors explicitly set forth in *Gulf Oil*, the Supreme Court later observed that some investigation into the merits of the case as well as potential defenses is required when assessing a forum non conveniens motion. *Van Cauwenberghe*, 486 U.S. at 528; see also *Leasecomm Corp. v. Rivera*, 1994 Mass.App. Div. 115, 116 (1994) (implicit requirement for the successful assertion of forum non conveniens defense is the necessity of a trial in a more appropriate forum because of the existence of an actionable claim and a meritorious defense thereto). And, as stated, an underlying question is whether the "ends of justice" would be served by transferring the case to another forum. See *Spider Staging Corp.*, 87 Wash.2d at 579, 555 P.2d 997.

\*6 Continuant contends that there are three possible issues in this case: the opportunity to cure, contract coverage, and repair issues. It argues that the first issue is the most significant, as Continuant's primary argument is that Buck breached the termination provision in the contract when it can-

celled the contract on September 27 and October 3. Buck responds that Washington law does not require it to present a defense to this claim, but it adds that its October 3 e-mail could act as notice under the contract and that Continuant made no attempt to cure after that date. Buck argued below that after it gave Continuant notice on October 3, Continuant failed to make any attempt to repair the system, thus forcing Buck to hire Packet Fusion to make the necessary repairs. Kennedy stated that after Continuant failed to fix the problem, Packet Fusion made the repairs on October 16. Lees added that “[u]pon cancellation of the contract with Continuant, we hired Packet Fusion.” CP at 75.

The facts do not support Buck's claim that its October 3 e-mail provided Continuant with notice of a default that could be cured. The date of Miles's work on Buck's system is unknown, but his October 9 invoice states that he tested the system afterward and that it ran “all clear.” CP at 17. On October 3, Lees sent Continuant an e-mail stating that it did not intend to “go forward in any way with this contract.” CP at 21. Packet Fusion performed its repairs that day, and not afterward on October 16. Therefore, the October 3 e-mail did not give Continuant any opportunity to cure because the system was repaired that day by another company.<sup>FN3</sup> If Buck is correct in stating that Packet Fusion solved the problem, there was nothing left to cure, even if Continuant overlooked the wording of the October 3 e-mail and thought that cure remained a possibility. The facts simply do not support the contention that this e-mail constituted notice and an opportunity to cure, in compliance with the contract's termination provisions. Thus, on the record before us, this defense to Continuant's breach of contract claim likely fails. See *Gray v. Gregory*, 36 Wash.2d 416, 418-19, 218 P.2d 307 (1950) (summary notice of termination of lease did not satisfy requirement of giving notice of default and opportunity to cure); *Filmline (Cross-Country) Prods., Inc. v. United Artists Corp.*, 865 F.2d 513, 518 (2nd Cir.1989) (notice of termination that included no provision to cure in compliance with explicit terms of contract

constituted breach of contract).

FN3. As stated, Packet Fusion's invoice makes the scope of its work unclear, but Buck asserts that Packet Fusion repaired the Avotus equipment when Continuant could not.

Buck also contends that Continuant's abandonment of the contract excused its allegedly defective notice and there were no damages even if it failed to comply with the notice requirement. See *Lazelle v. Empire State Sur. Co.*, 58 Wash. 589, 592, 109 P. 195 (1910) (surety to contract cannot complain when it can show no damage from failure to receive notice of breach). But Continuant has demonstrated damages because the termination deprived it of its contractual right to fix the alleged default and continue the benefits of its two-year maintenance contract.

\*7 A backup issue to the opportunity to cure issue is whether the maintenance contract covered the Avotus equipment. The contract does not mention the Avotus equipment, and Miles had to contact Avotus representatives to work on the problem Buck identified. Buck contends that Packet Fusion repaired the system when Miles did not, but there is no reference to Avotus in the Packet Fusion invoice. It is unclear whether Buck has a viable defense to this issue.

With regard to the repair issue, Miles's invoice supports Continuant's claim that Miles fixed the problem. Furthermore, Buck's October 3 e-mail seemed more concerned with Miles's need to work with Avotus personnel than with any failure to fix the system. Whether Packet Fusion addressed the same problem and fixed it cannot be determined by its invoice. Thus, Buck's defense to this issue is also unclear. At this preliminary stage, the merits of the case favor Continuant.

#### B. Public Interest Factors

The trial court did not address these factors, and the only one of potential significance is the im-

portance of having this suit resolved under Washington law. The contract's choice of law provision states that Washington law governs. Such a provision informs but does not govern a forum non conveniens decision. See *Hill v. Jawanda Transp. Ltd.*, 96 Wash.App. 537, 546, 983 P.2d 666 (1999). Although California courts would have little difficulty in applying Washington law, this factor slightly favors keeping this contract action in Pierce County. See *Lynch v. Pack*, 68 Wash.App. 626, 634, 846 P.2d 542 (1993) (affirming forum non conveniens dismissal in part because agreement required application of Montana law with which Montana courts were more familiar).

### C. Significant Cases

Buck argues that this case is similar to *J.H. Baxter*, in which Division One affirmed a forum non conveniens dismissal. In the underlying insurance coverage lawsuit, the coverage demanded was for environmental liabilities incurred at wood treatment facilities in Washington, Oregon, Wyoming, and California. *J.H. Baxter*, 105 Wash.App. at 659, 20 P.3d 967. The greatest exposure for the insurers was from the California facility, and the insured had its headquarters in California. *J.H. Baxter*, 105 Wash.App. at 659, 20 P.3d 967. In view of the factors making California "the center of gravity" for this insurance coverage dispute, Division One concluded that the trial court did not abuse its discretion in dismissing the action on the basis that California was a more convenient forum than Washington. *J.H. Baxter*, 105 Wash.App. at 665, 20 P.3d 967.

Buck also contends that *Spider Staging Corporation*, which reversed a forum non conveniens dismissal, is distinguishable. The court there concluded that the *Gulf Oil* factors did not "strongly favor" the Kansas forum so as to justify rejecting the Kansas plaintiff's decision to sue in Washington:

[A]ll of the evidence which pertains to the manufacturing and marketing of the scaffold is in Washington State. Respondents are Washington corporations, and all of their principal officers

reside in King County. Both of the engineers who designed the scaffold live in King County. The two principal witnesses from Kansas stated in affidavits that they willingly would appear in Washington. Also, appellant will bring the scaffold to Washington and give respondents an opportunity to examine it. The trial court therefore should not have disturbed appellant's choice of forum.

\*8 *Spider Staging Corp.*, 87 Wash.2d at 580, 555 P.2d 997.

Contract negotiations in this case took place in Washington, Oregon, and California. One party is domiciled in Washington, and the other in California. Whether the system was repaired from Washington or on-site in California is disputed, but the timing of the repairs vis-a-vis the language and date of the contract termination strongly suggests that Buck did not afford Continuant an opportunity to cure. The number of witnesses from California and Washington is roughly equivalent, and it is not evident that viewing Buck's phone system will be necessary. Unlike *J.H. Baxter*, therefore, the center of gravity in this case is not California. And, as in *Spider Staging Corporation*, the trial court gave little weight to the plaintiff's choice of forum. "Where a transfer would merely shift the inconvenience from one party to the other, the plaintiff's choice of forum should not be disturbed." 20 Am.Jur.2d, § 120, at 501; see also *SME Racks, Inc. v. Sistemas Mecanicos Para Electronica*, 382 F.3d 1097, 1103 (11th Cir. 2004) (trial court abused its discretion in failing to consider strong presumption in favor of plaintiff's choice of forum when weighing private interest factors). We conclude that the *Gulf Oil* factors do not strongly favor the defendant and, thus, the trial court abused its discretion in granting the motion to dismiss.

### II. Attorney Fees

Given our reversal of the trial court's dismissal order, we must reverse its award of attorney fees to Buck. Continuant does not request fees on appeal but asks us to require the trial court to award Con-

Not Reported in P.3d, 148 Wash.App. 1008, 2009 WL 73947 (Wash.App. Div. 2)  
(Cite as: 2009 WL 73947 (Wash.App. Div. 2))

tinuant the fees incurred in this appeal if Continuant prevails at trial. We leave the matter to the trial court if Continuant prevails on the merits below.

We reverse the trial court's orders dismissing Continuant's action and awarding attorney fees to Buck.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

We concur: HOUGHTON, P.J., and BRIDGEWATER, J.

Wash.App. Div. 2,2009.  
Continuant, Inc. v. Buck Institute for Age Research  
Not Reported in P.3d, 148 Wash.App. 1008, 2009  
WL 73947 (Wash.App. Div. 2)

END OF DOCUMENT

**Appendix B**

Not Reported in F.Supp.2d, 2010 WL 300411 (E.D.Wash.)  
(Cite as: 2010 WL 300411 (E.D.Wash.))



Only the Westlaw citation is currently available.

United States District Court,  
E.D. Washington.

Michael J. DESSERAULT, an individual, Hogue  
Ranches, Inc., a Washington corporation; and  
DEsserault Ranch, Inc., a Washington corporation,  
Plaintiffs,

v.

YAKIMA CHIEF PROPERTY HOLDINGS, LLC,  
formerly known as Yakima Chief U.S., LLC, a  
Washington limited liability company; et al., De-  
fendants.

No. CV-09-3055-FVS.  
Jan. 20, 2010.

West KeySummaryJoint Adventures 224   
1.2(6)

224 Joint Adventures

224k1.2 Essential Elements

224k1.2(5) Community of Interest

224k1.2(6) k. In General. Most Cited Cases

Hop growers have sufficiently pled that the guarantors had a community of interest in a supply agreement with a brewery in order to establish the existence of a joint venture agreement. Each guarantor was concerned with ensuring that sufficient hops were delivered to fulfill a contract with a brewery. Each guarantor had a mutual responsibility to provide their share of the hops.

Randall Robert Steichen, William Loren Weigand, III, Davis Wright Tremaine, Seattle, WA, for Plaintiffs.

Carter L. Fjeld, Kevan Tino Montoya, Tyler Michael Hinckley, Velikanje Halverson Attorney at Law, Yakima, WA, for Defendants.

ORDER DENYING PLAINTIFFS' MOTION TO

#### DISMISS COUNTERCLAIMS

FRED VAN SICKLE, Senior District Judge.

\*1 **THIS MATTER** comes before the Court on Plaintiffs' Motion to Dismiss Counterclaims. (Ct.Rec.27). Plaintiffs are represented by Randall R. Steichen and William L. Weigand, III. Defendants/Counter-claimants are represented by Carter L. Fjeld, Kevan T. Montoya, and Tyler M. Hinckley.

#### BACKGROUND

Counter-claimants claim that Plaintiffs Hogue and Desserault are liable for breach of a joint venture agreement and breach of fiduciary duties for failing to sell hops to YCI in 2007 and 2008. (Ct. Rec. 12 at 19). Counter-claimants contend that they supplied the hops that Hogue and Desserault should have provided and, because of that, they lost the opportunity to sell those hops in the market, resulting in damages in the amount of approximately \$6,600,000. *Id.*

#### DISCUSSION

##### I. Standard of Review

A counterclaim should not be dismissed for failure to state a claim upon which relief may be granted under Federal Rule of Civil Procedure 12(b)(6) unless it "appears beyond doubt that the [counter-claimant] can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957). The Court must "accept as true all facts alleged in the [counterclaim]" and "draw all reasonable inferences in favor of the [counter-claimant]." *Kassner v. 2nd Ave. Delicatessen, Inc.*, 496 F.3d 229, 237 (2d Cir.2007); *see also Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140 (9th Cir.1996). The Court must give the counter-claimant the benefit of every inference that reasonably may be drawn from well-pleaded facts. *Tyler v. Cisneros*, 136 F.3d 603, 607 (9th Cir.1998).

As a general rule, the Court “may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion”. *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir.2001). Rule 12(b)(6) provides that “when matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.” Fed.R.Civ.P. 12(b)(6) (emphasis added). However, there are exceptions to the requirement that consideration of extrinsic evidence converts a Rule 12(b)(6) motion to a motion for summary judgment. *Lee*, 250 F.3d at 688. The Court “may consider material which is properly submitted as part of the [counterclaim] on a motion to dismiss without converting the motion to dismiss into a motion for summary judgment.” *Id.* If the documents are not physically attached to a counter-claimant's pleadings, they may still be considered if the documents' authenticity is not contested and the counter-claimant necessarily relies on them. *Id.* at 689 (citations omitted).<sup>FN1</sup>

FN1. As this Court determined by separate order, the declaration of Randall R. Steichen and the exhibits attached thereto (Ct.Rec.34) shall be considered by the Court in its review of the instant Rule 12(b)(6) motion. (Ct.Rec.46).

To survive a motion to dismiss, the counter-claim must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. *Ashcroft v. Iqbal*, — U.S. —, —, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (May 18, 2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). A claim has “facial plausibility” when a party pleads factual content that allows the court to draw the reasonable inference that the other party is liable for the misconduct alleged. *Id.* The “plausibility” standard asks for more than a sheer possibility that a party has acted as alleged. *Id.*

## II. Breach of Joint Venture Claim

### A. Joint Venture Agreement

\*2 Plaintiffs first argue that Counter-claimants have failed to state an actionable breach of a joint venture claim. (Ct. Rec. 29 at 9–13). Counter-claimants allege that Plaintiffs breached a joint venture agreement when they stopped selling hops to YCI after 2006. (Ct. Rec. 29 at 9). Counter-claimants assert that they have sufficiently pleaded a claim for breach of a joint venture agreement. (Ct. Rec. 38 at 5–9).

A joint venture is a type of partnership whose purpose is limited to a particular transaction or project. *Pietz v. Indermuehle*, 89 Wash.App. 503, 510, 949 P.2d 449 (1998) (partnership law applies to joint ventures). Under Washington law, a joint venture requires (1) an express or implied contract (2) for a common purpose; (3) a community of interest; and (4) an equal right to voice and control of the enterprise. *Douglass v. Stanger*, 101 Wash.App. 243, 249, 2 P.3d 998 (2000).

As to the first element, an express or implied contract, Counterclaimants have alleged that Plaintiffs, as guarantors of the Group Supply Agreement, engaged in either an express or an implied contract to provide their pro rata share of the hop products that YCI was required to provide to Heineken. (Ct. Rec. 12 at 18). Plaintiffs assert that Defendants are not able to point to a contract, express or implied. (Ct. Rec. 29 & 42). Plaintiffs argue that the Group Supply Agreement was between YCI and Heineken, and the Guarantee was entered into between Heineken and the various growers in their independent capacities; therefore, nothing in these documents bind the growers to each other as partners or joint venturers. (Ct. Rec. 29 at 10–11). Plaintiffs further contend that a guarantee of the debts of an entity does not create a joint venture among the guarantors. *See Rohda v. Boen*, 45 Wash.2d 553, 557–560, 276 P.2d 586 (1954) (a guarantee is not sufficient to create the community of interest in profits necessary for the creation of a

joint venture).

At this early stage in the litigation process, it is clear that there is a material dispute regarding the existence of an express or implied contract. While Plaintiffs may ultimately be found correct, Counter-claimants' allegations survive a motion to dismiss under general pleading standards. See *Iqbal*, 129 S.Ct. at 1949. Drawing all reasonable inferences in favor of Counter-claimants, the joint venture claim is allowed to go forward at this juncture.

As to the second element, common purpose, Counter-claimants allege the guarantee was common to all guarantors and required that the guarantors provide quantities of hops if any of the others failed to provided their required share. (Ct. Rec. 12 at 18). The joint venture's purpose was to grow and pool hops to provide YCI with all of the hops that Heineken required under the Group Supply Agreement. *Id.* Counter-claimants have sufficiently pleaded a common purpose of the joint venture.

As to the third element, a community of interest, Counterclaimants allege that the guarantors had a community of interest in the Heineken Group Supply Agreement. (Ct. Rec. 12 at 18). "Community of interest," as applied to a joint venture, "means ... a mixture or identity of interest in a venture in which each and all are reciprocally concerned and from which each and all derive a material benefit and sustain a mutual responsibility." *Carboneau v. Peterson*, 1 Wash.2d 347, 375-376, 95 P.2d 1043 (1939).

\*3 It can be inferred from the facts presented in the counterclaim that each guarantor was concerned with ensuring that sufficient hops were delivered to YCI to fulfill the Heineken contract. Each guarantor had a mutual responsibility to provide their pro rata share of the hops. Counter-claimants have sufficiently pleaded a community of interest in the joint venture.

Counter-claimants also adequately allege facts supporting the final element, an equal right to voice

and control of the enterprise. (Ct. Rec. 12 at 17-18). One has an equal right to a voice in the joint venture when he has an equal right in management and conduct of the undertaking, and when the members equally govern on the subject of how, when, and where the agreement is to be performed. *Carboneau*, 1 Wash.2d at 376, 95 P.2d 1043. The counterclaim alleges that each Counter-claimant and Plaintiffs entered into the guarantee to deliver and pool their pro rata share of hops to satisfy YCI's obligation under the Heineken contract. Each guarantor had an obligation to perform and an obligation to cover the other guarantors' delivery volume deficiencies, if any. (Ct. Rec. 12 at 17-18).

Based on the foregoing, the Court finds that Counter-claimants have adequately alleged the existence of a joint venture agreement in this case.

#### **B. Dissolution of Joint Venture**

Plaintiffs contend that even if Counter-claimants could establish a joint venture agreement, it would have dissolved when Hogue and Desserault provided notice that they were ceasing hop-growing operations and would no longer provide hops to YCI. (Ct. Rec. 29 at 11-12). Plaintiffs claim that any duties and obligations owed to the other joint venturers terminated by operation of law upon dissolution of the joint venture at the end of the 2006 crop year. *Id.* However, given the allegations by Counter-claimants that an agreement continued after 2006, and drawing all reasonable inferences in favor of Counterclaimants, the Court finds that dismissal on this basis is not appropriate at this time.

#### **C. Statute of Frauds**

Plaintiffs assert that Counter-claimant's joint venture claim is additionally barred by the applicable statute of frauds. (Ct. Rec. 29 at 13-14). Plaintiffs argue that because the alleged joint venture agreement is a contract that cannot be performed in one year,<sup>FN2</sup> Wash. Rev.Code § 19.36.010 renders the unwritten agreement void. Plaintiffs also argue that because the alleged joint venture agreement is a contract for the sale of

goods for a price of \$500.00 or more, Washington's Uniform Commercial Code invalidates such an unwritten agreement. Wash. Rev.Code § 62A.2-201 (1). Plaintiffs contend that Counter-claimants have not alleged the existence of any writing(s) that would satisfy the requirements of the applicable statute of frauds. (Ct. Rec. 42 at 9-10).

FN2. The Group Supply Agreement created a four year rolling obligation that was automatically extended unless terminated by either party.

Counter-claimants respond that dismissal on a 12(b)(6) motion on statute of frauds grounds is inappropriate where the party claiming the breach has alleged the existence of a contract and may be able to produce writings that satisfy the statute of frauds or obtain testimony from the moving party that suggests that a contract was formed. *Powers v. Hastings*, 20 Wash.App. 837, 841, 582 P.2d 897 (1978). Counter-claimants also assert that the joint venture was an agreement to collectively transact business with a third party, not a contract for the sale of goods to each other; therefore, it does not fall under the statute of frauds. (Ct. Rec. 38 at 13-14). Counter-claimants further assert that the joint venture agreement here did not by its terms require performance that could not be completed within one year. Therefore, the agreement is not within the statute of frauds. Lastly, Counter-claimants contend that Plaintiffs "partially performed" under the joint venture agreement until 2006; thus, they cannot now contend that the statute of frauds renders the joint venture agreement unenforceable.<sup>FN3</sup>

FN3. When a party asserting that an agreement violates the statute of frauds has performed under that agreement, that party is estopped from alleging that the agreement violates the statute of frauds. *Becker v. Lagerquist Bros., Inc.*, 55 Wash.2d 425, 434, 348 P.2d 423 (1960); see also *Miller v. McCamish*, 78 Wash.2d 821, 829, 479 P.2d 919 (1971) (partial performance may exempt agreement from statute of frauds).

\*4 The allegations of an express or implied contract in the counterclaim, taken as true, suggest that Counter-claimants may be able to produce writings which could satisfy the statute of frauds. Accordingly, the Court finds that Plaintiffs' motion to dismiss based on the statute of frauds is denied at this time.

Counter-claimants have adequately alleged a cause of action for breach of a joint venture. Consequently, Plaintiffs' motion to dismiss is denied with respect to this claim.

### III. Breach of Fiduciary Duties Claim

Plaintiffs maintain that because no joint venture agreement exists, Counter-claimant's breach of fiduciary duties claim must be dismissed. (Ct. Rec. 29 at 15-17). Plaintiffs contend that even if a joint venture agreement is established, any fiduciary duties owed would have terminated when Plaintiffs ceased hop growing operations and withdrew from the joint venture. *Id.* at 16, 582 P.2d 897. Plaintiffs lastly argue that "the nominal conclusory allegations that have been pled are not sufficient to state a claim upon which relief can be granted." See *S. Atl. Ltd. P'ship of Tenn. L.P. v. Riese*, 284 F.3d 518, 533 (4th Cir.2002) (even when parties to arms-length transaction have reposed confidence in each other, no fiduciary duty arises unless one party dominates the other); (Ct. Rec. 42 at 11).

As concluded above, the Court at this juncture is not able to hold that no joint venture agreement exists in this case. Counterclaimants have adequately alleged a cause of action for breach of a joint venture. *Supra*. Also as determined above, given the allegations by Counter-claimants that an agreement continued after 2006, and drawing all reasonable inferences in favor of Counterclaimants, dismissal on the basis that Plaintiffs withdrew from the joint venture is not appropriate at this time. *Supra*.

Counter-claimants allege that Plaintiffs "breached their fiduciary duty of good faith, fairness, candid disclosure and honesty." (Ct. Rec. 12

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(Cite as: **2010 WL 300411 (E.D.Wash.)**)

at 21). Counter-claimants explain that Plaintiffs' failure to provide the hops that they agreed to deliver left the remaining joint venturers in a position in which they had to provide a greater share of hops to YCI to fulfill their obligations under the Heineken contract. *Id.* Counter-claimants' allegations, taken as true, sufficiently plead a claim for breach of fiduciary duties. Therefore, the Court denies Plaintiffs' motion to dismiss this cause of action as well.

#### **CONCLUSION**

Based on the foregoing, **IT IS HEREBY ORDERED** that Plaintiffs' Motion to Dismiss Counterclaims (Ct.Rec.27) is **DENIED**.

**IT IS SO ORDERED.** The District Court Executive is hereby directed to enter this order and furnish copies to counsel.

E.D.Wash.,2010.  
Desserault v. Yakima Chief Property Holdings, LLC  
Not Reported in F.Supp.2d, 2010 WL 300411  
(E.D.Wash.)

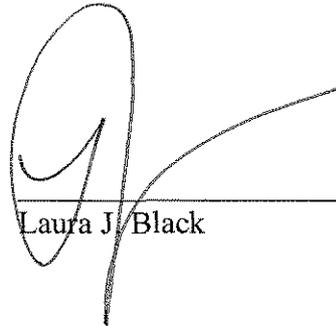
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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20<sup>th</sup> day of December, 2012, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to all counsel of record as follows:

Mr. Gregory J. Arpin  
Paine Hamblen LLP  
717 W. Sprague Avenue, Suite 1200  
Spokane, WA 99201-3505  
Attorney for Respondent

- U.S. Mail
- Hand Delivered
- Overnight Mail
- Telecopy (FAX)
- Via email



Laura J. Black