

No. 309631

**FILED**

OCT 29 2012

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

---

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

---

DC FARMS, LLC, an Idaho limited liability company,

Appellant,

v.

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

Respondent.

---

APPELLANT DC FARMS, LLC'S APPEAL BRIEF

---

JED W. MORRIS  
WSBA# 13832  
TREVOR R. PINCOCK  
WSBA #36818  
LAURA J. BLACK  
WSBA #35672  
Attorneys for  
APPELLANT DC FARMS, LLC

**LUKINS & ANNIS, P.S.**  
1600 Washington Trust Financial Center  
717 W Sprague Ave.  
Spokane, WA 99201-0466  
Telephone: (509) 455-9555  
Facsimile: (509) 747-2323

No. 309631

**FILED**

OCT 29 2012

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

---

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

---

DC FARMS, LLC, an Idaho limited liability company,

Appellant,

v.

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

Respondent.

---

APPELLANT DC FARMS, LLC'S APPEAL BRIEF

---

JED W. MORRIS  
WSBA# 13832  
TREVOR R. PINCOCK  
WSBA #36818  
LAURA J. BLACK  
WSBA #35672  
Attorneys for  
APPELLANT DC FARMS, LLC

**LUKINS & ANNIS, P.S.**  
1600 Washington Trust Financial Center  
717 W Sprague Ave.  
Spokane, WA 99201-0466  
Telephone: (509) 455-9555  
Facsimile: (509) 747-2323

**TABLE OF AUTHORITIES**

	<u>Page</u>
<b>Cases</b>	
<u>Ellis v. City of Seattle</u> , 142 Wn.2d 450, 458, 13 P.3d 1065 (2000) .....	14
<u>Filmline (Cross-Country) Prods., Inc. v. United Artists Corp.</u> , 865 F.2d 513, 518 (2d Cir.1989).....	15
<u>Gray v. Gregory</u> , 36 Wn.2d 416, 218 P.2d 307 (1950).....	15, 16
<u>Harlan v. McGraw</u> , 107 Wash. 286, 181 P. 882 (1919) .....	16
<u>Hubbard v. Spokane Cy.</u> , 146 Wn.2d 699, 706-07, 50 P.3d 602 (2002) ..	14
<u>Moulden &amp; Sons, Inc. v. Osaka Landscaping &amp; Nursery, Inc.</u> , 21 Wn. App. 194, 584 P.2d 968 (1978).....	18
<u>Republic Inv. Co. v. Naches Hotel Co.</u> , 190 Wash. 176, 67 P.2d 858 (1937).....	15, 16
<u>Stevenson v. Parker</u> , 25 Wn. App. 639, 608 P.2d 1263 (1980) .....	15
<u>Tacoma Rescue Mission v. Stewart</u> , 155 Wn. App. 250, 255, 228 P.3d 1289 (2010).....	14, 15
<u>Trimble v. Wash. State Univ.</u> , 140 Wn.2d 88, 92-93, 993 P.2d 259 (2000) .....	14
<u>Walker v. McMurchie</u> , 61 Wash. 489, 112 P. 500 (1911).....	16
<b>Other Authorities</b>	
17 WAPRAC § 6.76 .....	15
17 William B. Stoebuck & John W. Weaver, <u>Washington Practice: Real Estate: Property Law 6.76</u> , at 437 (2d ed. 2004) .....	14

**TABLE OF CONTENTS**

	<u>Page</u>
I. INTRODUCTION .....	1
II. ASSIGNMENTS OF ERROR .....	3
III. STATEMENT OF THE CASE.....	4
IV. ARGUMENT.....	14
A.    STANDARD OF REVIEW.....	14
B.    LAMB WESTON BREACHED THE JOINT VENTURE AGREEMENT AS A MATTER OF LAW.....	15
C.    THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF LAMB WESTON, WHERE THERE IS A QUESTION OF FACT AS TO WHETHER DC FARMS COULD HAVE CURED THE ALLEGED BREACH.....	18
D.    THE TRIAL COURT FURTHER ERRED IN DISMISSING THE CASE BECAUSE CERTAIN CLAIMS SURVIVED SUMMARY JUDGMENT.....	20
1.    Lamb Weston Breached the Agreement’s Requirement to Give Timely Notice of Non- Renewal.....	20
2.    Lamb Weston Breached the Agreement by Failing to Fulfill DC Farms’ U.S. Bank Obligations.....	21
3.    Lamb Weston Breached the Agreement’s Obligations to Pay Certain Accrued Expenses for the 2009 Crop Season.....	22
V. CONCLUSION.....	22

## **I. INTRODUCTION**

In the midst of the 2009 potato growing season, Respondent Conagra Foods Lamb Weston, Inc. (“Lamb Weston”) found itself over-contracted and over-obligated for potatoes, given that season’s unfavorable market conditions. As a result, Lamb Weston was looking to reject contract potatoes wherever it could. Appellant DC Farms, LLC (“DC Farms”) became a casualty of Lamb Weston’s improper efforts to limit its financial losses.

DC Farms and Lamb Weston were involved in a joint venture to grow potatoes for the 2009 crop season through a Joint Venture Agreement. The arrangement was designed to be beneficial for both parties: Lamb Weston was guaranteed a certain supply of potatoes at a set price and grown under its specifications and supervision; DC Farms had a guaranteed buyer for its potatoes and guaranteed payment of expenses and loan obligations to U.S. Bank.

DC Farms’ interests in the joint venture relationship were protected by a contractual prohibition against summary termination by Lamb Weston, wherein Lamb Weston could not declare a “default” for purposes of terminating the Agreement until it had given DC Farms written notice and a description of the alleged breach of the Agreement and seven days to cure the alleged breach. Lamb Weston ignored these contractual requirements, and in November 2009, summarily terminated the Joint Venture Agreement without giving DC Farms written notice of

the breach – alleged glass contamination – or allowing seven days to cure, as required.

Had it been given the chance, DC Farms could have cured the alleged breach by providing replacement potatoes and/or placing additional safeguards to ensure against glass contamination. Both are cures that Lamb Weston has readily accepted in the past.

Not only did Lamb Weston breach the Joint Venture Agreement with its summary termination of the Agreement, but it continued to engage in post-termination actions in breach of its accrued obligations under the Joint Venture Agreement. Even though Lamb Weston did not give timely notice of non-renewal for the 2010 crop season, Lamb Weston failed to meet its obligations for the 2010 crop season or reimburse DC Farms for expenses already incurred for the 2010 crop season. Lamb Weston further breached its contractual obligation to guarantee repayment of DC Farms' outstanding loan obligations to U.S. Bank, and failed to authorize reimbursement for expenses incurred for the 2009 crop season.

DC Farms filed the current action seeking damages for Lamb Weston's various breaches of the Joint Venture Agreement and breach of the duties of good faith and fair dealing.

The parties filed Cross-Motions for Summary Judgment on the issue of whether Lamb Weston properly terminated the Joint Venture Agreement. The trial court denied DC Farms' Motion for Summary Judgment and granted Lamb Weston's Motion for Summary Judgment, finding that Lamb Weston had effectively terminated the Joint Venture

Agreement. The trial court's ruling is contrary to well-established Washington law requiring strict compliance with termination provisions, including notice and opportunity to cure, even where cure is purportedly "impossible". Moreover, DC Farms provided overwhelming evidence in support of its ability to cure the alleged breach of the Joint Venture Agreement. At the very least, there is a question of fact on this issue that prevented the trial court from dismissing DC Farms' claim that Lamb Weston breached the Agreement through its improper termination.

The trial court additionally erred in dismissing the entire action based on its limited ruling that Lamb Weston properly terminated the Agreement, where DC Farms' separate breach of contract claims were not resolved by the trial court's summary judgment disposition.

DC Farms respectfully submits that: (A) Lamb Weston breached the Joint Venture Agreement by summarily terminating the Agreement as a matter of law; (B) DC Farms is entitled to have a jury decide the fact-specific inquiry of whether DC Farms could have cured the alleged breach of the Joint Venture Agreement; and (C) additional issues remain in the case, preventing dismissal.

## **II. ASSIGNMENTS OF ERROR**

A. The trial court erred in denying DC Farms' Motion for Partial Summary Judgment, because Lamb Weston breached the Joint Venture Agreement's requirement to provide notice of any alleged default and seven days to cure as a matter of law.

B. The trial court erred in granting Lamb Weston's Motion for Summary Judgment, because whether DC Farms could have cured the alleged breach of the Joint Venture Agreement is a question of fact for the jury to resolve.

C. The trial court erred in dismissing the case in its entirety, because DC Farms' additional breach of contract claims remained viable even after the court's grant of Lamb Weston's Motion for Summary Judgment on the issue of termination.

### **III. STATEMENT OF THE CASE**

DC Farms is an Idaho limited liability company that farms potatoes and other crops in Southeastern Idaho. Prior to the 2009 growing season, DC Farms had been in business with Lamb Weston on a limited basis. DC Farms had grown potatoes for Lamb Weston in previous years on small volume grower storage contracts. See CP 117, 201, 223.

In the Fall of 2008, Lamb Weston approached DC Farms about entering in to a joint venture arrangement. CP 117. In this type of arrangement, Lamb Weston enters into an agreement with a grower to supply potatoes and split the profits on a percentage basis. CP 224, CP 136. In general terms, Lamb Weston's joint venture agreements are mutually-beneficial because they allow the parties to share in the expense, profit, and risk in growing potatoes. See CP 130-48. Lamb Weston benefits from this arrangement by, among other things, having a certain supply of potatoes grown under its specifications and supervision on land owned by the grower; the grower benefits by, among other things, having

a buyer that is contractually-obligated to purchase a designated amount of potatoes at a set price and guaranteed payment of expenses and loan obligations. See generally CP 130-40, CP 224, CP 239.

On or about January 29, 2009, DC Farms and Lamb Weston entered into such an arrangement through a Strategic Potato Supply Agreement, in which the parties agreed to engage in a joint venture to “work together in growing potatoes” (hereafter referred to as the “Joint Venture Agreement” or “Agreement”), and to split the profits from the sale of potatoes. See id.

The Joint Venture Agreement provided important protections to DC Farms. For example, the Joint Venture Agreement allowed Lamb Weston to terminate the Agreement only “upon any event of default”, as defined by the Agreement, and protected DC Farms against summary termination. CP 137-38. Under the terms of the Agreement, Lamb Weston could not declare a material breach or default of the Agreement, as is required to trigger the right to terminate, without **written notice** and description of an alleged breach of the Agreement and seven days to **cure**:

Section 7.2 Default, Remedies and Termination.

Default by FARM: Any of the following that remain uncured after receipt of seven (7) days written notice of default, which notice shall describe the nature of the default, shall be considered a material breach and default by the FARM.

CP 137-38 (emphasis added). Until and unless notice and opportunity to cure of an alleged breach was properly given under the Agreement, there

could be no default and no corresponding right for Lamb Weston to terminate the Agreement. See id.

In addition, the Joint Venture Agreement contemplated automatic renewal for the 2010 crop season unless timely notice of non-renewal was given by Lamb Weston:

This Agreement shall begin on the Effective Date and shall continue in effect through the 2009 crop year and automatically extend for successive one-crop year periods on each October 1<sup>st</sup> unless Lamb Weston provides written notice of non-renewal on or before October 1, 2009 or annually thereafter. For purposes of clarity, if Lamb Weston does not provide a notice of non-renewal on or before October 1, 2009, then this Agreement would extend for an additional crop year for each year where Lamb Weston does not provide a notice of non-renewal on or before that year's respective October 1....likewise, if notice of non-renewal was provided on or before October 1, 2010 then this Agreement would terminate with the end of the 2011 crop (no later than July 15, 2012).

Id. If Lamb Weston failed to given notice of non-renewal by October 1, 2009, the Joint Venture Agreement and all obligations thereunder would automatically renew for the 2010 crop season. See id.

DC Farms began farm work for the 2009 crop season and preparation for the 2010 crop season under the Joint Venture Agreement. See generally CP 118, ¶ 8. The October 1<sup>st</sup> deadline for canceling the Joint Venture Agreement for the 2010 crop season passed without any notice of non-renewal from Lamb Weston. CP at 120, ¶ 14. DC Farms made significant financial investments in potatoes to be grown in 2010 under the Joint Venture Agreement. Id.

However, unbeknownst to DC Farms, as early as September 1, 2009, Lamb Weston was already looking to limit losses on DC Farms' 2009 Joint Venture Potatoes. See CP 173 (email referencing the amount of DC Farms' potatoes in storage and moving forward a plan to sell them to "dehy plants" to avoid further losses on "excess" potatoes).

In fact, in 2009, the potato industry as a whole experienced a market decline. CP 634-35. As a result, potatoes were being dumped or used for cattle feed because the growers' costs were exceeding potential return. Id. Through arrangements like the Joint Venture Agreement, Lamb Weston had over-contracted for potatoes at a set price that did not reflect these unfavorable market conditions. See CP 85, CP 173, CP 243-44, CP 619-23. As a result, Lamb Weston was looking to reject contract potatoes. CP 277-81. It was within these circumstances that Lamb Weston summarily terminated DC Farms' Joint Venture Agreement in November 2009.

On or about October 25, 2009, Lamb Weston reported that a light bulb had broken near the area where Lamb Weston was removing potatoes from one of DC Farms' cellars. CP 174. At Lamb Weston's instruction, DC Farms removed and disposed of three or four truckloads (approximately 1,800-2,200 hundred weight) of potatoes from that cellar in order to remove any potatoes that might be contaminated with glass. CP 174-75.

Two days later, Lamb Weston reported finding a glass light bulb within a protective membrane covering on the potato processing line.

Lamb Weston determined that the potatoes being processed at the time of the discovery came from the same cellar at DC Farms where Lamb Weston had previously identified a broken light bulb. See CP 177, CP 290-91. Notably, although Lamb Weston shut down the processing line and initially held the potentially-affected potatoes from the processing plant, no glass (other than that contained within the cover) was ever found. CP 175.

The next day, Lamb Weston's representatives visited DC Farms' cellars, reportedly to investigate the circumstances surrounding the alleged glass contamination. However, it is clear that the "investigation" was merely a perfunctory step in the termination of the Joint Venture Agreement. No one from Lamb Weston contacted DC Farm's employees or even waited for the results of pending insurance and police investigations before making a determination that the cause of the alleged glass contamination was DC Farms' employees throwing potatoes at light bulbs and using that determination as a basis to terminate the arrangement between Lamb Weston and DC Farms.<sup>1</sup> CP 304-11.

Toward the middle of November 2009, Lamb Weston representatives met with DC Farms and verbally informed its owners that the remaining Joint Venture Potatoes would not be processed and that the Joint Venture Agreement was terminated. See CP 119, ¶ 13, CP 311.

---

<sup>1</sup> DC Farms was never able to definitively determine whether employees were responsible for any glass in the potatoes. CP 119, ¶ 12. However, for the limited purposes of this appeal and a summary judgment determination, DC Farms does not dispute this fact.

Days after that meeting, on or about November 19, 2009, Lamb Weston representatives delivered an undated letter formally notifying DC Farms that the Joint Venture Agreement was terminated. CP 183. The letter is an unequivocal termination of the Joint Venture Agreement for the “negligence and misconduct”<sup>2</sup> of DC Farms 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 for breach due to DC Farms’ negligence and/or misconduct in the supervision and storage of potatoes in the DC Farms potato storage sheds, which resulted in pervasive glass contamination and other potential issues.** This breach has forced ConAgra to cease all future shipment of potatoes from your storages due to our inability to accept any potatoes from DC Farms’ storages for processing....Furthermore, as a result of the limited amount of potatoes that were actually delivered to our plants and processed prior to the discovery of the glass contamination, we have incurred financial losses and we expect DC Farms to fully compensate us for these losses.

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. Otherwise, I must respectfully reserve ConAgra’s rights herein to pursue any and all available remedies if we are not able to resolve them as provided above.

---

<sup>2</sup> Under the Agreement, “negligence and misconduct” by DC Farms that remains uncured after notice and opportunity to cure is a basis for default and termination of the Agreement. See CP 138 (including “the negligence or misconduct of FARM, its employees or agents resulting in the loss of, or damage to, a material portion of the Crop” that remains uncured as a basis for declaring a default and material breach).

Id (emphasis added). This letter was the first written communication of any kind giving notice of the alleged default under the Agreement.<sup>3</sup> See CP 120, ¶ 14.

Even after Lamb Weston breached the Agreement through its improper termination, DC Farms attempted to continue to perform under the Agreement by offering to run all of the Joint Venture Potatoes through additional safety procedures, such as extra inspections and/or additional conveyers and sorters, and by offering to replace the same quantity and variety of potatoes from other cellars unaffected by any potential glass issues for the Joint Venture Potatoes. CP 119-20, CP 670-71. DC Farms has presented expert testimony that these would have been “reasonable” options under the Agreement. CP 634. Indeed, even Lamb Weston has subsequently admitted that these would have been “viable options”. CP 275.

In the past, Lamb Weston has taken additional safety precautions, such as those suggested by DC Farms, in the event of potential foreign materials, including glass. See CP 317-24 (Lamb Weston’s American Falls plant manager confirming that Lamb Weston sometimes puts extra inspectors on the processing line to look for foreign material, including glass, or might require growers to conduct extra inspections as potatoes are removed from storages if there is a concern that the potatoes contain

---

<sup>3</sup>Lamb Weston has previously attempted to argue that the termination letter constituted notice of DC Farms’ opportunity to cure, as required by the Agreement. However, there is no interpretation of the letter, however strained, that would allow for such an unreasonable argument. The letter unequivocally terminates the Agreement.

foreign material); see also CP 184-86 (Lamb Weston internal document detailing extra inspections and precautions put in place for potential glass contamination).<sup>4</sup> In fact, Lamb Weston has admitted that it would have processed the Joint Venture Potatoes “[i]f it would have been a different year”. CP 280.

As to DC Farms’ offer to provide replacement potatoes of the same quantity and quality from cellars with no potential glass contamination issues, Lamb Weston regularly accepts trades of potatoes from growers in the event that there are issues with potatoes from certain cellars. CP 74-75, 84-85. Most telling on the issue, when potato supplies were back down in Spring 2010, Lamb Weston purchased some of the same Joint Venture Potatoes outside of the Agreement. CP 120, ¶ 18. Thus, whether these potatoes were “acceptable” or “unacceptable”, “safe” or “unsafe”, simply depended on Lamb Weston’s need for the potatoes at the time. CP 439 (internal Lamb Weston communications discussing the subsequent purchase of Joint Venture Potatoes that it had previously rejected under the Agreement).

Even post-termination, Lamb Weston continued to breach its accrued obligations under the Agreement.

First, the Agreement requires Lamb Weston to “pay for the Crop ten (10) days after Lamb Weston’s fiscal month-end during which the product is delivered.” CP 136. Lamb Weston first refused to pay DC

---

<sup>4</sup> While Lamb Weston has previously maintained that it has a “zero tolerance” policy for glass, its own internal documents contradict this position. See CP 184-86.

Farms the balance owing for the potatoes it had processed prior to the alleged discovery of glass unless DC Farms released Lamb Weston from any and all claims for wrongful termination of the Agreement and from liability for the U.S. Bank note, which DC Farms refused. CP 120, ¶¶ 15-16, CP 491 (proposed settlement agreement), CP 492, CP 834-37.

Second, Lamb Weston agreed to “pay Bank the remaining balance, including interest, so that Bank debt is paid in full”, in the event that the Crop proceeds are “insufficient” to repay the loan in full. CP 136. Lamb Weston failed to honor its obligation to repay the U.S. Bank loan, and DC Farms was required to do so. See CP 491, 67-71, 834-37.

Third, in the event of termination, the Joint Venture Agreement also 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. Lamb Weston refused to approve payment for DC Farm’ accrued expenses for the 2009 crop season. CP 670-71, 834-37.

Fourth, although Lamb Weston had failed to give timely notice of non-renewal for the 2010 crop season, it refused to compensate DC Farms for accrued expenses related to the 2010 crop season or to otherwise meet its obligations for the 2010 crop season. CP 620, 670-71, 834-37.

DC Farms filed the current lawsuit, seeking damages for breach of contract and breach of the duties of good faith and fair dealing. DC Farms’ claims relate both to the improper termination of the Joint Venture Agreement and Lamb Weston’s additional failures to fulfill financial

obligations to DC Farms and U.S. Bank. CP 001-007. The parties filed Cross-Motions for Summary Judgment, with Lamb Weston moving on the issue of whether it properly terminated the Joint Venture Agreement. See generally CP 53-68, 326-55. After briefing and oral argument, the trial court denied DC Farms' Motion for Summary Judgment and granted Lamb Weston's Motion for Summary Judgment. CP 846-48.

In its oral ruling on the parties' Cross-Motions for Summary Judgment, the court expressly recognized that DC Farms had additional legal claims that survived the court's grant of summary judgment on this issue of termination and indicated that it would not dismiss the case outright.

The Court: Anytime you interrupt a contract like this unexpectedly there's just bound to be loose ends in my experience, so I just don't know what those are, because they aren't really before me today. **So what I'm going to do is grant the motion for summary judgment but not grant the dismissal at this time. And you can either work on resolving those differences under the circumstances or you can go to trial on those issues.**

RP 53-54 (emphasis added).

Nonetheless, the trial court dismissed the action in its entirety. CP 846-48. As significant claims survived the trial court's grant of Lamb Weston's Motion for Summary Judgment, the trial court's dismissal of the case was in error. These surviving claims include:

Lamb Weston's breach of its obligation to repay the U.S. Bank loan in full.

Lamb Weston's failure to pay outstanding crop expenses for the 2009 season.

Lamb Weston's failure to provide timely notice of non-renewal for the 2010 crop season and fulfill its resulting obligations.<sup>5</sup>

Even if Lamb Weston properly terminated the Joint Venture Agreement, as found by the trial court on Lamb Weston's Motion for Summary Judgment, these separate breach of contract claims survived any such disposition, and dismissal of the case was in error.

This timely appeal followed.

#### **IV. ARGUMENT**

##### **A. Standard of Review.**

This Court reviews summary judgment determinations *de novo*. Hubbard v. Spokane Cy., 146 Wn.2d 699, 706-07, 50 P.3d 602 (2002). Summary judgment is warranted only if "there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Ellis v. City of Seattle, 142 Wn.2d 450, 458, 13 P.3d 1065 (2000) (quoting Trimble v. Wash. State Univ., 140 Wn.2d 88, 92-93, 993 P.2d 259 (2000)).

---

<sup>5</sup> See CP 005-006 (DC Farms' Complaint seeks damages for breach of contract for Lamb Weston's actions in "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.").

**B. Lamb Weston Breached the Joint Venture Agreement As a Matter of Law.**

Under the undisputed facts and as a matter of law, Lamb Weston breached the Joint Venture Agreement by terminating the Agreement without written notice and opportunity to cure.

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) (citing 17 William B. Stoebuck & John W. Weaver, Washington Practice: Real Estate: Property Law 6.76, at 437 (2d ed. 2004)). A termination notice that fails to follow the terms of the termination clause is “ineffective.” Id.; see also Tacoma Rescue Mission, 155 Wn. App. at 255 (finding that a termination notice that lacked a notice of termination date, as required by the contract and also failed to provide the reasons for termination “failed to comply with ... lease requirements” and was ineffective as a matter of law).

Because the power of termination is strictly construed under Washington law, “[i]f advance notice must be given, the termination is not effective until the notice period has expired.” 17 WAPRAC § 6.76 (citing Gray v. Gregory, 36 Wn.2d 416, 218 P.2d 307 (1950)); Stevenson v. Parker, 25 Wn. App. 639, 608 P.2d 1263 (1980) (where notice of termination did not provide notice of right to “remedy the default” as required by the contract, the notice was ineffective).

In fact, Washington courts have held that if a contract allows the breaching party to have time to cure a breach, an attempted termination that does not provide an opportunity to cure is not effective, even if 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) (party was not relieved of giving notice required by lease on theory that remedying breach was useless or impossible); see also Filmline (Cross-Country) Prods., Inc. v. United Artists Corp., 865 F.2d 513, 518 (2d Cir.1989) (notice of termination that included no provision to cure in compliance with explicit terms of contract constituted breach of contract).

In Gray v. Gregory, the lease at issue required the landlord to provide a notice of default and opportunity to cure before the lease could be terminated. Gray, 36 Wn.2d at 417. Due to an alleged breach of the lease, the landlord summarily terminated the lease without providing notice of default and an opportunity to cure, contending that no notice was necessary because the breach was “incurable” and irremediable. Id. at 417-18. The Court rejected the argument that the non-breaching party could summarily terminate the lease without complying with the requirements of the lease to provide notice before termination, even where it would have been “impossible” to cure the alleged breach. Id. at 418-19.

The Court in Republic Investment Co. v. Naches Hotel Company, also specifically rejected an argument that impossibility or futility negated the express contractual requirement of providing notice and opportunity to cure:

Respondent also contends that it was relieved of giving the notice provided for in the lease, because it was not required to do a useless thing - this on the theory that it was not possible for the lessee to fulfill its covenant relative to completing construction of the hotel building. In support of this contention, a number of cases are cited to the effect that where the lessee has so breached a covenant as to make reinstatement impossible, failure of the lessor to give notice of forfeiture as required by the lease will not defeat the action. We are inclined to the view, however, that these cases are not in harmony with the decisions of this court relative to forfeiture of this character.

Republic Investment Co., 190 Wash. at 182 (citing Walker v. McMurchie, 61 Wash. 489, 112 P. 500 (1911); Harlan v. McGraw, 107 Wash. 286, 181 P. 882 (1919)).

As detailed above, the Joint Venture Agreement unequivocally required Lamb Weston to provide written notice and description of a breach under the Agreement and seven days' opportunity to cure before it could declare a default and trigger its termination rights under the Agreement. CP 137-38. It is undisputed that Lamb Weston did not provide DC seven days opportunity to cure to cure under the Agreement. The termination letter unequivocally terminated the Agreement and makes no provision for DC Farms to cure.

As a matter of law, Lamb Weston breached the Joint Venture Agreement by summarily terminating the Agreement without contractually-required notice and opportunity to cure.

**C. The Trial Court Erred in Granting Summary Judgment in Favor of Lamb Weston, Where There is a Question of Fact As to Whether DC Farms Could Have Cured the Alleged Breach.**

Lamb Weston's Cross-Motion for Summary Judgment was based on an argument that DC Farms' alleged breach of the Agreement was "incurable".<sup>6</sup> There is – at the very least – a question of fact as to whether DC Farms could have reasonably cured the alleged default under the Agreement. DC Farms is entitled to the benefit of a jury's determination as to the futility or impossibility of the offered cures, given the disputed facts.

What constitutes a sufficient cure is not unilaterally defined and limited by Lamb Weston. Instead, a cure is designed to "place the nonbreaching party in the same position as he would have occupied had no breach occurred." Moulden & Sons, Inc. v. Osaka Landscaping & Nursery, Inc., 21 Wn. App. 194, 584 P.2d 968 (1978).

First, DC Farms could have replaced the rejected potatoes with the same quantity and quality of potatoes from cellars that had no potential glass contamination issues. CP 119-20. It is undisputed that Lamb Weston has a history of accepting replacement potatoes when there are issues with a certain cellar.<sup>7</sup> CP 74-75, CP 84-85. There is at least a

---

<sup>6</sup> CP 330.

<sup>7</sup> Lamb Weston has previously argued that it would not have been "obligated" to accept replacement potatoes because the Agreement solely required Lamb Weston to purchase certain potatoes from certain fields. Under Lamb Weston's argument, there could be no cure if DC Farms was unable to provide the exact potatoes from the fields specified in the Agreement. This argument is completely contradicted by the Agreement's termination provision, which specifically allows DC Farms the opportunity

question of fact as to whether providing Lamb Weston with the same quantity and quality of potatoes with no potential glass contamination issues would have put Lamb Weston in “the same position” as it would have been had the Joint Venture Potatoes been processed as initially planned. DC Farms is entitled to a jury’s determination of that factual issue.

Similarly, there is at least a question of fact as to whether placing additional safeguards to ensure against glass contamination could have cured the alleged breach. In fact, Lamb Weston has previously utilized this approach to dealing with potential glass or other contamination issues. CP 317-24, CP 184-87, CP 280. Most telling, the rejected Joint Venture Potatoes were later purchased and processed by Lamb Weston outside of the Agreement when it needed them. CP 120. At the very least, Lamb Weston’s argument that these potatoes could not be salvaged cannot be rectified with its contrary actions in later accepting these same potatoes.

Given the issues of fact inherent in Lamb Weston’s argument that the alleged glass contamination was an “incurable” default, the trial court erred in granting Lamb Weston’s Motion for Summary Judgment as a matter of law.

---

to cure a breach that results in “the loss of, or damage to, a material portion of the crop.” CP 137.

**D. The Trial Court Further Erred In Dismissing the Case Because Certain Claims Survived Summary Judgment.**

At the time the trial court orally ruled on the parties' Cross-Motions for Summary Judgment, it denied DC Farms' Motion for Partial Summary Judgment and granted Lamb Weston's Motion for Summary Judgment. RP 53-54. However, at that time, the trial court also expressly recognized that DC Farms had outstanding legal claims that survived summary judgment dismissal and indicated that the court was not inclined to dismiss the case outright. *Id.* Nonetheless, the trial court dismissed the action in its entirety.

The trial court's dismissal of the case is in error because three separate breach of contract claims remained after the trial court's ruling on summary judgment: (1) Lamb Weston's breach of the Agreement by failing to give timely notice of non-renewal or fulfill its resulting obligations under the Agreement; (2) Lamb Weston's failure to fulfill obligations to U.S. Bank, as provided under the Agreement; and (3) Lamb Weston's failure to pay certain incurred expenses for the 2009 and 2010 crop seasons.

**1. Lamb Weston Breached the Agreement's Requirement to Give Timely Notice of Non-Renewal.**

The Joint Venture Agreement provides for automatic extensions for successive one-year crop periods unless Lamb Weston provides written notice of non-renewal on or before October 1<sup>st</sup> of the prior crop year. CP 137. DC Farms maintains that Lamb Weston did not provide

written notice of termination of the Joint Venture Agreement for the 2010 crop season on or before October 1, 2009, and accordingly, Lamb Weston obligated itself to perform for the 2010 crop season. Thus, DC Farms maintains that Lamb Weston is liable for damages incurred under the Agreement as a result of the breach, including expenses for the 2010 crop season. See CP 620, 671-71, 834-37.

This claim is not dependent on Lamb Weston's ability to terminate the Joint Venture Agreement because the obligations arose in October 2009 – before Lamb Weston terminated the Agreement. Thus, this claim should have survived the trial court's summary judgment determination that Lamb Weston properly terminated the Agreement.

**2. Lamb Weston Breached the Agreement by Failing to Fulfill DC Farms' U.S. Bank Obligations.**

Also under the Agreement, Lamb Weston agreed to “pay Bank the remaining balance [of the Loan], including interest, so that Bank debt is paid in full”, in the event that the Crop proceeds are “insufficient” to repay the loan in full. CP 136. DC Farms claims that Lamb Weston failed to honor its obligation to repay the U.S. Bank loan, and that DC Farms suffered financial damages as a result of this breach of this provision of the Agreement. See CP 491, 670-71, 834-37.

Again, this claim is not dependent on the separate issue of whether Lamb Weston properly terminated the Agreement, and accordingly, it

should have properly survived the court's summary judgment determination.

3. **Lamb Weston Breached the Agreement's Obligations to Pay Certain Accrued Expenses for the 2009 Crop Season.**

In the event of termination, the Joint Venture Agreement also 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. DC Farms has a breach of contract claim based upon Lamb Weston's refusal to approve payment for DC Farm's accrued expenses for the 2009 crop season. CP 620, 670-671, CP 834-37.

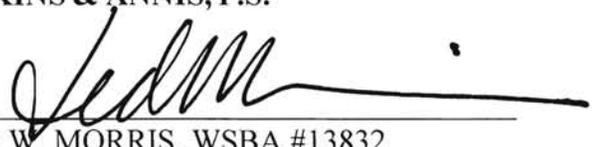
By its very terms, this claim should have survived a determination that Lamb Weston properly terminated the Agreement, because it is an obligation that expressly arises upon termination.

**V. CONCLUSION**

For the foregoing reasons, 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 a jury trial on the outstanding issues of whether DC Farms could have cured the alleged breach of the Agreement and additional breaches of contract.

Respectfully submitted this 29<sup>th</sup> day of October, 2012.

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

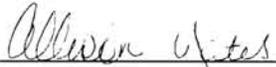
  
\_\_\_\_\_  
JED W. MORRIS, WSBA #13832  
TREVOR R. PINCOCK, WSBA #36818  
LAURA J. BLACK, WSBA #35672  
Attorneys for Appellant DC FARMS, LLC

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29 day of October, 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

  
\_\_\_\_\_  
ALLISON YATES