

FILED

NOV 20 2012

COURT OF APPEALS
STATE OF WASHINGTON

No. 309631
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STATE OF WASHINGTON
DIVISION III

DC FARMS, LLC, an Idaho limited liability company,

Appellant,

vs.

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

Respondent.

RESPONSE BRIEF OF RESPONDENT,
CONAGRA FOODS LAMB WESTON, INC.

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TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. ASSIGNMENTS OF ERROR 2

III. STATEMENT OF THE CASE..... 3

IV. ARGUMENT 8

 A. STANDARD OF REVIEW/APPLICABLE LAW 8

 B. FACTUAL MISREPRESENTATIONS CANNOT
 CREATE QUESTIONS OF FACT 9

 C. THE AGREEMENT WAS PROPERLY TERMINATED
 BY LW DUE TO DC FARMS' DEFAULT 10

 1. LW Relied Upon DC Farms' Own Reports
 Confirming the Glass Contamination..... 10

 2. The Law Does Not Require Performance of a
 Useless or Futile Act 12

 3. DC Farms Relies on Real Estate Law that Does
 Not Apply..... 15

 4. DC Farms' Default Could Not be Cured 17

 a. Visual inspections were insufficient 17

 b. LW was not contractually or legally
 required to accept "replacement
 potatoes" from other operations 21

 5. No Cure Was Effectuated Within Seven Days of
 the Written Notice of Default..... 23

 D. SUMMARY JUDGMENT DISMISSAL IS
 APPROPRIATE 24

 1. The Trial Court Did Not "Expressly Recognize"
 Additional Claims 25

 2. There are No "Additional" Claims that Survive
 Summary Judgment..... 26

a.	DC Farms misquotes the Agreement §7.1	27
b.	DC Farms misrepresents the Agreement §6.7	28
c.	DC Farms misrepresents the Agreement §3.3, and ignores the corresponding terms from the Tri-Party Agreement, ¶8 ...	30
V.	CONCLUSION	31

TABLE OF AUTHORITIES

Page

Cases

<u>Allbrand Discount Liquors v. Times Square Stores Corp.</u> , 60 A.D.2d 568, 399 N.Y.S. 2d 700 (2nd Dep't 1977).....	16, 17
<u>Anderson v. Liberty Lobby, Inc.</u> , 477 U.S. 242 (1986)	10
<u>Badgett v. Security State Bank</u> , 116 Wn.2d 563 (1991)	22
<u>Carlson Real Estate Co. v. Soltan</u> , 549 N.W.2d 376 (Minn.App. 1996).....	15
<u>Carlstrom v. Hanline</u> , 98 Wn. App. 780 (2000).....	9
<u>Egerer v. CRS West, LLC</u> , 116 Wn. App. 645 (2003).....	21
<u>Filmline (Cross-Country) Prod. v. United Artists</u> , 865 F.2d 513 (2nd Cir. 1989).....	16
<u>Gray v. Gregory</u> , 36 Wn.2d 416 (1950)	15, 16
<u>Hearst Communications, Inc. v. Seattle Times Co.</u> , 154 Wn.2d 493 (2005)	9
<u>In re Best Film and Video Corp.</u> , 46 B.R. 861 (Bankr.E.D.N.Y. 1985)	14
<u>Kelly v. Aetna Cas. & Sur. Co.</u> , 100 Wn.2d 401 (1983)	9
<u>Klontz v. Puget Sound Power & Light, Co.</u> , 90 Wn. App. 186 (1998).....	10
<u>L.K. Comstock & Co., Inc. v. United Engineers & Constructors Inc.</u> , 880 F.2d 219 (9th Cir.1989).....	14
<u>Larken, Inc. v. Larken Iowa City Limited Partnership</u> , 589 N.W.2d 700 (Iowa 1998).....	14
<u>Leghorn v. Wieland</u> , 289 So.2d 745 (Fla.App. 1974).....	14
<u>LJL Transp., Inc. v. Pilot Air Freight Corp.</u> , 905 A.2d 991 (Pa.Super.Ct. 2006)	15
<u>Marshall v. AC&S, Inc.</u> , 56 Wn.2d 181 (1989)	10

<u>McBride v. Walla Walla County,</u> 95 Wn. App. 33 (1999).....	23
<u>McDonald v. State Farm Fire & Cas. Co.,</u> 119 Wn.2d 724 (1992)	9
<u>McGary v. Westlake Investors,</u> 99 Wn.2d 280 (1983)	9
<u>Moratti v. Farmers Ins. Co. of Wash.,</u> 162 Wn. App. 495 (2011).....	13
<u>Music v. United Ins. Co. of America,</u> 59 Wn.2d 765 (1962)	13
<u>Overton v. Consolidated Ins. Co.,</u> 145 Wn.2d 417 (2002)	23
<u>Ranger Ins. Co. v. Pierce County,</u> 164 Wn.2d 545 (2008)	8
<u>Republic Inv. Co. v. Naches Hotel Co.,</u> 190 Wash. 176 (1937).....	15, 16
<u>Scott v. Harris, 550 U.S. 372 (2007).....</u>	10
<u>Smith v. Stockdale, 166 Wn. App. 557 (2012)</u>	10
<u>Stacey v. Redford, 226 S.W.3d 913 (Mo.App.S.D. 2007).....</u>	14, 15
<u>Tacoma Rescue Mission v. Stewart,</u> 155 Wn. App. 250 (2010).....	15, 16
<u>Willener v. Sweeting, 107 Wn.2d 388 (1986).....</u>	13
<u>Young v. Key Pharmaceuticals,</u> 112 Wn.2d 216 (1989)	8
 <u>Statutes</u>	
Federal Food, Drug and Cosmetic Act, 21 U.S.C. §342(a).....	18
RCW 62A.2-712.....	21

Other Authorities

17 WILLIAM B. STOEBUCK & JOHN W. WAVER,
WASHINGTON PRACTICE; REAL ESTATE: PROPERTY LAW
§ 6.76, at 437 (2d ed. 2004)..... 16

CR 15(b)..... 26

CR 56(c)..... 8

Volume 17 of *Washington Practice* 16

WPI 302.11..... 22

I. INTRODUCTION

Appellant DC Farms' employees caused thousands of tons of potatoes to become contaminated with broken glass by throwing potatoes at numerous overhead industrial-sized light bulbs in five storage cellars. The contaminated potatoes were contracted to be sold to Lamb Weston (LW) for use in making French fries. Pursuant to the applicable contract, LW had the right to terminate the contract due to DC Farms' default, which was defined to include

the negligence or misconduct of FARM, its employees or agents resulting in the loss of, or damage to, a material portion of the Crop.

Following LW's termination of the contract, DC Farms sued LW, arguing that LW had no cause to terminate, and failed to give DC Farms an adequate written notice of its default and an opportunity to cure. The Trial Court correctly dismissed DC Farms' claims as a matter of law, noting DC Farms' own police report, insurance claims and admissions under oath, in which DC Farms confirmed the glass contamination and damage to the crop. On appeal, DC Farms ignores—or worse, misquotes—relevant contract provisions, and continues a pattern of factual misrepresentations. DC Farms relies on inapplicable legal authority governing forfeiture of real property and unlawful detainer actions, and ignores law applicable to commercial contracts for the sale of goods.

The Trial Court correctly dismissed this case on summary judgment:

(1) DC Farms' default—pervasive glass contamination making the potatoes unsafe for human consumption—was incurable. Proposed visual inspections could not have guaranteed the absence of imbedded glass, and LW had no contractual or legal obligation to accept non-contracted "replacement" potatoes from other sources.

(2) Even if a cure were possible, DC Farms did not effectuate such cure within seven days of the written notice of default provided by LW.

(3) LW was not contractually obligated to pay for potatoes it never received, nor to cover DC Farms' expenses for a crop that was never delivered.

II. ASSIGNMENTS OF ERROR

DC Farms asserts that the Trial Court erred in (1) denying DC Farms' motion for partial summary judgment, (2) granting LW's motion for summary judgment, and (3) dismissing this case. The Trial Court properly ruled in LW's favor as a matter of law, and properly dismissed this case.

III. STATEMENT OF THE CASE

1. LW and DC Farms were parties to a Strategic Potato Supply Agreement ("Agreement"), dated January 29, 2009.¹ Under the Agreement, DC Farms was to grow specific varieties of potatoes in specific fields, produced "in a manner that makes [the potato Crop] suitable for storage and processing into high quality frozen French fries." Agreement, §1.4, §2.1.1 and §3.1 (CP 130-32).

2. DC Farms retained all title to and ownership of the potatoes until such time as they were delivered to LW. Agreement, §6.4 (CP 136). Upon delivery to LW's American Falls plant, LW was to pay a contracted price for the potatoes. "Total Crop expenses" were to be "deducted from the total Crop proceeds," and any "profits" above the cost of production were to be shared equally. Agreement, §6.6 and §6.7. (CP 136).

3. Relevant to this case, the Agreement also provided:

Section 7.2 Default, Remedies and Termination.

Default by FARM: Any of the following events 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 FARM:

(c) The negligence or misconduct of FARM, its employees or agents resulting in the loss of, or damage to, a material portion of the Crop.

¹ DC Farms incorrectly refers to this Agreement as a "Joint Venture Agreement." Plaintiff's purpose in mislabeling the Agreement was to support an argument that partnership law applied. (See CP 65). Partnership law was not pled in the Complaint, and this claim has been abandoned on appeal. The Strategic Potato Supply Agreement should be referred to by its proper name.

Section 7.2.2 LW's Remedies.

Upon any event of default...LW, in addition to any other remedy afforded it by law or by this Agreement:

(a) **May terminate this Agreement...**

(b) ...LW shall be entitled to reimbursement from FARM upon demand for any and all costs and expenses reasonably incurred by LW in connection with the default... It is specifically agreed that **LW has the right to set off** such costs and expenses against funds that would otherwise be due FARM under the terms of this Agreement.

(CP 137-38).

4. Following the 2009 potato harvest, DC Farms stored the contracted potatoes—over 24,000 tons—in eight of its storage cellars. (CP 377; CP 439-50). Each of these cellars had been inspected before the harvest, and there were no reported missing or broken lights. (CP 369; CP 452-67).

5. Starting on October 23, 2009, workers began to remove potatoes from one of the cellars for delivery to LW's American Falls plant for processing. On October 25, 2009, an operator in the cellar found a broken light bulb on potatoes being loaded onto a truck. (CP 469-70). Operations were suspended, and four truck loads of potatoes—approximately 110 tons—were dumped and "wasted" in order to eliminate any possible contamination caused by what was then thought to be an isolated bulb. (Id.)

6. Operations were subsequently resumed. In the overnight hours between October 26 and 27, 2009, another broken light bulb was found on a collection conveyor inside LW's American Falls processing plant. (*Id.*) The potatoes that were being processed were from the same DC Farms' cellar at which the first broken bulb was found.

7. An inspection of the cellars on October 27 and 28, 2009 revealed **30 light bulbs** in five cellars were broken out or missing. (CP 372-74; CP 474). One of DC Farms' owners, Doug Case, assisted with the investigation and collection of 21 metal bases from the broken bulbs, which were still screwed into the light fixtures. (CP 404; CP 379). Mr. Case pointed out that potato matter could be seen on several of the broken light fixtures. (CP 405-6; CP 474).

8. DC Farms' other owner, David Cooper, questioned the laborers employed by DC Farms who had been working in the cellars. Mr. Cooper advised that his employees admitted that they broke the lights by throwing potatoes at them. (CP 470; CP 474; CP 480).

9. Since it was impossible to isolate the segments of stored potatoes that might have contained glass from the broken light bulbs throughout the various storage cellars, all operations were halted. (CP 469).

10. At the time operations were halted, the five storage cellars that had broken or missing bulbs above the potatoes held over 13,000 tons of potatoes—more than half of the 2009 potato crop. (CP 443-50; CP 474).

11. DC Farms' owners suggested at the time that they put someone on the pile of potatoes to watch for glass when the potatoes were unloaded, and could have someone watch for glass while running the potatoes over a conveyor. Complaint, ¶3.10 (CP 3) (*See also*, CP 405, 410; CP 392-93). LW rejected this suggestion as it had a "zero tolerance" policy for glass in potatoes meant for human consumption, and there could be no guarantee that visual inspections could eliminate the possibility of imbedded glass. (CP 365; CP 379-80; CP 347).

12. Following the broken glass incident, DC Farms' owners filed a police report with the Bingham County (Idaho) Sheriff's office on November 17, 2009. (CP 385; CP 477-84). DC Farms reported to the police that their employee broke "about 20 lights" in four different storage cellars, and the broken glass fell down "into the pile of potatoes and were then covered in potatoes." According to DC Farms' owners, this left them with "\$2 to 2.5 million dollars in potatoes that *can't be sold* due to the broken glass." (*Id.*)

13. In addition, DC Farms' owners filed three separate insurance claims for damages caused by the glass contamination. They filed a liability claim with DC Farms' insurer, Oregon Mutual (CP 529, 536-37), and a liability claim and a property damage claim with another insurance company, Liberty Northwest, that insured Golden Sunset Ranch and DC Farms. (CP 395-6; CP 486-7; CP 521 CP 530). Golden Sunset Ranch was owned by the father-in-law of Mr. Case and Mr. Cooper, and DC Farms was a named insured under Golden Sunset's policy. (CP 525).

After investigating the claim—including interviewing DC Farms' owners—Liberty Northwest accepted the property damage claim for "damaged potatoes from glass shards;" determined the potatoes were a total loss; and paid its policy limits (\$850,000). (CP 398-99; CP 481; CP 489; CP 525; CP 533).

14. Doug Case confirmed that the report he made to the police and the insurance company regarding the glass contamination of the potatoes was "*the same report I made to Tommy Brown*" at LW. (CP 409).

15. On November 19, 2009, in response to DC Farms' report that the potatoes were contaminated with broken glass caused by its employees, LW hand-delivered to DC Farms a written notice that DC Farms was in default, and that it was terminating the Strategic Potato Supply Agreement pursuant to § 7.2(c). (CP 360; CP 432).

16. In subsequent months, DC Farms offered "replacement potatoes" from "other operations" for the potatoes rejected due to glass. Complaint, ¶3.10 (CP 3). The terminated Agreement contains no requirement that LW accept non-contracted "replacement potatoes." On the contrary, the Agreement was for specific potatoes from specific fields, grown in accordance with strict specifications to ensure the quality of the potatoes.² See Agreement, §§1.4, 1.8, 2.1.1, 3.1 (CP 130-32).

² The only "replacement" potatoes actually offered were sampled in June 2010, and did *not* meet minimum requirements for processing into frozen French fries. (CP 381).

17. Pursuant to the Agreement, §7.2.2(b), LW had the right to offset against amounts LW owed to DC Farms all costs and expenses incurred which were connected to DC Farms' default. During the latter part of 2009 and early 2010, DC Farms and LW engaged in settlement negotiations concerning amounts owed by LW to DC Farms for potatoes delivered to, and processed by, LW prior to the discovery of glass, minus the offset for "glass downtime costs" associated with LW having to shut down and clean that portion of its plant affected by the broken glass. (CP 363; CP 400; CP 435; CP 491-94). Although no written settlement agreement was ever executed, LW paid to DC Farms—and DC Farms accepted—\$243,860.54 in early 2010 for the cost of the potatoes delivered (\$345,142.33) minus LW's "glass downtime cost" (\$101,281.79) (CP 756-58).

IV. ARGUMENT

A. STANDARD OF REVIEW/APPLICABLE LAW

This is a review of an order on summary judgment. Accordingly, the Appellate Court reviews the ruling below *de novo*. Ranger Ins. Co. v. Pierce County, 164 Wn.2d 545,552 (2008). Summary judgment is appropriate where the pleadings, declarations, and materials on file show that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c); Young v. Key Pharmaceuticals, 112 Wn.2d 216, 225 (1989).

As in any breach of contract case, the rights, duties and obligations of the parties are governed by the specific terms of the written contract. McDonald v. State Farm Fire & Cas. Co., 119 Wn.2d 724, 733-34 (1992) ("clear and unambiguous contracts are enforced as written"). The interpretation of a contract is a question of law for the Court. Kelly v. Aetna Cas. & Sur. Co., 100 Wn.2d 401, 407 (1983). Terms of a contract are read as a whole, and given their ordinary, usual, and popular meaning. Hearst Communications, Inc. v. Seattle Times Co., 154 Wn.2d 493, 503 (2005). Contracts will be interpreted to avoid absurd results. Carlstrom v. Hanline, 98 Wn. App. 780, 784-5 (2000), *citing* McGary v. Westlake Investors, 99 Wn.2d 280, 285 (1983).

B. FACTUAL MISREPRESENTATIONS CANNOT CREATE QUESTIONS OF FACT.

As an initial matter, DC Farms misquotes the contract at issue, and makes various factual misrepresentations, both below to the Trial Court, and now to this Court on appeal. Many of the more egregious factual misrepresentations are detailed in LW's Appendices A and B, attached to this brief.³ Such misrepresentations contradict the record—most notably, DC Farms' own police report and insurance claims—and contradict the deposition testimony of DC Farms' owners. DC Farms cannot create a

³ Most of DC Farms' factual misrepresentations are not relevant to the legal arguments on appeal. LW chose to detail DC Farms' various misrepresentations in Appendices so as not to get sidetracked from relevant issues that are material to this appeal.

genuine issue of fact with self-serving declarations that contradict unambiguous deposition testimony. Klontz v. Puget Sound Power & Light, Co., 90 Wn. App. 186, 192 (1998), *quoting* Marshall v. AC&S, Inc., 56 Wn.2d 181, 185 (1989) ("To the extent that [plaintiff's] subsequent declaration contradicts his prior deposition testimony, a genuine issue of fact on the issue does **not** arise."); *See also*, Smith v. Stockdale, 166 Wn. App. 557, 567 (2012) ("[Plaintiff's] declaration cannot override her previous deposition to create an issue of fact.").

Further,

[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact. **When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.** (Italics in original, bold added).

Scott v. Harris, 550 U.S. 372, 380 (2007), *quoting* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986).

C. **THE AGREEMENT WAS PROPERLY TERMINATED BY LW DUE TO DC FARMS' DEFAULT.**

1. **LW Relied Upon DC Farms' Own Reports Confirming the Glass Contamination.**

According to the Agreement, LW had the right to terminate the contract due to:

The negligence or misconduct of [DC Farms], its employees or agents resulting in the loss of, or damage to, a material portion of the Crop.

Agreement, §7.2(c) and §7.2.2(a) (CP 137-38).

It is undisputed that broken industrial-sized light bulbs were found both in the contracted potatoes being unloaded at DC Farms' cellar, and at LW's plant. (CP 469-70; CP 474). The subsequent investigation of the cellars revealed that up to 30 light bulbs were broken or missing in five of the eight storage cellars. (CP 474). The contaminated cellars at issue held over 13,000 tons of the contracted potatoes—over half of the entire 2009 crop. (CP 439-50).

At the time the Agreement was terminated in November 2009, DC Farms had reported to LW, the police and an insurance company that the contracted potatoes were contaminated with broken glass. Specifically, DC Farms' owners reported to the police that their employees had broken the light bulbs, causing glass to "fall into and become covered by the potatoes" leaving them with "\$2 to 2.5 million in potatoes that can't be sold due to the broken glass." (CP 480). Likewise, DC Farms filed insurance claims seeking to recover damages for "damaged potatoes from glass shards." (CP 486-87; CP 521; CP 529-30).

It is undisputed that the report DC Farms made to the police and its insurer is the same report DC Farms made to LW. Doug Case admitted under oath:

Q: Now, at the time...that Deputy Lusk was contacted and you talked with Deputy Lusk based on what he has in his report, and then what you've said here

today, you felt that there might have been glass in the potatoes at the time; is that right?

A: Yes, that's what I thought at the time.

Q: And then at the time that you—the insurance claim was filed...you thought there might have been glass in the potatoes; isn't that right?

A: At the time I thought that.

Q: And then at the time that the investigator from the insurance company came out and talked with you and Dave, you still felt at that time that there might have been glass in the potatoes; isn't that right?

A. I think that's right. Yeah, that's right. That's what I told the investigator. Yeah, that's right, at the time, that's what I thought. **And that same report I made to Tommy Brown** [Manager of Ag Operations at LW].

(CP 409).

LW relied upon DC Farms' own report that its employees caused pervasive glass contamination of the contracted potatoes. As the "negligence or misconduct" of DC Farms' employees damaged "a material portion of the crop," LW had a contractual right to terminate the Agreement and refuse to accept the adulterated potatoes.

2. **The Law Does Not Require Performance of a Useless or Futile Act.**

DC Farms argues that LW did not properly terminate the Agreement because LW failed to provide a written notice of default and an opportunity to cure. Complaint, ¶¶3.15 and 4.3 (CP 5-6). Under the Agreement, §7.2, the "negligence or misconduct" of DC Farms or its employees shall be considered a material breach and default if it

...remain[s] uncured after receipt of seven (7) days written notice of default, which notice shall describe the nature of the default...

It is undisputed that DC Farms was notified of the glass contamination more than seven days prior to the termination of the Agreement. DC Farms' owners assisted with the initial investigation of the cellars in late October 2009, after the first broken light bulbs were discovered, and subsequently filed a police report and insurance claims due to the glass contamination of the potatoes. (CP 404-05). More than three weeks elapsed between the time the glass was first discovered and when the Agreement was terminated in late November.

The Agreement, however, does provide for receipt of seven days *written* notice of default. But such written notice of the known glass contamination would have served no purpose because the default was incurable. Washington law "does not require someone to do a useless act." Moratti v. Farmers Ins. Co. of Wash., 162 Wn. App. 495, 504-05 (2011), *citing* Willener v. Sweeting, 107 Wn.2d 388, 395 (1986) ("even where performance is a condition precedent to the right of action or performance of another, a party need not tender performance when other party will not perform that party's part of the agreement."); *see also*, Music v. United Ins. Co. of America, 59 Wn.2d 765, 768-69 (1962) (strict performance of contract terms not required if such performance would be futile. "[T]o

give literal meaning to such provision would be to exalt the letter of the law while submerging the spirit of the contract.").

No Washington court has directly addressed the question of whether a party to a commercial contract must give a written notice of a known default, and an opportunity to cure a breach that is incurable. Courts from other jurisdictions that have addressed this question, however, have uniformly rejected such a requirement. For example, a Missouri court recited the rule: "[t]he law does not require written notice to be given when doing so would be a vain and useless act." Stacey v. Redford, 226 S.W.3d 913, 918 (Mo.App.S.D. 2007). That court also surveyed other jurisdictions that had addressed this issue:

Missouri law is in accord with appellate decisions from other jurisdictions more specifically holding that **the failure to give written notice, pursuant to a notice-and-cure provision in a contract, does not prevent immediate termination of the agreement if the breach is incurable**. *See, e.g.,* L.K. Comstock & Co., Inc. v. United Engineers & Constructors Inc., 880 F.2d 219, 232 (9th Cir.1989) (the notice provision is based on the assumption that the breach which would be used to terminate the contract is curable; notice is not required where doing so would have been a useless gesture); In re Best Film and Video Corp., 46 B.R. 861, 875 (Bankr.E.D.N.Y. 1985) (notice provision assumes the breach which could result in termination is curable); Leghorn v. Wieland, 289 So.2d 745, 748 (Fla.App. 1974) (if the breach was so grave as to be incurable, giving notice would be a useless gesture); Larken, Inc. v. Larken Iowa City Limited Partnership, 589 N.W.2d 700, 703-05 (Iowa 1998) (a hotel owner had the right to immediately terminate a management

agreement because of the manager's self-dealing, despite a notice-and-cure provision in the contract); Carlson Real Estate Co. v. Soltan, 549 N.W.2d 376, 381 (Minn.App. 1996) (a notice-and-cure provision is inapplicable to a default that is not susceptible to cure); LJL Transp., Inc. v. Pilot Air Freight Corp., 905 A.2d 991, 992 (Pa.Super.Ct. 2006) (a 90-day cure provision was inapplicable to an admitted breach of agreement which was impossible to cure).

Stacey v. Redford, 226 S.W.3d at 918-19.

This rule is consistent with the Washington case authority, cited above, recognizing that Washington law does not require a party to a contract to perform a futile or useless act.

3. **DC Farms Relies on Real Estate Law that Does Not Apply.**

Ignoring this authority, DC Farms asserts that a contract—presumably any contract—that contains a notice of default and cure provision must be strictly enforced, and that any purported termination is not effective if there is no opportunity to cure, even if a cure is impossible. Appellant's Brief, p. 16-17. In support, DC Farms relies upon authorities governing *unlawful detainer actions*, and the forfeiture of real property. The first case cited by DC Farms, Tacoma Rescue Mission v. Stewart, 155 Wn. App. 250, 255 (2010) is instructive:

The purpose of an *unlawful detainer action* is to resolve in a summary proceeding the *right to possession of real property*. (Citation omitted). A termination notice that fails to follow a lease's terms *is ineffective to maintain an unlawful detainer action*. See Gray v. Gregory, 36 Wn.2d 416, 418-19 (1950); Republic Inv. Co. v. Naches Hotel Co., 190 Wash. 176, 180 (1937)...*Therefore*, "[p]owers of

termination must be exercised strictly in the manner provided in the termination clause." 17 WILLIAM B. STOEBUCK & JOHN W. WAVER, WASHINGTON PRACTICE; REAL ESTATE: PROPERTY LAW § 6.76, at 437 (2d ed. 2004).

On appeal, DC Farms relies on the cases cited in Tacoma Rescue, including Gray v. Gregory, Republic Inv. v. Naches Hotel, and even Volume 17 of *Washington Practice*, which governs "Real Estate: Property Law." DC Farms, however, cherry picks only certain parts of the relevant rulings in those cases, and fails to mention their true context. These cases governing forfeiture of real property and unlawful detainer actions do not apply to the Agreement at issue in our case, which is not a leasehold agreement.

The only case cited by DC Farms that involves a commercial contract that does not involve a leasehold forfeiture is a federal case out of the 2nd Circuit, Filmline (Cross-Country) Prod. v. United Artists, 865 F.2d 513 (2nd Cir. 1989). That case does not support DC Farms' argument. In Filmline, the court determined that, under New York law, a notice of termination that did not conform to the Agreement was ineffective. However, the court recognized an exception to this rule: a party need not undertake a "futile act." Filmline, 865 F.2d at 519 *citing Allbrand Discount Liquors v. Times Square Stores Corp.*, 60 A.D.2d 568, 399 N.Y.S. 2d 700 (2nd Dep't 1977). The futility exception did not apply

in Filmline because the evidence established that the cure was difficult but not impossible. Id.

Similar to New York, Washington State does not require a party to perform a futile or useless act.

4. DC Farms' Default Could Not be Cured.

a. Visual inspections were insufficient.

To the police, DC Farms' owners reported that its potatoes were contaminated with broken glass and "can't be sold." (CP 480). To its insurance company, DC Farms' owners asserted that the potatoes damaged by broken glass could not be cleaned, as this was cost prohibitive. (CP 523). That fact led to Liberty Northwest's determination that the covered property—DC Farms' potatoes—was a total loss, and payment of its policy limits, \$850,000, was appropriate. (CP 524-25). DC Farms accepted these insurance proceeds, and deposited the money in its general operating account. (CP 398-99; CP 489; CP 525).

In the context of this suit, however, DC Farms makes a different claim (but does not offer to return the insurance proceeds). DC Farms now asserts that it could have cured its breach by putting the potatoes "through additional safety procedures, such as extra inspections and/or running the potatoes through additional conveyers/sorters." Complaint, ¶3.10; (CP 3-4; *see also*, CP 392-93; CP 405, 410). But such proposed visual inspections

(apart from being inconsistent with its insurance claim) could not guarantee the absence of broken glass *imbedded* in the potatoes. Thankfully for consumers of its French fries, LW has "zero tolerance" for glass in its food products. (CP 365; CP 379-80). Dr. Richard Dougherty, a Food Safety Expert with extensive experience with food safety and quality issues, confirmed the obvious: any food product containing broken glass is "adulterated," as defined by federal law, and is potentially injurious to health. (CP 345-47) *See* the Federal Food, Drug and Cosmetic Act, 21 U.S.C. §342(a). In the case at hand:

Glass from the several broken bulbs could have been scattered among large quantities of the potatoes throughout the storage facilities destined for the Lamb Weston processing facility. **There would be no way visual inspections could guarantee the absence of imbedded glass particles.** Since it was impossible to isolate the segments of stored potatoes that might have contained glass from the broken light bulbs, Lamb Weston properly refused to accept raw potatoes from the suspect storage facilities owned and operated by DC Farms, LLC. (Emphasis added).

(CP 347 at ¶4).

Dr. Dougherty's conclusions are wholly uncontroverted. The mere possibility of glass contamination was a sufficient basis to reject the potatoes—particularly under the present circumstances in which dozens of broken or missing lights were unaccounted for and reported by DC Farms itself to be buried throughout the potato piles in five potato cellars.

Rather than contesting whether the visual inspections could detect glass particles *imbedded* in the potatoes, DC Farms makes two assertions that are demonstrably false. First, DC Farms claims it is "most telling" that LW subsequently purchased and processed—under a different contract—*the very same* potatoes that it previously rejected as being contaminated. (Appellant's Brief, p. 19). This is false. In actuality, LW subsequently purchased only those potatoes that were *not* stored in the cellars that had broken lights. Broken or missing lights were discovered in five of the eight storage cellars DC Farms used to store the 2009 potato crop. (CP 474; CP 440-50) In May 2010, LW entered into a separate contract with DC Farms (the 2009 Agreement having been terminated), for the purchase of the 2009 potatoes still stored in *the three uncontaminated cellars*, that is, the three cellars (#3704, #3705 and #3214/Nickel) that did *not* have broken lights or any potential for glass contamination. (CP 539-49; *see also*, CP 61 at ln. 19). **It does not follow that because LW subsequently purchased and processed the uncontaminated potatoes, it could or would have also processed the potatoes contaminated with broken glass.**

Second, DC Farms asserts that LW "has previously utilized this approach [extra visual inspections] to dealing [sic] with potential glass or other contamination issues" Appellant's Brief, p. 19, *citing* CP 317-24, CP

184-87, CP 280. CP 184-87 is a summary from LW of all instances between June 2006 and December 2011, in which a glass object was found in potatoes being processed at LW's American Falls plant. CP 317-24 is LW's American Falls plant manager, Bob Schutte's testimony about some of these incidents. In all cases (except for the case at hand), the glass was a discrete single event, such as a beverage bottle picked up from the field during harvest. The response was to shut down the line, isolate the contamination, and dump or waste any raw product that may have been affected. Additional inspectors were used to "look for the root cause" of the contamination. (CP 321, 324).

This is completely consistent with the decision to reject raw potatoes that were contaminated with broken glass while sitting in DC Farms' storage cellars. The root cause of the contamination was known: broken glass from numerous broken industrial-sized light bulbs throughout five of the eight cellars. What was also understood—from DC Farms' own report—was that the glass contamination was pervasive, and the contamination could not be isolated in any meaningful way with regard to the potatoes in the five affected cellars. (CP 347; CP 474). DC Farms cannot create a genuine issue of material fact by comparing how LW handled other vastly dissimilar foreign material incidents.

b. LW was not contractually or legally required to accept "replacement potatoes" from other operations.

DC Farms also argues that it could have "cured" its breach by swapping the contaminated potatoes with "replacement potatoes available from other operations." Complaint, ¶3.10 (CP 3); Appellant's Brief, p. 18. But there is nothing in the Agreement that requires LW to buy "replacement" or substitute potatoes. On the contrary, the contract was not simply for an *amount* of generic potatoes. The Strategic Potato Supply Agreement was for specific potatoes from specific fields. (CP 365). Specifically, the "Crop" was defined to mean all the potatoes "grown on the Properties," which in turn was defined as specific fields identified in the Agreement. Agreement, §1.4 and §1.8 (CP 130-31). The Agreement allowed LW to monitor the quality of the potatoes to ensure they were "suitable for storage and for processing into high quality frozen French fries." Complaint, ¶¶3.1 and 3.4 (CP 1-2); and Agreement, §3.1 (CP 132).

Under the Uniform Commercial Code, as adopted in Washington, if a seller fails to deliver contracted goods, the buyer *may* "**cover**" by buying substitute goods, **but is not required to do so**, and the failure to cover does not preclude the buyer from any other remedies, such as termination of the contract and recovery of damages. *See* RCW 62A.2-712; Egerer v. CRS West, LLC, 116 Wn. App. 645, 649-50 (2003) (the buyer may cover, that is, purchase substitute goods, or as a "complete alternative," the buyer may decline to cover, and recover damages for nondelivery).

The Appellant's argument that it could have "cured" its breach by *forcing* LW to accept non-contracted "replacement" potatoes suggests that LW was *required* to cover by buying substitute potatoes that did not come from the contracted fields. Such would be inconsistent with the Agreement, and is inconsistent with the UCC as adopted in Washington.

Apart from the UCC, Washington law governing contracts does not require a party to accept a material change to the contract, or otherwise accept a term to which it did not agree. Every contract carries with it an implied duty of good faith and fair dealing, which obligates the parties to "cooperate with each other so that each may obtain the full benefit of performance." WPI 302.11; Badgett v. Security State Bank, 116 Wn.2d 563, 569 (1991). But any alleged "duty of good faith and fair dealing" cannot trump the express terms of the written contract, and a party is not obligated to accept a material change:

[T]here cannot be a breach of the duty of a duty of good faith when a party simply stands on its rights to require performance of a contract according to its terms.

Id., 116 Wn.2d at 570.

The Agreement provides that LW had the right to terminate the Agreement if the negligence or misconduct of DC Farms' employees results in the loss of, or damage to, a material portion of the Crop. LW did not breach the Agreement, nor any duties of good faith or fair dealing, by exercising express contract rights agreed to by DC Farms, and refusing

to alter the terms of the contract to apply to "replacement" potatoes from other sources not grown in accordance with the Agreement.

DC Farms purports to provide an expert opinion that accepting replacement potatoes would have been a "reasonable" thing to do. Appellant's Brief, p. 10, *citing* CP 634. But nowhere does Appellant's expert analyze the applicable Agreement to determine if such an idea is consistent with the actual terms of the contract. To the contrary, the Agreement was for specific potatoes grown in a specific manner from specific fields. There was no contractual requirement that LW accept substitute potatoes from another source. And whether a party is required to accept non-contracted substitute goods in order to allow a defaulting party to "cure" is a legal conclusion. Legal conclusions offered under the guise of "expert opinions" are properly excluded by the Court. McBride v. Walla Walla County, 95 Wn. App. 33, 37 (1999); Overton v. Consolidated Ins. Co., 145 Wn.2d 417, 430 (2002).

5. No Cure Was Effectuated Within Seven Days of the Written Notice of Default.

Even if DC Farms could have cured its breach, it did not do so within seven days of receiving written notice of default. It is undisputed that the broken and missing lights were discovered between October 25 and 28, 2009. Following LW's investigation, which was based in large part on DC Farms' report to LW confirming the glass contamination, LW

delivered a written letter to DC Farms on November 19, 2009 advising DC Farms of its decision to terminate the Agreement pursuant to §7.2(c), due to the "pervasive glass contamination" of the potatoes "due to DC Farms' negligence and/or misconduct in the supervision and storage of potatoes in the DC Farms' potato storage sheds." (CP 432).

If a written notice of default is required, then it was provided by this November 19 letter. No cure was effectuated between November 19 and November 26. (CP 394). At the latest, the Agreement properly terminated on November 26, 2009, seven days after delivery of the written notice of default.

D. SUMMARY JUDGMENT DISMISSAL IS APPROPRIATE.

DC Farms' Complaint contains one—and only one—cause of action: "Breach of Contract and the Contractual Duty of Good Faith and Fair Dealing." Complaint, §IV (CP 5). DC Farms' breach of contract claim against LW was based entirely on the allegation that LW improperly terminated the contract at issue. Specifically, DC Farms alleged that LW breached the contract by terminating it without cause, and without proper notice and opportunity for DC Farms to cure its default. Complaint, ¶¶3.12, 3.16., 3.17, and 4.4 – 4.6 (CP 4-6).

The only damages DC Farms sought to recover were "**[d]amages for breach of contract** as alleged herein." Complaint, §IV (sic) Prayer

For Relief, ¶2 (CP 6). This breach of contract claim was rejected by the Trial Court on summary judgment. As a matter of law, the Court concluded "this contract was properly terminated" due to glass contamination (as confirmed by DC Farms' own reports), and "there's no breach of contract on [LW's] part." RP 52-54.

DC Farms alleged no damages, and asserted no claim or cause of action in its Complaint that was independent of its breach of contract claim. If there is no breach of contract as a matter of law, DC Farms is not entitled to recover damages from LW.

1. The Trial Court Did Not "Expressly Recognize" Additional Claims.

DC Farms asserts that the Trial Court "expressly recognized that DC Farms had outstanding legal claims that survived summary judgment dismissal." Appellant's Brief, p. 20. A simple reading of the transcript from the relevant proceedings reveals this to be false. (*See* Appendix A). Following the summary judgment hearing, the Trial Court ruled that LW did not breach the Agreement, but was "unclear" whether dismissal was appropriate because there might be "loose ends" that were "not really before me today." RP 52-53. The Trial Court confirmed it was *not* ruling on whether any claims existed that survived summary judgment:

MR. KOBLUK: So you're...not ruling that there are other issues?

THE COURT: No.

MR. KOBLUK: You're just saying that you don't know?

THE COURT: I don't know, and as a matter of caution I'm not ready to dismiss this claim, because it just occurs to me that anytime you truncate a contract like this there's probably—there may or may not be contractual rights at that time, but that hasn't been the focus of either party's arguments today.

(RP 56).

The Trial Court gave the parties a couple of weeks to sort this out and submit additional briefing and argument. Following subsequent briefing and a hearing on presentment, the Trial Court again reiterated that "this contract was terminated properly;" was satisfied there were no "loose ends;" and dismissed the case as a matter of law. (RP 75, 78). It is disingenuous for DC Farms to assert that the Court initially declined to dismiss because it "expressly recognized" that additional claims existed.

2. There are No "Additional" Claims that Survive Summary Judgment.

DC Farms argues that even if LW properly terminated the Agreement and did not breach the contract, there are unpled contract "claims" that survive summary judgment.⁴ DC Farms supports its arguments by misquoting one provision of the Agreement, and taking

⁴ DC Farms suggested in its briefing on presentment (after the Trial Court's oral ruling on summary judgment) that the court could allow it to amend its Complaint to conform to the evidence under CR 15(b). (CP 837). DC Farms filed no such motion to amend, and no such order is at issue on appeal.

selective portions of two inapplicable provisions completely out of context.

a. DC Farms misquotes the Agreement §7.1.

First, prior to the discovery of broken glass, the 2009 Agreement automatically renewed on October 1, 2009 for the successive one-year crop period (2010). DC Farms argues that because the Agreement automatically renewed, LW is obligated to pay for crop expenses for the 2010 crop, which are separate from the 2009 crop expenses. But when quoting the relevant contract provision, DC Farms *omits* dispositive language. *See* Appellant's Brief, p. 6. The following is the applicable provision, with the omitted language highlighted:

This Agreement...shall automatically extend for successive one-crop year periods on each October 1st 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.*

Agreement, §7.1 (CP 137).

It is undisputed that the Agreement, which applied "collectively" to both the 2009 crop and the 2010 extension, was terminated early pursuant to §7.2(c) of the Agreement. (CP 432). Accordingly, from the date of termination in November 2009, there was no further contractual obligation for either the 2009 or the 2010 potato crop.

b. DC Farms misrepresents the Agreement §6.7.

Second, DC Farms argues that the Agreement provides: in the event that the crop proceeds are "insufficient" to repay DC Farms' loan, LW agreed to "pay Bank the remaining balance [of DC Farms' Loan], including interest, so that Bank debt is paid in full." Appellant's Brief, p. 21. The quoted language is from the Agreement, §6.7 (CP 136). This selective reading of that section ignores language requiring payment by LW only after "the raw product was delivered." (*Id.*) This follows provisions governing ownership and delivery of the Crop (§6.4), and providing that "total Crop expenses" are to be deducted from "total Crop proceeds." (§6.6).

LW's contractual obligation was to pay DC Farms' crop expenses *from the proceeds of the Crop*. Only if the "total proceeds" were "insufficient," was LW obligated to pay off DC Farms' outstanding bank debt. Due to the glass contamination, the Agreement was terminated, and the potato Crop was not delivered to LW. Thus, LW received no crop proceeds, and had no corresponding obligation to pay crop expenses. Simply stated, LW did not guarantee DC Farms' loan, and the Agreement does not require LW to pay for a Crop that was not delivered.

Further, it is undisputed that DC Farms has already received all of the proceeds for its 2009 potato crop, and that these proceeds were more

than sufficient to cover all outstanding crop expenses DC Farms now claims. DC Farms is not entitled to be paid *again* for these expenses by LW. Plaintiff has alleged \$615,060 in 2009 crop expenses that were "incurred but not reimbursed through the line of credit." (CP 754). DC Farms' own records and admissions establish that DC Farms received more than sufficient proceeds from the 2009 crop to cover these expenses.

DC Farms received:

- \$243,860.54: from LW for potatoes delivered before the discovery of glass (\$345,142.33 minus glass downtime cost of \$101,281.79) (CP 756-58);
- \$1,469,830.32: from LW (under a separate contract) for the potatoes in the three uncontaminated cellars (CP 759-61);
- \$737,028: from Nonpareil and other brokers for "salvage" of the potatoes in the five contaminated cellars (CP 763-95);
- \$850,000: property insurance proceeds for the same contaminated potatoes (CP 398-99; CP 481; CP 489; CP 525).

Under the Agreement (and assuming delivery of the Crop), LW's obligation was to pay "total Crop expenses...from total Crop proceeds." Agreement, §6.6 (CP 136). Because DC Farms already received the total Crop proceeds—which far exceed its claimed crop expenses—DC Farms is not entitled recover anything further from LW.⁵

⁵ Likewise, DC Farms received 100% of the proceeds for its 2010 potato crop. (CP 825-27).

c. **DC Farms misrepresents the Agreement §3.3, and ignores the corresponding terms from the Tri-Party Agreement, ¶8.**

Finally, DC Farms argues that LW was required "to approve all outstanding and unpaid Crop expenses properly incurred by FARM...for funding under the Loan..." Appellant's Brief, p. 22. The quoted language is lifted from the second paragraph of §3.3 (CP 132). The first paragraph of that section provides that this applies under circumstances in which LW exercises its **option to take over completion of the crop**, that is, "to enter on the Properties and conduct the Farming Practices." *See also*, Agreement, §7.2.2(a): if DC Farms became unable to complete growing or harvesting operations, LW had the option to hire a different farmer to take over and "continue farming operations and produce the Crop." (CP 138).

If LW exercised the option to take over completion of the crop, LW agreed to approve expenses "for funding under the Loan." Agreement, §3.3 (CP 132). The "Loan" refers to DC Farms' loan with US Bank. The Agreement does *not* require LW (as opposed to DC Farms' bank) to pay these expenses. Rather, the only obligation for LW to pay for these expenses is found in the Tri-Party Agreement, executed between DC Farms (as the farmer and borrower), US Bank (as the lender), and LW (as the contracted purchaser of the Crop). (CP 150-53). Again, in the event LW exercised the option of taking over completion of the crop, it agreed

"to approve all outstanding and unpaid Crop expenses properly incurred by Farm...*Thereafter, upon assignment from Bank to LW of the Loan note*...LW agrees to immediately pay Bank any and all amounts...that have been advanced or have accrued under the Loan." Tri-Party Agreement, ¶8 (CP 151).

LW did not exercise its option to take over completion of the Crop, and the Bank never assigned DC Farms' Loan to LW. On the contrary, the potato crop had already been harvested and the potatoes were contaminated while in DC Farms' storage cellars. There was no reason for LW to take over farming operations, which had been completed. The provisions related to payment of "unpaid crop expenses" upon taking over completion of the crop do not apply.

V. CONCLUSION

LW properly terminated the Strategic Potato Supply Agreement due to DC Farms' default, which caused thousands of tons of potatoes to become contaminated with broken glass. DC Farms' factual assertions are inconsistent with the record—including DC Farms' owners' police report, insurance claims and deposition admissions—and its legal claims are not supported by Washington law. Summary dismissal of this case was proper, and should be affirmed.

RESPECTFULLY SUBMITTED this 20th day of November, 2012.

PAINÉ HAMBLÉN LLP

By: _____



GREGORY J. ARPIN, WSBA #2746

GERALD KOBLUK, WSBA #22994

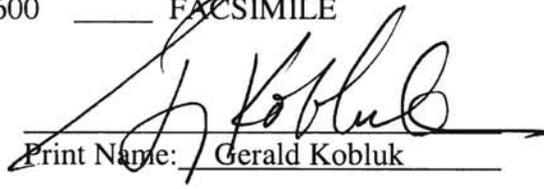
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of November, 2012, I caused to be served a true and correct copy of the foregoing **RESPONSE BRIEF OF RESPONDENT, CONAGRA FOODS LAMB WESTON, INC.**, by the method indicated below and addressed to the following:

Jed W. Morris
Trevor R. Pincock
Lukins & Annis, P.S.
717 West Sprague Avenue, Suite 1600
Spokane, Washington 99201

U.S. MAIL
 HAND DELIVERED
 OVERNIGHT MAIL
 FACSIMILE


Print Name: Gerald Kobluk

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APPENDIX A

Misquotes and Factual Misrepresentations

Appellant's Brief misquotes the contract at issue, and is filled with numerous factual misrepresentations. This list below contains some of the more egregious examples. This list is not intended to be exhaustive.

<p><u>Misquote:</u> (Appellant's Brief, p. 6)</p> <p>"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 1st 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..."</p>	<ul style="list-style-type: none">• This quote is from §7.1 of SPSA (CP 137)• DC Farms <i>omits</i> relevant and dispositive language.• "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 1st unless Lamb Weston provides written notice of non-renewal on or before October 1, 2009 or annually thereafter (<i>collectively, the "Term"</i>); <i>provided, however, that this Agreement is subject to early termination as provided under Sections 7.2 or 7.3 below.</i> For purposes of clarity, if Lamb Weston..."• The SPSA was terminated early pursuant to §7.2 due to DC Farm's default. (<i>See</i> CP 183)
<p><u>Misrepresentation:</u> (Appellant's Brief, p. 7)</p> <p>"Lamb Weston was already looking to limit losses on DC Farms' 2009 Joint Venture [<i>sic</i>] Potatoes. <u>See</u> 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)."</p>	<ul style="list-style-type: none">• The cited email (CP 173) concerns an excess of "<i>Eliminators</i>" (<i>See</i> Subject line of email)• "Eliminators" are undersized potatoes that are separated from the potato crop at the time of harvest as they are not suitable for processing into frozen French fries (hence, they are "eliminated" from inclusion under the contract).• This email regarding "excess" <i>eliminators</i> being offered to a "dehy" plant has nothing to do with the 2009 SPSA potatoes DC Farms had in storage.

<p><u>Misrepresentation:</u> (Appellant's Brief, p. 8)</p> <p>"No one from Lamb Weston contacted DC Farm's [<i>sic</i>] 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..." (Citing CP 304-11, depo. of Jan deWeerd)</p>	<ul style="list-style-type: none"> • Both owners of DC Farms, Case and Cooper, were present and assisted LW employees with the investigation of the broken glass. (CP 180) • LW relied on information <i>provided by DC Farms owners</i> that confirmed that the potatoes were contaminated with glass broken by its employees. (CP 225-26; 295-98) • DC Farms filed a "felony malicious injury" police report against its employee for throwing potatoes in various storage cellars, causing broken glass from about 20 lights to "fall down into the pile of potatoes and were then covered in potatoes." (CP 477-484) • DC Farms' owners filed insurance claims for "damage to potatoes due to glass shards." (CP 486-89) (and recovered policy limits under a property damage policy) • Doug Case admitted under oath that the reports DC Farms made to the police and the insurance companies were "<i>the same report I made to Tommy Brown</i>" at LW. (CP 409) • The deposition testimony from Jan deWeerd cited by Appellant confirms that the decision to reject the potatoes was made over a seven to ten day period that <i>followed</i> the investigation report and DC Farms' representations to LW about the glass contamination. (CP 304-311)
<p><u>Misrepresentation:</u> (Appellant's Brief, p. 10)</p> <p>"Indeed, even Lamb Weston has subsequently admitted that these would have been 'viable options.' CP 275."</p> <p>[regarding DC Farms' offer of additional visual inspections or replacement potatoes]</p>	<ul style="list-style-type: none"> • The "viable options" quote is from the deposition of Bart Ralphs (CP 275). • Ralphs is <i>not</i> a speaking agent of LW. This is confirmed both by DC Farms' counsel's question, and Ralph's answer (at CP 275): <p>Q: What do you think about those ideas? <i>I know you're not the guy who makes the decision, but do they seem like viable options in your mind?..</i></p>

	<p>A: If you're asking <i>my opinions</i>, yes, I thought those were viable—viable options, but here again, <i>they needed to talk to somebody that can make those decisions</i>...I've never been in the situation where that has had to happen.</p> <ul style="list-style-type: none"> • Opinions offered by non-speaking agents are not "admissions" of LW.
<p><u>Misrepresentation:</u> (Appellant's Brief, p. 11)</p> <p>"Lamb Weston has admitted that it would have processed the Joint Venture [<i>sic</i>] Potatoes '[i]f it would have been a different year.' CP 280."</p>	<ul style="list-style-type: none"> • Again, this quote is taken from Bart Ralph's deposition testimony (CP 280). • Ralphs is not a speaking agent of LW, and was offering "my opinion" only. (CP 281) • Opinions offered by non-speaking agents are not "admissions" of LW.
<p><u>Misrepresentation:</u> (Appellant's Brief, pp. 11, 19)</p> <p>"Most telling, the rejected Joint Venture [<i>sic</i>] Potatoes were later purchased and processed by Lamb Weston outside of the Agreement when it needed them. CP 120." (pp. 11 and 19)</p> <p>"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. (p. 11)</p> <p>"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." (p. 19)</p>	<ul style="list-style-type: none"> • The glass contamination occurred in 5 of DC Farms' 8 storage cellars. (CP 180; 443-50) LW subsequently purchased potatoes from the three cellars (#3704, 3705 and 3214/Nickel) that did not have any broken or missing lights. (CP 540) • Appellant cites to Cooper's own declaration (CP 120), in which he confirms at ¶ 19: "...LW agreed to process the joint venture [<i>sic</i>] potatoes from the three cellars that had no broken or missing lights." (See also, CP 61) • LW never purchased from DC Farms or processed the "same" potatoes that were rejected as being potentially contaminated with broken glass.
<p><u>Misrepresentation:</u> (Appellant's Brief, pp. 5, 21)</p> <p>Lamb Weston "guaranteed payment of [DC Farms'] expenses and loan obligations." (p. 5,</p>	<ul style="list-style-type: none"> • Lamb Weston was not party to, and did not guarantee DC Farms' obligations under DC's bank loan. • The rights and obligations as between DC

<p><i>citing</i> CP 130-40, CP 224, CP 239)</p> <p>"...Lamb Weston failed to honor its obligation to repay [DC Farms'] U.S. Bank loan..." (p. 21, <i>citing</i> CP 491, 670-71, 834-37)</p>	<p>Farms and LW with regard to the 2009 Potato Crop are defined by the SPSA. (CP 130-48).</p> <p>§6.4: DC Farms owned the potatoes until they were delivered to LW.</p> <p>§6.6 and 6.7: Following delivery, LW was obligated to pay for crop expenses from the proceeds of the potato crop.</p> <ul style="list-style-type: none"> • Nothing in the SPSA requires LW to pay for DC Farms' crop expenses if no crop is delivered. • As the contracted purchaser of the potato crop—which was collateral for DC Farms' loan—LW was granted certain rights in accordance with a Tri-Party Agreement. (CP 150-55). Nowhere in this Agreement does LW <i>guarantee</i> payment of DC Farms' debt.
<p>Misrepresentation: (Appellant's Brief, pp. 13, 20)</p> <p>"...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." (<i>citing</i> RP 53-54)</p>	<ul style="list-style-type: none"> • The trial court granted LW's motion for summary judgment, ruling that LW did not breach the SPSA, but was initially "unclear" whether dismissal was appropriate because there might be "loose ends" that were "not really before me today." RP 52-53. • Contrary to "expressly recognizing" additional claims, the trial court reserved ruling: <p>MR. KOBLUK: So you're not ruling that there are other issues? THE COURT: No. MR. KOBLUK: You're just saying that you don't know? THE COURT: I don't know, and as a matter of caution I'm not ready to dismiss this claim, because it just occurs to me that anytime you truncate a contract like this there's probably—there may or may not be contractual rights at that time, but that hasn't been the focus of either party's arguments today...Why don't you talk a</p>

couple of weeks. (RP 56)

- Following subsequent briefing and a hearing on this discrete issue, the Court explained: "what I meant by 'loose ends' I probably should have been more careful...I was just wondering out loud if there weren't some contract close-out issues..." RP 75. The Court ultimately decided there weren't any such issues, and dismissed the case. RP 78. The Court's dismissal did not conflict with any "expressly recognized" existing legal claim.

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APPENDIX B

Abandoned Factual Misrepresentations

To the Trial Court below, DC Farms relied on various factual assertions that were demonstrably false, and contradicted by the record, including DC Farms' owners' own sworn testimony. DC Farms appears to have abandoned these factual assertions on appeal, but they are relevant to show that the Trial Court correctly rejected DC Farms' arguments on summary judgment.

Misrepresentation: (Plaintiff's Response to Defendants' Motion for Summary Judgment, p. 3, CP 608)

"Doug Case and David Cooper did NOT report to the Bingham County Sheriff deputy, or anyone else, that a DC employee broke out lights in the storages; and they never reported to anyone that there was pervasive glass contamination of the potatoes." (CP 608, ln. 15)

(See also CP 616, ¶7, and CP 625, ¶8)

- Bingham County Police Report. (CP 477-84) DC Farms' filed a "felony malicious injury" report against its employee for breaking numerous lights and contaminating millions of dollars of potatoes with broken glass.

- Confirmed by Deputy Drew Lusk. (CP 385-88)

- Insurance claims for "damage to potatoes due to glass shards." (CP 486-89)

- Confirmed by claims representative for Liberty NW Ins. (CP 521) and Oregon Mutual Ins. (CP 530).

- Case previously admitted under oath that the reports DC Farms made to the police and to the insurance companies were "*the same report I made to Tommy Brown*" at LW. (CP 409)

- DC Farms' representations are reflected in the Investigation Report. (CP 470; CP 474)

Misrepresentation: (Memorandum in Support of DC Farms' Motion for Partial Summary Judgment, pp. 3-4, CP 55-56)

"DC was aware that several of these cellars contained burned out, missing, and broken light bulbs...prior to the time they were loaded with potatoes." CP 55, ln. 13

- DC Farms' police report and insurance claims are premised on broken glass in the potatoes. If there was no glass—because the lights had been missing before harvest—DC Farms would be subject to criminal liability for filing a false police report and insurance fraud.

<p>[DC Farms argued the contracted potatoes may not have been contaminated with glass after all, thus LW had no right to terminate the SPSA.]</p>	<ul style="list-style-type: none"> • Deputy Lusk: No report that lights were missing before harvest. (CP 386) • Bob Durbin (Liberty NW Ins.): No report that lights were missing before harvest. (CP 522) • Bob Bafaro (Oregon Mutual Ins.): No report that lights were missing before harvest. (CP 532-33)
<p>Misrepresentation: (Plaintiff's Response to Defendants' Motion for Summary Judgment, p. 7, CP 612)</p> <p>"...Article 2 of the Uniform Commercial Code does not apply. This was not a sale of potatoes." (CP 612, ln. 7).</p>	<ul style="list-style-type: none"> • The sole purpose of the SPSA was for DC Farms to grow potatoes per the contract for sale to LW. (CP 130-40) • §6.4 and §6.7: DC Farms retained ownership of the Crop until such time it was delivered to and purchased by LW. (CP 136) • §6.1.3: LW granted security interest in the Crop. (CP 135) • The Tri-Party Agreement confirms that DC Farms was to grow potatoes for sale to LW. (CP 150-55) • "Background" paragraph: "LW is the contracted purchaser of the Crop." (CP 150) • ¶ 2: LW to be provided all "UCC filings" related to Crop. (CP 150) Since the Crop was used as collateral for the loan, DC Farms filed a UCC Financing Statement for the potato Crop.
<p>Misrepresentation: (Plaintiff's Response to Defendants' Motion for Summary Judgment, pp. 3 and 6, CP 608, 611)</p> <p>"DC did not receive any insurance proceeds [for damage to the potatoes] from Liberty Northwest." (CP 608, ln. 19)</p>	<ul style="list-style-type: none"> • Liberty NW Ins. paid insurance limits (\$850,000) for "damaged potatoes from glass shards" related to potatoes owned by DC Farms. (CP 489; CP 525) (The payment went to "attn David Cooper" at Golden Sunset Ranch. DC Farms was a named insured on Golden Sunset's insurance policy, which covered the potatoes owned by DC Farms.)

	<p>(CP 525)</p> <ul style="list-style-type: none">• Doug Case admitted these insurance proceeds were deposited into DC Farms' general operating account. (CP 398-99)• After DC Farms received these insurance proceeds, Cooper dropped the criminal complaint. Pursuant to Deputy Lusk's police report: "at this time they are no longer interested in pursuing the case as they were paid by the insurance company." (CP 481)
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