

No. 62713-9-I

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON, DIVISION I

LIN XIE, INDIVIDUALLY AND DBA
GIANT INTERNATIONAL
METAL RESOURCES, AND THE
MARITAL COMMUNITY,
Appellant,

v.

SEATTLE IRON & METALS
CORPORATION, A WASHINGTON
CORPORATION,
Respondent.

2009 SEP - 8 PM 3:03
STATE OF WASHINGTON
K

BRIEF OF APPELLANT

DR. Lin Xie
Appellant/Defendant in Pro Per
Suite 3, 19280 11th PL. S.
SeaTac, WA 98148

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C SUMMARY INTRODUCTION

Should an innocent person be destroyed financially, without due process and a fair trial, by claims barred by the statute of limitation? **(No)**

Can the trial court grant partial summary judgment in favor of the Plaintiff in a “first impression” case when the main claims were barred by the one-year statute of limitation of RCW 62A.5-115? **(No)** A statute that is the key dispute in another “first impression” case *Alhadeff v. Meridian on Bainbridge Island*, 144 Wash. App 928, review granted, 165 Wash.2d 1015, now accepted for review by the Washington Supreme court based on RAP 13.4 (b)(4).¹ In the case at bar, the conforming contract was the letter of credit itself, so such statute of limitation must be enforced.

Another “first impression” issue considered and ruled upon implicitly in favor of the Plaintiff, in spite of the fact that the Plaintiff raised this issue in the first time in his reply brief, is RCW 62A.2-325. This statute defines some *conditions precedent* that a Seller must perform before he is entitled to ask for direct payment from the Buyer. Incredibly, the trial court specifically stated that it could grant the summary judgment without deciding whether those *conditions precedent* were performed. As such, the court’s decision in effect says that the first beneficiary of a

¹ RAP 13.4 (b)(4) provides as follow:

If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

transferable Letter of Credit must pay the second beneficiary if the Issuer/Bank repudiates the payment regardless whether the product is properly delivered, payment documents are duly presented and notification is seasonably given. The trial court in effect, outlaws the usage of transferable letter of credit, a very common bank instrument for small business who do not have sufficient credit but need to do large business transaction. This will have detrimental effect to the US export business. **Since the trial court's ruling was barred by both above statues, it should be voided.**

This case involved a small and honorable company with the trade name "Giant International Metal Resources (**Giant**)" with the principle Dr. Lin Xie who had an excellent academic credential and a large company "Seattle Iron and Metal Corporation (**SIMCO**)" who was dominating the Seattle scrap metals supply but failed to honor some key contract obligations including duly presentment to bank for payment. As a result, the Letter of Credit payment was repudiated by Bank of Shanghai. This case is of first impression in Washington and the issues presented are of substantial public interest. It is a case mainly concerned around the right and obligations of parties to a transferable letter of credit which is used as the sole payment instrument by parties to contract of sales. As such, UCC Article 5 and Article 2 shall apply here. In this case common law principles are specifically displaced by Article5's remedies and statute of limitations provisions.

After it did exactly what the contract, law and court rule required, Giant was horrified by the total lack of *justice* and *fairness* in the trial court's ruling. The transaction was designed such that as an agent between the Seller (SIMCO) and the China buyer, Giant was supposed to make around \$4,000 in the best case scenario. The payment was with a transferable letter of credit (**LOC**) because Giant simply did not have that large credit otherwise. Incredibly, the trial court's order would force Giant, *without a chance for a fair trial*, to pay up to \$200,000 (principle and interest depend on the length of the appeal) for some metals that Giant never received and never accepted in spite of the fact that UCC has provided remedies for SIMCO to recover from the Bank for repudiation. Although some pocket change for SIMCO, this judgment amount would be life and death for Giant.

The trial court reached its decision as is mainly because of the misinformation, misrepresentation, missing information and changing legal theory from SIMCO. As such the summary judgment was premature. The appeal will be the first time that insufficient evidences can be raised.

First of all, the trial court granted the Plaintiff's Motion for Partial Summary Judgment on his breach of contract claim even though the mover, who had the burden to prove that no genuine legal issues exist, failed to mention RCW 62A.5-115 and RCW 62A.2-325 in the motion. Instead, the mover raised RCW 62A.2-325 issue for the first time in his reply memorandum. The court ruled on the contract breach claim but

failed to identify which of those many contradicting forms was the breached “contract”.

Secondly, the Respondent failed to disclose that the contract party who was also the letter of credit beneficiary was dissolved and its successor was not jointed in the case at bar. As a consequence of the dissolution, SIMCO could not provide affidavit in support of its motion with “personal knowledge” such that it failed to prove facts below that would affect its capability to maintain action: 1) who was the buyer and Seller? 2) Was the product delivered to Giant and perfect tender achieved? 3) Why the payment documents were not duly presented and who was responsible? 4) Was the seasonable notification given? 5) Which of those many conflicting forms constituted the contract in this case?

Lastly, to compensate for his shortcoming in facts and issues, the Respondent engaged in multiple court rule violations and witness interference. All these bad behaviors appeared to be paid off when, before the final judgment, the trial court abused its discretion and granted all motions and (proposed) Orders from the Plaintiff and denied (or ignored) all motions and (proposed) Orders from the Defendant without providing any reason and explanation. For example, the court granted leave to the Plaintiff to file over-length reply brief that raised new issues for the first time while rejected the Defendant’s several request/motions for leave to file amendment. As such the trial court’s decisions are unfair and unjust.

D ASSIGNMENT OF ERRORS AND ISSUES

a. ASSIGNMENT OF ERROR

1. The Superior Court erred in granting partial summary judgment.
2. The Superior Court erred in granting final judgment, CP 609-616.
3. The Superior Court erred in denying the Defendant's Motion regarding seasonable notification, CP 465.
4. The Superior Court abused its discretion in implicitly granting leave for plaintiff to file over length reply brief but denying the Defendant's request for response, CP 660.
5. The Superior Court abused its discretion in implicitly denying the Defendant's motion to reconsider without providing any reason, CP 321-335.
6. The Superior Court abused its discretion in denying the Defendant's Motion to file amended answer without providing any reason, CP 641 when necessary parties to contract (SIMEXCO, QIANGSHENG) were not jointed.

b. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Did the superior court err in considering and granting summary judgment on issues (RCW62A.2-325) raised for the first time in the reply brief without deciding whether Seller had performed conditions precedent, RP 40:20(ASSIGNMENT OF ERROR 1-6)?
2. Did the court err in granting the motion for partial summary judgment, CP 479, on breach of "Contract" claim when it failed to identify "the contract" (ASSIGNMENT OF ERROR 1-6)?
3. Were the claims barred by the one-year statute of limitation imposed by RCW62A.5-115(ASSIGNMENT OF ERROR 1-6)?

4. Did the Plaintiff fail to show any conforming delivery that was accepted by Giant when his submissions attested that the delivery was done to QIANGSHENG (ASSIGNMENT OF ERROR 1-6)?

5. Did the Plaintiff fail to establish facts upon which relief can be granted RAP 2.5(a) (ASSIGNMENT OF ERROR 1)?

6. Did the Respondent fail to prove that the Letter of Credit payment documents were duly presented (ASSIGNMENT OF ERROR 1-2)?

7. Did the Plaintiff provide reasonable notice required by RCW62A.2-325 (ASSIGNMENT OF ERROR 3)?

8. Was the Pleading Insufficient when the contract breach claim in the motion for summary judgment was never pleaded in the amended complaints (ASSIGNMENT OF ERROR 1)?

9. Must the Respondent disclose to the court that the letter of credit beneficiary (SIMEXCO) was dissolved and his successor (SIMEXINC) was not jointed in this case (ASSIGNMENT OF ERROR 1, 2 and 6)?

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18. Did the Superior Court err in denying Giant's request in the response to motion for final judgment that the real parties of interest be jointed in this case, CP 510-513 (ASSIGNMENT OF ERROR 2, 6)?

19. Did the Superior Court err in ignoring Giant's showing that there was no conforming delivery, no dishonor and no seasonable notice under RCW 62A.2-325, CP 295-298 (ASSIGNMENT OF ERROR 1, 2, 6)?

20. Did the superior court err in awarding interest for the period when the buyer's payment obligation was suspended by RCW62A.2-325, CP 609-616 (ASSIGNMENT OF ERROR 2)?

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E STATEMENT OF THE CASE

This case is about the right and obligation of parties to a transferable letter of credit. The appellant/defendant was a small local business using the trade name Giant International Metals Resources (“**Giant**”) with Dr. Lin Xie as the principle. Giant is an honest business promoting the export of American goods to China and other countries. The Sellers in this case were Seattle Iron & Metals Corporation (**SIMCO**), Seattle Iron & Metal Export Corp (**SIMEXCO**), Seattle Iron & Metal Export, INC. (**SIMEXINC**) and collectively “**SIM**”, all with Alan Sidell as the principle, *Ex. 2 for Alan Depo*.

SIM was a dominating player in the Seattle area shredded scrap metal market. In around July 2005, SIM just started doing export of scrap metals to China, *Deposition of Christopher Berge (Chris Depo) at 13:1-8*. In order to promote trade and to reduce the US trade deficit with China, Giant approached SIM on behalf of some Chinese companies including SHANGHAI QIANGSHENG IMPORT & EXPORT CO. (QIANGSHENG), *CP 185:46A*, to purchase 2,000Metric Ton of shredded steel scrap. *CP 60-62*. The contract GMHD07092005 was signed on July 13, 2005, *Id.*

This contract price at \$175 per metric ton was an attractive price and very soon the market for scrap metal started to rise quickly and stayed high for the next two-three years, *Deposition of Lin Xie (Lin Depo) at 171*. This turned out to be the root cause for all of the troubles in this

transaction. As such Giant soon felt the excuse and extra demand from SIM.

After Giant signed and faxed back the contract, Chris Berge, under the order of Mr. Sidell, *Chris Depo at 14:4-15*, wrote by hand on the contract “No L/C on Friday, No deal!!!” and faxed it to Giant. *CP 60-62*. By the time Giant received the fax, it was nearly the end of Wednesday afternoon.

Giant understand these extra words as confirmation that only *letter of credit (LOC)* was the allowed payment instrument and no cash was to be used because SIM would not trust a new customer with 30-day payment terms, *Chris Depo at 16:2-5*. In addition, the “Friday” should be at least July 22, 2005 because that was the normal speed commercial bankers operate. In this case, Giant did not receive SIM’s bank details and would not know which bank to send the LOC until Friday, July 15, 2005. *Ex.3 Chris Depo*, when SIM introduced SIMEXCO as the beneficiary of the Letter of Credit. On July 21, 2005, the first LOC (DTSGSM302305) was sent to SIM for approval. *CP 246-248*. Then SIM requested multiple amendments, *CP 251-253*, to move back the shipment date and to make the LOC terms simpler.

a. The contract formation and Letter of Credit negotiation

Some definitions are essential to describe the relationship among parties in a transferable LOC.

Letters of credit are well described by the Fourth Circuit:

Letters of credit have long been used to facilitate the financing of commercial transactions between buyers and sellers by providing certain and reliable means to ensure payment for goods delivered or services rendered. ... A letter of credit is a tripartite arrangement under which one party establishes a credit, usually at a bank, on which it authorizes a third party to draw, provided certain conditions are met. The bank, as a mere stakeholder of the credit, issues a letter to the third party (known as the beneficiary) confirming the credit and stating the conditions for any draw to be made against it. In essence, the bank's promise to pay the beneficiary upon the beneficiary's timely presentation to the bank of documents conforming to the conditions delimited in the letter replaces the promise of the party which established the credit.

Amwest Surety Ins. Co. v. Republic Nat.'l Bank, 977 P.2d 122,125 (4th Cir. 1992), cert. denied, 507 U.S. 985 (1993). In Washington State, RCW 62A.5-101 through 62A.5-118 governs letters of credit.

When an LOC is expressed designated as “transferable”, RCW62A5-112(1), the beneficiary may request that the paying bank transfer all or part of the credit due to one or more transferees (third parties) up to the total value of the original LOC. The respective rights under the credit are passed to the transferee who must comply with the terms and conditions of the transferred credit in order to receive payment. A transferable LOC is often used when the beneficiary is not the ultimate supplier of merchandise but the middleperson between the supplier and a buyer.

A transfer effectively substitutes the *transferee* (in this instance SIM, which became *second beneficiary*) for the *first beneficiary* (Giant). The transfer creates a ‘*direct relationship*’ between the issuer (Bank) and

the second beneficiary (SIM). *Banca Del Sempione v. Provident Bank of Maryland*, 160 F.3d 992 (4th Cir. 1998)

In the heat of the contract negotiation, SIM was not confident about its capability to handle Letter of credit and was about to cancel the whole contract, *Michael Dollar deposition (Mike Depo)* at 29:5-10, CP 532. On July 28, 2005, Dr. Xie from Giant and Alan Sidell, President of SIMCO (at that time Executive President of SIMCO) met to express Giant's concern on SIM's delay in performance, CP284. That meeting could be described as "tense" and "unequal bargain power", *Lin Depo* at 151. SIM wanted to cancel or scale down the contract but Giant did not agree with the request.

At or around that meeting, Giant and SIM exchanged and signed some forms. Giant agreed to accept 1,000MT immediately, with another 1,000 MT to be delivered at a future time. CP 262. SIM issued numerous sales order for this transaction. The contract (GMHD07092005) was never mentioned in those forms. Giant understood these forms as the internal work orders between SIMCO and SIMEXCO for tax purpose, *Alan Sidell Deposition (Alan Depo)* at 22:9 (also in Appendix 67). All the work orders as a whole would implement the contract GMHD07092005. Giant was allowed access to some forms CP 178, CP 181 and was refused to others².

² Giant received Sales Order 4789 (CP 181). But Sales Order 4740, 4784 (which were revealed by CP 178) and Sales Order 4827 (mentioned in CP 106) were within SIM's knowledge and the Respondent refused Giant's request for production of these and other

Footnote continued on next page

SIM delayed a few days and decided that they did not like LOC DTSGSM302305 and asked Giant to cancel it and to consider cash deal, CP 266. Giant then made the position clear that we shall stick to LOC as the only possible or absolute payment instrument or no deal, CP 265. Giant then forward another LOC (LC0502745YK) for the total 2,000MT contract (GMHD07092005). For this one, SIM did some more amendments, CP 265, and the final transferred version that SIM finally found acceptable is in CP 271-275. The master version of this LOC is in CP 255-260³. By accepting this LOC, SIM committed itself as shipper for C & F delivery to Shanghai because the LOC required the Bill of Lading for payment.

For LOC (LC0502745YK), the **applicant/customer/buyer** is QIANGSHENG; the **issuer** is Bank of Shanghai; the **first beneficiary** is

Footnote continued from previous page

documents. Ex.3, *Alan Depo* (Appendix 61:7). These work orders would show that SIM got internal orders for 2,000 MT of scrap but only completed 1,000 MT. i.e. there were some incomplete work orders. In fact, SIM's invoice D42527, CP 108, indicated that for work order 4740, only two containers were delivered and 48 containers were still outstanding. This work order 4740 was "*the new contract*" designated in SIM's motion for summary judgment. CP 90.

³ From the master LOC (CP 255-260), Giant transferred the amount for 1,000MT to SIM (per SIM's demand) with the amount for another 1,000 MT to be transferred any moment SIM gave permission. For the 1,000MT value transferred, only SIM can present the documents to Wells Fargo as the second beneficiary. However, Giant still had the right to present documents under the master LOC for the remaining credit. So if SIM really believed that Giant was the buyer and provided all payment documents to Giant, Giant can still get paid by presenting documents to Wells Fargo before the deadline (for this case September 15, 2005, CP 238).

Giant, CP 184:50 and the **second beneficiary/Seller** is SIMEXCO, CP 184:59.

Here are some required terms in this LOC:

46A: 2 – Full set of clean on board ocean bills of lading consigned to **SHANGHAI QIANGSHENG IMPORT & EXPORT CO., Ltd.**;
4 – Beneficiary's certified copy of fax dispatched to **SHANGHAI QIANGSHENG IMPORT & EXPORT CO., Ltd.**

With this LOC, QIANGSHENG appeared as the principle/applicant/customer/buyer and Giant as the agent. The following shipments were performed according to the terms listed in this LOC. Giant transferred duty of payment to QIANGSHENG and duty of goods delivery and document presentation to SIM.

b. SIM failed to duly present payment documents.

On August 30, 2005, two containers were shipped and a bill of lading (NA1080776) issued, CP 542-544. On August 31, 2005, 41 containers shipped and a bill of lading (008610) was to be issued by the ship forwarder CU Transport⁴. CP 237. However, there were some discrepancies in the draft bills of lading and need correction. After several

⁴ In this case, CU Transport was the forwarder for *QIANGSHENG*. There was no contractual agreement between *Giant* and CU Transport since this was the first shipping arrangement. Giant never saw the original bill of lading from this forwarder prior to this shipment. The relationship between shippers (SIM and Giant) and CU Transport was the same based on the disclaimers printed on the back of the original bill of lading CP 537-541.

rounds of intense communications, the final bill of lading was received on September 15, 2005, CP 545-546.

On that same day, Giant attempted to deliver documents to Wells Fargo Bank. The bank would not accept the delivery as complete, however, because several key documents were in the possession of SIM and the bank would want the second beneficiary to present documents, CP 238, *Lin Depo* 195. Giant then went to SIM's business office to ask for all the required documents in SIM's possession and told Mike Dollard that those documents must be presented the same day to satisfy the LOC terms, CP 238.

At this critical point, there were two choices for SIM. 1) Considered Giant as the buyer and handed over all documents to Giant ("perfect tender") so that Giant could be entitled to the goods and could claim payment under the remaining credit of the master LOC; 2) Continued to present all documents to Bank of Shanghai via Wells Fargo for payment with QIANGSHENG as the buyer.

This transaction involved so many independent parties and some delay was sometime unavoidable. But SIM got the final chance and was just one step away from the goal—Wells Fargo. But for some reason, SIM decided to make a detour in the last minute.

SIM specifically rejected Giant's request for "Original Invoice" and "CCIC inspection report" among others, CP 238. SIM also declined Giant's offer to make the 15 minute drive to Wells Fargo together but promised to deliver the documents itself on the same day. It was later

recognized that SIM delivered documents in two lots to US Bank, CP 314, and CP 316 on September 15, 2005 and September 21, 2005 respectively. Two weeks' delay was too much for the bank of Shanghai to accept⁵.

SIM's decision not to make that 15 minutes drive to Wells Fargo was a failure of consideration. If it went and Wells Fargo accepted documents then all were happy. Even if Wells Fargo rejected the documents (very unlikely because, in the first trip there, Giant was told that Wells Fargo was waiting for the documents), SIM could have the official explanation and another 15 minutes back still leave time for US Bank. But then Wells Fargo would be liable for any damage.

Here SIM botched the last opportunity for duly presentment against Giant's stern warning and offering to help. So SIM was estopped from alleging that Giant was responsible for the late presentment, CP 300:9. More details for such delay were within the knowledge of the Respondent⁶ who failed to produce Giant's discovery request on this regard, *Ex.3 for Alan Depo* (Appendix 61). For one thing, SIM decided to

⁵ It was the Bank of Shanghai who refused the payment. US Bank and Wells Fargo simply just received and passed on the documents. From CP 316, some documents were sent on September 21, 2005 which was too late for even sending directly to Wells Fargo. So the issue is *delay* rather than which Bank to send the presentment. SIM also distorted Dr. Lin Xie's deposition, CP 85:23. Xie just wanted SIM to go to Wells Fargo at same moment. Wells Fargo just needed those documents in the possessions of second beneficiary but never specifically mentioned must from US Bank.

⁶ There was some insight from Michael Dollard, *Mike Depo* 49 (Appendix 76), who explained that he interpreted the Seal on CP 184 and the line on CP 186:47B, "...therefore documents presented to *us* will be ..." as saying that documents must be sent to US Bank.

ignore this line in CP186:47B: “This letter of credit is restricted for presentation of documents to Wells Fargo HSBC Trade Bank.” (See more in *Mike Depo* at 48 or Appendix 76)

c. Parties worked together to recover loss.

Bank of Shanghai refused to pay the LOC for late presentation. As the first and second beneficiary, of course, both Giant and SIM would receive notice from bank that as of that date the payment had not been received yet⁷. After some time, Bank of Shanghai returned the original documents back to SIM who is still holding them as of today.

Following that Giant hired Mr. Robert J. Adolph to conduct some legal action. SIM also considered Mr. Adolph as being here to assist Giant and SIM, CP 352 and had frequent private communications with the Adolph Law Group, CP 353, 33-35. Then Giant and SIM had several meeting to find solutions. Giant would like that SIM fulfill its obligation for the 2,000MT contract which was the main reason that QIANGSHENG did not waive those discrepancies to Bank of Shanghai. QIANGSHENG took cash deposit from the steel mill and then issued LOC (LC0502745YK) in the amount of \$406,000 for 2,000MT scrap metals,

⁷ The trial court clearly erred by stating that a notice to first beneficiary from Wells Fargo saying that the LOC was put on hold pending applicant’s waiver constituted the “Seasonable Notice” required by RCW 62A.2-325, RP at 41:7. The court also erred by saying that summary judgment can stand without deciding whether RCW 62A.2-325 apply here, RP 40:20.

CP 258. SIM's inability to deliver 2,000MT put QIANGSHENG in default, *Lin Depo at 140*.

In addition, both parties discussed Mr. Adolph's opinion on the case *Voest-Alpine Trading v. Bank of China*, 142 F.3d 887, affirmed, 167 F. Supp. 2d 940.

Soon after the transaction several key employees from SIM, who were involved with this transaction, left the companies, *Alan Depo at 34* for mysterious reason including Deeanna Curnew (Traffic controller, CP 523), Michael Dollard (account executive, CP 591) and Chris Berge (Marketing Manager, CP 62).

On November 2, 2005, Giant's Lawyer sent a legal letter to SIM, CP 591-592, demanding that SIM took responsibility for its failure to timely present documents. No respond was received from SIM on this letter⁸ and Giant considered SIM's silent as consent. Then both parties were still working together try to collect from other parties.

d. Respondent tried to collect from the first beneficiary.

On June 11, 2007 SIM's new attorney wrote to Giant, CP 593-594 demanding payment and providing some response to the Giant's November 2, 2005 letter. This was the first notice from SIM seeking direct

⁸ Giant paid Adolph Law Group for the legal service at that time and SIM considered Adolph as working for them as well CP 352. There was mutual understanding that both parties were collecting from Banks and applicant. Giant was never informed by SIM that they would collect from and charge Giant 12% legal interest on top of the principle, CP 471-473.

payment from Giant. So SIM's notice for payment was sent almost two years after the payment repudiation by Bank of Shanghai. SIM decided to sue the weak and vulnerable instead of the party at wrong. The formal complaint, CP 56-62, was filed on August 23, 2007 and the amended complaint, CP 67-70, was filed on February 28, 2008. The complaints contained four causes of action (breach of contract, unjust enrichment, fraud and negligent misrepresentation). Giant filed the answer to complaints on October 31, 2007, CP 63-66. In the answer, Giant asserted affirmative defense and setoff. Shortly after this, on February 23, 2008, SIMEXCO, a Washington corporation which was in business for 34 years and was the second beneficiary, was dissolved⁹, without sending the required RCW 23B.14.060 notice to Giant for "known claims", *Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co.* 158 Wn. 2d. 603. Giant considered this as SIM's attempt to evade liability.

SIMEXINC was the successor to SIMEXCO, *Alan Depo 22* or Appendix 67. So SIMEXINC was the real party of interest in this case but was not represented or jointed.

⁹ It was Alan Sidell who disclosed the fact that SIMEXCO was dissolved. Such details were verified by the Washington Secretary of State's official web site.
http://www.secstate.wa.gov/corps/search_detail.aspx?ubi=600401318

http://www.secstate.wa.gov/corps/search_detail.aspx?ubi=602746387

Giant could not use such information in its Response for Summary judgment because Alan's deposition was not signed or signature waived and therefore not part of the record before the hearing.

Dr. Lin Xie's Deposition was conducted on July 22, 2008 and the Deposition for Alan Sidell was done on August 28, 2008. The next day, SIM filed the motion for Partial Summary Judgment on August 29, 2008, CP 79-97, with a hearing Date set on September 26, 2008, CP 101. The motion requested summary judgment on two causes of action (breach of contract and unjust enrichment). Because Alan Sidell refused to sign his deposition, *Alan Depo* 158-163 (Appendix 73-74), or waived his signature, Giant could not use the deposition in its response to the plaintiff's motion for summary judgment in which SIM used Dr. Lin Xie's deposition as the primary source of evidence. SIM also refused Giant's request to postpone the summary judgment hearing to allow additional time to conduct discovery, CP 661:2.

Deposition for Christopher Berge was held on September 4, 2008 and the signature was reserved, *Chris Depo at 45*. Therefore it could not be used in time for the Giant's response. Michael Dollard's Deposition was at September 3, 2008 and the signature was waived, *Mike Depo at 75*. So only the deposition of Mike Dollard was available for the Response.

Because the appellant pointed out some genuine issues (including RCW 62A.2-325) that the Motion for summary judgment failed to address, SIM filed its reply brief, CP 44-53, to contain issues raised in the first time. In particular, in Supplemental Declaration of Todd W. Wyatt, CP 1-43, SIM used Alan Sidell's deposition that was not signed. CP 24-29. The trial court considered issues raised in the first time in SIM's reply brief and granted summary judgment in favor of respondent on the breach

of contract and denied the unjust enrichment claim, CP 479 (Appendix 81).

Giant filed a motion for reconsideration on October 6, 2008. CP 321-335. The court did not have any response or explanation on this motion after repeated requests from both parties.

The trial court rejected Giant's motion for "Seasonable Notification" on November 10, 2008 and once again without reason and explanation

The trial court refused Giant's request ¹⁰ to strike SIM's motion for final judgment, CP 507, for KCLR 7¹¹ violation and also gave no response to Giant's motion for extension of time to file response (this motion disappeared in the court system).

The trial court denied Giant's motion to file amended answer on January 28, 2009 in the same manor: No reason and no explanation.

¹⁰ On December 2, 2008, Giant's attorney received SIM's Motion for voluntary partial dismiss and entry of final judgment, CP 522, only five court days before the hearing date December 9, 2008. Giant never agreed to be served by fax, and the parties have previously delivered original documents to each other within the time constraints of the civil rules, CP 521. After repeated complaints from the defendant and the fact that the Giant's consul was in the process of withdraw from appearance and Giant was yet to obtain the legal files, the respondent push to a new hearing date of December 10, 2008. But the new notice was not received by mail before 12:00 moon On Monday, December 8, 2008 when the defendant's response was due. Plaintiff's motion does not comply with KCLR 7.

¹¹ Rule 7 requires a party filing a motion to "serve and file all motion documents no later than six court days before the date the party wishes the motion to be considered." KCLR 7(b)(3). Civil Rule 5 defines how the document may be served: Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, filing with the clerk of the court an affidavit of attempt to serve.

F ARGUMENT

a. Summary

Giant is compelled to show here that the trial court's ruling is unfair and unjust. Giant was supposed to make \$3,000-\$4,000 commission as an agent helping a big scrap yard SIM to open its export market. Giant did all it was supposed to do under the laws and contract. But now the court ordered Giant to pay up to \$200,000.00 (principle and interest when this appeal is done) for damage caused by SIM's negligent and late presentation.

We shall demonstrate why the trial court's ruling was void and against the statue with these *genuine issues*. 1) SIM failed to mention that all its claims were barred by the one-year statute of limitation imposed by RCW 62A.5-115; 2) Although it did raise this issue for the first time in its Reply Brief, SIM failed to prove that it performed the *conditions precedent* require by RCW 62A.2-325, CP 373; 3) Respondent's submissions and standing failed to establish facts¹² upon which relief can be granted; 4) To compensate for its shortcoming in facts and issues, SIM resorted to court rule violation and witness interference.

RCW 62A.1-203, Obligation of good faith, states that: "Every contract or duty within this Title imposes an obligation of good faith in its performance or enforcement." We shall reveal in below that SIM failed

¹² Most importantly, SIM failed to show that Giant instead of QIANGSHENG or Bank of Shanghai was liable for the payment.

such obligation. Many arguments can be found in “Response to Motion for Partial Summary Judgment, CP 282-303 (Appendix 15-36)” and “Motion for Reconsideration, CP324-335 (Appendix 38-49)” with more legal analysis in this section.

Summary judgment is appropriate 'if the pleadings . . . together with the affidavits, if any, 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) . Summary judgments should be reviewed de novo, viewing all facts and reasonable inferences in the light most favorable to the nonmoving party. *Allstate Ins. Co. v. Raynor*, 143 Wn.2d 469, 475, 21 P.3d 707 (2001).

b. The respondent’s claims were barred by the one-year statute of limitation

Under the Rules of Appellate Procedure, an "appellate court may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a). "However, this rule does not apply when the question raised affects the right to maintain the action." *New Meadows Holding Co. v. Washington Water Power Co.*, 102 Wn.2d 495, 498, 687 P.2d 212 (1984). In addition, a statute not brought before a trial court but pertinent to the substantive issues which were raised before the court may be considered for the first time on appeal. *STATE v. FAGALDE*, 85 Wn.2d 730, 732, 539 P.2d 86 (1975).

Article 5's statute of limitations section provides: An action to enforce a right or obligation arising under Article 5 must be commenced within one year after the expiration date of the relevant letter of credit or one year after the cause of action accrues, whichever occurs later. A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. RCW 62A.5-115

RCW 62A.5-115 Official Comment 2 reads:

This section applies to all claims for which there are remedies under Section 5-111 and to other claims made under this title, such as claims for breach of warranty under Section 5-110. Because it covers all claims under Section 5-111, the statute of limitations applies not only to wrongful dishonor claims against the issuer but also to claims between the issuer and the applicant arising from the reimbursement agreement. These might be for reimbursement (issuer v. applicant) or for breach of the reimbursement contract by wrongful honor (applicant v. issuer).

There are remedies provided by RCW 62A5-111(1): *If an issuer wrongfully dishonors or repudiates its obligation to pay money under a letter of credit before presentation, the beneficiary, successor, or nominated person presenting on its own behalf may recover from the issuer the amount that is the subject of the dishonor or repudiation.*

1. RCW 62A.5-115 imposed the one-year statute of limitation on the Respondent's Claim.

In the case at bar, the issuer repudiated the payment and failed to provide speedy and sufficient notice. So the issuer is liable to the

beneficiaries for payment. SIM's main cause of action in this case is simply "*no payment received*".

SIM attempts to avoid the obvious application of Article 5 to the lawsuit by couching its causes of action as common law contract, tort, and equitable claims outside the scope of Article 5. However, SIM fails to point to the existence of any contract, tort, or equitable obligation that would give SIM any right or benefit that is in any way meaningfully different from the right or benefits that he was otherwise entitled to as the letter of credit second beneficiary in an Article 5 transaction. This is especially true that in this case LOC (LC0502745YK) itself is the conforming contract that SIM based upon for his delivery. It will be absurd to claim that the Letter of Credit itself is not governed by Article 5 of UCC. Because no duty arising *outside* of Article 5 has been breached and the Respondent can cite no claim that is meaningfully different from what respondent could have asserted as remedies under RCW 62A.5-111(1).

The documents were presented to the issuer on September 27, 2005 and this lawsuit was filed on August 23, 2007, nearly two years after the cause of action accrues.

RCW 62A.5-103 defines the scope of Article 5 of the UCC. Specifically, Article 5 "applies to letters of credit and to certain rights and obligations arising out of transaction involving letter of credit." RCW62A.5-103(1).

This case involves two such “certain rights and obligations” that Article 5 specifically provides for: RCW 62A.5-111(1)’s remedies for beneficiary of a letter of credit to recover from the issuer’s repudiation, and RCW 62A.5-115’s one year statute of limitations applying to Article 5 lawsuits.

As Official Comment 2 to RCW 62A.5-103 makes clear, “Normally Article 5 should not be considered to conflict with practice except when a rule explicitly stated in the UCP or other practice is different from a rule *explicitly stated in Article 5.*” RCW 62A.5-103, OfficialComment2 (emphasis added). RCW 62A.5-111(1) explicitly provide a cause of action for beneficiary of a letter of credit to recover from the issuer’s repudiation, and RCW 62A.5-115 explicitly provides that the statute of limitations in a lawsuit arising under Article 5 is one year.

Thus, for the contract between first beneficiary and second beneficiary , or even if the parties’ letter of credit transaction could be deemed a contract, because the subject matter of that contract would involve right and obligations expressly and specifically covered by Article 5, it follows that the contract would be subject to Article 5’s one-year statute of limitations.

It is apparent from the plain meaning of RCW 62A.5-115 and its Official Comment 3 that a cause of action brought more than one year after it accrues is time barred, regardless of whether the claim “arise under”, “arose out of,” or “is associated with” Article 5.

UCC scholars support the appellant's argument that Article 5's statute of limitations must not be evaded by labeling the repudiated payment claim as some other cause of action. *L. Lawrence, Anderson on the Uniform Commercial Code*, Vol. 7A § 5-115:5, p. 642, is instructive in explaining "Claims arose out of an Article 5 transaction":

This raises the question as to whether a right or obligation arises under Revised Article 5 when it arises from a contract that is entered into under the authority of Revised Article 5.

Example: If the applicant sues the issuer for breach of the contract between the applicant and the issuer, does such claim arise under Revised Article 5 or does it arise under ordinary contract law?

The Official Comments make it clear that Revised Article 5's statute of limitations applies to all suits on contracts that are authorized, recognized, or contemplated by Revised Article.

White & Summers (who are cited as authority in *Kenney v. Read*, 100 Wn. App. 467, and other Washington State UCC opinion) explain Article 5's one-year statute of limitation as follows:

The statute of limitations governs not only suits against the issuer for wrongful dishonor but also claims against nominated persons, advising banks, and *others whose rights arise from or are associated with the letter of credit transaction*. It also governs the applicant's claim for wrongful honor, since that claim arises out of a letter of credit transaction and even through it is essentially a suite on a written contract, the reimbursement agreement. The one-year statute of limitations should be widely applied so that no part of the same dispute finds its way outside of Article 5 while another portion of the same dispute is foreclosed by the one-year statute of limitations. 3 James J. White and Robert S. Summers, *Uniform Commercial Code*, § 26-15, at 227(5th ed. 2006) (emphasis added)

So the Article 5's statute of limitations provision should be read broadly such that no part of respondent's suit finds its way outside of Article 5.

Those scholars do highlight some common sense. Almost every letter of credit is to facilitate the execution of some sales contract. If every claim can be reframed under the contract to evade the statute of limitation, there is hardly any case that RCW 62A.5-115 would apply.

Kraus v. Stroh Brewery Co., 240 F. Supp. 2d 632 is the only widely cited decision analyzing the issue of whether claims arising out of an Article 5 transaction brought more than one year after the statute of limitation are time barred. That case involved a dispute over an alleged wrongful draw on a letter of credit. The plaintiff brought several causes of action in contract and tort.

Kraus held that "Article 5 includes a one-year statute of limitations period for any 'action to enforce a right or obligation arising under this article....'" *Kraus* 240 F. Supp. 2d at 635 citing MCLS §440.5115(identical to UCC 5-115 and RCW 62A.5-115) (emphasis in original). Because the lawsuit was filed more than one year after the alleged wrongful collection upon the letter of credit, all of the plaintiffs' cause of action was time barred. *Krause*, 240 F. Supp. 2d at 636.

Michigan and Washington have enacted identical version of Article 5's remedies and one-year statute of limitation provisions. *Krause's* holdings are also consistent with the broad interpretation given to Article 5's statute of limitations by the UCC scholars cited above.

The trial court in *Alhadeff v. Meridian on Bainbridge Island, LLC* (2008) 144 Wash.App. 928, review granted, 165 Wash.2d 1015 also agreed with such reasoning and ruled that all cause of actions are based on wrongful collection upon a letter of credit and are barred by the one-year statute of limitations in RCW 62A.5-115.

The Court of Appeal in *Alhadeff* reversed the trial court ruling and the case is now under review by the Washington Supreme court for “substantial public interest”. But as is commented in *Hawkland UCC Series § 5-115:2 [Rev] Scope* (2009) that:

What the Alhadeff court failed to take into account in its analysis was the intention of the drafters as manifested in U.C.C. § 5-115 [Rev] to push the reach of the statute beyond the letter of credit itself and to reach matters that would be collateral to it, clearly including the breach of warranty.

In *Hawkland UCC Series § 5-115:2 [Rev] Statues of limitations* (2009), it states that:

This provision represents the concern of the drafters to have an internal limitations provision rather than relying on general statutes that may leave some doubt, for example as to whether it should fall under the statute that relates to a contract or the general limitations provision.

There are some significant different between *Alhadeff* and the case at bar. 1) The current case is about bank repudiation claim under RCW 62A.5-111(1) while the *Alhadeff* case is for warranty under RCW 62A.5-110; 2) The *Alhadeff* case involved some warranty agreement negotiated for extra protection in addition to the letter of credit itself. But in current case, the contract only indicates that the letter of credit is

“irrevocable and payable 100% at sight”, CP 60, and all other terms are part of the letter of credit itself. There is no Extra consideration.

Alhadeff is relevant to the case at bar inasmuch as a showing that RCW 62A.5-115 is a relevant statute of public interest and the respondent cannot simply just ignore it in his motion for summary judgment. Other than this observation, *Alhadeff* cannot be used as precedent until the Washington Supreme court reaches its decision.

The issuer, Bank of Shanghai, repudiated LOC (LC0502745YK) mainly because of the late presentment by SIM plus some minor discrepancies, *Ex.25, Lin Xie Deposition (Lin Depo)*.

If literal compliance is the watchword for letter of credit transaction, then all parties involved must bear the risk that the literal and exacting nature of the transactions may at time operate to their disadvantage. *Paramount Export Company v. Asia Trust Bank*, 193 Cal. App. 3d 1474.

In the instance case, SIM was the last “dancer” who failed to properly “pirouette down the path” prescribed by UCP¹³ article 8, subdivisions e and f, *Id.* The respondent was therefore estopped from asserting that appellant did not comply with the terms and condition (right and obligations) of the letter of credit.

¹³ The Plaintiff agreed that he had no knowledge of UCP, *Alan Depo* at 49:24.

2. SIM should use the remedies within the one-year statute of limitation.

SIM had a claim against the issuer. The First Circuit held that “a variance between documents specified and documents submitted is not fatal if there is *no* possibility that the documents could mislead the paying bank to its detriment.” *Flagship Cruises, Ltd. V. New England Merchants National Bank of Boston*, 569 F.2d 699, 705 (1st Cir. 1968) (emphasis in original)

The fatal defect here is the late presentment by SIM. However, Bank of Shanghai did not provide timely and proper notice of dishonor/repudiation, so it was liable for payment.

As discussed in CP 455, foot note 3 and in CP 457-463, the current case is identical to *Voest-Alpine Trading v. Bank of China* on this point: “Issuing bank’s notice of discrepancies and disposition of presentation documents was insufficient under Uniform Customs and Practices for Documentary Credits (UCP) to constitute notice of refusal to honor letter of credit, where notice did not expressly state that it was rejecting presentation documents, and issuing bank stated that it would contact applicant to determine if it would waive *discrepancies*.”

c. Issue of RCW 62A.2-325 was raised for the first time in the reply memorandum

It is the responsibility of the moving party to raise in its summary judgment motion all of the issues on which it believes it is entitled to summary judgment. Allowing the moving party to raise new issues in its

rebuttal materials is improper because the nonmoving party has no opportunity to respond. It is for this reason that, in the analogous area of appellate review, the rule is well settled that the *court will not consider issues raised for the first time in a reply brief*. E.g., In *Marriage of Sacco*, 114 Wn.2d 1, 5, 784 P.2d 1266 (1990); *Stevens v. Security Pac. Mortgage Corp.*, 53 Wn. App. 507, 519, 768 P.2d 1007, review denied, 112 Wn.2d 1023 (1989); *State v. Manthie*, 39 Wn. App. 815, 826 n.1, 696 P.2d 33, review denied, 103 Wn.2d 1042 (1985); RAP 10.3(c).

Rebuttal documents "are limited to documents which explain, disprove, or contradict the adverse party's evidence." *White v. Kent Med. Ctr., Inc. P.S.*, 61 Wn. App. 163, 168-69, 810 P.2d 4 (1991). If, in its response memorandum, the nonmoving party discusses new issues without actually seeking summary judgment on them, these issues are not proper subjects for the moving party to rebut in its reply memorandum. *White*, at 169. Consequently, the trial court may not grant summary judgment to the moving party on these issues. *White*, at 169. **SIM and the trial court violated the above rule.**

UCC addresses letter of credit throughout UCC Article 2, 3 and 5. This case involved sale of goods, therefore implicating UCC Article 2 which addresses payment by letter of credit:

§ 62A.2-325. "Letter of credit" term; "confirmed credit" (1) Failure of the buyer seasonably to furnish an agreed letter of credit is a breach of the contract for sale.(2) The delivery to seller of a proper letter of credit suspends the buyer's obligation to pay. If the

letter of credit is dishonored, the seller may on reasonable notification to the buyer require payment directly from him.

There is no dispute that a proper letter of credit was delivered to SIM. So the key words here are “*buyer*”, “*dishonor*” and “*reasonable notification*”.

1. ***The Letter of Credit was not dishonored because no duly presentment.***

OfficialComment1 (emphasis added) of RCW 62A.2-325 provides:

1. Subsection (2) follows the general policy of this Article and Article 3 (Section 3-602) on conditional payment, under which payment by check or other short-term instrument is not ordinarily final as between the parties if the recipient *duly presents the instrument* and honor is refused. Thus the furnishing of a letter of credit does not substitute the financing agency's obligation for the buyer's, but the seller must first give the buyer reasonable notice of his intention to demand direct payment from him.

We can basically stop here: *Duly presentment of the instrument* is required. To complete the analysis, “*dishonor*” is defined in RCW 62A.3-502 and details can be found in CP 295-297,329-330(Appendix 28-30, 43-44). Here we can summarize it: A letter of credit is an unaccepted documentary draft unless signed by issuer to pay. *An unaccepted draft which is payable on demand is dishonored if presentment for payment is duly made to the drawee and the draft is not paid on the day of presentment.* RCW 62A.3-502(c) expands this rule to unaccepted documentary draft and UCC § 5-112 further expands this rule to letter of

credit but the period is now “seven days”¹⁴. The UCC makes clear that when presentment is not duly made, a bank may refuse payment without dishonor:

(3) Without dishonoring the instrument, the party to whom presentment is made may (i) return the instrument for lack of a necessary indorsement, or (ii) *refuse payment or acceptance for failure of the presentment to comply with the terms of the instrument, an agreement of the parties, or other applicable law or rule.* RCW 62A.3-501(b)(3)(emphasis added).

Because SIM did not duly present the documents, so the LOC (LC0502745YK) was not dishonored but repudiated.¹⁵

2. *QIANGSHENG was the applicant/customer and the intended recipient/buyer.*

To find out who is the real buyer, we have to look at the contract. UCC § 2-204 states that “a contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.”

The touchstone of contract interpretation is the intent of the parties. *Scott Galvanizing, Inc. v. Northwest EnviroServices, Inc.*, 120 Wn.2d 573, 580, 844 P.2d 428 (1993). In Washington, 'extrinsic evidence is

¹⁴ OFFICIAL COMMENT5 for RCW 62A.3-502. Dishonor: 5. Subsection (c) gives drawees an extended period to pay documentary drafts because of the time that may be needed to examine the documents. The period prescribed is that given by Section 5-112 in cases in which a letter of credit is involved.

¹⁵ The Respondent, in its *reply brief*, contended that, CP 50, the definition of “dishonor” in Article 5 should be used to defend RCW 62A.2-325 and the motion for summary judgment. But this is a self-defeating proposition. The Respondent has been framing his claims as common law cause outside Article 5. Now he agrees that the claim arise out of Article 5 and so RCW 62A.5-115 shall apply.

admissible as to the entire circumstances under which the contract was made, as an aid in ascertaining the parties' intent.' *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990). Under the context rule, determination of the intent of the contracting parties is to be accomplished by viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties. *Id.*

First of all, SIM has assumed a quasi contractual relation with QIANGSHENG. That relationship grows out of the fact that QIANGSHENG received a benefit (the metals) the retention of which would work a serious injustice to the respondent. This quasi contractual obligation is imposed without reference to the obligor's consent. *SECOND NAT. BANK OF TOLEDO v. M. SAMUEL & SONS, Inc.*, 12 F.2d 963.

Secondly, there is consent between SIM and QIANGSHENG. In its answer to the Defendant's first interrogatories, SIM agreed that Giant did not have such credit line and could not be the buyer and stated:

Once it became clear, by approximate July 20, 2005, that Defendants (Giant) could not obtain a proper letter of credit between Defendants (Giant) and the Plaintiff (SIM), Plaintiff and Defendants agreed to go forward to obtain a letter of credit from the third-party buyer (*QIANGSHENG*) payable to both Defendants and Plaintiff. *Ex.3 Alan Depo* (Appendix at 57:25).

Consequently, SIM approved this LOC (LC0502745YK) and with it QIANGSHENG became the disclosed principle and the real party of interest, CP 185:46A (It specifically requested that the Bill of Lading must

be consigned to QIANGSHENG). The applicant specifically made this LOC transferable so that Giant can transfer it to SIM. Multiple amendments were done to the LOC costing up to \$1,000 bank fee for each amendment and transfer. SIM consented to be the shipper on the Bill of Ladings, CP 277-281 with QIANGSHENG as consignee and used that bill of lading for presentment to bank. This LOC became the *conforming contract* based on which SIM had the metals delivered.

In the course of performance, SIM asked for the Fax number of QIANGSHENG and Giant supplied it to SIM, CP 185(hand-written notes) this was after SIM refused to let Giant pass on documents but insist on doing it directly. Then SIM had several private communications with QIANGSHENG to provide documents (Giant did not see the content of such communications¹⁶ until the discovery). By using these documents to obtain the cargo, QIANGSHENG consented with the contract but failed to pay. So there was *privity of contract* here.

Lastly, we shall have a look at the Seller's actual performance. SIM never delivered anything conforming to contract GMHD07092005

¹⁶ For example, CP 115-116, SIM submitted the AQSIQ certificate to the applicant to make sure that he could pick up the metals (Mr. Z. Wu is the director of QIANGSHENG, *Lin Depo* at 87:24). SIM also faxed to QIANGSHENG within 48 hours after the shipment advising "Name of Vessel, Date, Quantity, weight and value of the shipment", CP 185:46A:4. See CP 287, foot note 4.

SIM obviously didn't want others to have a copy of his AQSIQ license, a document required to ship metal scrap to China. SIM also made some wild allegation against Giant, CP 86, foot note 6, without any supporting evidence. Giant reputed this in CP 287, foot note 4. Wild allegations, hearsay and misrepresentations were found in the respondent's submissions in supporting his motion for partial summary judgment.

(no 2,000MT and no documents received) or Sales Order4789, CP 181 (Giant never received any metals at the listed address and no documents received).

In summary, only SIM can be the Seller (need CCIC/AQSIQ) and only QIANGSHENG can be the buyer¹⁷. Giant simply did not have that large credit for such transaction. So SIM was required to send “seasonable notice” to QIANGSHENG which it did not do.

3. *Giant was the agent.*

Here Giant acted as the agent¹⁸ for QIANGSHENG. It has long been the law that an undisclosed principal may enforce a contract made through an agent on his behalf. This rule is set forth in *Columbia Security Co. v. Aetna Accident & Liability Co.*, 108 Wash. 116, 126-27, 183 P. 137 (1919):

"It is a well established general rule that, where an agent on behalf of his principal, enters into a simple contract as though made for himself, and the existence of the principal is not disclosed, the contract inures to the benefit of the principal who may appear and hold the other party to the contract made by the agent. By appearing and claiming the benefit of the contract, it thereby becomes his own to the same extent as if his name had originally appeared as a contracting party, and the fact that the agent has made the contract

¹⁷ SIM misrepresented to the trial court in numerous occasions, CP 83, that it delivered metals to Giant and then Giant sent to another buyer in China. Giant never received any metals. Not even had a chance to look at the metals. SIM did C&F terms directly to QIANGSHENG on the LOC terms and refused to hand over any documents to Giant.

¹⁸ The trial court recognized the fact that Giant was the agent (middle person), RP 26:2 but was wrong in describing the nature of the transferable letter of credit. Such credit was secure and well established by UCP and the commercial banks.

in his own name does not preclude the principal from suing thereon as the real party in interest."

(Quoting 2 C.J. 873.) This rule is also set forth in several secondary sources. See *Restatement (Third) of Agency* § 6.03 (Tentative Draft No. 4, 2003); *Restatement (Second) of Agency* § 302 [*6] (1958); 12 *Richard A. Lord, Williston on Contracts* § 35:46, at 410-12 (4th ed. 1999). The principle (QIANGSHENG) appeared with LOC (LC0502745YK) and claimed the benefit (the scrap metals).

By transferring the letter of credit from the applicant to the second beneficiary, Giant assigned the duty of product delivery and document presentment to SIM and assigned the duty of payment to QIANGSHENG via the issuer. This is an Assignment of Rights, RCW 62A.2-210 (5): *A transaction whereby an obligee (the assignor, Giant) transfers her rights to some third party (the assignee, SIM/ QIANGSHENG). As a consequence, the assignor's contract rights are extinguished, and the assignee may demand any performance due to the assignor.* To be more precise, SIM may demand payment from QIANGSHENG and QIANGSHENG may demand duly presentment and deliver 2,000MT of metals. A consequence of such assignment is that Giant lost his right to demand payment from the applicant and issuer for SIM's portion of the benefit.

4. ***The product was not delivered to and accepted by Giant and there was no "perfect tender".***

The scrap metal was not delivered to Giant. Giant did not even have a chance to accept because the delivery was not done. Giant will not

accept the delivery without inspection or be given the CCIC inspection report. The risk of loss was still at the hand of Seller. The CCIC report was presented to Giant during the discovery process. It was delivered to the applicant/customer, so SIM has valid claims for conversion and unjust enrichment against him.

With the "*perfect tender*" rule, "if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may . . . reject the whole." RCW 62A.2-601(a). "The seller by his individual action cannot shift the risk of loss to the buyer unless his action conforms with all the conditions resting on him under the contract." RCWA 62A.2-510 OFFICIAL COMMENT 1.

SIM delivered the goods to QIANGSHENG conforming to LOC (LC0502745YK, price term: CFR Shanghai, China, CP185), and RCW 62A.2-320 states that:

".... the term C.I.F. destination or its equivalent requires the seller at his own expense and risk to ... (d) prepare an invoice of the goods and procure any other documents required to effect shipment or to comply with the contract; and (e) forward and tender with commercial promptness all the documents in due form and with any indorsement necessary to perfect the buyer's rights."

RCW 62A.2-320(2). The Bill of Lading, CP 280-281, confirmed that the term was C & F with "freight Prepaid". So if SIM claimed that they have delivered to Giant, the above documents are required. If SIM intended to deliver conforming to *Contract (GMHD07092005)*, then CP 61 listed the required documents which Giant never received.

The metals were sent to Shanghai and the documents were sent to Bank of Shanghai. After SIM received the returned documents from the issuer, they should tender documents to Giant if they really intended to treat the first beneficiary as the “new buyer”. But Giant never received those documents (not even the “Original Invoices”). Without any chance to inspect the metals or the CCIC inspection report, Giant had the right to say “*no tender and no acceptance*”. Therefore the risk of Loss is still with the Seller/SIM.

Indeed, Giant pressed SIM for evidence of his delivery and acceptance by buyer, *Ex.3 Alan Depo* (Appendix at 60), by SIM failed to provide any¹⁹.

5. *The required seasonable notice was not given for almost two years.*

The trial court clearly erred by stating that a notice to first beneficiary from Wells Fargo saying that the LOC was put on hold pending applicant’s waiver constituted the “Seasonable Notice” required by RCW 62A.2-325, RP at 41:7. SIM did not provide the required seasonable notice to the applicant/buyer (QIANGSHENG). The first notice demanding payment from Giant was sent on June 11, 2007, CP 593-594.

¹⁹ SIM’s answer to the Defendant’s first Interrogatories and Requests for Production of Documents Propounded to Plaintiff is in *Ex 3, Alan Depo* (Appendix 51-64). The productions are in SIMC 00010-0123 and the supplemental productions are in SIMC 0124-0146. These documents had called to the attention of the trial court. Many of those productions are in the CP and were used in the court proceeding.

SIM delivered the goods as well as the documents directly to applicant/QIANGSHENG and refused to hand over title documents to Giant". To ask the first beneficiary Giant for direct payment, SIM would have to finish the "perfect tender" by delivering all the required documents to Giant and then sent seasonable notice to ask for direct payment.

d. Failure to establish facts upon which relief can be granted.

In addition to its discretionary nature, RAP 2.5(a) contains several express exceptions from its general prohibition against raising new issues on appeal, including the "failure to establish facts upon which relief can be granted." This exception is fitting inasmuch as "appeal is the first time sufficiency of evidence may realistically be raised." *State v. Hickman*, 135 Wn.2d 97, 103 n.3, 954 P.2d 900 (1998).

Because the entire key employee from SIM who were involved in this transaction left the dissolved company SIMEXCO, the evidences submitted with the motion for summary judgment were very sketchy on details. The SIM failed to establish these specific facts upon which relief may be predicated. *GROSS v. LYNNWOOD*, 90 Wn.2d 395, 583 P.2d 1197. a) Whether the product was delivered to Giant according to the contract and was accepted; b)The seasonable notice required by RCW 62A.2-325 was given; c) Claims were not barred by RCW 62A.5-115; d) Did SIM duly present the documents to the right bank and why? e) Why the real Seller (SIMEXCO, the contract party and the second beneficiary

and SIMEXINC the successor) and the real Buyer (QIANGSHENG) were not jointed? As a general rule, courts construing contracts require that parties to the contract be joined. See, e.g., *Aungst v. Roberts Const. Co., Inc.*, 95 Wash. 2d 439, 625 P.2d 167 (1981) (citing *Lomayaktewa v. Hathaway*, 520 F.2d 1324, 20 Fed. R. Serv. 2d 843 (9th Cir. 1975)).

1. ***Insufficient Evidence.***

SIM in effect amended his complaint with “new contract”, CP90:7 in his motion for summary judgment without any chance for the Defense to amend answer. In addition, SIM’s reply brief further inserted “course of dealing changing supplements obligation” argument for the first time, CP51. So appeal is the first time sufficiency of evidence may realistically be raised against that *new legal theory* since the trial court refused motion to amend. The Supreme Court affirmed that *a defendant may raise sufficiency of evidence for the first time on appeal. State v. Alvarez*, 128 Wn.2d 1, 9, 904 P.2d 754 (1995).

There is insufficient evidence to support such *new legal theory* because no conforming delivery to Giant was done according to this *new contract*.

2. ***Insufficient Pleading.***

Here SIM failed to identify the right theory that relieve can be granted. A complaint must apprise the defendant of the nature of the plaintiff’s claims and the legal grounds upon which the claims rest. *Christensen v. Swedish Hosp.*, 59 Wn.2d 545, 548, 368 P.2d 897 (1962).

"Pleadings are primarily intended to give notice to the court and the opponent of the general nature of the claim asserted." *Lewis v. Bell*, 45 Wn. App. 192, 197, 724 P.2d 425 (1986) (citing *Lightner v. Balow*, 59 Wn.2d 856, 370 P.2d 982 (1962)). Although inexpert pleading is permitted, insufficient pleading is not. Id. "A pleading is insufficient when it does not give the opposing party fair notice of what the claim is and the ground upon which it rests." Id. (citing *Williams v. W. Sur. Co.*, 6 Wn. App. 300, 492 P.2d 596 (1972)).

The equitable (as well as UCP -dictated) approach to holding a party to its originally-stated legal position is a near relative to the principle that bars a litigant from "mending its hold" (see *Harbor Insurance Co. v. Continental Bank Corp.*, 922 F. 2d 357, 362 (7th Cir. 1990)). Sudden change of positions on the part of SIM indicates genuine issues of material facts.

SIM claimed, for at least three times in writing, that CP 60-62 or contract (GMHD07092005) is *the true and correct copy* of the "contract"²⁰. But later, SIM claimed that CP 178, 181 (Sales Order4789) is the "New Contract" or "modification of the original contract" and SIM

²⁰ Here is from *Alan Depo* 135 (Appendix 72), where Exhibit-5 is CP 524-526 and Exhibit A pointed to CP 60-62.

Q. So, when you allege that his actions "constitute a material breach of the Contract," what contracts are you referring to?

A. I would say this contract. I'd revise my answer. I would say this contract.

Q. Exhibit-5, Exhibit A to the deposition?

A. Yes.

So it leave no imagination that the "Contract" referred in the complaints was CP 60-62.

had no obligation to ship 2,000 metric tons of metal, CP90. “In exchange for a modification of the amount shipped, SIMC extended the deadline for defendants to produce a satisfactory letter of credit to August 5.” SIM’s reply brief further inserted “course of dealing changing supplements obligation” argument for the first time, CP51. By changing the “contract” from GMHD07092005 to work Order 4789 (“New Contract”), CP 181, SIM was making a "veiled attempt" to amend his complaint to fit his new theory for summary judgment, CP 90, without allowing the Defendant a chance to amend answer and counter-claims. In fact CP 178 revealed Sales Orders 4740, which Giant was yet to find any record of anyone signed it. SIM refused to provide all the work orders identified in the record.

The insufficient pleading misled the Defendant into conducting discovery on wrong theory of recovery.

3. *Insufficient Affidavit.*

Alan Sidell’s affidavit is insufficient because it was *not* based on personal knowledge. It was based on knowledge of other people (*hearsay*) who all left the dissolved company (SIMEXCO) shortly after the transaction²¹.

²¹ See *Alan Depo112* (Appendix 68)

Q. Do you have any personal knowledge if anybody from Seattle Iron & Metals delivered documents to a bank?

A. Do I have personal knowledge?

Q. Yes.

A. No, I don't.

This is crucial because SIM's motion for summary judgment failed to explain, with personal knowledge, why SIM did not deliver the presentation on 9/15/2005.

It has been said that the court should not grant summary judgment when there is some question as to the credibility of a witness whose statements are critical to an important issue in the case. *Powell v. Viking Insurance Co.*, 44 Wn. App. 495, 722 P.2d 1343 (1986).

The Supplemental Declaration of Todd Wyatt, CP 1-43 contains inadmissible evidence because the Exhibit E, CP 23-29, was from deposition testimony of Alan Sidell that he refused to sign, *Alan Depo* 162 (Appendix 74) so that Giant could not use it in its Response. Parties should not use an unsigned deposition transcript as part of the record in a summary judgment proceeding. *Babcock v. Mason County Fire Dist*, No. 6, 144 Wn.2d 774, 777 n.3, 30 P.3d 1261 (2001) (noting that where deponent has not signed or waived signature, deposition is not part of record)

e. Due process violation and Abuse of Discretion.

Bearing in mind the words of Mr. Justice Frankfurter that fairness of procedure is due process in the primary sense, *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 161, 71 S.Ct.624, 95 L.Ed.817 (1951)(concurring opinion). In the case at bar, the trial court, by awarding summary judgment and denying appellant's requests for response or amended answer without any explanations, denied the

appellant's right for a fair trial. Summary judgment procedure is not designed to deprive a litigant of trial on disputed issue of fact. *Meadows v. Grant's Auto Brokers, Inc.*, 71 Wn. 2d 874, 431 P.2d 216 (1967).

1. *Genuine issue of material fact exists and summary judgment is premature.*

Where material facts averred in an affidavit are particularly within the knowledge of the party moving for summary judgment, it is advisable that the cause proceed to trial in order that the opponent may be allowed to disprove such facts by cross-examination and by the demeanor of the moving party while testifying. *Hulse v. Driver*, 11 Wn. App. 509, 524 P.2d 255 (1974).

First, genuine issue of material fact as to whether LOC (LC0502745YK) was repudiated solely due to SIM's failure to duly present necessary document to bank preclude summary judgment with respect to damage to Giant caused by SIM's action. *SAMSUNG America, INC, v. Yugoslav-Korean consulting*, 248 A.D.2d 290, 670 N.Y.S.2d 466 .

Second, Alan SIDELL's misrepresentation and contradicting statement in regarding to whether SIMEXCO (who was listed as the second beneficiary in the LOC, CP 272:59) was the real party of interest, *Alan Depo 22:4* (Appendix 67), raises an issue of material fact as to whether SIM was hiding SIMEXCO as well as SIMEXINC as the necessary party to the case.

Last, we have the classic example of conflicting affidavits. SIM claimed that the metals were delivered and invoice sent. But the scrap metal was not delivered to Giant and Giant did not even have a chance to accept. If the affidavits and counter-affidavits submitted by the parties conflict on material facts, the court is essentially presented with an issue of credibility, and summary judgment will be denied. See, e.g., *Riley v. Andres*, 107 Wn. App. 391, 27 P.3d 618 (2001); *Meadows v. Grant's Auto Brokers, Inc.*, *supra*.

2. *The trial court erred in not following the contract and statute.*

The trial court should keep intact the rights, obligations and remedies dictated by the parties' contract (including UCC) instead of shifting the loss from the second beneficiary to the first beneficiary. The trial court's ruling is not contract interpretation but judicial draftsmanship. There are remedies against the issuer for wrongful repudiation and against the applicant for conversion/unjust enrichment. But SIM failed to take advantage of such remedies.

The law regarding the sanctity of contracts has been long established and rests upon 'a solid foundation of reason and justice.' As was said in *Dermott v. Jones*, 2 Wall. 1, 8, 17 L.Ed. 762, the law requires parties to do what they have agreed to do. 'If unexpected impediments lie in the way, and a loss must ensue, it leaves the loss where the contract places it. If the parties have made no provision for a dispensation, the rule of law gives none. It does not allow a contract fairly made to be annulled, and it does not permit to be interpolated what the parties themselves have not stipulated.' We shall not depart.

SECOND NAT. BANK OF TOLED v. M. SAMUEL & SONS, supra.

In *REICHENBACH V. SAGE*, 13 WASH. 364; 43 P. 354 (1896) and in *Dermott v. Jones*, 2 Wall. 1, 17 L. Ed. 762, the supreme court of the United States, in passing upon this question said:

"It is a well-settled rule of law, that if a party by his contract charge himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties, however great, will not excuse him."

And in commenting upon the case of *Schools Trustees v. Bennett*, 27 N.J.L. 513, the court said:

"The principle which controlled the decision of the case referred to rests upon a solid foundation of reason and justice. It regards the sanctity of contracts. It requires parties to do what they have agreed to do."

In *Buyer's Liability under Letter of Credit*, 12 Int'l Fin. L. Rev. 45 (1993) (citing *Ronstan International Ltd v. R C Marine Corp* (1993) 4 NZBLC 103, 112), the judge stated:

By failing to present the documents, the seller is not then complying with the contract and the buyer's obligation to pay is not revived. The buyer has complied with the contract by doing all it has promised to do.

Therefore, if the seller is solely at fault in not presenting the documents while the letter of credit is alive, then the seller's default is not a trigger to revive the buyer's obligation to pay and accordingly the seller cannot have subsequent recourse against the buyer.

In *Note* (1926), 40 Harv. L. Rev. 294:

As the seller demands the letter of credit because he distrusts the financial responsibility of the buyer, it is submitted that normally he looks exclusively to the issuing bank for payment.

If he cannot utilize it through his own fault, he cannot have recourse against the buyer: he cannot have the best of both worlds.

Correspondence, 25 Mod. L. Rev. 639, 1962. Here SIM requested that “No L/C, No Deal”, CP 60. Just before the issue of LOC (LC0502745YK), SIM asked whether it was possible to do cash deal, CP 266, but QIANGSHENG refused to consider, CP 265. It was then “take this L/C or no deal”. So it was the meeting of mind for all parties that “LOC (LC0502745YK) was the *exclusive* or *absolute payment* instrument for this transaction”.

In addition, after 4-5 amendments to the LOC, the contract (GMHD07092005) was augmented by LOC (LC0502745YK) with its terms. Beside, Giant did not have that large credit at the time to do the transaction and LOC was the only choice. So the consideration by both parties was that LOC (LC0502745YK) was the *absolute* payment instrument allowed.

Genuine issue of material fact as to whether letter of credit opened by applicant for goods shipped to China was dishonored (repudiated) solely due to shipper’s (SIM) failure to present necessary documentation to bank preclude summary judgment.

Here Giant fulfilled its contractual obligation by transferring a letter of credit to SIM that SIM approved. SIM was clearly aware that the documents must be sent to Wells Fargo, *Lin Depo at 182:13*, but invented the theory of *one parcel rule*, CP 53, 85, to justify its two-week delay in

sending in the documents. This is nothing more than an excuse and has no merit.

3. *Attorney misconduct.*

Other than violation of court rules on motion and practice, SIM also tried to prevent key witness from talking. As detailed in CP 518 and CP 575-577 (Appendix 93-95), SIM's attorney coached Mike Dollard to say "I don't know" to most questions.

4. *Abuse of discretion.*

CR 15 provides that leave to amend pleadings 'shall be freely given when justice so requires.' The trial court's discretion must not be 'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.' *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Generally, it is an abuse of discretion to fail to give any reason for denying a motion to amend. *Walla*, 50 Wn. App. at 883, 885 (citing *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962) ('outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion')).

This is true to all section D especially to Assignment of Error (4, 5, 6) and to Issues (14, 16).

G CONCLUSION

Respondent seeks to avoid the application of specific Article 5 provisions dealing with remedies and statute of limitation by trying to

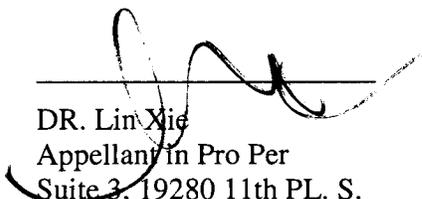
make this lawsuit what it is not. The factual allegations behind appellant's contract breach cause of action boil down to allegation of payment repudiation on the letter of credit. The legislature has provided Respondent with a remedy: remedies pursuant to RCW 62A.5-111(1). Respondent sought his remedy too late. Because Article 5 claims are subject to a one year statute of limitations and this action was filed well after that deadline, this court should dismiss the Respondent's breach of contract claim;

This court finds that genuine issue of material facts exists and reverse the trial court's order granting summary judgment and final judgment;

This court finds that the plaintiff fails to establish facts upon which relief can be granted and dismiss the claim for breach of contract;

This court finds that the trial court abused its discretion and reverses the order granting summary judgment as well as the final judgment. Remand for amend.

Respectfully submitted this 8th day
of September, 2009,



DR. Lin Xie
Appellant In Pro Per
Suite 3, 19280 11th PL. S.
SeaTac, WA 98148

H APPENDIX

- a. **RCW 62A.5-115, RCW 62A.5-325 and RCW 62A.3-502**
Appendix 1-7

- b. **Registration Details of Seattle Iron & Metals.**
Exhibit Two for Deposition Upon Oral Examination of Alan Paul Sidell on Thursday, August 28, 2008, **Appendix 8-9**

- c. **Defense's Response to the Plaintiff's Motion for Partial Summary Judgment**
CP 282-303 **Appendix 14-36**

- d. **Defense's Motion for Reconsideration**
CP 324-335 **Appendix 37-49**

- e. **Defendant's First Interrogatories and Request for Production**
Appendix 50-64
Exhibit Three for Deposition Upon Oral Examination of Alan Paul Sidell on Thursday, August 28, 2008 (Defendant's First Interrogatories and Request for Production of Documents Propounded to Plaintiff **and Objection, Answers, and Responses Thereto**)

- f. **Selected Pages from Deposition of Alan Paul Sidell**
Appendix 65-74
Selected Pages from Deposition upon Oral Examination of Alan Paul Sidell on Thursday, August 28, 2008

- g. **Selected Pages from Deposition of Michael Dollard**
Appendix 75-79
Selected Pages from Deposition upon Oral Examination of Michael Dollard on Wednesday, September 2, 2008

- h. **Order Granting Plaintiff's Motion for Partial Summary Judgment**
1) Order Granting Plaintiff's Motion for Partial Summary Judgment, CP 479-481 **Appendix 81-83**

2) Order Denying Defendants' Motion Regarding Seasonable Notification and Imposing Terms, CP 465-466

Appendix 84-85

3) Order Granting Plaintiff's Motion for Voluntary Partial Dismissal and Entry of Final Judgment. From CP 609-616

Appendix 86-89

4) Order Denying Defendants' Motion to file an amended Answer, CP 641-642

Appendix 90-91

i. Photos of Alan Sidell and attorney

Photos taken by Dr. Lin Xie's cell phone outside the glass window of the deposition conference room. Mr. Alan Sidell and attorney were shown to coach the witness. CP 575-577.

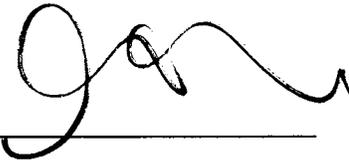
Appendix 92-95

CERTIFICATE OF SERVICE

I hereby certify, under penalty of perjury under the Laws of the State of Washington, that a copy of the foregoing Brief has been served, in person, upon

Barry G. Ziker, WSBA No. 11220;
Todd W. Wyatt, WSBA No. 31608
Salter Joyce Ziker, PLLC,
1601 Fifth Avenue, Suite 2040,
Seattle, Washington 98101,

on this 8th day of September, 2009.

A handwritten signature in black ink, appearing to read 'Lin Xie', written over a horizontal line.

Dr. Lin Xie

1)
RCW 62A.5-115

2)
RCW 62A.5-325

3)
RCW 62A.3-502



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ANNOTATED REVISED CODE OF WASHINGTON
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*** Statutes current through the November 2008 General Election (2009 c 2). Annotations current through December 18, 2008. ***

TITLE 62A. UNIFORM COMMERCIAL CODE
ARTICLE 5. LETTERS OF CREDIT

GO TO REVISED CODE OF WASHINGTON ARCHIVE DIRECTORY

Rev. Code Wash. (ARCW) § 62A.5-115 (2009)

§ 62A.5-115. Statute of limitations

An action to enforce a right or obligation arising under this Article must be commenced within one year after the expiration date of the relevant letter of credit or one year after the cause of action accrues, whichever occurs later. A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach.

HISTORY: 1997 c 56 § 16; 1965 ex.s. c 157 § 5-115.

NOTES:

OFFICIAL COMMENT

1. This section is based upon Sections 2-725 (2) and 4-111.
2. This section applies to all claims for which there are remedies under Section 5-111 and to other claims made under this title, such as claims for breach of warranty under Section 5-110. Because it covers all claims under Section 5-111, the statute of limitations applies not only to wrongful dishonor claims against the issuer but also to claims between the issuer and the applicant arising from the reimbursement agreement. These might be for reimbursement (issuer v. applicant) or for breach of the reimbursement contract by wrongful honor (applicant v. issuer).
3. The statute of limitations, like the rest of the statute, applies only to a letter of credit issued on or after the effective date and only to transactions, events, obligations, or duties arising out of or associated with such a letter. If a letter of credit was issued before the effective date and an obligation on that letter of credit was breached after the effective date, the complaining party could bring its suit within the time that would have been permitted prior to the adoption of Section 5-115 and would not be limited by the terms of Section 5-115.

USER NOTE: For more generally applicable notes, see notes under the first section of this heading, part, article, chapter or title.



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TITLE 62A. UNIFORM COMMERCIAL CODE
ARTICLE 2. SALES
PART 3. GENERAL OBLIGATION AND CONSTRUCTION OF CONTRACT

GO TO REVISED CODE OF WASHINGTON ARCHIVE DIRECTORY

Rev. Code Wash. (ARCW) § 62A.2-325 (2009)

§ 62A.2-325. "Letter of credit" term; "confirmed credit"

(1) Failure of the buyer seasonably to furnish an agreed letter of credit is a breach of the contract for sale.

(2) The delivery to seller of a proper letter of credit suspends the buyer's obligation to pay. If the letter of credit is dishonored, the seller may on reasonable notification to the buyer require payment directly from him.

(3) Unless otherwise agreed the term "letter of credit" or "banker's credit" in a contract for sale means an irrevocable credit issued by a financing agency of good repute and, where the shipment is overseas, of good international repute. The term "confirmed credit" means that the credit must also carry the direct obligation of such an agency which does business in the seller's financial market.

HISTORY: 1965 ex.s. c 157 § 2-325.

NOTES:

OFFICIAL COMMENT

PRIOR UNIFORM STATUTORY PROVISION: None.

PURPOSES: To express the established commercial and banking understanding as to the meaning and effects of terms calling for "letters of credit" or "confirmed credit":

1. Subsection (2) follows the general policy of this Article and Article 3 (Section 3-602) on conditional payment, under which payment by check or other short-term instrument is not ordinarily final as between the parties if the recipient duly presents the instrument and honor is refused. Thus the furnishing of a letter of credit does not substitute the financing agency's obligation for the buyer's, but the seller must first give the buyer reasonable notice of his intention to demand direct payment from him.

2. Subsection (3) requires that the credit be irrevocable and be a prime credit as determined by the standing of the issuer. It is not necessary, unless otherwise agreed, that the credit be a negotiation credit; the seller can finance himself by an assignment of the proceeds under Section 5-114.

3. The definition of "confirmed credit" is drawn on the supposition that the credit is issued by a bank which is not doing direct business in the seller's financial market; there is no intention to require the obligation of two banks both local to the seller.

CROSS REFERENCES: Sections 2-403, 2-511(3) and 3-602 and Article 5.

DEFINITIONAL CROSS REFERENCES: "Buyer". Section 2-103.

Appendix-3

"Contract for sale". Section 2-106.
"Draft". Section 3-104.
"Financing agency". Section 2-104.
"Notifies". Section 1-201.
"Overseas". Section 2-323.
"Purchaser". Section 1-201.
"Seasonably". Section 1-204.
"Seller". Section 2-103.
"Term". Section 1-201.

RESEARCH REFERENCES

WASHINGTON LAW REVIEW.

Letters of credit in Japanese-United States trade. *38 Wash. L. Rev. 169.*

Letters of credit -- A comparison of Article 5 of the Uniform Commercial Code and Washington practice. *37 Wash. L. Rev. 325.*

USER NOTE: For more generally applicable notes, see notes under the first section of this heading, part, article, chapter or title.



60 of 76 DOCUMENTS

ANNOTATED REVISED CODE OF WASHINGTON
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*** Statutes current through the November 2008 General Election (2009 c 2). Annotations current through December 18, 2008. ***

TITLE 62A. UNIFORM COMMERCIAL CODE
ARTICLE 3. NEGOTIABLE INSTRUMENTS
(FORMERLY: COMMERCIAL PAPER)
PART 5. DISHONOR

GO TO REVISED CODE OF WASHINGTON ARCHIVE DIRECTORY

Rev. Code Wash. (ARCW) § 62A.3-502 (2009)

§ 62A.3-502. Dishonor

(a) Dishonor of a note is governed by the following rules:

(1) If the note is payable on demand, the note is dishonored if presentment is duly made to the maker and the note is not paid on the day of presentment.

(2) If the note is not payable on demand and is payable at or through a bank or the terms of the note require presentment, the note is dishonored if presentment is duly made and the note is not paid on the day it becomes payable or the day of presentment, whichever is later.

(3) If the note is not payable on demand and subsection (a) (2) does not apply, the note is dishonored if it is not paid on the day it becomes payable.

(b) Dishonor of an unaccepted draft other than a documentary draft is governed by the following rules:

(1) If a check is duly presented for payment to the payor bank otherwise than for immediate payment over the counter, the check is dishonored if the payor bank makes timely return of the check or sends timely notice of dishonor or nonpayment under *RCW 62A.4-301* or *62A.4-302*, or becomes accountable for the amount of the check under *RCW 62A.4-302*.

(2) If a draft is payable on demand and subsection (b) (1) does not apply, the draft is dishonored if presentment for payment is duly made to the drawee and the draft is not paid on the day of presentment.

(3) If a draft is payable on a date stated in the draft, the draft is dishonored if (i) presentment for payment is duly made to the drawee and payment is not made on the day the draft becomes payable or the day of presentment, whichever is later, or (ii) presentment for acceptance is duly made before the day the draft becomes payable and the draft is not accepted on the day of presentment.

(4) If a draft is payable on elapse of a period of time after sight or acceptance, the draft is dishonored if presentment for acceptance is duly made and the draft is not accepted on the day of presentment.

(c) Dishonor of an unaccepted documentary draft occurs according to the rules stated in subsection (b) (2), (3), and (4), except that payment or acceptance may be delayed without dishonor until no later than the close of the third business day of the drawee following the day on which payment or acceptance is required by subsection (b) (2), (3), and (4).

(d) Dishonor of an accepted draft is governed by the following rules:

(1) If the draft is payable on demand, the draft is dishonored if presentment for payment is duly made to the acceptor and the draft is not paid on the day of presentment; or

(2) If the draft is not payable on demand, the draft is dishonored if presentment for payment is duly made to the acceptor and payment is not made on the day it becomes payable or the day of presentment, whichever is later.

(e) In any case in which presentment is otherwise required for dishonor under this section and presentment is excused under *RCW 62A.3-504*, dishonor occurs without presentment if the instrument is not duly accepted or paid.

(f) If a draft is dishonored because timely acceptance of the draft was not made and the person entitled to demand acceptance consents to a late acceptance, from the time of acceptance the draft is treated as never having been dishonored.

HISTORY: 1993 c 229 § 62; 1965 ex.s. c 157 § 3-502. Cf. former RCW sections: RCW 62.01.007, 62.01.070, 62.01.089, 62.01.144, 62.01.150, 62.01.152, and 62.01.186; 1955 c 35 §§ 62.01.007, 62.01.070, 62.01.089, 62.01.144, 62.01.150, 62.01.152, and 62.01.186; prior: 1899 c 149 §§ 7, 70, 89, 144, 150, 152, and 186; RRS §§ 3398, 3461, 3479, 3534, 3540, 3542, and 3576.

NOTES:

RECOVERY OF ATTORNEYS' FEES -- EFFECTIVE DATE -- 1993 C 229: See *RCW 62A.11-111* and *62A.11-112*.

OFFICIAL COMMENT

1. Section 3-415 provides that an indorser is obliged to pay an instrument if the instrument is dishonored and is discharged if the indorser is entitled to notice of dishonor and notice is not given. Under Section 3-414, the drawer is obliged to pay an unaccepted draft if it is dishonored. The drawer, however, is not entitled to notice of dishonor except to the extent required in a case governed by Section 3-414 (d). Part 5 tells when an instrument is dishonored (Section 3-502) and what it means to give notice of dishonor (Section 3-503). Often dishonor does not occur until presentment (Section 3-501), and frequently presentment and notice of dishonor are excused (Section 3-504).

2. In the great majority of cases presentment and notice of dishonor are waived with respect to notes. In most cases a formal demand for payment to the maker of the note is not contemplated. Rather, the maker is expected to send payment to the holder of the note on the date or dates on which payment is due. If payment is not made when due, the holder usually makes a demand for payment, but in the normal case in which presentment is waived, demand is irrelevant and the holder can proceed against indorsers when payment is not received. Under former Article 3, in the small minority of cases in which presentment and dishonor were not waived with respect to notes, the indorser was discharged from liability (former Section 3-502 (1) (a)) unless the holder made presentment to the maker on the exact day and note was due (former Section 3-503 (1) (c)) and gave notice of dishonor to the indorser before midnight of the third business day after dishonor (former Section 3-508 (2)). These provisions are omitted from Revised Article 3 as inconsistent with practice which seldom involves face-to-face dealings.

3. Subsection (a) applies to notes. Subsection (a) (1) applies to notes payable on demand. Dishonor requires presentment, and dishonor occurs if payment is not made on the day of presentment. There is no change from previous Article 3. Subsection (a) (2) applies to notes payable at a definite time if the note is payable at or through a bank or, by its terms, presentment is required. Dishonor requires presentment, and dishonor occurs if payment is not made on the due date or the day of presentment if presentment is made after the due date. Subsection (a) (3) applies to all other notes. If the note is not paid on its due date it is dishonored. This allows holders to collect notes in ways that make sense commercially without having to be concerned about a formal presentment on a given day.

4. Subsection (b) applies to unaccepted drafts other than documentary drafts. Subsection (b) (1) applies to checks. Except for checks presented for immediate payment over the counter, which are covered by subsection (b) (2), dishonor occurs

according to rules stated in Article 4. When a check is presented for payment through the check-collection system, the drawee bank normally makes settlement for the amount of the check to the presenting bank. Under Section 4-301 the drawee bank may recover this settlement if it returns the check within its midnight deadline (Section 4-104). In that case the check is not paid and dishonor occurs under Section 3-502 (b) (1). If the drawee bank does not return the check or give notice of dishonor or nonpayment within the midnight deadline, the settlement becomes final payment of the check. Section 4-215. Thus, no dishonor occurs regardless of whether the check is retained or is returned after the midnight deadline. In some cases the drawee bank might not settle for the check when it is received. Under Section 4-302 if the drawee bank is not also the depository bank and retains the check without settling for it beyond midnight of the day it is presented for payment, the bank becomes "accountable" for the amount of the check, i.e. it is obliged to pay the amount of the check. If the drawee bank is also the depository bank, the bank is accountable for the amount of the check if the bank does not pay the check or return it or send notice of dishonor within the midnight deadline. In all cases in which the drawee bank becomes accountable, the check has not been paid and, under Section 3-502 (b) (1), the check is dishonored. The fact that the bank is obliged to pay the check does not mean that the check has been paid. When a check is presented for payment, the person presenting the check is entitled to payment not just the obligation of the drawee to pay. Until that payment is made, the check is dishonored. To say that the drawee bank is obliged to pay the check necessarily means that the check has not been paid. If the check is eventually paid, the drawee bank no longer is accountable.

Subsection (b) (2) applies to demand drafts other than those governed by subsection (b) (1). It covers checks presented for immediate payment over the counter and demand drafts other than checks. Dishonor occurs if presentment for payment is made and payment is not made on the day of presentment.

Subsection (b) (3) and (4) applies to time drafts. An unaccepted time draft differs from a time note. The maker of a note knows that the note has been issued, but the drawee of a draft may not know that a draft has been drawn on it. Thus, with respect to drafts, presentment for payment or acceptance is required. Subsection (b) (3) applies to drafts payable on a date stated in the draft. Dishonor occurs if presentment for payment is made and payment is not made on the day the draft becomes payable or the day of presentment if presentment is made after the due date. The holder of an unaccepted draft payable on a stated date has the option of presenting the draft for acceptance before the day the draft becomes payable to establish whether the drawee is willing to assume liability by accepting. Under subsection (b) (3) (ii) dishonor occurs when the draft is presented and not accepted. Subsection (b) (4) applies to unaccepted drafts payable on elapse of a period of time after sight or acceptance. If the draft is payable 30 days after sight, the draft must be presented for acceptance to start the running of the 30-day period. Dishonor occurs if it is not accepted. The rules in subsection (b) (3) and (4) follow former Section 3-501 (1) (a).

5. Subsection (c) gives drawees an extended period to pay documentary drafts because of the time that may be needed to examine the documents. The period prescribed is that given by Section 5-112 in cases in which a letter of credit is involved.

6. Subsection (d) governs accepted drafts. If the acceptor's obligation is to pay on demand the rule, stated in subsection (d) (1), is the same as for that of a demand note stated in subsection (a) (1). If the acceptor's obligation is to pay at a definite time the rule, stated in subsection (d) (2), is the same as that of a time note payable at a bank stated in subsection (b) (2).

7. Subsection (e) is a limitation on subsection (a) (1) and (2), subsection (b), subsection (c), and subsection (d). Each of those provisions states dishonor as occurring after presentment. If presentment is excused under Section 3-504, dishonor occurs under those provisions without presentment if the instrument is not duly accepted or paid.

8. Under subsection (b) (3) (ii) and (4) if a draft is presented for acceptance and the draft is not accepted on the day of presentment, there is dishonor. But after dishonor, the holder may consent to late acceptance. In that case, under subsection (f), the late acceptance cures the dishonor. The draft is treated as never having been dishonored. If the draft is subsequently presented for payment and payment is refused dishonor occurs at that time.

JUDICIAL DECISIONS

Exhibit Two for Deposition Upon Oral Examination of Alan Paul Sidell on
Thursday, August 28, 2008. Registration details of SIMCO

Department of Licensing

License Query System

Search Results

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Your Search Criteria:

License Type: All Business and Professional Licenses

Last Name: sidell

First Name: alan

Sort By: Name

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Click on a name below for more information.

Results 1 - 10 of 10:

Name	License Type	City	State	Status
AMERICAN RECYCLING CORP AMERICAN RECYCLING CORPORATION	Washington State Business	SEATTLE	WA	
AMERICAN RECYCLING CORPORATION AMERICAN RECYCLING CORPORATION	Washington State Business	SPOKANE	WA	
DACO INVESTMENTS, LLC DACO INVESTMENTS, LLC	Washington State Business			
SEATTLE IRON & METALS CORPORATION SEATTLE IRON & METALS CORPORATION	Washington State Business	SEATTLE	WA	
SEATTLE IRON & METALS EXPORT CORP SIMCO EXPORT CORPORATION	Washington State Business	SEATTLE	WA	
SEATTLE IRON & METALS EXPORT, INC. SEATTLE IRON & METALS EXPORT, INC.	Washington State Business			
SHALMAR 08, LLC SHALMAR 08, LLC	Washington State Business			
SHALMAR 95 L.L.C. SHALMAR 95 L.L.C.	Washington State Business			
SIDELL, ALAN P	Notary Public	SEATTLE	WA	Active
TRISIDE, LLC TRISIDE, LLC	Washington State Business			

Results 1 - 10 of 10:

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Appendix-9

1)
Defense's Response to the Plaintiff's Motion for Partial Summary Judgment

CP 282-303

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

SEATTLE IRON & METALS
CORPORATION, a Washington Corporation

Plaintiff,

vs.

LIN XIE, individually and dba GIANT
INTERNATIONAL METAL RESOURCES,
and the marital community composed of LIN
XIE and JANE DOE XIE; and LH
HIGHTECH CONSULTING LLC, a
Washington limited liability company,

Defendants.

GIANT INTERNATIONAL METAL
RESOURCES

Third-Party Plaintiff,

vs.

CHINA UNITED TRANSPORT, INC., a
foreign corporation,

Third-Party Defendant

NO. 07-2-27492-8 SEA

RESPONSE TO MOTION FOR PARTIAL
SUMMARY JUDGMENT

I. RELIEF REQUESTED

COME NOW Defendants, Lin Xie, Giant International Metal Resources, and LH
Hightech Consulting LLC (collectively, "Defendants"), by and through their attorneys of

Defendants' Response to Motion for Partial Summary Judgment
Page 1 of 22
7337- 091508
07-2-27492-8

DICKSON STEINACKER LLP
1401 WELLS FARGO PLAZA
1201 PACIFIC AVENUE
TACOMA, WASHINGTON 98402
(253) 572-1000 - FACSIMILE (253) 572-1300

1 record, Dickson Steinacker LLP, and Kevin T. Steinacker and Matthew J. Smith, and request
2 that the Court deny Plaintiff's Motion for Partial Summary Judgment.

3 II. STATEMENT OF FACTS

4 Dr. Lin Xie is President of LH Hightech Consulting, LLC, which operates under the
5 trade name Giant International Metal Resources ("Giant").¹ Declaration of Lin Xie in
6 Support of Response to Plaintiff's Motion for Summary Judgment ("Xie Decl.") at 2. Giant
7 deals with scrap metal, and acts as a broker between suppliers and buyers of scrap metal,
8 including international trade. *Id.* In July 2005, Plaintiff and Defendant Giant International
9 Metal Resources ("Giant") entered into a contract for the sale of scrap metal. In this
10 transaction, Giant acted as the broker between the supplier of the scrap metal (Plaintiff) and
11 the end buyer of the scrap metal.
12

13 On or about July 13, 2005, Plaintiff and Giant signed a contract for the sale of 2,000
14 metric tons of steel. *Id.*, Ex. A. The contract required payment "by Irrevocable Letter of
15 Credit payable 100% at sight in favor of the Sellers within three days after signing the
16 contract." One of Plaintiff's employees added in handwriting "No L/C on Friday, no deal!!!",
17 before faxing the contract back to Giant. The writing does not specify to which particular
18 Friday it refers.
19

20 After the parties signed the contract, Giant commenced with obtaining a letter of
21 credit. Giant proposed a letter of credit obtained from one end buyer that had obtained a letter
22

23
24 ¹ LH Hightech Consulting, LLC formally became an LLC in June 2007. Xie Decl., at 2. Since at least 2005, LH
25 Hightech Consulting used the trade name "Giant International Metal Resources." *Id.* For purposes of this
26 response brief, Defendants will be collectively referred to as "Giant".

1 of credit through ING Bank. *Id.*, Ex. B. Plaintiff asked for amendments to the letter of credit,
2 which Giant completed at significant cost. *Id.*, Ex. C. Despite these amendments, Plaintiff
3 eventually rejected that letter of credit.

4 Giant subsequently obtained another letter of credit through a different end buyer,
5 Shanghai Qiangsheng Import N Export Co., Ltd. (“Qiangsheng”). *Id.*, Ex. D. Qiangsheng
6 had created the letter of credit through its bank, Bank of Shanghai (hereafter “master letter of
7 credit”). The master letter of credit named Giant as the beneficiary, and was for 2,000 metric
8 tons of scrap steel (partial shipments were acceptable), and was a documentary credit. A
9 documentary letter of credit requires a beneficiary to present particular documents, listed in
10 the body of the letter of credit, to a designated advising bank or to the issuing bank itself.
11 Under such a letter of credit, the issuing bank (Bank of Shanghai) would pay funds upon
12 presentation of the documents listed in the letter of credit. The letter of credit also stated that
13 it was transferrable, meaning that the beneficiary (Giant) could transfer some or all of the
14 value of the letter of credit to another entity by means of letter of credit.

17 On July 28, 2005, Dr. Xie from Giant and Alan Sidell, President of SIMCO (at that
18 time Executive Vice President of SIMCO) met regarding the terms of the contract. At that
19 meeting, Plaintiff and Giant amended the contract. Giant agreed to accept 1,000 MT
20 immediately, with another 1,000 MT to be delivered at a future time. *Id.* at 3, Ex. E.

21 Plaintiff issued numerous sales order with respect to this transaction. *See id.*, Ex. G
22 (noting sales orders 4740, 4784, 4789); Sidell Declaration, at Ex. A (noting sales order 4827).
23 Giant’s understanding of the amendments was that Plaintiff would ship 1,000 metric tons
24 immediately, and another 1,000 metric tons in the future. Xie Decl. at 3-4.

1 Plaintiff also apparently asked Giant to ask the end buyer to change the terms to a cash
2 payment. Giant inquired with Qiangsheng about changing that term to a cash term (i.e.,
3 payment by cash, nor letter of credit), but it would only commit to a letter of credit
4 transaction. *Id.*, Ex. F at 2 (August 3, 2005 email from Giant to Mike Dollard: "China buyer
5 refuse to change the payment and use Cash payment."). Giant transferred the letter of credit
6 to Plaintiff for the value of \$175,000, which represented 1,000 metric tons at \$175 per ton.
7 Plaintiff again proposed modifications to the letter of credit, with which Giant complied. *Id.*,
8 Ex. F. Giant provided the letter of credit that Plaintiff finally found acceptable on August 5,
9 2005. *Id.*, Ex. H.

11 The letter of credit that included several conditions for payment. First, it required
12 presentation of several documents, including:

- 13 1. Signed commercial invoice in 3-fold indicating this L/C No. LC0502745YK
14 and Contract No. GMHD07092005;
- 15 2. Full set of clean on board ocean bills of lading consigned to Shanghai
16 Qiangsheng Import N Export Co., Ltd. marked "Freight Prepaid";
- 17 3. Packing List/Weight memo in 3 copies indicating quantity/gross and net
18 weights of each package and packing condition;
- 19 4. Beneficiary's certified copy of fax dispatched to Shanghai Qiangsheng Import
20 N Export Co., Ltd. within 48 hours after shipment advising name of vessel, date,
21 quantity, weight and value of the shipment;
- 22 5. Pre-shipment inspection certificates issued by CCIC at loading port in 1
23 original and 3 copies; and
- 24 6. Declaration of non-wooden package issued by beneficiary.

25 *Id.*, Ex. H, at 3.²

26 On August 30, 2005, two containers were shipped and a bill of lading issued. On
27 August 31, 2005, 41 containers shipped and a bill of lading was to be issued by the shipping

² These documents were also required by the master letter of credit. Xie Decl., at Ex. D.

1 agent. *Id.*, Ex. I, J. However, the shipping agent for the August 31 shipment, CU Transport,
2 produced bills of lading that contained discrepancies. Giant worked with CU Transport to fix
3 the bill of lading.

4 On September 15, 2005, Giant received a final bill of lading from CU Transport. *Id.*,
5 Ex. J. That same day, Giant attempted to deliver the documents in its possession to Wells
6 Fargo bank. The bank would not accept the delivery, however, because it did not include all
7 of the documents required by the letter of credit. Xie Decl. at 5. Many of those documents
8 were still in the possession of Plaintiff. *Id.* Dr. Xie then went to Plaintiff's business and told
9 them that the documents needed to be delivered to Wells Fargo bank, and offered to drive
10 with its employee to the bank. *Id.* Plaintiff stated that delivery of the documents would need
11 to be presented to Wells Fargo Bank that same day to satisfy the terms of its letter of credit
12 with Qiangsheng (i.e., the master letter of credit).³ *Id.* Plaintiff declined to travel to Wells
13 Fargo with Dr. Xie, and stated that it would deliver the documents. *Id.*

14
15
16 Apparently, Plaintiff then sent the documents to its own bank, US Bank. Declaration
17 of Matthew J. Smith ("Smith Decl."), Ex. C, D. Although a letter suggests that Plaintiff sent
18 the documents on September 15, 2005, there is no evidence that US Bank actually received
19 the documents that day. For unknown reasons, Plaintiff again sent the letter of credit
20 documents to US Bank on September 21, 2005. It is unknown which of these transmittals
21 contained the original documents required by the letter of credit.
22

23
24 ³ Although Giant had transferred to Plaintiff a letter of credit for 1,000 metric tons, documents could still be
25 presented under the master letter of credit for the 1,000 metric tons that Giant did not transfer.

1 In order to allow the shipment to be unloaded after the scrap metal shipment arrived in
2 Shanghai, China, Qiangsheng needed a copy of the supplier's (i.e., SIMCO's) AQSIQ
3 certificate submitted to Chinese customs. Xie Decl., at 5. An AQSIQ certificate is a
4 certificate issued by the Chinese government that certifies the shipper's credentials and
5 operations. *Id.* Although the letter of credit did not include a requirement for the AQSIQ
6 certificate to be included among the documents, providing an AQSIQ certificate to Chinese
7 customs is common practice in the industry. *Id.* As Plaintiff itself acknowledges, an AQSIQ
8 certificate "allows a supplier of product to import those products into China." Motion at 8:17.

9
10 Giant had previously advised Plaintiff that an AQSIQ certificate was necessary in this
11 transaction, and had inquired whether Plaintiff had such a certificate (which it did).⁴ Xie
12 Decl., at 5. On or about September 20, 2005, Qiangsheng notified Giant that it needed a copy
13 of the AQSIQ certificate in order to offload the scrap metal. Dr. Xie contacted Plaintiff by
14 telephone to ask that they send the certificate to Chinese customs immediately, in order to
15 avoid demurrage charges while the ship sat at the port, unloaded. Giant called Plaintiff
16 numerous times asking that Plaintiff send the AQSIQ certificate to Chinese customs. Giant
17 also e-mailed Plaintiff on September 22, 2005, asking that it send the AQSIQ certificate.
18 Despite these repeated requests, Plaintiff waited until September 26, 2005 to finally fax the
19 AQSIQ certificate to China customs. This delay caused additional demurrage charges to
20 accrue, which the end buyer would have to pay to be able to unload the cargo.
21
22

23
24 ⁴ Although the immaterial to this motion, Giant feels compelled to rebut Plaintiff's allegation that Giant
25 attempted some "scheme" to defraud Chinese customs. Giant never engaged in such a scheme, nor has it ever
engaged in any other "scheme". Xie Decl., at 6. Plaintiff perhaps confuses this idea of a "scheme" with a
partnership proposal Giant might have made.

1 7. Should the Court deny Plaintiff's Motion to impose liability upon LH Hightech
2 Consulting LLC because Plaintiff fails to address Washington caselaw regarding
3 successorship? (Yes)

4 **V. LEGAL AUTHORITY AND DISCUSSION**

5 **A. The Court should deny Plaintiffs' Motion for Summary Judgment if**
6 **material issues of fact exist.**

7 Summary judgment is appropriate only when there is no genuine issue of material fact.
8 *Hartley v. State*, 103 Wn.2d 768, 774, 698 P.2d 77 (1985). Pursuant to Civil Rule, a court
9 may grant summary judgment only
10

11 if the pleadings, depositions, answers to interrogatories, and admissions on file,
12 together with the affidavits, if any, show that there is no genuine issue as to any
13 material fact and that the moving party is entitled to a judgment as a matter of
14 law.

15 CR 56(c).

16 The Washington Supreme Court has further clarified the term "material fact":

17 A material fact is one upon which the outcome of the litigation depends. In
18 ruling on a motion for summary judgment, the court's function is to determine
19 whether a genuine issue of material fact exists, not to resolve any existing factual
20 issue.

21 ...
22 One who moves for summary judgment has the burden of proving that
23 there is no genuine issue of material fact, irrespective of whether he or his
24 opponent, at the trial, would have the burden of proof on the issue concerned.

25 In ruling on a motion for summary judgment, the court must consider the
26 material evidence and all reasonable inferences therefrom most favorably to the
27 nonmoving party and, when so considered, if reasonable men might reach
28 different conclusions the motion should be denied.

29 When, at the hearing on a motion for summary judgment, there is
30 contradictory evidence, or the movant's evidence is impeached, an issue of
31 credibility is present, provided the contradicting or impeaching evidence is not too
32 incredible to be believed by reasonable minds. The court should not at such

1 hearing resolve a genuine issue of credibility, and if such an issue is present the
2 motion should be denied.

3 *Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966 (1963) (citations omitted).

4 The court may determine questions of fact as a matter of law only when reasonable
5 minds could reach but one conclusion about them. *Hartley*, 103 Wn.2d at 775.

6 As outlined below, material issues of fact exist in this case, which therefore precludes
7 Plaintiff's Motion for Partial Summary Judgment.

8 **B. Giant fulfilled its contractual obligation by transferring a letter of credit**
9 **to SIMCO that SIMCO approved.**

10 SIMCO claims that Giant breached the contract by failing to pay SIMCO in full for
11 the scrap metal in the contract. In doing so, SIMCO glosses over the function of letters of
12 credit. Even assuming the contract was amended to 1,000 metric tons, the contract clearly
13 required payment by letter of credit. Xie Decl., Ex. A, at 1. Giant fulfilled its contractual
14 obligations because it provided a letter of credit to SIMCO, which SIMCO accepted.

15
16 SIMCO mischaracterizes the nature of a letter of credit, claiming that it "is a way to
17 guarantee that the funds for payment will be available once performance under the contract at
18 issue has been completed." Motion at 3 n.2. This is incorrect. The rights and obligations
19 between an issuer of a letter of credit and a beneficiary are independent of the underlying
20 contract. RCW 62A.5-103(4); *Alhadeff v. Meridian on Bainbridge Island, LLC*, 144 Wn.
21 App. 928, 940, 185 P.3d 1197 (2008). "In other words, 'the issuer must pay on a proper
22 demand from the beneficiary even though the beneficiary may have breached the underlying
23 contract with the applicant.'" *Alhadeff*, 144 Wn. App. at 941 n.4 (quoting 3 James J. White &
24 Robert S. Summers, Uniform Commercial Code, § 26-2, at 113 (4th ed. 1995)).

25
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1401 WELLS FARGO PLAZA
1201 PACIFIC AVENUE
TACOMA, WASHINGTON 98402
(253) 572-1000 - FACSIMILE (253) 572-1300

1 Because the letter of credit enables the beneficiary to receive money regardless of
2 what transpires in the underlying transaction, the letter of credit is a valuable asset. A party to
3 the underlying contract provides a letter of credit in consideration of the other party's
4 promises and inducements. *See Alhadeff*, 144 Wn. App. at 936 n.2.

5 A letter of credit has been described as

6
7 a tripartite arrangement under which one party establishes a credit, usually at a
8 bank, on which it authorizes a third party to draw, provided certain conditions are
9 met. The bank, as a mere stakeholder of the credit, issues a letter to the third
10 party (known as the beneficiary) confirming the credit and stating the conditions
11 for any draw to be made against it. In essence, *the bank's promise to pay the
beneficiary upon the beneficiary's timely presentation to the bank of documents
conforming to the conditions delimited in the letter replaces the promise of the
party which established the credit.*

12 *Kenney v. Read*, 100 Wn. App. 467, 471, 997 P.2d 455 (2000) (quoting *Amwest Surety Ins.*
13 *Co. v. Republic Nat'l Bank*, 977 F.2d 122, 125 (4th Cir. 1992)) (emphasis added).

14 In the usual letter of credit setting, the end buyer establishes the letter of credit with its
15 bank (the issuing bank), and names the seller as the beneficiary of the letter of credit.
16 However, a letter of credit may also involve four parties, as it does in this case. *Alhadeff*, 144
17 Wn. App. at 936.

18 In this case, Giant made use of a transferrable letter of credit. The letter of credit
19 specifically stated that it was transferrable. *See* RCW 62A.5-112 (requiring letter of credit to
20 provide that it is transferrable).

21 In a transferred letter of credit, the issuing bank remains the same and is the entity that
22 has final approval of the presentation of the documents, and decides whether it will pay the
23
24
25

1 beneficiary. Once a letter of credit is transferred, a direct relationship exists between the new
2 beneficiary and the issuing bank:

3 A transfer effectively substitutes the transferee (in this instance BDS, which
4 became the second beneficiary) for the first beneficiary (Suriel). The transfer
5 creates a 'direct relationship' between the issuer (Provident) and the second
beneficiary (BDS).

6 *Banca Del Sempione v. Provident Bank of Maryland*, 160 F.3d 992 (4th Cir. 1998). The court
7 also found persuasive the second beneficiary's expert witness, who had testified that the
8 banking industry looks at the transfer to the second beneficiary as a separate undertaking. *Id.*

9 In this case, the end buyer (Qiangsheng) established a letter of credit with its bank
10 (Bank of Shanghai) and named Giant as the beneficiary of the letter of credit. Giant
11 subsequently transferred a portion of the value of the master letter of credit to Plaintiff by
12 means of another letter of credit. Thus, contrary to Plaintiff's argument that its only contract
13 was with Giant, a direct contractual relationship existed between Plaintiff and Bank of
14 Shanghai. That relationship, and the risks associated with it, was the province of Plaintiff.
15 Plaintiff went to great lengths to obtain a letter of credit it found acceptable. It was incumbent
16 upon Plaintiff to satisfy the terms of the letter of credit in order to ensure payment, which
17 Plaintiff failed to do.

18
19
20 **C. Plaintiff is responsible for any failure to comply with the terms of the**
21 **letter of credit.**

22 The issuing bank's refusal to pay the letter of credit is entirely the fault of Plaintiff.
23 First, Plaintiff presented the documents to the wrong bank. The letter of credit clearly stated
24 that the documents were to be presented to Wells Fargo Bank. Xie Decl., Ex. H, at page 4
25 line "47" ("This letter of credit is restricted for presentation of documents to Wells Fargo

1 HSBC Trade Bank ... Documents must be presented to Wells Fargo HSBC Trade Bank...”).
2 Yet Plaintiff sent the documents to US Bank. Second, even assuming that Plaintiff presented
3 the documents to the correct bank (i.e., U.S. Bank), Plaintiff presented the documents several
4 days after the deadline mandated by the terms of the transferred letter of credit. The letter of
5 credit required presentation within 10 days of shipment. *Id.*, Ex. H, at page 3 line “48”. Thus,
6 the deadlines for presentation of documents related to the shipments were September 9 and
7 10, deadlines that Plaintiff failed to meet.⁶ Third, the documents Plaintiff presented contained
8 discrepancies that allowed the issuing bank to refuse payment. *Id.* at 6. Plaintiff was the last
9 party to possess the documents before presenting them, and therefore had the last opportunity
10 to ensure their accuracy. Finally, had Plaintiff given the documents to Giant per Dr. Xie’s
11 request, or delivered the documents directly to Wells Fargo Bank, the presentation would not
12 have been late under the terms of the master letter of credit, which had a deadline of
13 September 15, 2005.
14
15

16 As the second beneficiary under the transferred letter of credit, Plaintiff assumed the
17 responsibility to timely present accurate documents for payment. This was Plaintiff’s
18 contractual obligation, which it breached.
19
20
21
22

23 ⁶ Plaintiff claims that it delivered the documents to US Bank on September 15, 2005. Motion at 15:18–20.
24 However, the evidence only indicates when Plaintiff sent the documents, not when the documents were received.
25 *See* Smith Decl., Ex. C, D. Plaintiff presents no confirmation from US Bank or other evidence that the bank
26 actually received the documents that day.

1 **D. The Court should deny Plaintiff's Motion for Partial Summary Judgment**
2 **because the UCC does not allow Plaintiff to collect from Giant in this case.**

3 Plaintiff's motion pays scant attention to the UCC. However, the provisions of the
4 UCC govern this transaction and make clear that the issuing bank did not dishonor the letter
5 of credit, and therefore Plaintiff cannot require payment of the money directly from Giant.

6 The UCC addresses letters of credit throughout UCC Article 2, 3, and 5. This contract
7 involved the sale of goods, therefore implicating UCC Article 2. RCW 62A.2-102. Article 2
8 also addresses payment by letter of credit:

9 The delivery to seller of a proper letter of credit suspends the buyer's obligation to
10 pay. If the letter of credit is dishonored, the seller may on seasonable notification
11 to the buyer require payment directly from him.

12 RCW 62A.2-325(2).

13 In this case, SIMCO may only seek payment directly from Giant if (1) the letter of
14 credit was dishonored; and (2) SIMCO provided seasonable notification requiring payment
15 directly from Giant.

16 **1. The letter of credit was not "dishonored."**

17 The UCC comment to § 2-325, upon which Washington's statute is based, notes:

18 Subsection (2) follows the general policy of this Article and Article 3 (Section 3-
19 802)⁷ on conditional payment, under which payment by check or other short-term

20 ⁷ UCC § 3-802 was subsequently recodified as UCC § 3-310. UCC § 3-310 cmt. 1. Any obligation of Giant for
21 payment in the underlying contract is likely discharged (versus suspended) according to UCC § 3-310.
22 Subsection (a) of UCC § 3-310 would most likely apply to the letter of credit in this case. RCW 62A.3-310(c)
23 (applying subsection (a) to instruments other than those listed in § 3-310 (which does not list letters of credit)
24 and on which a bank is liable as maker or acceptor). Subsection (a) provides that when such an instrument is
25 taken for an obligation, "the obligation is discharged to the same extent discharge would result if an amount of
26 money equal to the amount of the instrument were taken in payment of the obligation." 62A.3-310(a).

 Subsection (b) of UCC § 3-310 suspends the obligation until dishonor of the instrument. Although this
 subsection would probably not apply, it would impose no liability upon Giant, either. The letter of credit in this
 case was not "dishonored", as analyzed further in this section of Giant's Response Brief. Moreover, § 3-
 310(b)(3) arguably discharges any obligation by Giant, because Giant transferred to Plaintiff a letter of credit
 that originated with a third person. RCW 62A.3-310(b)(3) ("In the case of an instrument of a third person which
 Defendants' Response to Motion for Partial Summary Judgment

1 instrument is not ordinarily final as between the parties if the recipient duly
2 presents the instrument and honor is refused.

3 UCC § 2-325 cmt. 1.

4 The recipient must “duly present” the letter of credit, and only if the letter of credit is
5 “dishonored” may the seller seek payment from the buyer. In this case, which involved a
6 documentary letter of credit, Plaintiff presented documents (to U.S. Bank) for payment under
7 the letter of credit, but the issuing bank did not accept Plaintiff’s presentation of documents
8 and denied payment. The UCC also provides the definition of “dishonor”, which determines
9 whether the issuing bank in this case “dishonored” the letter of credit.

10 UCC Article 3 defines the term “dishonor” with respect to an unaccepted documentary
11 draft:

12 Dishonor of an unaccepted documentary draft occurs according to the rules stated
13 in subsection (b) (2), (3), and (4), except that payment or acceptance may be
14 delayed without dishonor until no later than the close of the third business day of
15 the drawee following the day on which payment or acceptance is required by
16 subsection (b) (2), (3), and (4).

17 RCW 62A.3-502(c).⁸

18 Thus, dishonor of a letter of credit occurs in the following circumstances:

19 (b) Dishonor of an unaccepted draft other than a documentary draft is governed
20 by the following rules:

21 (1) If a check is duly presented for payment to the payor bank otherwise
22 than for immediate payment over the counter, the check is dishonored if the payor
23 bank makes timely return of the check or sends timely notice of dishonor or

24 is negotiated to the obligee by the obligor, discharge of the obligor on the instrument also discharges the
25 obligation.”).

26 ⁸ The UCC commentary makes clear that this section applies to letters of credit. See UCC § 3-502 cmt. 5 (noting
that extended period of time to pay letter of credit is that given by UCC § 5-112).

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1 nonpayment under RCW 62A.4-301 or 62A.4-302, or becomes accountable for
2 the amount of the check under RCW 62A.4-302.

3 (2) If a draft is payable on demand and subsection (b)(1) does not apply,
4 the draft is dishonored if presentment for payment is duly made to the drawee and
5 the draft is not paid on the day of presentment.

6 (3) If a draft is payable on a date stated in the draft, the draft is dishonored
7 if (i) presentment for payment is duly made to the drawee and payment is not
8 made on the day the draft becomes payable or the day of presentment, whichever
9 is later, or (ii) presentment for acceptance is duly made before the day the draft
10 becomes payable and the draft is not accepted on the day of presentment.

11 (4) If a draft is payable on elapse of a period of time after sight or
12 acceptance, the draft is dishonored if presentment for acceptance is duly made and
13 the draft is not accepted on the day of presentment.

14 RCW 62A.3-502(b).

15 Again, the UCC makes clear that presentment must be “duly made” before a bank
16 dishonors the presentation. RCW 62A.3-502(b). The UCC makes clear that when
17 presentment is not duly made, a bank may refuse payment without dishonor:

18 *Without dishonoring the instrument, the party to whom presentment is made may*
19 *(i) return the instrument for lack of a necessary indorsement, or (ii) refuse*
20 *payment or acceptance for failure of the presentment to comply with the terms of*
21 *the instrument, an agreement of the parties, or other applicable law or rule.*

22 RCW 62A.3-501(b)(3) (emphasis added).

23 In this case, Plaintiff did not “duly present” the documents required by the letter of
24 credit, as its presentation failed to comply with letter of credit’s terms. Specifically, SIMCO
25 presented the letter of credit past its expiration date, presented it to the wrong bank, and
26 included documents that contained errors. See Section V.C, *supra*. The issuing bank could
refuse payment or acceptance without dishonor for any one of those mistakes, and in fact did
so. RCW 62A.3-501(b)(3). Because the issuing bank did not “dishonor” the letter of credit,
Plaintiff cannot seek payment directly from Giant. RCW 62A.2-325(2).

1 **2. SIMCO did not provide reasonable notification to Giant requiring**
2 **payment directly from Giant.**

3 Even if the Court determines that Bank of Shanghai dishonored the letter of credit
4 (which it did not), SIMCO offers no evidence regarding any notification provided to Giant
5 that SIMCO required payment directly from Giant. The Court may therefore dismiss
6 SIMCO's motion for summary judgment for breach of contract on this basis alone.

7 **E. Giant was not unjustly enriched because it did not ever take possession of**
8 **the scrap metal.**

9 A person has been unjustly enriched when he has profited or enriched himself at the
10 expense of another contrary to equity. *Dragt v. Dragt/DeTray, LLC*, 139 Wash.App. 560, 576,
11 161 P.3d 473 (2007). Enrichment alone will not trigger the doctrine; the enrichment must be
12 unjust under the circumstances as between the two parties to the transaction. *Id.* Unjust
13 enrichment has three elements: (1) There must be a benefit conferred on one party by another;
14 (2) the party receiving the benefit must have an appreciation or knowledge of the benefit; and
15 (3) the receiving party must accept or retain the benefit under circumstances that make it
16 inequitable for the receiving party to retain the benefit without paying its value. *Id.*

17 However, a party cannot seek damages in a quasi-contract action (such as unjust
18 enrichment) where a valid written agreement covers the parties' dispute. *Chandler v. Wash.*
19 *Toll Bridge Auth.*, 17 Wn.2d 591, 604, 137 P.2d 97 (1943).

20 Plaintiff seeks summary judgment on its unjust enrichment claim, alleging that
21 "defendants received approximately 1,000 metric tons of scrap metal." Motion at 15:3.
22 However, Giant never took possession of the scrap metal. Plaintiff delivered the scrap metal
23 directly from its property to the freight forwarder. *See Xie Decl., Ex. I, J* (identifying each
24
25

1 forwarding agent and listing Qiangsheng as consignee). The freight forwarder then shipped
2 the scrap metal across the Pacific to Shanghai, China. There, Qiangsheng apparently
3 offloaded and took possession of the scrap metal.

4 Furthermore, a contract governs the relationship between Giant and Plaintiff, and
5 therefore unjust enrichment is an inappropriate cause of action.
6

7 **F. The Court should deny Plaintiff's motion to dismiss Giant's affirmative
8 defenses .**

9 Plaintiff also seeks to dismiss Giant's affirmative defenses. Plaintiff's motion
10 addresses four of Giant's affirmative defenses, but material issues of fact exist for each of
11 these affirmative defenses, so the Court should deny Plaintiff's motion.⁹

12 **1. Material issues of fact exist as to Giant's affirmative defense of estoppel.**

13 Estoppel requires: "(1) an admission, statement, or act inconsistent with a claim
14 afterward asserted; (2) action by another in reasonable reliance on that act, statement, or
15 admission; and (3) injury to the party who relied if the court allows the first party to contradict
16 or repudiate the prior act, statement, or admission." *Berschauer/Phillips Constr. Co. v.*
17 *Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 831, 881 P.2d 986 (1994).¹⁰
18

19 In the July 13, 2005 contract, an employee of SIMCO wrote on the contract "No L/C
20 on Friday, no deal!!!" However, a material issue of fact exists as to whether the "Friday"
21 refers to July 15, July 22, or some other Friday. If the Friday refers to July 22, Plaintiff is
22

23 ⁹ Plaintiff's motion does not address Giant's affirmative defenses of (1) failure to state a claim upon which relief
24 can be granted; (2) failure to allege fraud with particularity as required by CR 9(b); and (3) Plaintiff's damages
25 were caused by Plaintiff or by third parties over which Giant had no control.

26 ¹⁰ The *Berschauer/Phillips* Court did not hold that estoppel must be proved by clear, cogent, and convincing
evidence on summary judgment.

1 estopped from any claim that Giant breached the July 13 contract by not providing Plaintiff a
2 letter of credit by July 15, 2005. In addition, Plaintiff continued to work with Giant to obtain
3 a letter of credit after July 15, 2005, and Giant relied upon these actions to procure a letter of
4 credit acceptable to Plaintiff. This creates a material issue of fact whether Plaintiff is
5 estopped from alleging that the July 13, 2005 contract was not in force.
6

7 Also in this case, Dr. Xie asked an employee of Plaintiff on September 15, 2005 to
8 present the documents to Wells Fargo Bank that same day so that delivery would be timely
9 under the master letter of credit. The employee stated that he would deliver the documents.
10 Giant relied upon that statement, and was injured when Plaintiff sent the documents to US
11 Bank instead of Wells Fargo. Thus, material issues of fact exist as to the issue of estoppel.
12

13 **2. Material issues of fact exist as to Giant's affirmative defense of waiver.**

14 Waiver is an agreement to relinquish a known right under the terms of a contract that
15 excuses the other party's obligation to perform. *Sherman v. Lunsford*, 44 Wn. App. 858, 862,
16 723 P.2d 1176 (1986). Either party to a contract may waive any of the provisions made for its
17 benefit and such a waiver generally need not be expressly declared, but may instead be
18 implied from the party's conduct. *Reynolds Metals Co. v. Electric Smith Constr. & Equip.*
19 *Co.*, 4 Wn. App. 695, 700, 483 P.2d 880 (1971). Material issues of fact exist as to whether
20 Plaintiff waived contractual rights.
21

22 Plaintiff asserts that Plaintiff and Giant either amended its July 13, 2005 contract or
23 entered into a new contract entirely. In the purported amendment to the contract, Plaintiff
24 requested documentation from Giant that the end customer was a company called Bao Steel.
25 However, Plaintiff apparently never received such documentation. Assuming Plaintiff did not
26

1 receive that documentation, it waived any right to receive that documentation once it shipped
2 the scrap metal to Shanghai.

3 Also, to the extent Plaintiff claims that Giant must pay for the scrap metal, Plaintiff
4 “waived” any cash payment term by accepting a letter of credit, as specifically stated in the
5 contract.
6

7 **3. Material issues of fact exist as to Giant’s affirmative defense of unclean
8 hands.**

9 Numerous material issues of fact exist with respect to the unclean hands defense, due
10 to Plaintiff’s failure to duly present the documents under the letter of credit. Plaintiff
11 delivered the documents after the deadline outlined in the transferred letter of credit, and
12 presented the documents to the wrong bank, presented documents that contained
13 discrepancies. Also, when Giant asked that the documents be presented directly to Wells
14 Fargo Bank so that payment could be received under the master letter of credit, Plaintiff
15 refused or neglected to do so. All of these circumstances raise material issues of fact
16 concerning the affirmative defense of unclean hands.
17

18 Plaintiff shipped the 1,000 metric tons of scrap metal in two shipments. Plaintiff first
19 shipped 90,870 pounds of scrap steel using one freight forwarder, then shipped another
20 1,900,840 pounds through another freight forwarder. Even if CU Transport, the second
21 freight forwarder, was late in providing an accurate bill of lading, Plaintiff could have
22 presented the documentation for the first shipment of scrap steel. Plaintiff’s failure to present
23 documents on the first shipment raises a material issue of fact as to Plaintiff’s “unclean
24 hands”.
25

1 **4. Material issues of fact exist as to Giant's affirmative defense of failure to**
2 **mitigate damages.**

3 “One who has suffered a wrong at the hands of another must make a reasonable effort
4 to mitigate his damages,” and a plaintiff cannot recover for any damages which could
5 reasonably have been avoided. *Tennant v. Lawton*, 26 Wn. App. 701, 703, 615 P.2d 1305
6 (1980).

7 Giant asked Plaintiff to present the documents directly to Wells Fargo Bank so that
8 payment could be received under the master letter of credit. Plaintiff refused or neglected to
9 do so. As the deadline to present documents under the transferred letter of credit had already
10 expired by September 15, 2005, Plaintiff could have mitigated its damages by presenting the
11 documents under the master letter of credit, or allowing Giant to do so. In addition, Plaintiff
12 could have mitigated its damages by expeditiously forwarding its AQSIQ certificate to
13 Chinese customs when Giant first requested that it do so. Plaintiff's delay caused extra
14 demurrage charges to the end buyer (Qiangsheng), which may have contributed to
15 Qiangsheng's refusal to waive the discrepancies in Plaintiff's presentation of documents.
16

17 Plaintiff's failure to present documents regarding the first shipment also raises
18 material issues of fact regarding mitigation of damages. Even if Plaintiff had not procured a
19 bill of lading from CU Transport by the deadline for presenting documents, it could have
20 mitigated its damages by presenting the documents for the first shipment by the deadline.
21

1)
Defense's Motion for Reconsideration

CP 324-335

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

SEATTLE IRON & METALS
CORPORATION, a Washington Corporation

NO. 07-2-27492-8 SEA

Plaintiff,

MOTION FOR RECONSIDERATION

vs.

LIN XIE, individually and dba GIANT
INTERNATIONAL METAL RESOURCES,
and the marital community composed of LIN
XIE and JANE DOE XIE; and LH HIGHTECH
CONSULTING LLC, a Washington limited
liability company,

Defendants.

I. RELIEF REQUESTED

COME NOW Defendants, Lin Xie, Giant International Metal Resources, and LH Hightech Consulting LLC (collectively, "Defendants"), by and through their attorneys of record, Dickson Steinacker LLP, and Kevin T. Steinacker and Matthew J. Smith, and submit this Motion for Reconsideration of the Court's Order Granting Plaintiff's Motion for Partial Summary Judgment, entered September 26, 2008, pursuant to Civil Rule 59.

II. STATEMENT OF FACTS

Plaintiff filed a motion seeking summary judgment on several issues. Defendants opposed Plaintiff's motion because, *inter alia*, the motion failed to address the relevant law and because

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DICKSON STEINACKER LLP
1401 WELLS FARGO PLAZA
1201 PACIFIC AVENUE
TACOMA, WASHINGTON 98402
(253) 572-1000 - FACSIMILE (253) 572-1300

1 genuine issues of material fact exist. On September 26, 2008, the Court heard oral argument from
2 counsel regarding Plaintiff's motion. The Court entered an Order Granting Plaintiff's Motion for
3 Partial Summary Judgment ("Order"), granting Plaintiff's motion on its breach of contract claim
4 against Defendant Lin Xie and his marital community.

5 **III. EVIDENCE RELIED UPON**

6 Defendants rely upon the pleadings and papers on file with this Court.

7 **IV. STATEMENT OF ISSUES**

8 1. If a contract uses a letter of credit for payment, must a seller meet the
9 requirements of RCW 62A.2-325 before seeking payment directly from the buyer? (Yes)

10 2. Did the Contract between Plaintiff and Defendant Xie require payment by letter of
11 credit? (Yes)

12 3. Should the Court vacate its Order because Plaintiff failed to address RCW 62A.2-
13 325 in its motion, which is a procedural error fatal to its motion? (Yes)

14 4. Did Defendant Xie provide a proper letter of credit to Plaintiff? (Yes)

15 5. Should the Court vacate its Order because the letter of credit was not "dishonored"
16 as that term is used in RCW 62A.2-325? (Yes)

17 6. Should the Court vacate its Order because Plaintiff has failed to allege that, and
18 because material issues of fact exist whether, Plaintiff seasonably notified Defendant Xie that
19 Plaintiff required direct payment from him? (Yes)

20 7. Should the Court amend its Order and allow Defendants' affirmative defenses to
21 remain because genuine issues of material fact exist on those issues? (Yes)

22 8. If the Court upholds its Order, should the Court amend the Order and instruct
23 Plaintiff to provide to Defendants all required original documents that reflect title to the goods,
24 and assign to Defendant Xie all claims Plaintiff might have against another party regarding this
25 transaction? (Yes)

26 **V. LEGAL AUTHORITY AND DISCUSSION**

A party that moves for summary judgment bears the burden of proving that no genuine
issues of material fact exist, and that the moving party is entitled to summary judgment as a matter

1 of law. CR 56(c); *Herring v. Texaco, Inc.*, 161 Wn.2d 189, 194, 165 P.3d 4 (2007). The court
2 must take all facts in the light most favorable to the non-moving party. *Id.*

3 In this case, Plaintiff failed to show that it is entitled to summary judgment as a matter of
4 law, as its motion failed to address the law applicable to this transaction. Also, genuine issues of
5 material fact exist on several issues, including Defendants' affirmative defenses, which precludes
6 entry of summary judgment or entitles Defendants to trial on those issues.

7
8 **A. If a contract requires payment by letter of credit, the seller must comply with
RCW 62A.2-325 before seeking direct payment from the buyer.**

9 When a contract involves the sale of goods, the UCC, not the common law, governs an
10 action for the breach of that contract. The common law of contracts still can apply, but it is
11 displaced by any conflicting provisions of the UCC. RCW 62A.1-103 (noting that principles of
12 law and equity *supplement* UCC provisions); *see also U.S. Bank Nat'l Ass'n v. Whitney*, 119 Wn.
13 App. 339, 346, 81 P.3d 135 (2003) ("The common law applies absent a contrary UCC
14 provision."); *Tacoma Fixture Co. v. Rudd Co.*, 142 Wn. App. 547, 555, 174 P.3d 721 (2008)
15 (noting distinction between common law contracts and contracts governed by UCC); *cf. Herron v.*
16 *McClanahan*, 28 Wn. App. 552, 562, 625 P.2d 707 (1981) ("When an available remedy is purely
17 statutory in character, the procedures provided in the statute are exclusive and mandatory and
18 must be strictly followed.").

19
20 When a contract uses a letter of credit, the UCC provides the only procedure by which a
21 seller may seek direct payment from the buyer on the underlying contract:

22 The delivery to seller of a proper letter of credit suspends the buyer's obligation to
23 pay. If the letter of credit is dishonored, the seller may on seasonable notification to
24 the buyer require payment directly from him.

25 RCW 62A.2-325(2).

1 Logically, suspension of a buyer's obligation to pay means the buyer has no obligation to
2 directly pay the seller unless certain events occur that lift that suspension. Other sections of the
3 UCC show that a seller might be prevented from seeking direct payment from the buyer. For
4 example, a buyer's obligation to pay is completely discharged when the seller takes a certified
5 check, even if the seller cannot ultimately collect on the check. RCW 62A.3-310(a).

6 Thus, a seller that agrees to letter of credit terms cannot simply elect to not use the letter
7 of credit, allege that the buyer breached the contract by not paying, and seek payment directly
8 from the buyer. The seller must first navigate its way through the UCC and show that the buyer's
9 obligation is no longer suspended.

10
11 **B. In this case, the contract required payment by letter of credit.**

12 Defendants seek clarification from the Court that it applied RCW 62A.2-325 before
13 granting summary judgment to Plaintiff. The contract at issue in this case indisputably called for
14 payment by letter of credit. Declaration of Lin Xie in Support of Response to Plaintiff's Motion
15 for Partial Summary Judgment ("Xie Decl."), at Ex. A, at 1 ¶ 4 (July 3, 2005 contract) ("Payment:
16 by Irrevocable Letter of Credit"). Even the alleged contract amendments noted payment by letter
17 of credit. Declaration of Alan Sidell, at Ex. A (August 29, 2005 Invoice) ("Terms: Letter of
18 Credit"), Ex. B (August 23, 2005 Invoice) ("Terms: Letter of Credit"); Declaration of Todd
19 Wyatt, Ex. F (August 2, 2005 Fax Transmittal) ("An irrevocable Letter of Credit . . . must be
20 delivered"), Ex. G (Sales Order 4789) ("Terms: Letter of Credit").

21
22 Because the contract required payment by letter of credit, Plaintiff may only seek direct
23 payment from Defendants if allowed by RCW 62A.2-325.

1 **C. Plaintiff failed to address RCW 62A.2-325 in its motion for summary**
2 **judgment, which is procedurally fatal to its motion.**

3 The moving party on summary judgment must raise in its motion papers all issues that
4 arguably justify summary judgment. *White v. Kent Med. Ctr., Inc.*, 61 Wn. App. 163, 168–69,
5 810 P.2d 4 (1991). The moving party must still “identify those portions of the pleadings,
6 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,
7 which it believes demonstrate the absence of a genuine issue of material fact.” *Id.* at 170.
8 Rebuttal documents are limited to those documents that explain, disprove, or contradict the
9 adverse party’s evidence. *Id.* at 168–69. Thus, the moving party cannot raise an issue for
10 summary judgment for the first time in its rebuttal documents.

11 In this case, Plaintiff did not show that it was entitled to judgment as a matter of law
12 because it did not address the applicable law. Plaintiff’s motion for summary judgment failed to
13 address RCW 62A.2-325, which is the only statute that authorizes Plaintiff to seek payment
14 directly from Defendants. This omission by Plaintiff is fatal to its motion for summary judgment.
15 Plaintiff cannot simply address it in its rebuttal brief. The Court should therefore amend its Order
16 and deny summary judgment.

17 **D. Giant delivered to Plaintiff a proper letter of credit.**

18 Even if the Court addresses the merits of RCW 62A.2-325, genuine issues of material fact
19 exist that preclude summary judgment in favor of Plaintiff. RCW 62A.2-325 suspends a buyer’s
20 obligation to pay if the buyer provides a proper letter of credit.

21 In this case, Giant delivered a proper letter of credit to Plaintiff on August 5, 2005. Xie
22 Decl., Ex. H. There is no dispute that the letter of credit was “proper”. *See* RCW 62A.5-102(j)
23 (defining “letter of credit”); 62A.5-104 (noting formal requirements of letter of credit); 62A.5-
24 25 26

1 108(5) (noting standard practice of financial institutions). In this case, a letter of credit was issued
2 by Bank of Shanghai, and advised by both Giant's bank (Wells Fargo) and SIMCO's bank (US
3 Bank). See Xie Decl., Ex. D, H. In any event, Plaintiff has made no argument that the letter of
4 credit was not "proper".

5 Thus, Defendant Xie's obligation to pay Plaintiff directly was suspended, and only if
6 Plaintiff satisfied RCW 62A.2-325 could it seek direct payment from the buyer.

7 **E. The letter of credit was not "dishonored".**

8 The Court apparently determined that the letter of credit was "dishonored" because the
9 bank did not pay the funds. However, "dishonor" does not simply mean "non-payment".¹ For
10 a bank to dishonor an instrument, the letter of credit must first be "duly presented" to the bank.
11 This requirement to "duly present" documents is found throughout the UCC sections addressing
12 letters of credit. The UCC comment to § 2-325, upon which Washington's statute is based, notes:

13 Subsection (2) follows the general policy of this Article and Article 3 (Section 3-802)
14 on conditional payment, under which payment by check or other short-term
15 instrument is not ordinarily final as between the parties if the recipient *duly presents*
16 the instrument and honor is refused.

17 UCC § 2-325 cmt. 1 (emphasis added).

18 Article 3 defines the term "dishonor" as it is used in RCW 62A.2-325:

19 Dishonor of an unaccepted documentary draft occurs according to the rules stated in
20 subsection (b) (2), (3), and (4), except that payment or acceptance may be delayed
21 without dishonor until no later than the close of the third business day of the drawee
22 following the day on which payment or acceptance is required by subsection (b) (2),
23 (3), and (4).

24 ¹ Plaintiff, in its reply brief, contended that "dishonor" simply means non-payment. Reply Brief at 7. However,
25 the definition it cites states in full: "'Dishonor' of a letter of credit means failure timely to honor or to take an
26 interim action, such as acceptance of a draft, that may be required by the letter of credit." RCW 62A.5-
102(1)(e). If the bank timely took an interim action required by the letter of credit (e.g., the bank notified
SIMCO of discrepancies in its presentation), then even under Plaintiff's proposed definition the bank did not
"dishonor" the letter of credit.

1 RCW 62A.3-502(c).² These subsections also require presentment of documents to be “duly
2 made.”³ “Dishonor” did not occur under any of those subsections.

3 The definition of “presentment” allows a bank to refuse payment without dishonor:

4 *Without dishonoring the instrument, the party to whom presentment is made may (i)*
5 *return the instrument for lack of a necessary indorsement, or (ii) refuse payment or*
6 *acceptance for failure of the presentment to comply with the terms of the instrument,*
7 *an agreement of the parties, or other applicable law or rule.*

8 RCW 62A.3-501(b)(3) (emphasis added).

9 In this case, Plaintiff did not “duly present” the documents required by the letter of credit,
10 as its presentation failed to comply with the letter of credit’s terms. Specifically, Plaintiff
11 presented the letter of credit past its expiration date, presented it to the wrong bank, and included
12 documents that contained errors. Xie Decl. at 6. The issuing bank refused payment or acceptance

13 _____
14 ² This section is the appropriate definition of “dishonor” as that term is used in RCW 62A.2-325. In 2003, UCC
15 § 2-325 was amended. The amendment conformed the section to a revised UCC Article 5. UCC § 2-325 cmt. 1.
16 The amendment added a definitional cross-reference for “dishonored”, noting that it is the definition found in
17 § 3-502. Washington adopted the revised Article 5, but it has not yet amended RCW 62A.2-325. Nevertheless,
18 because RCW 62A.2-325 has no definitional cross-reference for “dishonored”, yet Washington has adopted the
19 Article 5 amendments, the UCC’s reference is persuasive authority that the definition of “dishonored” found in
20 § 3-502 applies. In addition, the UCC commentary found in RCW 62A.3-502 makes clear that it applies to
21 letters of credit. RCW 62A.3-502, UCC cmt. 5 (noting that extended period of time to pay letter of credit is that
22 given by UCC § 5-112). If this definition of “dishonor” did not apply to letters of credit, there would be no
23 reason for the commentary to specifically mention letters of credit.

24 ³ These subsections state:

25 (b) Dishonor of an unaccepted draft other than a documentary draft is governed by the following rules:

26 (1) If a check is duly presented for payment to the payor bank otherwise than for immediate
payment over the counter, the check is dishonored if the payor bank makes timely return of the check or
sends timely notice of dishonor or nonpayment under RCW 62A.4-301 or 62A.4-302, or becomes
accountable for the amount of the check under RCW 62A.4-302.

(2) If a draft is payable on demand and subsection (b)(1) does not apply, the draft is *dishonored if
presentment for payment is duly made* to the drawee and the draft is not paid on the day of presentment.

(3) If a draft is payable on a date stated in the draft, the draft is *dishonored if (i) presentment for
payment is duly made* to the drawee and payment is not made on the day the draft becomes payable or the
day of presentment, whichever is later, *or (ii) presentment for acceptance is duly made* before the day the
draft becomes payable and the draft is not accepted on the day of presentment.

(4) If a draft is payable on elapse of a period of time after sight or acceptance, the draft is
dishonored if presentment for acceptance is duly made and the draft is not accepted on the day of
presentment.

RCW 62A.3-502(b) (emphasis added).

1 without dishonor. Because the issuing bank did not “dishonor” the letter of credit, Plaintiff cannot
2 seek payment directly from Giant. RCW 62A.2-325(2).

3 This result makes the most sense in a transaction such as this. Giant, as broker between
4 the end buyer and the supplier, was to receive a small portion of the entire contract’s value. Giant
5 did not have the cash on hand to simply purchase the scrap metal from SIMCO. Thus, it
6 negotiated with SIMCO to pay by letter of credit after the parties agreed not to use a cash term.
7 This arrangement allocated risks to each party. SIMCO assumed the risk of “duly presenting”
8 documents. If it did not “duly present” the documents, it risked not getting paid by the issuing
9 bank. SIMCO’s benefit, however, was that it obtained a direct contractual relation with the
10 issuing bank and presentation was within its control. It could ensure payment by the issuing bank,
11 even if it breached the underlying contract. Giant, meanwhile, assumed the risk that if SIMCO
12 did not duly present the documents, it would not get paid by the issuing bank. Giant’s benefit,
13 however, is that it was protected from direct liability for payment to SIMCO if SIMCO did not
14 “duly present” the documents. Otherwise, a broker would have no ability to ensure payment
15 under the letter of credit, as it could not submit the documents on its own, and it could not compel
16 the supplier to submit the documents.
17

18 **F. Genuine issues of material fact exist as to whether Plaintiff “seasonably
19 notified” Defendants that it would seek direct payment from Defendants.**

20 In addition to requiring a letter of credit to be dishonored, RCW 62A.2-325 also requires a
21 seller to seasonably notify a buyer that it will seek direct payment from the buyer.⁴ “An action is
22 taken ‘seasonably’ when it is taken at or within the time agreed or if no time is agreed at or within
23 a reasonable time.” RCW 62A.1-204(3). “Prejudice” is not an element in RCW 62A.2-325.
24

25 ⁴ The Court’s Order granted Defendants 30 days to provide additional briefing regarding the issue of reasonable
26 notification. Defendants intend to submit additional briefing on that issue, in addition to this motion for
reconsideration.

1 Seasonable notification is a condition precedent to a seller seeking payment directly from the
2 buyer. See *Peter Pan Seafoods, Inc. v. Olympic Foundry Co.*, 17 Wn. App. 761, 769, 565 P.2d
3 819 (1977) (applying reasonable notification in context of warranty of RCW 62A.2-508).

4 Where a defendant's obligation is subject to a condition precedent of performance by
5 the plaintiff, the latter must allege and prove that he:

- 6 (1) performed the condition precedent, or
7 (2) was excused from performance.

8 *Langston v. Huffacker*, 36 Wn. App. 779, 786, 678 P.2d 1265 (1984) (citation omitted).

9 In this case, Plaintiff presented no evidence as to when dishonor took place, which makes
10 it impossible to determine if Plaintiff seasonably notified Defendants. Plaintiff also has not
11 alleged or proved that it performed the condition precedent of reasonable notification, or that its
12 performance was excused. Moreover "reasonableness" is an issue of fact. For these reasons, the
13 Court should deny summary judgment.

14 **G. The Court should vacate its Order to the extent it strikes any of Defendants'**
15 **affirmative defenses because genuine issues of material fact exist with those**
16 **defenses.**

17 The Court's Order does not explicitly strike Defendants' affirmative defenses, although
18 Plaintiff moved to strike some, but not all, of Defendants' affirmative defenses. The Court noted
19 at oral argument that by granting summary judgment in favor of Plaintiff, it implicitly struck
20 Defendants' affirmative defenses. The Court should vacate or amend its Order because issues of
21 fact exist as to Defendants' affirmative defenses. Defendants' affirmative defenses may excuse
22 any contractual obligations, or may work to limit liability.

23 To the extent that the affirmative defenses should be viewed as counter-claims or set-offs,
24 Defendants ask that the Court treat them as such, pursuant to Civil Rule 8(c). "When a party has
25 mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on
26

1 terms, if justice so requires, shall treat the pleading as if there had been a proper designation.” CR
2 8(c). In this case, Defendants alleged the affirmative defenses of unclean hands and failure to
3 mitigate, and have made clear throughout the course of this lawsuit their position that Plaintiff’s
4 own actions caused nonpayment of the letter of credit., and caused damage to Defendants.

5 Under the doctrine of unclean hands, a party seeks recovery but equity bars him or her
6 from enforcing a legal right because his or her own conduct is unconscientious, unjust, or marked
7 by bad faith. *Portion Pack, Inc. v. Bond*, 44 Wn.2d 161, 170, 265 P.2d 1045 (1954).

8 Numerous material issues of fact exist with respect to the unclean hands defense. Plaintiff
9 failure to duly present the documents under the letter of credit. Plaintiff also waited to present
10 the first shipment’s documents along with the second shipment’s documents, a needless delay that
11 caused nonpayment for that shipment. Plaintiff refused to give its original documents to Giant for
12 Giant to timely deliver. Also, when Giant instructed Plaintiff to present the documents directly to
13 Wells Fargo Bank, Plaintiff refused or neglected to do so. Any of these actions led to the non-
14 payment of the letter of credit. All of these circumstances raise material issues of fact concerning
15 the affirmative defense of unclean hands. Plaintiff’s lack of conscientiousness and bad faith is the
16 reason it has not been fully paid. Seeking payment directly from Giant is therefore unjust.

17 Issues of fact also exist as to whether Plaintiff failed to mitigate its damages. “One who
18 has suffered a wrong at the hands of another must make a reasonable effort to mitigate his
19 damages,” and a plaintiff cannot recover for any damages which could reasonably have been
20 avoided. *Tenant v. Lawton*, 26 Wn. App. 701, 703, 615 P.2d 1305 (1980).

21 Giant asked Plaintiff to present the documents directly to Wells Fargo Bank, which would
22 have enabled payment under the master letter of credit. Plaintiff refused or neglected to do so.
23 Plaintiff also could have mitigated its damages by quickly forwarding its AQSIQ certificate to
24
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1 Chinese customs when Giant first requested that it do so. Plaintiff's delay caused extra demurrage
2 charges to the end buyer (Qiangsheng), which may have contributed to Qiangsheng's refusal to
3 waive the discrepancies in Plaintiff's presentation of documents. Plaintiff's failure to present
4 documents regarding the first shipment also raises material issues of fact regarding mitigation of
5 damages.

6 Issues of fact exist on the estoppel defense. Plaintiff has not clearly identified the written
7 contract it claims was breached. Plaintiff alleges that the July 13, 2005 contract required delivery
8 of a letter of credit by July 15, 2005., and that failure to deliver the letter of credit by then voided
9 the contract. Motion at 12. However, an issue of fact exists as to whether the "Friday" hand-
10 written into the original contract refers to July 15 or some other Friday. Plaintiff also contends
11 that its sales order reflects the terms of the contract. Motion at 11 (citing Wyatt Decl., Ex. G
12 (sales order)). But there are no less than four sales orders, and a genuine issue of material fact
13 exists as to which, if any, of these sales orders reflected the terms of the order. See Wyatt Decl.
14 Ex. F (referencing sales order 4740 and 4784); Ex. G (sales order 4789); Sidell Decl., Ex. A
15 (referencing sales order 4827). If, as Plaintiff alleges, Exhibit F proves that Giant agreed to "an
16 amendment to our sales order number 4740" and purchase only 1,000 metric tons, why did
17 Plaintiff only ship 45 tons under sales order number 4740? Sidell Decl., Ex. B.

18 Although issues of fact exist as to whether Plaintiff waived any requirement regarding
19 documentation the end customer was Bao Steel, the Court did not grant Plaintiff's breach of
20 contract claim on that basis.

21 Plaintiff's motion did not address the affirmative defense that Plaintiff's damages were
22 caused by Plaintiff or by third parties. Material issues of fact exist on these matters as well.
23 Because issues of fact exist on these affirmative defenses, and the merits of the defenses were not
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1 addressed at oral argument, the Court should amend its Order to allow trial on these issues

2 **H. If the Court upholds its Order, it should amend the Order and require**
3 **Plaintiff to provide to Defendants all original documents reflecting title to the**
4 **goods, and assign all claims Plaintiff may have against any other parties**
5 **involved in this transaction.**

6 Under the UCC as it applies to this transaction, the buyer is required to pay only after the
7 seller has delivered original title documents. These documents are listed as required under the
8 contract. Xie Decl., Ex. A, at 2 ¶ 5; *see also* RCW 62A.2-310 (requiring seller to tender title
9 documents). In this case, Plaintiff still has possession of many of these original title documents.
10 Giant never possessed the goods at issue in this dispute, and never acquired any title documents.
11 Xie Decl. at 5. The documents may be necessary for Dr. Xie to seek a remedy from third parties.

12 If the Court upholds its Order, Plaintiff has been made whole, and the Court should
13 assign to Dr. Xie any claims Plaintiff may have against third parties (i.e., Bank of Shanghai, U.S.
14 Bank, Wells Fargo Bank, or the freight forwarders) regarding this transaction.

15 **VI. CONCLUSION**

16 For the foregoing reasons, the Court should vacate or amend its Order Granting Plaintiff's
17 Motion for Partial Summary Judgment.

18 **DATED** this 6th day of October, 2008.

19 DICKSON STEINACKER LLP

20 

21 Kevin T. Steinacker, WSBA #35475

22 Matthew J. Smith, WSBA #33309

23 Attorneys for Defendants

1)
Defendant's First Interrogatories and Request for Production of Documents
Propounded to Plaintiff **and Objection, Answers, and Responses Thereto**

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

SEATTLE IRON & METALS CORPORATION, a Washington corporation,

Plaintiff,

v.

LIN XIE, individually and doing business as GIANT INTERNATIONAL METAL RESOURCES, and the marital community composed of LIN XIE and JANE DOE XIE; and LH HIGHTECH CONSULTING LLC, a Washington limited liability corporation,

Defendants.

Case No. 07-2-27492-8 SEA

DEFENDANTS' FIRST INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS PROPOUNDED TO PLAINTIFF AND OBJECTIONS, ANSWERS, AND RESPONSES THERETO

TO: SEATTLE IRON & METALS CORP.

AND TO: TODD WYATT, BARRY ZIKER, AND SALTER JOYCE ZIKER, PLLC, Attorneys for Plaintiff

Pursuant to the provisions of Civil Rules 26, 33, and 34, Defendant Giant International Resources requests that Plaintiff answer fully and in writing each of the Interrogatories and/or produce pursuant to the Requests for Production the following-described documents at DICKSON STEINACKER LLP, 1401 Wells Fargo Plaza, 1201 Pacific Avenue, Tacoma, WA 98402, within **thirty (30)** days of the date of service.

1 **DEFINITIONS**

2 For purposes of these Interrogatories and Requests for Production, including the sections
3 marked "Definitions" and "General Procedures", the following terms shall have the meaning
4 set forth below:

5 1. "And" or "or" means "and/or", with the singular form being deemed to include the
6 plural and vice versa.

7 2. "Complaint" means Plaintiff's Complaint filed in the within cause, bearing the same
8 cause number as this pleading.

9 3. "Answer" means Plaintiffs' Answer and Affirmative Defenses.

10 4. "Document or Documents" means writings of every kind and character pertaining to
11 the designated subject matter, including, without limitation, the original and any copy,
12 regardless of origin or location, of any book, pamphlet, periodical, letter, memorandum, diary,
13 file, note, calendar, newspaper, magazine, statement, bill, invoice, order, policy, telegram,
14 correspondence, summary, receipt, opinion, investigation statement or report, schedule,
15 manual, financial statement, audit, tax return, articles of incorporation, bylaws, stock book,
16 minute book, agreement, contract, deed, security agreement, mortgage, deed of trust, title or
17 other insurance policy, report, record, study, hand written note, map, drawing, working paper,
18 chart, paper, draft, index, tape, microfilm, data sheet, data processing card, computer printout,
19 computer program, check bank statement, passbook, or any other written, typed, printed,
20 photocopied, dittoed, mimeographed, multilithed, recorded, transcribed, punched, taped,
21 filmed, photographic or graphic matter, however produced, to which you have nor have not
22 had access.

23 5. "He" or any other masculine, feminine or neuter pronoun means any individual,
24 regardless of sex or entity to whom the Interrogatory and/or Request for Production otherwise
25 would apply.

26 6. "Identify" or "Identity" means:

(a) When used with reference to a natural person, to state his or her full name,
present home address, present business address, present home and business telephone number,
present or last known position and business affiliation at the time in question.

1 (b) When used with reference to an entity, such as a partnership (either general or
2 limited), joint venture, trust or corporation, to state the full legal name of such entity, each
3 name under which such entity does business, the entity's telephone number and the identity of
4 the chief operating officer, manager, trustee, or other principal representative.

5 (c) When used with reference to documents, to state specifically:

6 (i) The type of document involved (e.g., letter, interoffice memorandum,
7 etc.), together with information sufficient to enable the location of the document such as its
8 date, the name of any addressee and the name of any signor, the title or the heading of the
9 document and its approximate number of pages; and

10 (ii) The identity of the custodian or other person last known to have
11 possession of the document, together with the present or last known location of the document.

12 7. "Relating to" means pertinent, relevant or material to, evidencing, having a bearing on,
13 or concerning, affecting, discussing, dealing with, considering or otherwise relating in any
14 manner whatsoever to the subject matter of the inquiry.

15 8. "You" means each of the plaintiffs or defendants and each of their directors, officers,
16 agents, employees, attorneys and representatives.

17 GENERAL PROCEDURE

18 1. These Interrogatories and/or Requests for Production have been served upon you.
19 This discovery is to be answered under oath within thirty (30) days of the date of service in
20 the manner provided by the Civil Rules and Local Rules of the Superior Court in which this
21 matter is filed.

22 **THESE INTERROGATORIES AND REQUESTS FOR PRODUCTION ARE**
23 **CONTINUING, AND IN THE EVENT YOU DISCOVER FURTHER INFORMATION**
24 **OR DOCUMENTATION WHICH ALTERS, MODIFIES, DELETES, OR**
25 **AUGMENTS THE ANSWERS GIVEN NOW OR ANY TIME HEREAFTER, YOU**
26 **ARE TO PROVIDE SUCH INFORMATION BY SUPPLEMENTAL ANSWERS**
AND/OR PRODUCTION OF SUCH DOCUMENTS.

2. Regardless of the noun, pronoun, or other designation, if any, used in an Interrogatory
to describe the person or entity to whom it is directed or about whom it is concerned, answers
to each of the Interrogatories shall include all responsive information, known to or about such

1 person or entity. In addition, in the case of a person, it shall include all information known to
2 or about such person's spouse, if any, and other members of his or her household; and in the
3 case of a partnership, corporation, or other entity, shall include all responsive information
4 contained in such entity's business records regardless of whether official, and all information
5 known to or about such entities, owners, partners, shareholders, directors, officers, agents, or
6 other representatives.

7 3. In answering any of these Interrogatories, if you rely upon any testimony, whether
8 given at a deposition, investigation, hearing or otherwise, you are to set forth separately for
9 each such Interrogatory, the identity of the person testifying, the date upon which he or she
10 testified, the identity of the document constituting the transcript of the testimony and the page
11 number or numbers of the transcript on which such testimony appears.

12 4. If you claim that an answer, either in whole or in part, to any Interrogatory or portion
13 thereof, or that production of a document, either in whole or in part, to any Request for
14 Production, is subject to any privilege or otherwise objectionable or protected from discovery,
15 you are to identify the subject matter, the answer to which such privilege, objection or
16 protection is thought to apply, and state the ground or basis for each such claim, objection,
17 privilege or protection. In the case of Interrogatories, the attorney making the objection shall
18 sign in the space following each objection. All portions of such an Interrogatory not regarded
19 as calling for a protected or objectionable response are to be answered fully.

20 5. By these Requests for Production, if provided, you are asked to produce for inspection
21 and copying each and every one of the documents and other tangible things identified below
22 by item or category which you have in your possession or custody or under your control.

23 OBJECTIONS

24 The following general objections apply to all or so many of Defendants' discovery
25 requests that for convenience they are set forth immediately below and are hereby
26 incorporated into each specific answer and response set forth below. The assertion of the
same, similar, or additional objections or partial answers to the individual discovery requests
are not intended to waive any of plaintiff's general objections.

1 1. Plaintiff has not completed its investigation of the facts related to this action,
2 nor has it completed its discovery or preparation for trial. Plaintiff reserves the right to rely
3 on any facts, documents, or other evidence that it may develop or that may come to its
4 attention subsequent hereto. Plaintiff reserves the right to assert additional objections and/or
5 to amend its answers should it discover additional grounds for objection or basis for response.

6 2. Plaintiff objects to each discovery request to the extent it is burdensome,
7 oppressive, and seeks information that is neither relevant to the subject matter of this litigation
8 nor reasonably calculated to lead to the discovery of admissible evidence.

9 3. Plaintiff objects to each discovery request to the extent it seeks information
10 protected from disclosure by any applicable attorney-client or attorney work product privilege
11 or any applicable joint interest or joint defense privilege.

12 4. Plaintiff objects to each discovery request on the grounds of burdensomeness
13 to the extent it seeks information already in Defendants' possession.

14 5. Plaintiff objects to Defendants' definitions and instructions insofar as they
15 purport to impose upon Plaintiff any obligations greater than those provided by Washington
16 state superior court rules, case law decisions and/or laws governing the proper scope and
17 extent of discovery. Plaintiff further objects to each definition and instruction to the extent it
18 is overly broad, unduly burdensome, vague, and/or ambiguous, and thus likely to lead to a
19 confusing, misleading, inaccurate, or incomplete answer.

20 6. Plaintiff objects to each discovery request to the extent it seeks information not
21 in Plaintiff's possession, custody, or control and/or information that is equally obtainable by
22 Defendants from other sources.

23 7. Plaintiff objects to each discovery request to the extent it would require
24 Plaintiff to review each and every document in each of its files and to interview each and
25 every agent or representative of Plaintiff, to determine if that document, or agent, or
26

1 representative may have information that may be responsive to one or more of these discovery
2 requests. Such a requirement is unduly burdensome and expensive.

3
4 **I. INTERROGATORIES**

5 **INTERROGATORY NO. 1:** Please identify all persons (including the office or
6 position held by each person if answering on behalf of a corporation) providing information
7 for the answering of these Interrogatories and Requests for Production of Documents and to
8 which Interrogatories each provided responses.

9 **ANSWER:**

10 Alan Sidell, President, Seattle Iron & Metals Corp., c/o Salter Joyce Ziker PLLC.

11
12 **INTERROGATORY NO. 2:** Please identify each and every person who has
13 knowledge of the facts asserted in your Amended Complaint. In answering this interrogatory,
14 please also:

- 15 a. State the facts that are believed to be within the knowledge of that person;
16 b. Provide the name, address, and telephone number of the person. If any such
17 person cannot be identified by name and address, provide all relevant
18 information that will aid in locating or identifying such a person;
19 c. Identify all documents which bear on the existence or truth of any of the facts
20 identified in response to this interrogatory.

21 **ANSWER:**

22 Objection. This interrogatory is overly broad, unduly burdensome, vague and
23 ambiguous. Notwithstanding those objections, Plaintiff answers as follows:

24 Alan Sidell, c/o Salter Joyce Ziker PLLC. Although he was not involved in the day-
25 to-day negotiations, Mr. Sidell has general knowledge regarding the facts of this matter.

26 Lin Xie. Mr. Xie is expected to have knowledge regarding all aspects of this matter.

Susan Ng. Ms. Ng is expected to have knowledge regarding all aspects of this matter.

Mike Dollard. Home: 425-746-0412. Cell: 206-650-7642. Mr. Dollard is expected to
have knowledge regarding all aspects of this matter.

Chris Berge. Contact information unknown, but believed to be living or working in
the Olympia area. Mr. Berge is believed to have knowledge regarding the initial meetings
between Plaintiff and Defendants and various representations made by Defendants.

Aleki Leiataua, U.S. Bank. 1420 Fifth Avenue, Suite 900, Seattle, Washington
98101. Mr. Leiataua may have knowledge regarding the letter of credit and related
documents relevant to the transaction between Plaintiff and Defendants.

1 Robert Adolf. The Adolph Law Group, 701 Fifth Avenue, 71st Floor, Seattle,
2 Washington 98104. 206-386-7791. Mr. Adolph is expected to have knowledge regarding the
3 efforts of Defendants, if any, to collect funds from third-parties that were eventually due to
4 Plaintiff.

5 **INTERROGATORY NO. 3:** Please identify each person you, or your representative,
6 expect to call as an expert witness at the time of trial. In answering this interrogatory, please
7 provide:

- 8 a. The subject matter upon which each expert is expected to testify;
- 9 b. The qualifications, (including education and work experience), of each expert
10 named; and
- 11 c. The address and phone number of each expert

12 **ANSWER:**

13 Experts have not yet been identified. This answer may be supplemented as required by the
14 civil rules.

15 **INTERROGATORY NO. 4:** Please indicate whether the contract or agreement
16 between you and the Defendant was in any way modified or changed. If so, please state:

- 17 a. Whether the modification was written or oral; if written, attach a copy thereof to
18 your answers to these interrogatories.
- 19 b. The nature of all modifications or changes made or agreed upon;
- 20 c. The date, place, and time of all modifications or changes were made;
- 21 d. The date, place, and time that each modification or change was agreed upon;
- 22 e. The names and addresses of all persons present when each modification or
23 change was agreed upon.

24 **ANSWER:**

25 Objection. This interrogatory is vague. Furthermore, discovery is ongoing, and Plaintiff
26 specifically reserves the right to supplement and/or amend this answer as discovery continues.
Notwithstanding those objections, Plaintiff answers as follows: yes. The contract was
modified by not only oral and written agreement, but by performance of the parties as well.
Facts relevant to these modifications include, but are not limited to:

Plaintiff's agreement to go forward working with Defendants even though Defendants failed
to obtain a proper letter of credit in the time frame proscribed in the original contract;

Once it became clear, by approximately July 20, 2005, that Defendants could not obtain a
proper letter of credit between Defendants and Plaintiff, Plaintiff and Defendants agreed to go
forward to obtain a letter of credit from the third-party buyer payable to both Defendants and
Plaintiff;

1 The original draft letter of credit, dated July 21, 2005, was amended on or about July 25,
2 2005, July 27, 2005, and/or August 5, 2005. See the attached documents for details; and

3 On August 1, 2005, because Defendants had still been unable to obtain a proper letter of
4 credit, the parties agreed to change the quantity of the contract to 1,000 Metric Tons. See the
attached documents for details.

5 Discovery is ongoing.

6 **INTERROGATORY NO. 5:** Did the Defendant inform you that your performance
7 under any agreement was unsatisfactory? If so, please state:

- 8 a. The date, time and place when you were informed and by whom;
9 b. Specify what you were told was unsatisfactory;
10 c. What action, if any, did you take to correct any alleged unsatisfactory
performance;

11 **ANSWER:**

12 Objection, this interrogatory is vague and ambiguous. Notwithstanding those objections,
13 Plaintiff answers as follows:

14 On July 28, 2005, Defendant Lin Xie sent a facsimile to Plaintiff mistakenly stating that
15 Plaintiff had "cancelled" the contract.

16 **INTERROGATORY NO. 6:** Did you inform Defendant that their performance under
any agreement was unsatisfactory? If so, please state:

- 17 a. The date, time and place when you informed Defendant;
18 b. The names of the person(s) you informed;
19 c. Specify what you told Defendant was unsatisfactory;
20 d. What action, if any, did Defendant take to correct any alleged unsatisfactory
performance;
21 e. Attach copies of all written communications and documents pertaining to
22 preceding subparts of this interrogatory.

23 **ANSWER:**

24 Objection, this interrogatory is vague, ambiguous, and unduly burdensome. Notwithstanding
those objections, Plaintiff answers as follows:

25 Yes. Throughout the course of performance, on numerous occasions, Defendants were unable
26 to provide a satisfactory letter of credit. In addition, Defendants were contacted on numerous
occasions regarding their lack of payment. See attached documents for details. Discovery is
ongoing.

1
2 **INTERROGATORY NO. 7:** Please describe in detail all misrepresentations made by
3 Defendant or omissions by Defendant that induced you to fail to take further action, as alleged
in the Complaint for Damages. In answering this interrogatory, please state:

- 4 a. The date, time, and place of the misrepresentation or omission;
5 b. The content of the misrepresentation or what material fact was omitted;
6 c. The person making the misrepresentation, and to whom it was made;
7 d. The person who omitted material facts, and to whom the duty to disclose was
owed;
8 e. The reason why you relied upon such misrepresentation or omission;
9 f. An explanation of what actions you failed to take as a result of the alleged
misrepresentations or omissions;
10 g. An explanation of how your reliance on such misrepresentation or omission
was to your detriment.

11 **ANSWER:**

12 At various times before the contract was executed, Defendants represented to Mr. Dollard that
13 Defendants had sufficient business connections and expertise to smoothly and efficiently sell
14 Plaintiff's materials in China. This was false. Plaintiff relied on Defendants'
15 misrepresentations when entering into the parties' agreement and when continuing to do
16 business with Defendants.

17 On January 25, 2006, via telephone, Defendants told Plaintiff that Defendants had served CU
18 Transport Inc. and the Bank of Shanghai with a lawsuit. This, in fact, was not true, and
19 service had never been effectuated. Defendants also said that Defendants had been in
20 previous trials similar to Defendants' dispute with CU Transport Inc. and had been successful.
21 Defendants also stated they were, or would be, represented by counsel.

22 In late February, 2006, Defendants stated that the parties were awaiting trial.

23 On May 22, 2006, Defendants stated that trial would occur in late 2006.

24 These statements by Defendants were false. Based upon Defendants' misrepresentations,
25 Plaintiff refrained from pursuing collection directly from Defendants or from third parties, to
26 the detriment of Plaintiff.

Furthermore, Defendants stated to Plaintiff that Defendants received \$60,000 from third-
parties to pay to Plaintiff, when in fact Defendants received \$99,980. Defendants'
misrepresentations caused Plaintiff to refrain from collection activities and refrain from
receiving monies to which Plaintiff was entitled.

Discovery is ongoing.

23 **INTERROGATORY NO. 8:** State any and all amounts of monies you received from
24 Defendant, the dates received, and how those monies were applied to Defendant's account(s).

25 **ANSWER:**

26 Plaintiff received a cashier's check from Wells Fargo Bank, N.A., dated December 20, 2005,
in the amount of \$60,000. This amount was applied to the total outstanding balance owed by
Defendants.

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INTERROGATORY NO. 9: Please describe in detail how your damages amount to at least \$ 98,100.90, as alleged in the Amended Complaint.

ANSWER:

The metal that was shipped was represented by two invoices, invoice D42527 and invoice D42616. The total of those invoices was \$158,100.90. In addition, Plaintiff is entitled to prejudgment interest and incidental and consequential damages.

INTERROGATORY NO. 10: Please describe in detail the dates upon which you delivered scrap metal pursuant to the contract, the amount delivered, the location of delivery, and the person who accepted delivery.

ANSWER:

See the enclosed documents for details.

INTERROGATORY NO. 11: If you did not deliver 2,000 MT of scrap metal as outlined in the contract attached to your Complaint, please state the reasons why you did not deliver that amount of scrap metal.

ANSWER:

Only 1,000 MT was delivered because the parties agreed to amend the contract to only deliver that amount.

INTERROGATORY NO. 12: Identify all persons employed by Seattle Iron & Metals Corp. from January 1, 2005 to the present, including their current address and phone number.

ANSWER:

Objection. This interrogatory is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence

INTERROGATORY NO. 13: If Chris Berge and Mike Dollard no longer work for Seattle Iron & Metals Corporation, please state in detail the reasons why they no longer work for your business.

ANSWER:

Both Mr. Berge and Mr. Dollard left voluntarily to pursue other opportunities.

1 **REQUESTS FOR PRODUCTION**

2 **REQUEST FOR PRODUCTION NO. 1:** Please produce all relevant books,
3 records, and papers reviewed or otherwise examined in your preparation and/or answering the
4 preceding Interrogatories.

5 **RESPONSE:**

6 Please see the enclosed documents.

7 **REQUEST FOR PRODUCTION NO. 2:** Please produce all documents in your
8 possession or under your control (including all drafts, marked up copies, copies non identical
9 in any way, and identical copies in different files) referring to or pertaining to the subject
10 matter of this lawsuit.

11 **RESPONSE:**

12 Objection. This request is vague, overly broad, and unduly burdensome. Notwithstanding
13 those objections, please see the enclosed documents.

14 **REQUEST FOR PRODUCTION NO. 3:** Please produce all photos, films, video or
15 audio tapes, cassettes or other records or pictures referring to or pertaining to this lawsuit,
16 including all edited and unedited versions, and all transcripts, indices, summaries, and
17 descriptions thereof.

18 **RESPONSE:**

19 No responsive documents exist.

20 **REQUEST FOR PRODUCTION NO. 4:** Please produce all correspondence,
21 written or otherwise, between you and each of the named Defendants and/or their agents.

22 **RESPONSE:**

23 Please see the enclosed documents.

24 **REQUEST FOR PRODUCTION NO. 5:** Please produce all documents that set
25 forth or otherwise evidence the qualifications of each person you intend to call as an expert.

26 **RESPONSE:**

Experts have not yet been identified. This response may be supplemented as allowed under
the civil rules.

REQUEST FOR PRODUCTION NO. 6: Please produce all records, books, and
papers provided to or otherwise examined by each person you intend to call as an expert.

RESPONSE:

Experts have not yet been identified. This response may be supplemented as allowed under
the civil rules.

1 **REQUEST FOR PRODUCTION NO. 7:** Please produce proof of transmittal of an
2 AQSIQ certificate to China regarding any scrap metal that you allege you delivered to
3 Defendant.

3 **RESPONSE:**

4 Objection. This request is vague and ambiguous. Notwithstanding those objections, please
5 see the enclosed documents.

6 **REQUEST FOR PRODUCTION NO. 8:** Please produce a copy of any Letter of
7 Credit that was delivered to U.S. Bank regarding any scrap metal the you allege you delivered
8 to Defendant.

8 **RESPONSE:**

9 Please see the enclosed documents.

10 **REQUEST FOR PRODUCTION NO. 9:** Please produce all written internal
11 communications regarding the transaction at issue, other than documents protected by
12 attorney-client privilege.

12 **RESPONSE:**

13 Please see the enclosed documents.

14
15 **INTERROGATORIES AND/OR REQUESTS FOR PRODUCTION SUBMITTED** this
16 _____ day of April, 2008.

17 DICKSON STEINACKER, LLP

18
19 _____
20 Kevin T. Steinacker, WSBA #35475
21 Matthew J. Smith, WSBA #33309
22 Attorneys for Defendants

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DEFENDANTS' FIRST DISCOVERY REQUESTS TO
PLAINTIFF AND OBJECTIONS, ANSWERS, AND
RESPONSES THERETO - 12

SALTER JOYCE ZIKER, PLLC
1601 Fifth Avenue, Suite 2040
Seattle, Washington 98101
Tel: 206-957-5960 / Fax: 206-957-5961

CERTIFICATION OF COMPLIANCE WITH CR 26(g).

ANSWERS AND RESPONSES dated this 6th day of June, 2008.

SALTER JOYCE ZIKER, PLLC



BARRY ZIKER, WSBA #11220

TODD WYATT, WSBA #31608

Attorneys for Plaintiff

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Selected Pages from Deposition upon Oral Examination of
Alan Paul Sidell
On Thursday, August 28, 2008

Page 18

1 Sidell, but you just answered that he's your brother,
 2 correct?
 3 A. Yes.
 4 Q. And he's still involved in the business?
 5 A. Yes.
 6 Q. What is his position?
 7 A. He's vice-president.
 8 Q. As vice-president, what does he do?
 9 A. He deals mostly with security and safety.
 10 Q. The other department heads, do they have the
 11 job title of vice-president or is it something
 12 different?
 13 A. There's one that's assistant vice-president.
 14 Q. So, is he the only vice-president, then?
 15 A. Assistant vice-president, yes. The rest are
 16 not titles that are vice-president or above.
 17 Q. Let me clarify because I think that was
 18 confusing. Is Marc Sidell the only --
 19 A. Yes.
 20 Q. -- vice-president?
 21 MR. WYATT: Wait until he finishes. I know
 22 you know the answer, but wait until he finishes the
 23 question before you answer. It makes it harder for
 24 the court reporter.
 25 THE WITNESS: Okay.

Page 19

1 Q. Do you know if there are any other
 2 businesses that Marc Sidell is involved with?
 3 A. That he is involved with?
 4 Q. Correct.
 5 A. Our branch in Spokane.
 6 Can I ask a question?
 7 Q. Sure.
 8 A. This is a company we bought out many years
 9 ago, and I wasn't even aware that that name was still
 10 active because we dissolved that company many, many
 11 years ago.
 12 Q. You're referring to Puget Sound Iron &
 13 Metal?
 14 A. Yeah, yeah. I didn't even know that it was
 15 still an active --
 16 Q. So, you don't use that trade name?
 17 A. No.
 18 (Exhibit-2 marked.)
 19 Q. The court reporter has just handed you
 20 what's been marked as Exhibit-2, and again I'll
 21 represent to you that this is a printout that I got
 22 from the Department of Licensing after entering in
 23 your name, Alan Sidell, and it came out with this list
 24 of ten different businesses, one of which is a notary
 25 public, but looking at that list, does that appear to

Page 20

1 be an accurate representation of businesses that you
 2 are involved with?
 3 A. Really not, no.
 4 Q. Let's start from the top. American
 5 Recycling Corporation?
 6 A. Well, let me first clarify your question and
 7 then we can go down the list. We restructured the
 8 company from a C to an S corporation, so we changed
 9 some of these entities, and a number of these are not
 10 related to the business. They're partnerships,
 11 property.
 12 Q. Okay. When did you restructure Seattle Iron
 13 from a C to an S corporation?
 14 A. Beginning in 2008.
 15 Q. Are you involved with American Recycling
 16 Corp?
 17 A. American Recycling is our branch in Spokane,
 18 yes.
 19 Q. It appears maybe there are two American
 20 Recycling Corporations, one in Seattle, one in
 21 Spokane?
 22 A. No. I don't follow that.
 23 Q. Looking at the very first one, it says
 24 "American Recycling Corp," and then the "City" of
 25 "Seattle WA," and then the second one down is

Page 21

1 "American Recycling Corporation," "Spokane WA"?
 2 A. I can't respond to that with knowledge of
 3 why it's listed in Seattle and Spokane, because it's
 4 obviously in Spokane.
 5 Q. Okay. But that is the Spokane branch of
 6 Seattle Iron & Metals?
 7 A. Yes, yes.
 8 Q. DACO Investments, LLC, what's that?
 9 A. That was a property partnership.
 10 Q. What did the property partnership do?
 11 A. What did it do?
 12 Q. Yes.
 13 A. Held property.
 14 Q. Where at?
 15 A. In Seattle.
 16 Q. Was the property that it held related in any
 17 way to Seattle Iron & Metals?
 18 A. It's property that the company used, leased.
 19 Q. Leased from DACO?
 20 A. Yes.
 21 Q. Is that the property that it still currently
 22 uses?
 23 A. A portion of.
 24 Q. And then Seattle Iron & Metals Corporation
 25 is the next one down. That's the business that you're

6 (Pages 18 to 21)

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Appendix-66

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1 representing here today, correct?
 2 A. Yes.
 3 Q. And then --
 4 MR. WYATT: Belated objection that he's not
 5 the 30(b)(6) for Seattle Iron & Metals. He's just --
 6 it's just a notice of his deposition.
 7 Q. Seattle Iron & Metals Export Corporation,
 8 what's that?
 9 A. That was our export DISC that was set up for
 10 tax purposes, and we've dissolved that.
 11 Q. Was that Seattle Iron & Metals Export
 12 Corporation different than the next one down?
 13 A. Yeah, that's the successor.
 14 Q. So, the business that was involved in this
 15 transaction with Giant International Metal Resources,
 16 was that the Seattle Iron & Metals Corporation?
 17 A. I believe that it was at that time.
 18 Q. It was not the Seattle Iron & Metals Export,
 19 Inc.?
 20 A. No.
 21 Q. Shalmar 08, LLC, what's that?
 22 A. Holds property that Seattle Iron & Metals
 23 resides on.
 24 Q. And Shalmar 95, LLC?
 25 A. Is a partnership that holds property in

Page 23

1 Spokane that is not business-related.
 2 Q. And then --
 3 A. I should say that the business does not
 4 occupy any processing on.
 5 Q. What business is located at that property?
 6 A. It's vacant right now.
 7 Q. The next one down is Notary Public. Then
 8 the last one is Triside, LLC; what's that?
 9 A. Triside is part of our newly formed S
 10 corporation, export for tax purposes, slash export for
 11 tax purposes.
 12 Q. Does it export scrap metal as well?
 13 A. Just paper transactions.
 14 Q. Are there any other businesses besides the
 15 ones listed here that you can recall that you are
 16 involved with?
 17 A. No.
 18 Q. That was a no?
 19 A. No.
 20 Q. So, going back to the Seattle Iron & Metals
 21 entity that's involved in this lawsuit, are you the
 22 only person that makes executive decisions?
 23 MR. WYATT: Object to the form, vague.
 24 Q. Are you the only person in Seattle Iron &
 25 Metals Co. that decides -- are you the person in

Page 24

1 Seattle Iron & Metals Co. who makes the ultimate
 2 decision on what Seattle Iron & Metals can and cannot
 3 do?
 4 MR. WYATT: Same objection, vague.
 5 Answer if you can.
 6 A. I give authority, depending on what level
 7 the person occupies in the company, to make some
 8 decisions independently, but ultimately if there's
 9 something that needs my input, I would make the final
 10 decision.
 11 Q. Who in Seattle Iron would be able to make
 12 decisions independently?
 13 MR. WYATT: Objection, vague.
 14 Q. Let me rephrase that.
 15 You mention that you sometimes allow people
 16 within Seattle Iron & Metals, employees, to make
 17 decisions independently, correct?
 18 A. Yes.
 19 Q. And who would those people be, generally
 20 speaking?
 21 A. I would need a clarification on that,
 22 because I'd need to know in relation to what,
 23 purchasing scrap metal, buying scrap metal, buying a
 24 machine, hiring somebody, firing somebody? Can you be
 25 more specific, please.

Page 25

1 Q. Sure. Let's talk about buying scrap metal.
 2 Who would have authority to act independently of you
 3 to buy scrap metal?
 4 A. A specific name or job description?
 5 Q. Let's start with a job description.
 6 A. Okay. Our nonferrous superintendent, Ken
 7 Trimble, T-r-i-m-b-l-e. And you're talking
 8 specifically Seattle Iron & Metals, not American
 9 Recycling?
 10 Q. Correct.
 11 A. Perhaps one of our purchasing people that
 12 was selling a piece of usable steel or a machine or
 13 something like that.
 14 Q. Do you have a ferrous superintendent?
 15 A. Yes.
 16 Q. Who is that?
 17 A. Well, we have an operations manager and then
 18 below him for the nonferrous department/ferrous
 19 department we have sub people, and the next level down
 20 for the ferrous would be Ed Armstrong, and Ed is -- I
 21 believe his title is ferrous production manager.
 22 Q. In 2005 do you know who that would have
 23 been?
 24 A. Probably Rick Buse, B-u-s-e.
 25 Q. Would he have had authority to make

7 (Pages 22 to 25)

Page 110

1 with CCIC, has that happened before where they
 2 inspected the containers and then two months or so
 3 later issued their inspection certificate?
 4 A. I don't know.
 5 Q. So, would you have any idea why there is
 6 that --
 7 A. I don't.
 8 Q. -- delay? Let me ask my question. Do you
 9 have any idea why there is the delay between the July
 10 22nd, '05, inspection date and the September 12th,
 11 2005, date listed on the top corner?
 12 A. I don't.
 13 Q. To your knowledge does CCIC normally supply
 14 Seattle Iron & Metals with the inspection certificates
 15 after the product is inspected?
 16 MR. WYATT: Object to the form.
 17 Q. In your previous experience with CCIC, they
 18 issue preinspection certificates, have you normally --
 19 how often do they provide you with the certificate?
 20 A. Normally. I could not say if it's always.
 21 (Exhibit-21 marked.)
 22 Q. The court reporter has handed you an exhibit
 23 marked 21. Do you recognize this document?
 24 A. No.
 25 Q. So, you've never seen this document before?

Page 111

1 A. Your question was do I recognize this
 2 document. No. Your next question was have I ever
 3 seen this document before. And I would say I don't
 4 know.
 5 Q. It appears to be a bill of lading; the top
 6 right corner, says "CU Transport Inc." So, do you
 7 have any knowledge on if and when Seattle Iron &
 8 Metals Corporation ever received this bill of lading?
 9 A. No.
 10 Q. Do you have any knowledge of whether Seattle
 11 Iron & Metals Corporation had contact information for
 12 CU Transport, Incorporated, let's say, prior to
 13 September 15th, 2005?
 14 A. If Seattle Iron & Metals had contact
 15 information?
 16 Q. Right. For CU Transportation.
 17 A. I don't know.
 18 Q. You testified earlier that you couldn't be
 19 certain that Exhibit-18 was the letter of credit that
 20 you accepted, but that Seattle Iron & Metals
 21 Corporation did accept a letter of credit.
 22 A. Yes.
 23 Q. To your knowledge did that letter of credit
 24 require the delivery of documents to a bank?
 25 A. Yes.

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1 Q. Do you have any personal knowledge if
 2 anybody from Seattle Iron & Metals delivered documents
 3 to a bank?
 4 A. Do I have personal knowledge?
 5 Q. Yes.
 6 A. No, I don't.
 7 Q. Do you recall where the letter of credit
 8 would require the documents to be delivered to?
 9 A. Typically it would go to our bank, if our
 10 bank was the receiving.
 11 Q. Do you have any specific recollection on
 12 this particular transaction?
 13 A. Well, just what I read in the letter of
 14 credit, but otherwise, no.
 15 Q. Do you have any personal knowledge that
 16 anybody from Seattle Iron & Metals Corporation
 17 provided documents to Giant for Giant to deliver?
 18 A. I don't know.
 19 Q. So, to your knowledge under some terms of
 20 letters of credit, Seattle Iron & Metals would deliver
 21 documents to a bank; is that correct? I'm speaking in
 22 general terms.
 23 A. Yes.
 24 Q. Who would normally be responsible for that
 25 delivery?

Page 113

1 A. Typically our controller.
 2 Q. Who is that?
 3 A. In this case it was Mike Dollard.
 4 Q. How would the controller, in this case Mike
 5 Dollard, generally speaking, deliver those documents?
 6 A. I don't know.
 7 Q. So, there weren't any specific
 8 instructions --
 9 A. I don't know.
 10 Q. -- from you to that person in how to perform
 11 their duty?
 12 A. That's their responsibility.
 13 (Exhibit-22 marked.)
 14 Q. The court reporter's handed you what's been
 15 marked as Exhibit-22. Do you recognize this document?
 16 A. No.
 17 Q. It appears to be a letter addressed to Aleki
 18 Leiatua, L-e-i-a-t-a-u-a, at US Bank from Michael
 19 Dollard. So, is that your handwriting on the bottom?
 20 A. No.
 21 Q. Do you have any personal knowledge as to why
 22 these documents that are listed in this letter --
 23 well, do you have any personal knowledge whether they
 24 were personally delivered or mailed to --
 25 A. No.

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1 Q. -- US Bank?
 2 A. No.
 3 Q. Turning back to Exhibit-18, go to the fourth
 4 page. This is the letter letter of credit. In the
 5 bottom right corner it says "SIMC 72." If you go to
 6 line 47B, about five lines down, it says, "This letter
 7 of credit is restricted for presentation of documents
 8 to Wells Fargo HSBC Trade Bank, N.A." I don't know if
 9 that's -- then it says "for substitution." I don't
 10 know if that's part of the same sentence or the next
 11 sentence. But looking at that sentence, would you
 12 interpret that to mean that the documents required by
 13 the letter of credit would need to be presented to
 14 Wells Fargo under this letter of credit?
 15 MR. WYATT: Objection, vague. Also object
 16 that it calls for a legal conclusion.
 17 THE WITNESS: Am I to answer that?
 18 MR. WYATT: Answer the best you can.
 19 A. By whom? It says that they need to, but it
 20 doesn't say by whom.
 21 Q. By the beneficiary.
 22 A. It doesn't say by the beneficiary, no. I
 23 don't see the word "beneficiary."
 24 Q. Does that indicate to you that the proper
 25 recipient of the documentation is Wells Fargo?

Page 115

1 MR. WYATT: Object to the form.
 2 A. I don't know where the chain begins. I
 3 only see what's listed here, so I don't -- I don't
 4 know.
 5 Q. Under your understanding of this letter of
 6 credit does Wells Fargo need to receive the documents
 7 listed in the letter of credit pursuant to this
 8 sentence?
 9 MR. WYATT: Same objection. Also, asked and
 10 answered.
 11 A. I don't have any way of knowing that. When
 12 I'm reading here, I don't know where they are down the
 13 line of handling the paperwork. I see Hongkong and
 14 Shanghai Bank is also listed.
 15 Q. Where is that that you're looking at?
 16 A. HSBC, Wells Fargo HSBC Trade Bank.
 17 Q. Going to the first page where it says
 18 "Issuing Bank: Wells Fargo HSBC Trade Bank N.A."
 19 The very first -- very front. And then in that box in
 20 the middle it says "Issuing Bank: Wells Fargo HSBC
 21 Trade Bank." Do you understand those to be two
 22 separate banks or what's your personal knowledge?
 23 A. No, it's one bank, but what I'm saying is
 24 that I don't know what the progression was there. I
 25 wasn't involved in that. I don't know.

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1 Q. Turning back to that fourth page with 72 in
 2 the corner, line 47B down towards the bottom, about
 3 five lines up, it says, "Documents must be presented
 4 to Wells Fargo HSBC Trade Bank, N.A., Trade Services
 5 OPS," and then has an address, says "via courier in
 6 one parcel." What is your interpretation of that
 7 sentence?
 8 A. I answer again --
 9 MR. WYATT: Hold on. Object to the form.
 10 Object to the extent it calls for a legal conclusion.
 11 Answer the best you can.
 12 A. Again, my answer is by whom?
 13 Q. So, you wouldn't know who needs to deliver
 14 documents required by that clause?
 15 A. Personally, no.
 16 Q. So, under your interpretation this clause
 17 does not require Seattle Iron & Metals Corporation to
 18 deliver the documents to Wells Fargo?
 19 A. That's not what I said.
 20 MR. WYATT: Hold on. Same objections. I'll
 21 also object as vague and asked and answered.
 22 Go ahead.
 23 A. I said I don't know and you phrased the
 24 question as if I responded in a certain --
 25 Q. Turning to the third page, 71 in the corner,

Page 117

1 line 46A says "Documents Required" and lists six
 2 different items. To your knowledge were there any
 3 other documents aside from these required under the
 4 letter of credit?
 5 A. I don't know.
 6 Q. Who do you believe on behalf of Seattle Iron
 7 & Metals Corporation and Seattle Iron & Metals Export
 8 Corporation was responsible for delivering documents
 9 under the terms of this letter of credit?
 10 MR. WYATT: Hold on. Objection, asked and
 11 answered, object to the extent it calls for a legal
 12 conclusion. Also object in that he's not the 30(b)(6)
 13 representative of those two entities.
 14 Go ahead.
 15 A. I still don't know.
 16 Q. Did you personally discuss with anyone from
 17 Giant International the delivery of documents prior to
 18 September 15th, 2005?
 19 A. No.
 20 Q. Did you discuss the delivery of documents
 21 with anyone else from Seattle Iron & Metals?
 22 MR. WYATT: By "delivery of documents," you
 23 mean the documents necessary for the letter of
 24 credit?
 25 MR. SMITH: Correct.

Page 118

1 A. Not specifically, no.
 2 Q. On that same page, 72 in the corner, down at
 3 the bottom it says, "Please call (206) 292-3491
 4 regarding any inquiries on negotiations." To your
 5 knowledge did anybody at Seattle Iron & Metals contact
 6 that phone number?
 7 A. I don't know.
 8 Q. Then on the very front of the exhibit
 9 towards the very bottom it says, "If you have any
 10 questions, please feel free to call our office at the
 11 above listed number." Do you know if anybody from
 12 Seattle Iron & Metals called that office?
 13 A. I don't know.
 14 Q. Then on the very last page at the bottom it
 15 says, "Please contact Irene Wu by telephone" and lists
 16 a phone number and a fax number and a helpline phone
 17 number regarding any inquiries. Do you know if
 18 anybody at Seattle Iron & Metals contacted Irene Wu?
 19 A. I don't know.
 20 Q. Do you know who Irene Wu is?
 21 A. No.
 22 (Exhibit-23 marked.)
 23 Q. The court reporter's handed you an exhibit
 24 marked 23. Have you seen this document before?
 25 A. No.

Page 119

1 Q. Appears to be a letter addressed, again, to
 2 Aleki at US Bank from Mike Dollard listing a bunch of
 3 documents that were enclosed with the letter. It's
 4 dated September 21st, 2005. Comparing that to
 5 Exhibit-22, appears to be similar, maybe not the same,
 6 as far as the list of documents. But do you have any
 7 personal knowledge why a second letter was sent to
 8 Aleki at US Bank on September 21st?
 9 A. No.
 10 Q. Is that your handwriting in the lower right
 11 corner?
 12 A. No.
 13 (Exhibit-24 marked.)
 14 Q. The court reporter's handed you an exhibit
 15 marked 24. Have you ever seen this document before?
 16 A. I don't recall.
 17 Q. Appears to be an email from Giant to Mike
 18 Dollard. Subject line is "AQSIQ Certificate." It
 19 says, "The China custom requires that you send a fax
 20 of your AQSIQ certificate to them to clear the custom
 21 so that the buyer can have access to the product.
 22 This is the standard procedure." Is that your
 23 understanding of the procedure?
 24 A. This is standard procedure? No.
 25 Q. What is an AQSIQ certificate?

Page 120

1 A. It's the document where you prequalify to
 2 ship scrap to China for import.
 3 Q. Who are you certified by?
 4 A. By the government in China, the AQSIQ
 5 division.
 6 Q. So, it's separate, then, from CCIC?
 7 A. CCIC is the arm that does the physical
 8 inspection.
 9 Q. Did you ever discuss the certificate with
 10 Mr. Xie?
 11 A. When?
 12 Q. Ever. Prior to in 2005?
 13 A. Prior to making the shipment?
 14 Q. At any time -- well, break this down, then,
 15 I guess. Prior to making the shipment did you discuss
 16 the certificate?
 17 A. No.
 18 Q. After making the shipment did you discuss it
 19 with him?
 20 A. Did I personally discuss it with him?
 21 Q. Right.
 22 A. I don't believe so, no.
 23 Q. Did someone from Seattle Iron & Metals
 24 discuss it with you?
 25 A. Yes.

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1 Q. Who was that?
 2 A. Mike Dollard.
 3 Q. What was said during those discussions?
 4 A. What was said?
 5 Q. What was said during those discussions?
 6 A. That Mr. Lin wanted a copy of our
 7 certificate, that the shipment had arrived and he
 8 needed a copy of our certificate.
 9 Q. Okay. And then what did you say in
 10 response?
 11 A. As I stated earlier, I was skeptical at
 12 first because of the conversation that we had had
 13 about potential misuse of the number. But we did
 14 provide that number to him.
 15 Q. That's the certificate number you're
 16 referring to?
 17 A. Yes.
 18 Q. How would a certificate be misused?
 19 A. That he would -- could potentially have
 20 purchased scrap from other dealers in the United
 21 States for import into China that did not have the
 22 prequalification to be able to do that, and he could
 23 have used our number to qualify that shipment for
 24 documentation.
 25 Q. Okay. The email in Exhibit-24 appears to

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1 Q. Did you hire an attorney in January of 2006?
 2 A. Specifically pertaining to this case or an
 3 attorney in general?
 4 Q. Did you hire an attorney to represent you in
 5 this case that Giant filed against CU Transport?
 6 A. No.
 7 Q. Did you ever appear or attempt to appear in
 8 that case as a party?
 9 A. No.
 10 Q. Did Giant ever represent itself to you as an
 11 agent of CU Transport?
 12 A. No.
 13 Q. Did you ever assign any of your claims that
 14 you might have had against CU Transport to Giant?
 15 A. No.
 16 Q. Did Giant have any role as like a
 17 collections agent for Seattle Iron & Metals?
 18 A. I don't know.
 19 MR. WYATT: Object to the form.
 20 (Exhibit-26 marked.)
 21 Q. The court reporter handed you Exhibit-26.
 22 It appears to be several pages of handwritten notes
 23 supplied by you in response to our discovery. Appears
 24 to me that there's two different styles of handwriting
 25 from the first page to the subsequent pages. Is any

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1 of this handwriting yours?
 2 A. Yes.
 3 Q. Which handwriting is yours?
 4 A. Second page.
 5 Q. Going forward to the end?
 6 A. Yes.
 7 Q. On the last page -- no, sorry. On the page
 8 marked SIMC 114 --
 9 A. On the last page?
 10 Q. No. On the page marked at the bottom right
 11 corner marked SIMC 114. At the top it says, "I called
 12 Robert Adolph about taking case for SIM. He needs
 13 release from," and I can't read that.
 14 A. "Giant." "B&G" or something "Giant."
 15 Q. What's "B&G," do you know?
 16 A. I don't recall. I just took kind of spotty
 17 notes here.
 18 Q. Was it your understanding that Robert Adolph
 19 represented Giant?
 20 A. Yes.
 21 Q. Is that the first time you called him about
 22 taking the case for SIM, as it says?
 23 A. I don't recall.
 24 Q. Do you know if there are any other
 25 handwritten notes that would --

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1 A. No.
 2 Q. -- state that? Turning to the page SIMC
 3 121, towards the bottom it says, "Who is working on
 4 this?" I think that is supposed to say "Adolph/
 5 Jackson." Is that first one, is that referring to
 6 Robert Adolph?
 7 A. Yes.
 8 Q. And who is "Jackson"?
 9 A. I think that's another name that he gave me.
 10 Q. Who is "he"?
 11 A. Mr. Lin. Of another attorney. I don't
 12 recall exactly, but I think that's what it was.
 13 Q. Do you recall contacting that attorney?
 14 A. No.
 15 Q. So, just to clarify, the very first page of
 16 the exhibit, that is not your handwriting; is that
 17 correct?
 18 A. No.
 19 (Exhibit-27 marked.)
 20 Q. The court reporter's handed you the exhibit
 21 marked 27. Do you recognize this?
 22 A. Yes.
 23 Q. Did you have either an opportunity to review
 24 the amended complaint before or after it was filed?
 25 A. Yes.

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1 Q. Did you approve of the language in the
 2 amended complaint?
 3 A. Yes.
 4 Q. Turning to paragraph 2.2, refers to
 5 "Purchase Contract (the 'Contract'), a true and
 6 correct copy of which is attached to this demand as
 7 Exhibit A." The copy I got did not have an
 8 Exhibit A. I'll represent to you that the original
 9 complaint had an Exhibit A attached to it which was
 10 the same exhibit marked as Exhibit-No.-5. Is it your
 11 understanding that the contract referred to here in
 12 paragraph 2.2 is that same contract?
 13 A. That was the basis for the contract, but it
 14 was not the final contract.
 15 MR. WYATT: I think his question -- tell me
 16 if I'm wrong -- I think his question was he didn't
 17 receive Exhibit A with this. Is this referring to the
 18 same document?
 19 A. Yes.
 20 Q. Paragraph 3.2 states, "Defendants' actions
 21 constitute a material breach of the Contract."
 22 "Contract" is then referring to that contract that's
 23 also Exhibit-5 in today's deposition; is that
 24 correct?
 25 MR. WYATT: Object to the form, calls for a

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1 legal conclusion.
 2 Q. I'm just trying to find what contract you're
 3 referring to here, but it's in capital C, "Contract,"
 4 previously in paragraph 2.2 it referred to "the
 5 Contract," capital C, as being that which was attached
 6 as Exhibit A. I'm probably going on a convoluted
 7 train. But Exhibit A to this amended complaint is
 8 supposed to be the same as Exhibit-5 here today,
 9 correct?
 10 A. I'll defer to my legal counsel.
 11 MR. WYATT: Object to the extent it calls
 12 for legal conclusions.
 13 Go ahead and answer.
 14 A. I assume, yes, because it's the document
 15 we're continuously referring to, so I'll assume yes.
 16 Q. Okay. I don't want you to make
 17 assumptions. Paragraph 2.2, the contract attached as
 18 Exhibit A, is that this document?
 19 A. Yes.
 20 Q. So then when paragraph -- by "this document"
 21 I was referring to Exhibit-5 of today's deposition.
 22 So when paragraph 3.2 refers to "the Contract" and the
 23 "Contract" is capital C, is that "Contract" referring
 24 to this --
 25 A. I don't know.

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1 MR. WYATT: Let him finish his question.
 2 Q. Was that "Contract" referring to this
 3 Exhibit-5 here today and Exhibit A as it's attached to
 4 the complaint?
 5 MR. WYATT: Same objection.
 6 Answer the best you can.
 7 A. I don't know.
 8 Q. Do you know any other contract it would be
 9 referring to?
 10 A. No.
 11 Q. So, when you allege that his actions
 12 "constitute a material breach of the Contract," what
 13 contract are you referring to?
 14 A. I would say this contract. I'd revise my
 15 answer. I would say this contract.
 16 Q. Exhibit-5, Exhibit A to the deposition?
 17 A. Yes.
 18 MR. WYATT: Belated objection to the form
 19 based on it asks for legal conclusions, but go ahead.
 20 Q. What actions do you allege constitute a
 21 material breach of that contract?
 22 MR. WYATT: Same objection.
 23 A. That he didn't pay us.
 24 Q. So, what did he not pay you? Can you be
 25 more specific.

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1 A. Can you rephrase that. We performed and
 2 made our shipment. And he didn't pay us for the
 3 shipment we made in its entirety.
 4 Q. Earlier you've testified that the letter of
 5 credit was the payment term under the contract; is
 6 that correct?
 7 MR. WYATT: Objection, mischaracterizes
 8 testimony.
 9 A. The form that he chose to pay us was the
 10 letter of credit. But he also paid us by bringing us
 11 a check or putting money in our account. I mean, he
 12 had to pay us regardless of what the form was, and
 13 obviously he did not restrict himself just to the
 14 letter of credit to pay us. He paid us cash, too.
 15 So, he did not feel bound by any particular type of
 16 conveyance.
 17 MR. SMITH: I'll move to strike. That
 18 wasn't my question.
 19 Q. Going to the "Second Cause of Action --
 20 Unjust Enrichment," paragraph 4.2 states that
 21 "Defendants' actions have caused them to be unjustly
 22 enriched at the expense of SIMCO." What actions are
 23 you referring to?
 24 MR. WYATT: Object to the extent it calls
 25 for a legal conclusion.

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1 Go ahead.
 2 A. We found out later that he actually did
 3 obtain funds in excess of \$60,000 and he for no
 4 specific explanation chose to take \$60,000 of what
 5 ended up being closer to \$98,000 and giving us part of
 6 that payment that he received.
 7 Q. So, the unjust enrichment claim refers to
 8 that money, is that correct, the difference between
 9 the \$98,000 and \$60,000?
 10 MR. WYATT: Same objection.
 11 Go ahead.
 12 A. I would assume so.
 13 Q. Was there any other --
 14 A. I don't know.
 15 Q. -- item that you think that Giant -- let me
 16 strike that.
 17 Is there any other way or any other action
 18 by Giant, aside from the money that you just
 19 mentioned, that caused them to be unjustly enriched?
 20 MR. WYATT: Same objection.
 21 A. I don't know.
 22 Q. So, you don't allege that Giant kept the
 23 metal for itself, do you?
 24 A. I don't know what happened to it. Never
 25 found out conclusively. I have no documentation. I

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1 MR. SMITH: Can we take a ten-minute break?
 2 MR. WYATT: Sure.
 3 (Discussion off the record.)
 4 Q. We're back on the record. Do you know
 5 offhand personally when Mr. Dollard first met Giant
 6 International or any representative from Giant?
 7 A. No, I don't.
 8 Q. Do you have any recollection of Giant
 9 wanting to contact you directly regarding either the
 10 shipment or the letter of credit? And by "contact
 11 directly," I mean by your cellphone.
 12 A. No.
 13 Q. Do you recall instructing your staff at all
 14 not to give your cellphone number to Giant?
 15 A. I generally don't give my cell number out,
 16 so it's possible.
 17 Q. To your knowledge did Giant pay for the CCIC
 18 inspection?
 19 A. I don't know that.
 20 Q. I might have already asked this and I
 21 apologize if it's a duplicate. But did you ask Mike
 22 Dollard to send the documents to US Bank?
 23 A. I don't know. I-- I wasn't involved. I
 24 don't know.
 25 Q. You don't recall that?

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1 A. No.
 2 Q. Do you know if Seattle Iron & Metals
 3 received the letter of credit that is Exhibit-18
 4 directly from US Bank?
 5 A. I don't know that.
 6 Q. So, you don't know who US Bank delivered
 7 this letter of credit to?
 8 A. No.
 9 Q. And just to clarify, you're here as a
 10 representative of Seattle Iron & Metals Corporation?
 11 MR. WYATT: No, he's not.
 12 Q. Are you here in your individual capacity?
 13 MR. WYATT: Yes. You're asking about the
 14 scope of your notice of deposition. Yeah, your notice
 15 of dep was to him.
 16 But go ahead and testify to what you
 17 understand to. I'm sorry.
 18 A. Okay. Do you want to ask the question
 19 again.
 20 Q. Your answers today, were you testifying to
 21 the extent of your knowledge as president of Seattle
 22 Iron & Metals Corporation?
 23 A. In my individual capacity?
 24 Q. No, in your role of president of Seattle
 25 Iron & Metals Corporation.

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1 MR. WYATT: Object to the extent -- object
 2 to the extent it calls for legal conclusion. I don't
 3 understand what the point of the question is. The
 4 deposition is what it is. I mean --
 5 MR. SMITH: Right.
 6 Q. But I'm wondering if your testimony today is
 7 consistent with your position as president of Seattle
 8 Iron & Metals Corporation?
 9 MR. WYATT: Objection. I have no idea what
 10 that question means.
 11 If you understand it, you can answer.
 12 THE WITNESS: I don't.
 13 A. I'm hesitating. I don't --
 14 Q. Was any of your testimony of the actions
 15 that you took individually, were any of those actions
 16 taken by you individually and not as president of
 17 Seattle Iron & Metals Corporation?
 18 MR. WYATT: Object to the extent it calls
 19 for a legal conclusion.
 20 If you understand, you can try to answer.
 21 THE WITNESS: I don't.
 22 Q. In today's deposition you've testified about
 23 several different things that you've done, you, Alan
 24 Sidell, correct?
 25 A. Yes.

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1 Q. Was there anything that you've testified to
 2 today that when you did that action, it was as Alan
 3 Sidell individual and not as Alan Sidell president of
 4 Seattle Iron & Metals, your understanding?
 5 MR. WYATT: Same objections.
 6 A. Okay. Did I take actions individually, not
 7 as part of my corporate role, my business role?
 8 Q. Right. In regards to the testimony today.
 9 A. No.
 10 MR. SMITH: Well, that concludes my
 11 questions for now. I'm going to reserve the right to
 12 call the witness back.
 13 MR. WYATT: We'll reserve signature.
 14 (Deposition adjourned at 1:55 p.m.)
 15 (Signature reserved.)
 16
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 24
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1 S I G N A T U R E
2
3
4
5 I declare under penalty of perjury under the laws
6 of the State of Washington that I have read my within
7 deposition, and the same is true and accurate, save
8 and except for changes and/or corrections, if any, as
9 indicated by me on the CHANGE SHEET flyleaf page
10 hereof. Signed in.....WA on the.....day
11 of....., 2008.
12
13
14
15
16 ALAN PAUL SIDELL
17 Taken: August 28, 2008
18
19
20
21
22 Michelle E. Diskin, RPR
23
24
25

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1 C E R T I F I C A T E
2 STATE OF WASHINGTON)
3) ss.
4 COUNTY OF KING)
5 I, the undersigned Registered Professional
6 Reporter and an officer of the Court under my
7 commission as a Notary Public for the State of
8 Washington, hereby certify that the foregoing
9 deposition upon oral examination of ALAN PAUL SIDELL
10 was taken before me on August 28, 2008, and
11 transcribed under my direction;
12 That the witness was duly sworn by me to testify
13 truthfully; that the transcript of the deposition is a
14 full, true, and correct transcript to the best of my
15 ability; that I am neither attorney for, nor a
16 relative or employee of, any of the parties to the
17 action or any attorney or counsel employed by the
18 parties hereto, nor financially interested in its
19 outcome.
20 IN WITNESS WHEREOF, I have hereunto set my hand
21 and seal this date: September 3, 2008.
22 /S/ MICHELLE E. DISKIN
23
24 NOTARY PUBLIC in and for the State of
25 Washington, residing at Seattle.
 Commission expires August 18, 2010.

42 (Pages 162 to 163)

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Appendix-74

1)
Selected Pages from Deposition upon Oral Examination of
Michael Dollard
On Wednesday, September 2, 2008

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1 Dr. Lin on that date?
 2 A. Not on that date.
 3 Q. Do you recall any conversation about
 4 meeting deadlines for the letter of credit with Dr.
 5 Lin?
 6 A. We had a lot of conversations involving the
 7 whole entire transaction, so I don't remember
 8 particularly what was involved.
 9 Q. Do you recall Dr. Lin asking you for a CCIC
 10 inspection report?
 11 A. No.
 12 (Exhibit-22 marked.)
 13 Q. The court reporter has handed you the
 14 exhibit marked 22. Do you recognize that document?
 15 A. So, it's a cover letter faxed to US Bank
 16 from me.
 17 Q. A fax?
 18 A. Oh, I'm sorry. It's not a fax, but it is a
 19 cover letter.
 20 Q. Is that your handwriting on the bottom?
 21 A. Yes.
 22 Q. It's dated September 15, 2005. Do you
 23 recall how you sent this document?
 24 A. I don't remember.
 25 Q. So, you don't remember if you mailed it?

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1 A. (Witness shakes head.)
 2 Q. You had previously mentioned that you used
 3 courier service for delivery of documents.
 4 A. Correct.
 5 Q. Do you know how long they would take to --
 6 A. Courier service was the same day.
 7 Q. Do you recall getting any receipt or
 8 confirmation from the courier service regarding
 9 delivery?
 10 A. I don't recall.
 11 Q. The letter's directed to Aleki Leiatua,
 12 L-e-i-a-t-a-u-a, at US Bank, and that's the banker
 13 that you had previous conversations with?
 14 A. Correct.
 15 Q. And do you know why you sent those documents
 16 to Aleki?
 17 A. These were supporting documentations for the
 18 letter of credit.
 19 Q. Do you know why you didn't send them to
 20 Wells Fargo?
 21 A. No.
 22 Q. Normally how would you determine where to
 23 send documents to? Is that covered under the letter
 24 of credit?
 25 MR. WYATT: Object to the form.

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1 Q. Let me rephrase it.
 2 Normally does the letter of credit tell you
 3 who to send the documents to?
 4 A. I don't recall.
 5 MR. WYATT: Object to the form.
 6 Q. Turning back to Exhibit-18. That's the
 7 letter of credit dated 8/5/05. On the fourth page,
 8 bottom right-hand corner says SIMC 72, line 47B, about
 9 five or six lines down it says, "This letter of credit
 10 is restricted for presentation of documents to Wells
 11 Fargo HSBC Trade Bank." Do you see that?
 12 A. Yes.
 13 Q. And then down towards the bottom of that
 14 same page it says, "Documents must be presented to
 15 Wells Fargo HSBC Trade Bank" and then lists an
 16 address, then after the address says "via courier in
 17 one parcel." Do you know if you ever sent those
 18 documents to Wells Fargo at that address?
 19 A. So, let me read this paragraph for a moment.
 20 Q. Sure.
 21 A. So, in the same general area that you were
 22 speaking --
 23 Q. Towards the bottom or towards the middle?
 24 A. Five or six rows down. -- it says,
 25 "Therefore, documents presented to us," which is US

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1 Bank, "will be sent to the issuing bank for payment."
 2 Q. So, you interpret "us" in that sentence to
 3 be US Bank?
 4 A. Yes.
 5 Q. Turning to the second page, SIMC 70, towards
 6 the top it says "Sender, Wells Fargo. Receiver, U.S.
 7 Bank."
 8 A. Yes.
 9 Q. Looking at that, do you still have the same
 10 -- looking at that, who do you think drafted this
 11 document?
 12 A. US Bank.
 13 MR. WYATT: Object to the form.
 14 THE WITNESS: Because I don't know?
 15 MR. WYATT: Right.
 16 A. I don't know.
 17 Q. Looking again on the page marked SIMC 72, at
 18 the very bottom it says, "Please call (206) 292-3491
 19 regarding any inquiries on negotiations." Did you
 20 ever call that phone number?
 21 A. I don't believe so.
 22 Q. The next page, SIMC 73, it says, "Please
 23 contact Irene Wu by telephone," and there's a couple
 24 of phone numbers, "regarding any inquiries." Did you
 25 ever contact Irene Wu?

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<p>1 A. I don't believe so.</p> <p>2 Q. Then on the front it says, "If you have any</p> <p>3 questions, please feel free to call our office at the</p> <p>4 above listed number." In the top right corner there's</p> <p>5 a phone number and a fax number. This is the very</p> <p>6 first page, SIMC 69. Do you see right towards the</p> <p>7 bottom it says, "If you have any questions, please</p> <p>8 feel free to call our office at the above listed</p> <p>9 number"?</p> <p>10 A. I see that paragraph.</p> <p>11 Q. The bottom signature, do you know whose</p> <p>12 signature that is?</p> <p>13 A. I don't.</p> <p>14 Q. Did you ever contact that office at the</p> <p>15 above listed number?</p> <p>16 A. Well, this document is similar to a lot that</p> <p>17 came from Aleki, so --</p> <p>18 Q. Did you ever talk with Aleki regarding</p> <p>19 delivery of those documents?</p> <p>20 A. I don't recall. Am I allowed to point</p> <p>21 anything out?</p> <p>22 Q. Sure.</p> <p>23 A. Because on 0070, the stamp here from US</p> <p>24 Bank, it says this "must accompany documents" to</p> <p>25 prepare for negotiation from US Bank. Furthering the</p>	<p>1 MR. SMITH: I would like something more</p> <p>2 specific. I believe I asked how do you know that the</p> <p>3 stamp required negotiation of the documents at US</p> <p>4 Bank, not that they could be a copy.</p> <p>5 MR. WYATT: Okay, I'll object to the extent</p> <p>6 that it calls for a legal conclusion. That's the</p> <p>7 objection.</p> <p>8 MR. SMITH: Okay.</p> <p>9 Q. And your answer to my question?</p> <p>10 A. Can you ask me again. I'm sorry.</p> <p>11 Q. How do you know that this stamp required</p> <p>12 negotiation of the documents to US Bank and not that</p> <p>13 you could provide a copy of this letter of credit</p> <p>14 along with the documents and present them to Wells</p> <p>15 Fargo?</p> <p>16 MR. WYATT: Same objection.</p> <p>17 A. You know, I always supplied the original</p> <p>18 documents, so I don't know the answer to your</p> <p>19 question.</p> <p>20 Q. Do you know if Aleki asked you to deliver</p> <p>21 the documents to him?</p> <p>22 A. I don't.</p> <p>23 (Exhibit-23 marked.)</p> <p>24 Q. The court reporter has handed you the</p> <p>25 exhibit marked 23. Do you recognize this exhibit?</p>
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<p>1 fact that that's why everything went to US Bank.</p> <p>2 Q. So, run that by me again.</p> <p>3 A. The stamp there says, "This is to be</p> <p>4 considered the original letter of Credit under our</p> <p>5 reference No." such and such. "This instrument must</p> <p>6 accompany documents prepared for negotiation."</p> <p>7 Q. What is it that you take that to mean?</p> <p>8 A. You were asking why we presented these</p> <p>9 documents to US Bank, and this further supports the</p> <p>10 reason.</p> <p>11 Q. And "this instrument," you take that to</p> <p>12 refer to the letter of credit?</p> <p>13 A. I do.</p> <p>14 Q. This whole exhibit, Exhibit-No.-18?</p> <p>15 A. Yes.</p> <p>16 Q. My question is, how do you know that that</p> <p>17 stamp requires the negotiation of the documents to US</p> <p>18 Bank and not just that you provide a copy of this</p> <p>19 letter of credit with the documents to Wells Fargo?</p> <p>20 A. I don't.</p> <p>21 MR. WYATT: Object to the form.</p> <p>22 MR. SMITH: In particular?</p> <p>23 MR. WYATT: You said, "How do you know" -- I</p> <p>24 forgot what the question was. I'll just leave it as</p> <p>25 object to the form for now.</p>	<p>1 A. So, it's a cover letter to Aleki. It's not</p> <p>2 on stationery, which is odd.</p> <p>3 Q. The stationery is the heading that's like in</p> <p>4 Exhibit-22?</p> <p>5 A. Correct.</p> <p>6 Q. Is that your handwriting on the bottom of</p> <p>7 Exhibit-23?</p> <p>8 A. Yes, it is.</p> <p>9 Q. Do you know why you sent documents to Aleki</p> <p>10 on September 21st?</p> <p>11 A. I do not.</p> <p>12 Q. Between the letter you sent that's</p> <p>13 Exhibit-22 and the letter that was sent, Exhibit-23,</p> <p>14 do you know which of those contained originals?</p> <p>15 A. I don't.</p> <p>16 Q. Looking at Exhibit-22, the second bullet</p> <p>17 point says, "Full Set of Clean Bill of Lading; 1</p> <p>18 original and two copies for each shipment." And then</p> <p>19 the second exhibit, 23, the second bullet point there</p> <p>20 says, "Full set of Clean Bill of Lading; 1 original</p> <p>21 for each shipment to add to the set already in your</p> <p>22 possession." So, did each of these letters, then,</p> <p>23 contain one original bill of lading?</p> <p>24 A. That's what it says.</p> <p>25 Q. So, you sent two original bills of lading</p>

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1 total?
 2 A. I don't know.
 3 Q. So, you don't recall sending any other bills
 4 of lading to US Bank?
 5 A. No.
 6 Q. Did you ever send any of these documents to
 7 Wells Fargo?
 8 A. I don't believe so.
 9 (Exhibit-24 marked.)
 10 Q. The court reporter's handed you an exhibit
 11 marked 24. Do you recognize that?
 12 A. It's a piece of paper with my handwriting on
 13 it.
 14 Q. Do you know when you wrote that?
 15 A. I don't.
 16 Q. Take a moment to review what is written and
 17 can you explain to me what these notes are about.
 18 A. Looks like the type of notes I would take
 19 while I was reviewing a letter of credit.
 20 Q. On the second middle section between the two
 21 lines it says, "Change name on all documents 2 of
 22 scrap." Is that what that says?
 23 A. That's just a little squiggly line. Change
 24 name of scrap on all documents.
 25 Q. What is that referring to?

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1 A. I could guess that whatever document I was
 2 reviewing had the wrong type of scrap on it.
 3 Q. Then below that is a number sign and I don't
 4 know what that says and says "certificate." What does
 5 that say?
 6 A. It's "BEN." I don't -- but I don't remember
 7 what it means or why I wrote it.
 8 Q. Then above that, "3 originals of B.O.
 9 Lading." Is that "Bill of Lading"?
 10 A. "Bill of Lading."
 11 Q. Do you know what that's referring to?
 12 A. Again, it's just a note to myself.
 13 (Exhibit-25 marked.)
 14 Q. The court reporter has handed you an exhibit
 15 marked 25. Do you recognize that exhibit?
 16 A. It's an email to me from Dr. Lin.
 17 Q. Do you recall receiving this?
 18 A. Not particularly.
 19 Q. So, you don't recall specifically receiving
 20 this on September 22nd?
 21 A. No.
 22 Q. Had you ever discussed the AQSIQ certificate
 23 with Dr. Lin?
 24 A. Yes.
 25 Q. When do you recall first discussing that?

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1 A. Sometime during all the drafting of the
 2 letter of credits. I don't have a date.
 3 Q. Do you remember what was said?
 4 A. "Do we have one?" I don't know. I said,
 5 "Do we have one?" I don't know what all was said.
 6 Q. Do you recall after the shipment was made
 7 discussing the AQSIQ certificate with Dr. Lin?
 8 A. Not particularly.
 9 Q. Do you recall discussing the substance of
 10 this email with anyone after you received it?
 11 A. I don't recall discussing it.
 12 Q. Do you recall discussing it with Alan
 13 Sidell?
 14 A. Again, I don't remember discussing it.
 15 Q. In your job duties back then, would you
 16 normally deal with AQSIQ certificates?
 17 A. I helped in the application of these and we
 18 gave it out from time to time.
 19 Q. How were they -- again, I'm a little new to
 20 this -- how were they used?
 21 A. I believe it was basically just a license to
 22 import into China. That's what that certificate
 23 allowed you to do.
 24 Q. Do you know who issued the certificate?
 25 A. The Chinese government.

Page 57

1 (Exhibit-26 marked.)
 2 Q. The court reporter's handed you the exhibit
 3 marked 26. Do you recognize this exhibit?
 4 A. This is a fax cover sheet from me.
 5 Q. It appears that you sent --
 6 A. It appears it went to China.
 7 Q. Do you recall sending this fax?
 8 A. It has my handwriting on it.
 9 Q. Is that your handwriting on the third page?
 10 A. Yes. So, I'm sure I sent it.
 11 Q. Turning back to Exhibit-25, it's dated
 12 Thursday, September 22nd, 2005, 7:36 p.m. And then
 13 back to Exhibit-26, it's "9/26 15:06," which would be
 14 3:06 p.m. Do you recall why there was four days
 15 between Giant's email to you and sending the fax to
 16 China?
 17 A. It was a weekend. I don't know.
 18 Q. 22nd was a Thursday, so the 26th was a
 19 Monday. Do you know why you wouldn't have sent it out
 20 on Friday?
 21 A. I don't know.
 22 Q. Did you get approval from Mr. Sidell before
 23 sending this certificate to China?
 24 A. Now that I see what I wrote on here, I do
 25 remember that I did get approval from Alan Sidell.

Page 58

1 Q. What did he say in regards to this
 2 certificate?
 3 A. He just wanted to make sure that we put this
 4 endorsement on the top to refer which booking numbers
 5 it related to.
 6 Q. You're referring to your handwriting?
 7 A. Yes.
 8 Q. Did he say why he wanted that in there?
 9 A. Just so it was used for this particular
 10 purpose.
 11 Q. Did he express to you any concerns about
 12 sending the certificate?
 13 A. It's a corporate license, so there's always
 14 concerns about where it's going to end up and who is
 15 going to use it and how they're going to use it, so we
 16 did discuss that.
 17 Q. Can you explain a little bit more in detail
 18 what kind of concerns as far as what you're referring
 19 to.
 20 A. We just wanted to make sure it was being
 21 used for these shipments at this point in time and not
 22 for any other shipments that might occur later.
 23 Q. Do you recall finding out that the
 24 presentation of documents was rejected by Bank of
 25 Shanghai?

Page 59

1 A. I don't recall that.
 2 Q. To your recollection did US Bank ever
 3 contact you regarding the documents that you submitted
 4 to them?
 5 A. We had so many discussions, I don't remember
 6 anything after the fact, after the shipment date.
 7 Q. So, you don't recall them expressing any
 8 concerns or any other comments about the documents?
 9 A. Correct.
 10 Q. Did you ever hear anything from Wells Fargo
 11 Bank?
 12 A. I don't think I ever had any contact with
 13 Wells Fargo.
 14 Q. And did you ever have any contact from Bank
 15 of Shanghai?
 16 A. No.
 17 Q. At any point in time did you learn that Bank
 18 of Shanghai was not going to pay under the letter of
 19 credit?
 20 A. Well, ultimately, yeah, when things
 21 proceeded and the letter of credit started to get
 22 close to expiration, then we knew there was a problem.
 23 Q. What happened at that point?
 24 A. I probably talked to Dr. Lin and we tried to
 25 figure out how to collect on the letter of credit.

Page 60

1 Q. Do you recall anything in particular?
 2 A. Not really, nothing factual. It's like we
 3 expect to get paid in conversations where we
 4 anticipate they're going to come through and pay us
 5 for the product.
 6 Q. "They" referring to?
 7 A. The Bank of -- or the customer, actually.
 8 Q. Did you ever try contacting Bank of
 9 Shanghai?
 10 A. I don't believe that I did.
 11 Q. After you learned that there was problems,
 12 did you ever contact Wells Fargo?
 13 A. Probably. I never -- when you say I learned
 14 of problems, I don't believe I ever learned that there
 15 were problems with the documentation that went with
 16 the letter of credit. The only problems I referred
 17 to, it wasn't being paid. I may have talked to Wells
 18 Fargo and said, "What else can we do," but I don't
 19 recall that.
 20 Q. Do you remember who you spoke with?
 21 A. It would have been Aleki.
 22 Q. He's with US Bank?
 23 A. Yes.
 24 Q. Do you think you ever talked to Wells Fargo?
 25 A. Oh, I don't think I ever talked with Wells

Page 61

1 Fargo.
 2 Q. Do you know when you would have spoken to
 3 Aleki?
 4 A. Before the expiration of the letter of
 5 credit, which we can look and see what date that was.
 6 I think it was Exhibit-18.
 7 Q. 18.
 8 A. It expires on September 14th. That was on
 9 line 31D.
 10 Q. That's the page SIMC 70?
 11 A. Yes.
 12 Q. Do you recall speaking with Aleki after that
 13 date?
 14 A. I don't recall.
 15 Q. Do you recall on or about that date the
 16 substance of any conversations you had with Aleki?
 17 A. No, I don't.
 18 (Exhibit-27 marked.)
 19 Q. The court reporter has handed you
 20 Exhibit-27. Do you recognize this exhibit?
 21 A. This is my handwriting.
 22 Q. On each of these pages?
 23 A. Yes.
 24 Q. Aside from that last page, in the first
 25 three pages -- let's start with the first page. Do

- 1) Order Granting Plaintiff's Motion for Partial Summary Judgment, CP 479-481

- 2) Order Denying Defendants' Motion Regarding Seasonable Notification and Imposing Terms, CP 465-466

- 3) Order Granting Plaintiff's Motion for Voluntary Partial Dismissal and Entry of Final Judgment. From CP 609-616

- 4) Order Denying Defendants' Motion to file an amended Answer, CP 641-642

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Honorable Chris Washington

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

SEATTLE IRON & METALS CORPORATION, a Washington corporation,

Plaintiff,

v.

LIN XIE, individually and doing business as GIANT INTERNATIONAL METAL RESOURCES, and the marital community composed of LIN XIE and JANE DOE XIE; and LH HIGHTECH CONSULTING LLC, a Washington limited liability corporation,

Defendants.

Case No. 07-2-27492-8 SEA

~~PROPOSED~~
ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This matter having come for hearing on Friday, September 26, 2008, on plaintiff Seattle Iron & Metals Corporation's motion for partial summary judgment, plaintiff appearing through Todd W. Wyatt and Salter Joyce Ziker, PLLC, defendants appearing through Matthew J. Smith and Dickson Steinacker LLP, the Court having heard the arguments of counsel, having reviewed the pleadings on file and the written submissions of the parties, including:

1. Plaintiff Seattle Iron & Metals Corporation's Motion for Partial Summary Judgment;

ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT - 1

2043 002 eh260102

SALTER JOYCE ZIKER, PLLC
1601 Fifth Avenue, Suite 2040
Seattle, Washington 98101
Tel: 206-957-5960 / Fax: 206-957-5961

- 1 2. Declaration of Alan Sidell in Support of Plaintiff Seattle Iron & Metals
- 2 Corporation's Motion for Partial Summary Judgment, and exhibits thereto;
- 3 3. Declaration of Todd W. Wyatt in Support of Plaintiff Seattle Iron & Metals
- 4 Corporation's Motion for Partial Summary Judgment, and exhibits thereto;
- 5 4. Defendants' Response to Motion for Partial Summary Judgment;
- 6 5. Declaration of Lin Xie in Support of Response to Plaintiff's Motion for Partial
- 7 Summary Judgment, and exhibits thereto;
- 8 6. Declaration of Matthew J. Smith in Support of Response to Plaintiff's Motion
- 9 for Partial Summary Judgment, and exhibits thereto;
- 10 7. Reply in Support of Plaintiff's Motion for Partial Summary Judgment; and
- 11 8. Supplemental Declaration of Todd W. Wyatt in Support of Plaintiff's Motion
- 12 for Partial Summary Judgment;
- 13 and being fully advised in the premises, now, therefore, it is hereby

14 ORDERED, ADJUDGED, AND DECREED that Plaintiff's Motion for Partial
 15 Summary Judgment is GRANTED ^{in part}. Summary judgment is granted in favor of SIMC on its
 16 breach of contract ^{against Xie and his marital community} and unjust enrichment claims. And it is further

17 ~~ORDERED, ADJUDGED, AND DECREED that Xie is personally liable for the debts~~
 18 ~~of Giant International. And it is further~~

19 ~~ORDERED, ADJUDGED, AND DECREED that LH Hightech Consulting is liable for~~
 20 ~~the debts of Giant International. And it is further~~

21 ORDERED, ADJUDGED, AND DECREED that prejudgment interest shall apply to
 22 the amounts due to plaintiff as set forth in plaintiff's invoices to defendants.

23 // Summary judgment is denied in
 24 // all other respects → reasonable notification under
 25 // Issues regarding the letter of credit will be reserved for 30 days
 26 // and Defendants may note a motion concerning that issue
 within that time. Enforcement of the judgment is stayed for 30 days.

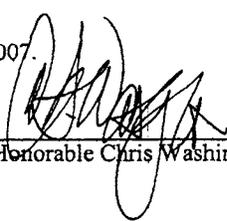
ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL
 SUMMARY JUDGMENT - 2

SALTER JOYCE ZIKER, PLLC
 1601 Fifth Avenue, Suite 2040
 Seattle, Washington 98101
 Tel: 206-957-5960 / Fax: 206-957-5961

2043 002 eh260102

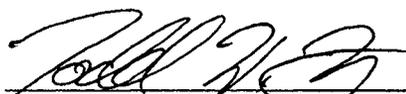
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DATED this 26th day of September, 2007.



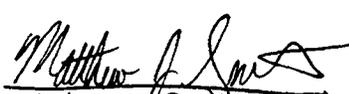
Honorable Chris Washington

Presented by:
SALTER JOYCE ZIKER, PLLC



Barry G. Ziker, WSBA No. 11220
Todd W. Wyatt, WSBA No. 31608

Attorneys for Plaintiff



Matthew J. Smith
Attorney for Defendants

ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL
SUMMARY JUDGMENT - 3

2043 002 eh260102

SALTER JOYCE ZIKER, PLLC
1601 Fifth Avenue, Suite 2040
Seattle, Washington 98101
Tel: 206-957-5960 / Fax: 206-957-5961

Honorable Chris Washington

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NOV 18 2008
DICKSON STEINACKER LLP

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

SEATTLE IRON & METALS
CORPORATION, a Washington corporation,

Plaintiff,

v.

LIN XIE, individually and doing business as
GIANT INTERNATIONAL METAL
RESOURCES, and the marital community
composed of LIN XIE and JANE DOE XIE;
and LH HIGHTECH CONSULTING LLC, a
Washington limited liability corporation,

Defendants.

Case No. 07-2-27492-8 SEA

~~(PROPOSED)~~
ORDER DENYING DEFENDANTS'
MOTION REGARDING SEASONABLE
NOTIFICATION AND IMPOSING
TERMS

This matter having come for consideration on Defendants' supplemental motion and briefing regarding seasonable notification, the Court having reviewed the pleadings on file and the written submissions of the parties, and being fully advised in the premises, now, therefore, it is hereby ordered that:

Defendants' motion regarding seasonable notification is DENIED.

~~It is further ORDERED that Defendants shall pay Plaintiff's attorneys' fees and costs incurred in responding to Defendants' supplemental motion, in the amount of \$2,339.00.~~

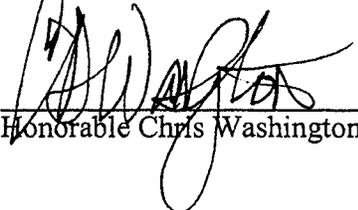
ORIGINAL

ORDER DENYING DEFENDANTS' MOTION REGARDING
SEASONABLE NOTIFICATION AND IMPOSING TERMS - 1

SALTER JOYCE ZIKER, PLLC
1601 Fifth Avenue, Suite 2040
Seattle, Washington 98101
Tel: 206-957-5960 / Fax: 206-957-5961

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DATED this ___ day of November, 2008.



Honorable Chris Washington

Presented by:
SALTER JOYCE ZIKER, PLLC



Barry G. Ziker
WSB No. 11220
Todd W. Wyatt
WSB No. 31608
Attorneys for Plaintiff

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

SEATTLE IRON & METALS CORPORATION, a Washington corporation,

Plaintiff,

v.

LIN XIE, individually and doing business as GIANT INTERNATIONAL METAL RESOURCES, and the marital community composed of LIN XIE and JANE DOE XIE; and LH HIGHTECH CONSULTING LLC, a Washington limited liability corporation,

Defendants.

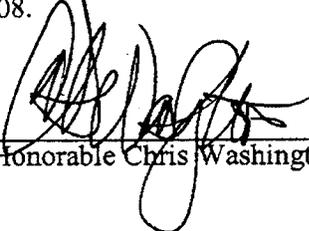
Case No. 07-2-27492-8 SEA

(PROPOSED)
ORDER GRANTING PLAINTIFF'S MOTION FOR VOLUNTARY PARTIAL DISMISSAL AND ENTRY OF FINAL JUDGMENT

This matter comes before the Court on Plaintiff's motion for voluntary partial dismissal of its claims and for entry of final judgment. The Court, having considered this motion, Defendants' response papers, and Plaintiff's reply, as well as the papers and pleadings on file with the Court, it is hereby ordered that Plaintiff's motion is GRANTED. Plaintiff's claims for unjust enrichment, fraud, and negligent misrepresentation are dismissed without prejudice. Judgment shall be entered against Defendants Lin Xie and the marital community composed of Lin Xie and Jane Doe Xie.

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DATED this 9th day of December, 2008.



Honorable Chris Washington

Presented by:

SALTER JOYCE ZIKER, PLLC



Barry G. Ziker
WSB No. 11220
Todd W. Wyatt
WSB No. 31608

Attorneys for Plaintiff

Honorable Chris Washington

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

SEATTLE IRON & METALS CORPORATION, a Washington corporation,

Plaintiff,

v.

LIN XIE, individually and doing business as GIANT INTERNATIONAL METAL RESOURCES, and the marital community composed of LIN XIE and JANE DOE XIE; and LH HIGHTECH CONSULTING LLC, a Washington limited liability corporation,

Defendants.

Case No. 07-2-27492-8 SEA

(PROPOSED)
JUDGMENT AGAINST DEFENDANTS
LIN XIE AND THE MARITAL
COMMUNITY COMPOSED OF LIN XIE
AND JANE DOE XIE

JUDGMENT SUMMARY

Judgment Creditor:	Seattle Iron & Metals Corporation
Attorneys for Judgment Creditor:	Barry G. Ziker, Todd W. Wyatt, and Salter Joyce Ziker, PLLC
Judgment Debtors:	Lin Xie and the marital community composed of Lin Xie and Jane Doe Xie
Attorneys for Debtors:	Matthew J. Smith and Dickson Steinacker LLP
Judgment amount (principal):	\$102,627.54
Interest and other fees and costs to date of judgment:	\$36,641.56
Total judgment:	\$139,269.10 (plus \$45.78 per diem after December 9, 2008 until judgment is paid)

JUDGMENT AGAINST DEFENDANTS LIN XIE AND THE MARITAL COMMUNITY COMPOSED OF LIN XIE AND JANE DOE XIE - 1

SALTER JOYCE ZIKER, PLLC
1601 Fifth Avenue, Suite 2040
Seattle, Washington 98101
Tel: 206-957-5960 / Fax: 206-957-5961

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Post-judgment interest:	The total amount of judgment shall bear interest at 12% per annum from date of judgment until paid in full.
-------------------------	---

JUDGMENT

This matter having come on for hearing this 9th day of December, 2008, before the undersigned Judge of the above-entitled Court upon Plaintiff's Motion For Voluntary Partial Dismissal and Entry of Final Judgment.

IT IS ORDERED:

Judgment is entered in favor of plaintiff Seattle Iron & Metals Corporation against defendants Lin Xie and the marital community composed of Lin Xie and Jane Doe Xie, jointly and severally, in the amount of \$139,269.10, with interest accruing thereafter at 12% per annum.

DONE IN OPEN COURT this 9th day of December, 2008.

JUDGE CHRIS WASHINGTON *CS*

Honorable Chris Washington

Presented by:

SALTER JOYCE ZIKER, PLLC

[Handwritten Signature]

Barry G. Ziker
WSBA No. 11220
Todd W. Wyatt
WSBA No. 31608
Attorneys for Plaintiff

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

SEATTLE IRON & METALS CORPORATION, a Washington corporation,

Plaintiff,

v.

LIN XIE, individually and doing business as GIANT INTERNATIONAL METAL RESOURCES, and the marital community composed of LIN XIE and JANE DOE XIE; and LH HIGHTECH CONSULTING LLC, a Washington limited liability corporation,

Defendants.

Case No. 07-2-27492-8 SEA

~~PROPOSED~~ *CW*
ORDER DENYING DEFENDANTS' MOTION TO FILE AN AMENDED ANSWER ~~AND IMPOSING SANCTIONS~~ *CW*

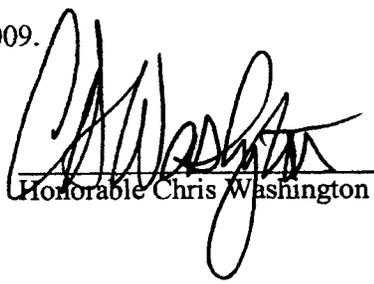
This matter having come for hearing on Defendants' Motion to File an Amended Answer. The Court, having considered Defendants' motion and any supporting declaration, Plaintiff's opposition to Defendants' motion and the supporting declaration of Todd W. Wyatt, and Defendants' reply in support of their motion, if any, as well as the papers and pleadings on file with the Court, and being fully advised in the premises, it is hereby

ORDERED that Defendants' motion to file an amended answer is DENIED.

~~It is further ORDERED that Defendants' motion violates Rule 11 and is frivolous, and therefore Defendants shall pay \$ _____ to Plaintiff as a sanction for Defendants' conduct.~~ *CW*

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DATED this 28th day of January, 2009.


Honorable Chris Washington

Presented by:

SALTER JOYCE ZIKER, PLLC



Barry G. Ziker
WSB No. 11220
Todd W. Wyatt
WSB No. 31608

Attorneys for Plaintiff
Seattle Iron & Metals Corporation

- 1) Photos taken by Dr. Lin Xie's cell phone outside the glass window of the deposition conference room. Mr. Alan Sidell and attorney were shown to coach the witness. CP 575-577.



From left to right: Alan Sidell, Mike Dollard, Todd W. Wyatt



From left to right: Mike Dollard, , Alan Sidell



From left to right: Mike Dollard , Alan Sidell,