

NO. 66619-3

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

RICHARD STABBERT, et al.,

Appellants,

v.

GLOBAL EXPLORER, LLC, et al.,

Respondents.

2011 JUN 27 PM 12: 03



BRIEF OF RESPONDENT

DEEPWATER CORROSION SERVICES, INC.

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. COUNTERSTATEMENT OF ISSUES	4
III. STATEMENT OF THE CASE	5
A. Factual Background	5
1. The Services Agreement	6
2. GML Failed to Perform Its Obligations Under the Services Agreement	8
3. Deepwater Exercised Its Right to Terminate the Services Agreement	9
B. Procedural History	11
1. Deepwater’s Summary Judgment Motion	11
2. Motion for Discovery Sanctions	13
3. Motion for Reconsideration .	15
IV. ARGUMENT	15
A. The Trial Court Properly Granted Deepwater’s Summary Judgment Motion	16

1.	The undisputed evidence established that Deepwater was entitled to and did terminate the Services Agreement in June 2009	18
2.	The undisputed evidence established that GML earned no commissions under the Services Agreement before it was terminated	19
3.	GML failed to present evidence establishing its claim that Deepwater repudiated the Services Agreement	19
B.	The Trial Court Properly Denied GML's and Stabbert's Motion for Reconsideration	23
1.	GML submitted no evidence establishing its repudiation theory	24
2.	Appellants' decision to fire some of their counsel provided no basis to challenge the trial court's summary judgment orders	25
C.	The Trial Court Properly Denied GML's and Stabbert's Motion for Discovery Sanctions	27
D.	Deepwater Is Entitled to an Award of Attorneys' Fees	30

V. CONCLUSION 30

APPENDIX A:
SERVICES AGREEMENT

TABLE OF AUTHORITIES

Cases

	<u>Pages</u>
<i>Alaska Pac. Trading Co. v. Eagon Forest Prods., Inc.</i> , 85 Wn. App. 354, 933 P.2d 417 (1997)	20-21, 22
<i>Amy v. Kmart of Washington, LLC</i> , 153 Wn. App. 846, 223 P.3d 1247 (2009)	28, 29
<i>Case v. Dundom</i> , 115 Wn. App. 199, 58 P.3d 919 (2002)	29
<i>Celotex Corp. v. Catrett</i> , 417 U.S. 317 (1986)	17
<i>Chandler v. Washington Toll Bridge Auth.</i> , 17 Wn.2d 591, 137 P.2d 97 (1943)	12
<i>Hearst Communications, Inc. v. Seattle Times Co.</i> , 154 Wn.2d 493, 115 P.3d 262 (2005)	17
<i>Holiday v. Merceri</i> , 49 Wn. App. 321, 742 P.2d 127 (1987)	24, 26
<i>Howell v. Spokane & Inland Empire Blood Bank</i> , 117 Wn.2d 619, 818 P.2d 1056 (1991)	17
<i>Khung Thi Lam v. Global Med. Sys. Inc.</i> , 127 Wn. App. 657, 111 P.3d 1258 (2005)	16
<i>Knecht v. Marzano</i> , 65 Wn.2d 290, 396 P.2d 782 (1964)	26
<i>Lovric v. Dunatov</i> , 18 Wn. App. 274, 567 P.2d 678 (1977)	20

<i>Paradiso v. Drake</i> , 135 Wn. App 329, 143 P.3d 859 (2006)	17-18
<i>Seven Gables Co. v. MGM/UA Ent. Co.</i> , 106 Wn.2d 1, 721 P.2d 1 (1986)	16-17
<i>State v. Brown</i> , 92 Wn. App. 586, 965 P.2d 1102 (1998)	18
<i>State v. Carter</i> , 74 Wn. App. 320, 875 P.2d 1 (1994)	29
<i>State v. Scott</i> , 92 Wn.2d 209, 595 P.2d 549 (1979)	24
<i>Wallace Real Estate Inv. Inc. v. Groves</i> , 124 Wn.2d 881, 881 P.2d 1010 (1994)	20, 22
<i>Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.</i> , 122 Wn.2d 299, 858 P.2d 1054 (1993)	28
<i>Young v. Key Pharmaceuticals</i> , 112 Wn.2d 216, 770 P.2d 182 (1989)	17

Rules

	<u>Pages</u>
CR 26(i)	5, 14, 28, 29
CR 56(c)	16
CR 59	15, 24, 26
CR 59(a)(1)	24, 25, 26
CR 59(a)(9)	24, 25, 26

King County Local Civil Rule 37(e)	14, 28
RAP 18.1	30

I. INTRODUCTION

Appellants Richard Stabbert and Global Marine Logistics (“GML”) asserted only one claim against respondent Deepwater Corrosion Services, Inc. (“Deepwater”): they alleged that Deepwater breached a written Services Agreement by failing to pay GML commissions allegedly due under the agreement.

GML’s claim against Deepwater is meritless. The trial court properly dismissed the claim on summary judgment. Based on undisputed evidence, the court determined that: (1) Deepwater was entitled to and did terminate the Services Agreement in June 2009; and (2) GML was entitled to no commissions prior to termination of the agreement.

There were three parties to the Services Agreement: Deepwater; GML; and respondent Global Explorer, LLC. Deepwater manufactures products that help protect underwater structures from corrosion. Global Explorer owned a vessel capable of supporting work on underwater oil pipelines. GML and its owner, Richard Stabbert, were acting as a broker for Global Explorer’s vessel, attempting to find pipeline repair and maintenance jobs for it in Mexico.

The Services Agreement granted Global Explorer and GML the right to market and sell Deepwater products on projects in Mexico. The agreement required Global Explorer and GML to bid and perform pipeline projects in Mexico using Deepwater's products. The agreement expressly entitled Deepwater to terminate the agreement if Deepwater failed to receive revenues of at least \$500,000 from such projects by March 1, 2009.

GML and Global Explorer never bid and performed a single project using Deepwater products. Because Deepwater received no revenue from any project bid and performed by Global Explorer or GML, it exercised its right to terminate the Services Agreement in June 2009.

Prior to its termination, the Services Agreement also provided that Global Explorer and GML could earn a commission by generating certain sales of Deepwater products in Mexico. Neither GML nor Global Explorer made any sales of Deepwater's products. Accordingly, GML earned no commissions under the Services Agreement before its termination.

Based on these undisputed facts, Deepwater moved

for summary judgment dismissal of GML's claim. In an effort to save its claim from summary judgment, GML created a new theory. It argued that Deepwater had somehow repudiated the Services Agreement. There is a fatal flaw in this theory: there is no evidence that Deepwater ever refused to perform any obligation it had under the Services Agreement. The trial court properly rejected GML's repudiation argument and granted summary judgment.

After the summary judgment hearing, GML and Stabbert filed an unfounded motion for discovery sanctions against Deepwater. The trial court properly rejected GML's effort to fabricate a claim by falsely accusing Deepwater of withholding evidence in discovery. Deepwater's response demonstrated that there was no substantive basis for the motion, and that GML and Stabbert failed to comply with the court rules before filing such a motion. The trial court properly refused to consider GML's and Stabbert's unfounded discovery arguments and denied the motion.

Before filing this appeal, GML and Stabbert moved the trial court to reconsider its orders granting summary judgment in favor of Deepwater and the other defendants. The trial court

properly denied the motion, because it failed to establish any issues of material fact that could have affected the court's summary judgment determinations.

This Court should affirm the trial court's orders granting Deepwater's motion for summary judgment, and denying GML's and Stabbert's motions for discovery sanctions and reconsideration.

II. COUNTERSTATEMENT OF ISSUES

1. Did the trial court properly grant Deepwater's motion for summary judgment dismissal of GML's claim that Deepwater breached the Services Agreement by failing to pay commissions to GML, where the undisputed evidence established that Deepwater was entitled to terminate the Services Agreement, and that GML had earned no commissions before the agreement was terminated?

2. Did the trial court properly reject GML's claim that Deepwater repudiated the Services Agreement, where GML failed to present any evidence that Deepwater refused to perform any obligations it had under the agreement?

3. Did the trial court properly deny GML's motion for reconsideration of the order granting Deepwater's summary judgment motion, where GML simply rehashed its unpersuasive repudiation arguments?

4. Did the trial court properly deny GML's and Stabbert's motion for discovery sanctions, where GML and Stabbert failed to comply with CR 26(i)'s requirement that counsel confer before filing a discovery motion, and where the allegations on which GML's and Stabbert's motion was based were demonstrably false?

III. STATEMENT OF THE CASE

A. Factual Background.

Deepwater is a company based in Houston, Texas. Deepwater manufactures and sells products used in the oil services industry to fight corrosion. Deepwater's products are used on underwater pipelines. CP 44-45.

Richard Stabbert is the sole owner of GML. CP 32. Stabbert approached Deepwater's president, Jim Britton, and told Britton that Stabbert could use his knowledge of and connections

with Pemex to generate large sales of Deepwater's products in Mexico. CP 45. Pemex is a Mexican national company that controls oil production in that country.

1. The Services Agreement.

On April 3, 2006, Deepwater entered into a Services Agreement with GML and Global Explorer. CP 45, 49-53. (For the Court's convenience, a copy of the Services Agreement is attached to this brief as Appendix A.) The Services Agreement gave GML and Global Explorer the right to market and sell certain of Deepwater's products in Mexico. CP 49.

In exchange for this right, GML and Global Explorer were required to:

- "[E]ither as a direct contractor or subcontractor . . . bid or otherwise solicit and perform contracts for pipeline corrosion work that employs" Deepwater's products (Services Agreement, § 4), CP 50;
- "[O]btain and provide financing for the acquisition and installation of [Deepwater's products] in connection with each Bid" (Services Agreement,

§ 4.b.), CP 50;

- For each bid, contract with Deepwater to provide its products on terms compensating Deepwater “at rates in effect at the time” (Services Agreement, § 4.c.), CP 50; and
- For each bid, “provide the services of one or more vessels” to deploy Deepwater’s products (Services Agreement, § 4.d.), CP 50.

The agreement required GML and Global Explorer to act as contractors or subcontractors on the bids, CP 50, and anticipated that they would profit from this activity. The Services Agreement also provided that if GML or Global Explorer sold Deepwater’s products in Mexico outside the bid process, Deepwater would pay a ten percent commission on such sales (Services Agreement, § 3.d.), CP 50.

The agreement was premised on the notion that Deepwater would benefit from sales of its products on the projects GML bid and performed. In the event that did not occur, Deepwater was entitled to terminate the agreement. Section 6 of

the Services Agreement provides:

Deepwater may, upon notice to Global [Explorer] and GML, unilaterally terminate this Agreement on or after March 1, 2009, if, by that date, Deepwater has not realized at least Five Hundred Thousand Dollars (U.S. \$500,000.00) in gross revenues as a result of its participation in the Bid process.

CP 51.

2. GML Failed to Perform Its Obligations Under the Services Agreement.

Deepwater's relationship with GML soured almost immediately after the Services Agreement was signed. Deepwater received reports from its existing Mexican agent, Hitec, that GML was uncooperative. CP 45. The situation deteriorated so quickly that in October 2006, just six months after the Services Agreement was signed, Deepwater sent a notice of default indicating that it was considering terminating the agreement. CP 45. Based on assurances from Global Explorer, Deepwater did not terminate the agreement at that time. *Id.*

By early 2007, however, Deepwater believed that the parties were in agreement that the Services Agreement should be terminated. CP 45. On January 23, 2007, Global Explorer's Frank

Steuart sent an e-mail to Deepwater's Jim Britton, with a copy to GML's Richard Stabbert:

Jim,

I have come to the same conclusion that you have that things aren't progressing with respect to the cathodic protection program. I know you had an interest in terminating the agreement. I actually think that if we did so . . . and knowing the product now . . . that we can then bring a proposal to you . . . discuss a deal . . . should one come up.

CP 45-46, 55 (ellipses in original).

After Steuart sent his e-mail to Deepwater and GML, Deepwater had no communications with GML or Stabbert for more than two years. CP 46; 33. GML never bid and performed a single project that used Deepwater's products. CP 46. GML never arranged any sales of Deepwater's products. *Id.* Deepwater was not surprised by this lack of performance because it believed that the Services Agreement had been terminated by agreement of the parties. *Id.*

3. Deepwater Exercised Its Right to Terminate the Services Agreement.

In March 2009, Richard Stabbert sent Jim Britton an

e-mail out of the blue stating that he wanted to begin trying to sell Deepwater's products. CP 46. Britton was astounded to hear from Stabbert. In May 2009, Stabbert and GML filed this lawsuit alleging that Deepwater had breached the Services Agreement by failing to pay commissions allegedly due. CP 1789, 1806.

Deepwater was unwilling to continue a relationship with GML. On June 4, 2009, Deepwater invoked its rights under the Services Agreement to terminate the agreement. CP 46, 57.

Deepwater sent written notice to GML and Global Explorer informing them that

the Services Agreement dated April 3, 2006
... is terminated in accordance with the last
sentence of Paragraph 6 thereof.

CP 57.

Prior to termination of the agreement, Deepwater received no revenue from any contracts bid and performed by GML or Global Explorer. CP 46. Nor did Deepwater sell any products in Mexico after the termination. CP 46-47.

Prior to termination of the Services Agreement, Deepwater did receive some revenue on a few small sales arranged

by Deepwater's agent in Mexico, Hitec. CP 47. Neither GML nor Global Explorer arranged those sales or had any contact with Deepwater concerning the sales. *Id.* The gross sales arranged by Hitec total less than \$170,000 over three years. *Id.*

B. Procedural History.

1. Deepwater's Summary Judgment Motion.

In its complaint, GML alleged that Deepwater breached the Services Agreement by failing to pay commissions allegedly due. CP 1791, 1806. Deepwater moved for summary judgment dismissal of this claim based on the following undisputed facts:

- GML never bid and performed a single project under the Services Agreement;
- As a result, Deepwater received no revenue from such projects;
- On June 4, 2009, Deepwater sent notice to GML and Global Explorer terminating the Services Agreement; and
- GML generated no sales of Deepwater products in

Mexico before the Services Agreement was terminated.

CP 9-11.

GML offered no evidence to dispute the facts supporting Deepwater's motion. GML offered no evidence that it had bid and performed any pipeline projects in Mexico. Nor did GML submit any evidence that it had generated any sales of Deepwater products before the Services Agreement was terminated. *See Consolidated Opposition to Global Defendants' Motions and Deepwater's Motion for Summary Judgment of Dismissal.* CP 444-472.

Instead, GML relied on a new theory not pled in its complaint. GML contended that Deepwater had repudiated the Services Agreement.¹ CP 470. GML offered no evidence that Deepwater had ever refused to perform any obligations it had

¹ GML also argued another theory it had not pled in its complaint. It suggested that it was entitled to pursue implied contract claims of quantum meruit or unjust enrichment. CP 465-66. Apparently, GML has abandoned these theories on appeal, because they are not mentioned in its brief. Even if GML had not abandoned them, they would be barred by Washington law. *See Chandler v. Washington Toll Bridge Auth.*, 17 Wn.2d 591, 604, 137 P.2d 97 (1943) (party to an express contract is bound by its terms and cannot avoid them by asserting implied contract claims).

under the Services Agreement. GML's repudiation argument was based largely on the e-mail sent by Global Explorer's Frank Steuart to Deepwater and GML, in which Steuart suggested that the Services Agreement should be terminated because it was not working. *See* CP 463.

The trial court held a summary judgment hearing on October 1, 2010. CP 1357. The court rejected GML's repudiation argument and granted Deepwater's summary judgment motion by order dated October 11, 2010. CP 1548-51. The court also granted summary judgment in favor of the other defendants that same day. CP 1545-47.

2. Motion for Discovery Sanctions.

The summary judgment hearing was held on Friday, October 1, 2010. CP 1357. The following Monday, October 4, GML and Stabbert filed a motion for discovery sanctions against Deepwater. CP 137.

The motion was based on a number of allegations that were demonstrably false, as Deepwater established in its opposition to the motion. For example, GML and Stabbert

contended that Deepwater had violated its discovery obligations by failing to sign and verify discovery responses. CP 1361. Deepwater submitted the signed and verified answers it had provided to counsel for GML and Stabbert in discovery. CP 1411, 1416-40, 1442-43. GML's and Stabbert's motion was based on the unsupported contention that Deepwater had refused to provide information about its sales in Mexico. *See* CP 1360-71. Deepwater confirmed under oath that it had produced detailed information about all its sales in Mexico. *See* CP 570-71, 1411-13, 1445, 1447-50.

The discovery motion also was procedurally defective. Counsel for GML and Stabbert filed the motion without conducting a discovery conference with Deepwater's counsel to address the issues raised in the motion, and therefore could not and did not certify that he had complied with CR 26(i) and King County Local Civil Rule 37(e). CP 1413.

The trial court denied the motion for discovery sanctions by order dated January 4, 2011. CP 1755. The court's order indicates that it denied the motion due to GML's and Stabbert's failure to comply with CR 26(i). *Id.*

3. Motion for Reconsideration.

Following entry of the court's summary judgment orders, GML and Stabbert filed a motion for reconsideration of those orders. CP 1552. The court denied the motion by order dated January 4, 2011. CP 1753-54. The court concluded that

[t]he admissible evidence submitted by plaintiff in support of the Motion for Reconsideration fails to supply, factually or legally, a valid basis for reconsideration pursuant to CR 59.

CP 1754.

IV. ARGUMENT

This Court should affirm the trial court's order granting Deepwater's summary judgment motion. The trial court properly determined that there were no issues of material fact and Deepwater was entitled to judgment as a matter of law.

This Court should affirm the trial court's order denying GML's motion for reconsideration of summary judgment in favor of Deepwater. The trial court properly determined that GML's motion did not raise any issue of material fact that affected summary judgment.

This Court should affirm the trial court's order denying GML's and Stabbert's motion for discovery sanctions. The trial court properly refused to consider the motion based on GML's and Stabbert's failure to comply with the court's discovery rules. Moreover, the motion lacked any substantive merit.

A. The Trial Court Properly Granted Deepwater's Summary Judgment Motion.

This Court reviews summary judgment determinations *de novo*, engaging in the same inquiry as the trial court. *Khung Thi Lam v. Global Med. Sys. Inc.*, 127 Wn. App. 657, 661, n.4, 111 P.3d 1258 (2005).

Summary judgment

shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, 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 judgment as a matter of law.

CR 56(c). If the moving party shows that there is no material issue of fact, the nonmoving party must set forth specific facts rebutting the moving party's contentions and demonstrate that a genuine issue of material fact exists. *Seven Gables Co. v. MGM/UA Ent. Co.*,

106 Wn.2d 1, 13, 721 P.2d 1 (1986). If the nonmoving party fails to make a showing sufficient to establish an essential element of its claim, summary judgment should be granted. *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)). The nonmoving party cannot rely on allegations, speculation, or argumentative assertions. *Seven Gables*, 106 Wn.2d at 13. It must present “competent evidence to support a prima facie case.” *Key Pharmaceuticals*, 112 Wn.2d at 227. If the plaintiff fails to come forward with evidence establishing each element of its claim, summary judgment should be granted. *Howell v. Spokane & Inland Empire Blood Bank*, 117 Wn.2d 619, 625, 818 P.2d 1056 (1991).

Washington courts frequently decide breach of contract claims on summary judgment. *See, e.g., Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 115 P.3d 262 (2005) (dismissing breach of contract claim and holding that defendant properly terminated contract on cross-motions for summary judgment); *Paradiso v. Drake*, 135 Wn. App. 329, 143 P.3d 859 (2006) (affirming summary judgment on breach of contract

claim). On summary judgment, Washington courts

interpret unambiguous contracts as a matter of law. Summary judgment is proper even if the parties dispute the legal effect of a certain provision of an unambiguous contract.

Paradiso, 135 Wn. App. at 334 (citing *State v. Brown*, 92 Wn. App. 586, 594, 965 P.2d 1102 (1998)).

1. The undisputed evidence established that Deepwater was entitled to and did terminate the Services Agreement in June 2009.

The Services Agreement expressly entitled Deepwater to terminate the agreement if by March 1, 2009, Deepwater did not receive at least \$500,000 in revenues from projects GML had bid and performed in Mexico. GML bid and performed no projects, so Deepwater's revenue did not meet the \$500,000 threshold. Deepwater sent GML and Global Explorer a notice on June 4, 2009, exercising Deepwater's right to terminate the Services Agreement. Based on these undisputed facts, the trial court properly determined that Deepwater was entitled to and did terminate the Services Agreement.

2. The undisputed evidence established that GML earned no commissions under the Services Agreement before it was terminated.

The Services Agreement provided that GML and Global Explorer could earn a ten percent commission on certain sales of Deepwater products. GML and Global Explorer were entitled to such a commission on any sales they generated in Mexico outside the pipeline project bid process.

The evidence established that GML generated no Deepwater sales in Mexico before the Services Agreement was terminated. Deepwater made a few sales in Mexico, totaling approximately \$170,000. All those sales were arranged by Deepwater's Mexican agent, Hitec. GML had nothing to do with those sales. In fact, GML had no contact with Deepwater concerning the sales. Based on these undisputed facts, the trial court properly determined that GML earned no commissions under the Services Agreement before it was terminated.

3. GML failed to present evidence establishing its claim that Deepwater repudiated the Services Agreement.

The indisputable evidence established that Deepwater properly terminated the Services Agreement, and that GML earned

no commissions before the agreement's termination. In a desperate effort to avoid summary judgment, GML concocted a theory that Deepwater had repudiated the Services Agreement. As the nonmoving party, GML was required to come forward with competent evidence establishing its new repudiation claim. GML was unable to do so, because Deepwater never refused to perform any obligations it had under the Services Agreement.

Repudiation requires proof of "a positive statement or action by the promisor indicating distinctly and unequivocally that he either will not or cannot substantially perform any of his contractual obligations." *Lovric v. Dunatov*, 18 Wn. App. 274, 282, 567 P.2d 678 (1977). In *Alaska Pac. Trading Co. v. Eagon Forest Prods., Inc.*, 85 Wn. App. 354, 933 P.2d 417 (1997), the court affirmed summary judgment dismissal of a repudiation claim that was based on statements by a buyer that he was unhappy with the terms of a contract and that his company might not accept the seller's log shipment. The court explained:

a court will not infer repudiation from
"doubtful and indefinite statements that
performance may or may not take place."
Wallace Real Estate Inv. Inc. v. Groves,

124 Wn.2d 881, 898, 881 P.2d 1010 (1994). Rather, the anticipatory breach must be a clear and positive statement or action that expresses an intention not to perform the contract. *Id.*

Alaska Pac. Trading, 85 Wn. App. at 365.

GML presented no evidence that Deepwater refused to perform the Services Agreement, because none exists.

Deepwater's obligations were dependent on GML's performance.

Deepwater was required to sell its products in connection with any pipeline projects GML bid and performed. GML never bid or performed any pipeline projects, so Deepwater never had the opportunity to supply products for such work, much less the chance to refuse to do so. Deepwater also had an obligation to pay Global Explorer and GML a commission if they sold Deepwater products outside the pipeline projects. GML never made any sales, so Deepwater had no obligation to pay a commission. There is no evidence GML ever requested such a commission, or that Deepwater ever refused such a request.

Lacking any evidence that Deepwater refused to perform, GML attempted to manufacture a repudiation claim on

the flimsy basis of an e-mail Global Explorer's Frank Steuart sent to Deepwater's Jim Britton and GML's Richard Stabbert. Mr. Steuart's e-mail suggested terminating the Services Agreement because it was not working. GML never objected to this proposal, never contacted Deepwater about it, and never made a single sale of any Deepwater products.

The e-mail from Global Explorer's Frank Steuart is not evidence that Deepwater refused to perform any obligation under the Services Agreement. Steuart is not a representative of Deepwater. Accordingly, his proposal cannot be "a clear and positive statement or action [by Deepwater] that expresses [its] intention not to perform the contract." *Alaska Pac. Trading*, 85 Wn. App. at 365 (citing *Wallace Real Estate Inv. Inc. v. Groves*, 124 Wn.2d 881, 898, 881 P.2d 1010 (1994)). At most, the evidence establishes that Deepwater believed the Services Agreement was terminated by agreement of all parties, particularly in light of GML's silence in response to the Steuart e-mail, and lack of performance afterward. Given GML's acquiescence in Steuart's proposal that the Services Agreement be terminated, GML's belated

claim that Deepwater repudiated the agreement makes no sense.

The only other evidence GML offered in support of its repudiation theory was a notice of default Deepwater's Jim Britton sent to Frank Steuart in October 2006. The undisputed evidence established that Deepwater agreed not to terminate the Services Agreement at that time, based on assurances from Steuart that GML's and Global Explorer's performance would improve. CP 45. GML cannot use Deepwater's notice of default to support its repudiation theory. The trial court properly rejected GML's repudiation claim.

B. The Trial Court Properly Denied GML's and Stabbert's Motion for Reconsideration.

After the trial court granted the summary judgment motions filed by Deepwater and the other defendants, GML and Stabbert moved for reconsideration. With respect to summary judgment in favor of Deepwater, GML simply restated its repudiation argument and contended that the court should not have rejected the repudiation claim. *See* CP 1560-61. In addition, GML and Stabbert argued that issues relating to their dispute with their prior counsel constituted irregularities in the proceedings,

justifying reconsideration under CR 59(a)(1) and (9). The trial court denied the motion for reconsideration. CP 1753-54.

A motion for reconsideration under CR 59 is

“addressed to the sound discretion of the trial court and will not be reversed absent a clear or manifest abuse of that discretion.”

Holaday v. Merceri, 49 Wn. App. 321, 324, 742 P.2d 127 (1987) (citing *State v. Scott*, 92 Wn.2d 209, 212, 595 P.2d 549 (1979)). “An abuse of discretion exists only if no reasonable person would have taken the view adopted by the trial court.” *Holaday*, 49 Wn. App. at 324. This Court should affirm the denial of the motion for reconsideration because the trial court acted well within its discretion.

1. GML submitted no evidence establishing its repudiation theory.

The trial court properly determined that GML failed to raise any issue of material fact in its motion for reconsideration. GML offered no evidence disputing Deepwater’s right to terminate the Services Agreement in June 2009. Nor did GML submit any evidence establishing that it had sold any Deepwater products in Mexico prior to the termination.

GML relied exclusively on its repudiation theory. It

offered no new evidence to support its claim that Deepwater refused to perform any obligations under the Services Agreement. It simply made a half-hearted attempt to recycle its unsuccessful summary judgment argument. The court properly rejected that argument.

It appears that GML and Stabbert are not challenging this portion of the court's decision on appeal. They have not identified any evidence from the motion for reconsideration that establishes any material fact concerning the repudiation claim.

2. Appellants' decision to fire some of their counsel provided no basis to challenge the trial court's summary judgment orders.

GML's and Stabbert's motion for reconsideration primarily addressed their dispute with their former counsel, whom they terminated after counsel moved to withdraw due to an alleged conflict of interest. GML and Stabbert contended that the events relating to their decision to fire some of their attorneys somehow amounted to an irregularity in the proceedings justifying reconsideration under CR 59(a)(1) and (9). The trial court rejected this argument.

Civil Rule 59(a)(1) provides that the court may grant reconsideration if the moving party establishes an

[i]rregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial.

Civil Rule 59(a)(9) provides that the court may grant reconsideration if the moving party establishes that “substantial justice has not been done.” The Washington Supreme Court long ago established that “the granting of [reconsideration] for the lack of substantial justice should be relatively rare,” because CR 59 sets forth eight other grounds for relief. *Knecht v. Marzano*, 65 Wn.2d 290, 297, 396 P.2d 782 (1964). *See also Holaday*, 49 Wn. App. at 330 (reconsideration under CR 59 “is rarely granted on the sole basis that substantial justice has not been done”).

On appeal, the only connection GML and Stabbert have identified between their dispute with former counsel and summary judgment is based on pure speculation. GML and Stabbert have expressed concern that former counsel may have made negative statements about Stabbert in declarations former counsel filed under seal. GML and Stabbert further speculate that

if such negative statements were made, the court may have considered them in connection with the summary judgment motions.

The trial court's order denying the motion for reconsideration expressly states that the court did not consider the declarations of GML's and Stabbert's former counsel in connection with its summary judgment rulings. CP 1753. The dispute with former counsel provides GML and Stabbert no basis to challenge the court's summary judgment rulings.²

C. The Trial Court Properly Denied GML's and Stabbert's Motion for Discovery Sanctions.

The summary judgment hearing was held on Friday, October 1, 2010. Apparently sensing that their case was about to be dismissed, GML and Stabbert rushed to file a motion the following Monday, October 4, falsely accusing Deepwater of withholding evidence in discovery. Substantively, the motion was unfounded. It was based on a number of demonstrably false allegations. The

² GML and Stabbert have criticized the trial court for permitting former counsels' declarations to be filed under seal. Presumably, the court permitted this to protect GML's and Stabbert's attorney-client privilege. Regardless whether the declarations were properly sealed, this issue is irrelevant to the summary judgment orders, because the trial court did not consider the declarations in connection with the summary judgment motions.

motion was procedurally defective as well. GML and Stabbert violated CR 26(i) and Local King County Rule 37(e), both of which require counsel to confer with opposing counsel before filing a discovery motion.

The trial court denied the motion. The court's order indicates that the court denied the motion because GML and Stabbert failed to comply with CR 26(i).

This Court reviews rulings on motions for discovery sanctions under the abuse of discretion standard. *Amy v. Kmart of Washington, LLC*, 153 Wn. App. 846, 855, 223 P.3d 1247 (2009) (citing *Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 338, 858 P.2d 1054 (1993)). Appellate courts give "trial courts wide latitude and discretion" on such motions because trial courts are "'better positioned'" to decide them. *Amy*, 153 Wn. App. at 855-56 (quoting and citing *Fisons*, 122 Wn.2d at 339).

The trial court acted well within its discretion in denying GML's and Stabbert's motion due to their failure to comply with CR 26(i) and King County Local Rule 37(e). Both rules

require a party's counsel to confer with opposing counsel before filing a discovery motion, and to certify compliance with the rules. Civil Rule 26(i) applies to motions for discovery sanctions, as well as to motions to compel discovery. *Amy*, 153 Wn. App. at 863. The rule is "'a shield that protects the court from half-baked discovery disputes.'" *Id.* at 857 (quoting *Case v. Dundom*, 115 Wn. App. 199, 205, 58 P.3d 919 (2002) (dissenting opinion)). Accordingly, when a party who files a discovery motion fails to comply with CR 26(i), the trial court has discretion to deny the motion. As this Court recognized in *Amy*,

[a] trial judge is in the best position to determine whether and to what extent to get involved in discovery disputes in a particular case.

153 Wn. App. at 858.

The lack of any substantive merit to GML's and Stabbert's discovery motion provides an additional ground on which to affirm denial of the motion. *See Amy*, 153 Wn. App. at 868 (citing *State v. Carter*, 74 Wn. App. 320, 324 n.2, 875 P.2d 1 (1994)) (appellate court "may affirm on any basis supported by the record, whether or not the trial court considered that basis"). The motion

was based on a number of irresponsible and false allegations, such as GML's and Stabbert's claim that Deepwater had violated discovery rules by failing to sign and verify discovery responses. The record makes clear that this is simply untrue. CP 1411, 1416-40, 1442-43. The gist of the motion was a contention that Deepwater had refused to produce records of its sales in Mexico. Deepwater demonstrated that this contention was equally false. Deepwater provided the court with the detailed list of all its Mexican sales which it had produced in discovery, CP 1445, along with the sworn statement of Deepwater's president confirming that Deepwater had made no other sales in Mexico. CP 570-71.

D. Deepwater Is Entitled to an Award of Attorneys' Fees.

Pursuant to RAP 18.1, Deepwater requests an award of attorneys' fees on appeal. The Services Agreement provides that the prevailing party in any dispute is entitled to such an award. Services Agreement, § 9, CP 51.

V. CONCLUSION

This Court should affirm the summary judgment entered in favor of Deepwater dismissing appellants' claims against

Deepwater with prejudice. The undisputed evidence establishes that Deepwater was entitled to and did terminate the Services Agreement in June 2009. The undisputed evidence likewise establishes that GML did not earn any commissions under the Services Agreement before Deepwater terminated it. GML failed to present evidence to establish its claim that Deepwater repudiated the Services Agreement.

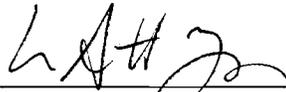
This Court should affirm the trial court's order denying the motion for reconsideration of its summary judgment. The motion failed to establish any issues of material fact.

This Court also should affirm the order denying appellants' motion for discovery sanctions. The motion was procedurally defective and substantively without merit.

DATED this 27th day of June, 2011.

HALL ZANZIG CLAFLIN
McEACHERN PLLC

By



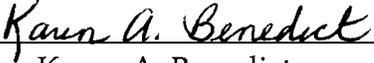
W. Scott Zanzig, WSB No. 17571
Attorneys for Respondent
Deepwater Corrosion Services, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 27, 2011, a copy of the Brief of Respondent Deepwater Corrosion Services, Inc. was served on the following parties via e-mail and U.S. mail:

Scott Erik Stafne
Stafne Law Firm
239 N. Olympic Avenue
Arlington, WA 98223-1336

Michael E. Gossler
Montgomery Purdue Blankinship & Austin PLLC
701 Fifth Avenue, Suite 5500
Seattle, WA 98104-7096



Karen A. Benedict

APPENDIX A

Services Agreement

This Services Agreement ("Agreement") is entered into as of the 30th day of April, 2006, by and among Global Explorer, LLC ("Global"), Global Marine Logistics, LLC ("GML"), and Deepwater Corrosion Services Inc. ("Deepwater").

1. **Basic Agreement.** The parties agree that they shall undertake the obligations set forth in this Agreement for the purpose of licensing (or such other method of obtaining protected status for Deepwater's anti-corrosion procedures as the parties may deem appropriate) pipeline corrosion technology through the appropriate Mexican National Authority, marketing that technology, and soliciting and performing pipeline corrosion protection work utilizing the technology in the territorial waters and the waters over the outer continental shelf of Mexico.

2. **Term.** This Agreement shall commence on the date first set forth above and shall continue concurrently with the term of protected status achieved pursuant to Section 3.c, below, but in any event until at least April 1, 2016, unless earlier terminated pursuant to Section 6, below, or by the written consent of all the parties, which consent may be withheld in the sole discretion of any party.

3. **Legal Representative; Grant of Exclusive License.** Deepwater hereby appoints Global and GML as its exclusive legal representative and agent, and grants an exclusive license to Global and GML to use, produce, sell, distribute, market, and install its Cathodic Protection Technology (defined below) in Mexico and within the exclusive economic zone (EEZ) and continental shelf adjacent to that country (the "Territory").

a. As used in this Agreement "Cathodic Protection Technology" means all cathodic protection, surveying, monitoring, and other applicable products and procedures associated with offshore submarine pipelines that are developed or manufactured by Deepwater and its affiliates, including without limitation Deepwater's ROV, CP Snake™, PipeMod Attenuation Modeling Software, RetroSled, ExpandaSled, retroLink, RetroClamp, RetroPod™, SunStation™, and V-String technologies. The term "Cathodic Protection Technology" shall be amended from time to time to include later-developed products, processes, and technology appropriate for cathodic pipeline protection work in the Territory.

b. The parties acknowledge and agree that Deepwater has previously entered into a binding agreement with Hitec Carmen S.A. de C.V. ("Hitec") pursuant to which Hitec operates as a legal representative of Deepwater in the Territory with respect to certain of Deepwater's products. Deepwater represents and warrants to Global and GML that Hitec's status as legal representative does not conflict with the authority granted to Global and GML hereunder and shall not impair the parties' ability to perform their obligations hereunder.

c. Global and GML shall, as co-applicants with Deepwater and on their own behalf and Deepwater's, take such steps as they deem necessary, convenient, and appropriate to license Deepwater's cathodic pipeline protection processes through the appropriate Mexican National Authority and/or otherwise obtain, maintain, and enforce protected status for Deepwater's anti-corrosion procedures in the Territory. Deepwater shall take all commercially reasonable actions requested by Global and/or GML to facilitate such

- 1 -

Stabbert GML production to Deepwater
512 of 8893

Ex: 1
Wit: STABBERT
Date: 7-7-2010
MILLS & LESSARD
(208) 292-9083

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CLERK'S PAPERS

protective registrations. All expenses of licensing and registering, maintaining, and enforcing such licenses and registrations shall be borne by Global and GML. This Section 3.c notwithstanding, neither Global nor GML shall undertake the licensing or registration of a Cathodic Protection Technology if doing so would alter or otherwise impair patent and intellectual property rights obtained for that Cathodic Protection Technology outside of the Territory.

d. Deepwater shall pay Global and GML (collectively) a ten percent (10%) commission on any sales of hardware or direct personnel billing generated by Global or GML in the Territory; provided that no such commission shall be paid on Cathodic Protection Technology that is utilized in a Bid (defined below).

4. Bids and Awarded Bids. Without otherwise limiting the scope of this Agreement, the parties agree that GML and/or Global shall, in their sole discretion, and either as a direct contractor or subcontractor for third-parties, bid or otherwise solicit and perform contracts for pipeline corrosion protection work that employs Cathodic Protection Technology in the Territory, including without limitation projects for Petróleos Mexicanos ("Pemex") and/or companies engaged by Pemex. Each party's participation in the bid process, either as a direct contractor or as a subcontractor and for all or any portion of such projects (a "Bid"), shall be governed by this Agreement and, specifically, the provisions of this Section 4.

a. In connection with the preparation of a Bid and work to be performed under an accepted Bid, Deepwater shall provide all necessary technical support related to the Cathodic Protection Technology, including without limitation engineering technical services, software, hardware, and other required technology. In addition to the foregoing, Deepwater shall provide applicable software to Pemex to facilitate certain engineering analyses related to its evaluation of the Cathodic Protection Technology and platform monitoring cathodic protection requirements.

b. Unless otherwise agreed in writing by the parties, Global and GML, or their assigns, shall obtain and provide financing for the acquisition and installation of Cathodic Protection Technology in connection with each Bid. Global and GML or their assigns shall act as principals, co-principals, teaming partners, or subcontractors in connection with any Bid, and shall be responsible for the development and submission of Bid materials subject to this Agreement, coordinating performance by the parties hereto of the obligations under any accepted Bid, and production and deployment of Cathodic Protection Technology in accordance with the terms of that accepted Bid.

c. For each Bid that utilizes Cathodic Protection Technology, Deepwater shall contract with Global and/or GML and provide such technology as a third-party subcontractor. Such obligation shall be in addition to any other obligations contained in this Agreement, and in connection therewith, Deepwater shall be compensated according to its standard terms and conditions (to the extent not inconsistent herewith), and at its rates in effect at the time the services are rendered, unless otherwise agreed by the parties.

d. In connection with any Bid that requires Cathodic Protection Technology, Global and GML shall provide the services of one or more vessels that are suitably equipped and manned to deploy the Cathodic Protection Technology in accordance with accepted Bid terms.

e. In accordance with this Section 4, the parties agree and acknowledge that all projects undertaken by them that employ Cathodic Protection Technology in the Territory

- 2 -

CLERK'S PAPERS

(whether acquired pursuant to a Bid or not) shall be subject to the terms and conditions of this Agreement. Accordingly, if Deepwater is solicited by third-parties to provide Cathodic Protection Technology in the Territory, it shall only do so utilizing the services of Global and GML, as set forth in this Agreement. Likewise, and to the extent such technology is applicable, Global, GML, and their subsidiaries and affiliates (if any) shall exclusively utilize Cathodic Protection Technology in connection with any cathodic pipeline protection work undertaken in the Territory.

5. Prior Agreements; Relationship of the Parties. Except to the extent inconsistent herewith, this Agreement shall not modify the terms of any previously entered-into agreements between the parties hereto. Unless specifically provided in this Agreement, none of the parties shall have any authority to act for, or to assume any obligation or responsibility on behalf of, the others. No party shall be responsible or liable for any indebtedness or obligation of the others, except as to those joint responsibilities, liabilities, indebtedness, or obligations incurred after the date hereof pursuant to and as limited by the terms of this Agreement. This Agreement shall not be deemed to create a general partnership between the parties with respect to any activities whatsoever.

6. Termination. Either (a) Deepwater or (b) Global and GML may terminate this Agreement if the other fails to comply with a material term or condition hereof; provided that prior to terminating this Agreement, the defaulting party shall have ten (10) days following receipt of notice of its default from the other to cure that default. If, ten (10) days following receipt of such notice, the event of default is continuing, the non-defaulting party may terminate this Agreement by providing written notice to all other parties hereto. Termination of this Agreement shall be effective immediately upon receipt of such notice by all parties. Notwithstanding the foregoing, Deepwater may, upon notice to Global and GML, unilaterally terminate this Agreement on or after March 1, 2009, if, by that date, Deepwater has not realized at least Five Hundred Thousand Dollars (U.S. \$500,000.00) in gross revenues as a result of its participation in the Bid process.

7. Survival. Notwithstanding termination of this Agreement for any reason (including without limitation those set forth in Section 6, above), the terms of this Agreement shall remain in full force and effect with respect to any project that is bid or awarded while this Agreement is in effect.

8. Remedies. Without prejudice to the rights and remedies otherwise available to it, each party agrees that the other shall be entitled to equitable relief by way of injunction and/or specific performance if it breach or threaten to breach any of the provisions of this Agreement.

9. Choice of Laws, Venue, Attorneys' Fees. This Agreement shall be governed by laws of the State of Washington without reference to its conflict of laws provisions. The parties submit to the exclusive personal jurisdiction of the United States District Court located in Seattle, Washington, with respect to any litigation arising out of this agreement or out of the performance of services hereunder. With further respect to any litigation arising hereunder, the substantially prevailing party in any such action shall be entitled to its reasonable attorneys' fees at trial and appeal.

10. Counterparts and Facsimile Signatures. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original and all of which together will constitute the same agreement whether or not each party executes each separate counterpart. A facsimile signature shall be deemed equivalent to an original signature.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first written above.

Global Explorer, LLC

Deepwater Corrosion Services Inc.

Name: Frank Stewart
Title: Manager

J. Britton

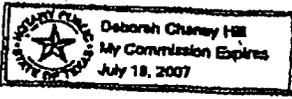
Name: JIM BRITTON
Title: CEO

Global Marine Logistics, LLC
Richard Stabbert

Name: Richard Stabbert
Title: Manager

SUBSCRIBED AND SWORN TO BEFORE ME, A NOTARY PUBLIC
FOR HARRIS COUNTY, STATE OF TEXAS THIS 31ST DAY
OF MARCH, 2006

SIGNATURE *Deborah Chaney Hill*



WITNESS: *Valerie A. Britton*
VALERIE A. BRITTON

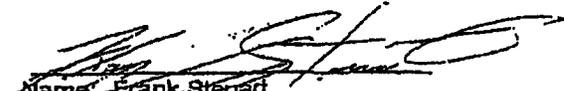
WITNESS: *Beverly A. Claplin*
BEVERLY A. CLAPLIN

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IN WITNESS WHEREOF, the parties hereto have executed this Services Agreement as of the date first written above.

Global Explorer, LLC

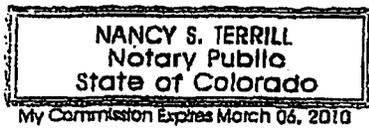
Deepwater Corrosion Services Inc.

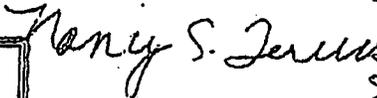

Name: Frank Steuart
Title: Manager

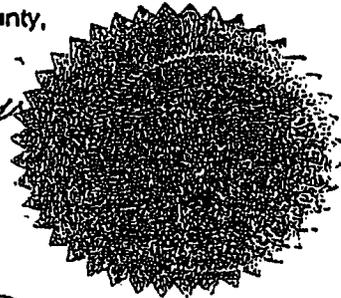
Name: _____
Title: _____

Subscribed and sworn to before me, a Notary Public in and for Mesa County, State of Colorado, this 3rd day of April, 2006.

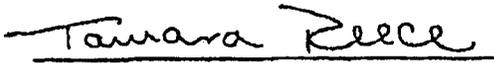
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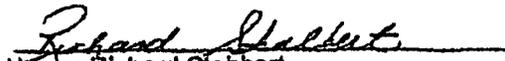


Witnesses to signature of Frank Steuart:


Tamara Reece 4-3-06


Robert C. Reece 4-3-06

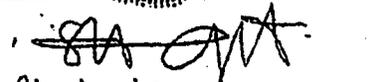
Global Marine Logistics, LLC


Name: Richard Stabbert
Title: Manager

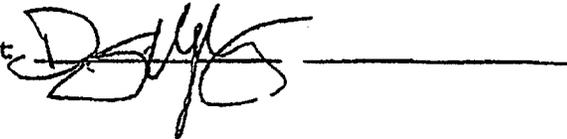


Subscribed and sworn to before me, a Notary Public for King County, State of Washington, this 6th day of April, 2006.

(Seal)


Stephanie B. Garhart

Witnesses to signature of Richard Stabbert:



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