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No. 66678-9-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.

OPEN BRIEF OF APPELLANT

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COURT OF APPEALS
STATE OF WASHINGTON
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Dr. Lin Xie
Appellant/Defendant in Pro Per
SeaTac, WA 98148

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C SUMMARY INTRODUCTION

Can the trial court disregard court rule and the controlling, directly in point, Supreme Court decision, without providing any legal reason and justification (**No**)? That is what happens to this case. The end result is that after paying more than \$200,000 including legal cost, the Defendant has neither been able to see the product nor received a single original document that was required by both the sales contract and the Letter of Credit ("**LOC**"). The core problem is that the trial court used a wrongly formulated "independent principle" as the tool to sever LOC terms from integrated contract agreement that parties bargained for through their own free will.

There were two "first impression" issues in the case at bar. The first one is whether the one-year statute of limitation of *RCW 62A.5-115* applies to the Plaintiff's claims (**Yes**)? This issue has since been resolved by the Supreme Court in *Alhadeff v. Meridian*, 167 Wash.2d 601 rejecting the foundation, a special interpretation of the "independent principle", used in the court of appeal decision of May 10, 2010 ("**Decision**"). Appeal is realistically the first time *RCW 62A.5-115* affirmative defense can be raised under the applicable substantive law, *Alhadeff, Id.* So shall the **Decision** remain the law of the case and perpetuate the error? The trial court had sufficiently been informed on this issue before the time it signed the sanction order. But it decided to ignore the Supreme Court ruling.

Multiple Supreme Court decisions, direct at point to the situation in this case, consistently recognized exceptions to the general rule and have considered issues not raised below "when the question raised affects the right to maintain the action". *RCW 62A.5-115* is one of such issues because it affected the Defendant's right to maintain the action when the trial court granted the summary judgment and dismissed all defendants' claims.

The second "first impression" issue ruled upon in the summary judgment in favor of the Plaintiff is *RCW 62A.2-325*, in spite of the fact that the Plaintiff raised this issue only in his reply brief. This statute defines some conditions precedent that a Seller must perform before he is entitled to ask for direct payment from the Buyer. The key issue is whether there was "sufficient notice" from the Plaintiff under *RCW 62A.2-325(No)*? This issue is still outstanding. The merit of this issue should not have been ruled upon in the *Decision* at all because it was never raised in the Plaintiff's motion for summary judgment but was discussed in the Plaintiff's reply brief. The *Decision* overruled the long standing rule on CR 56 (c) that the trial court may not grant summary judgment to the moving party on issues raised in its reply brief. The court should at least provide some legal analysis and reason for abandoning this well settled rule.

On the merit of this issue, we shall show that the notice must be for "notice for direct payment" and shall compliance with the contract payment terms and "perfect tender" requirement. As such, the "notice" has

not been given even till today and there is *continuing breach* of contract on the part of Plaintiff. The trial courts not only dismissed all the defendant's contentions but also slamed them as frivolous and applied sanction.

The Defendant don't believe that it shall be sanctioned just for submitting amendment and voicing grievances it suffered from the Plaintiff and its consul in the form of fraudulent misrepresentations and other misconducts. Most importantly, the trial court explicitly ruled in hearing that it would consider such setoff and counterclaims.

Since the trial court did not provide any explanation as to why the Defendant's claims are all frivolous, we must assert that the summary judgment and the final judgment prejudicially affect the post-judgment orders. So trial court's determination on the "breach of contract" by Giant must be examined for propriety.

In a nutshell, we need to scrutinize the right and obligations of parties as determined by the original contract and Letter of Credit ("*LOC*") terms guided by the law of the state in *Alhadeff, 167 Wash.2d 601*. The trial court and the *Decision* should revise the old judgment which was based on the outdated analysis on the "independent principle". The Washington state Supreme Court rejected such analysis.

D ASSIGNMENT OF ERRORS AND ISSUES

a. ASSIGNMENT OF ERROR

1. **The Superior Court erred in awarding sanction fee.**
2. **The Superior Court erred in not deducting Giant's damage caused by the Plaintiff's negligent and breach from the final judgment.**
3. **The Superior Court erred in denying the Defendant's Motion to file consolidated complaints.**
4. **The Superior Court erred in dismissing the Defendant's claims without following either CR 56 or CR 12 (c).**
5. **The Superior Court erred in making judgment not in conforming to the court of appeal mandate.**
6. **The Superior Court erred in substantially impaired the obligation of contract**
7. **The Superior Court erred in depriving the Defendant's equal protection right to claim for damages caused by the Plaintiff's negligent and contract violation.**

b. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. **Did the superior court err in awarding sanction for a first impression case that present debatable issues of substantial public importance?**
2. **Did the superior court err in awarding the Plaintiff to use CR 11 as a tool to intimidate and harass the Defendant into to giving up legitimate claims?**
3. **Did the superior court err in awarding the Plaintiff for waiting too long to ask the court to release the fund (failure to mitigate damage)?**

4. Did the superior court err in awarding CR 11 without specifying the offending conduct and a finding of how such filings constituted a violation?
5. Did the superior court err in awarding CR 11 without entering a finding of bad faith?
6. Did the superior court err in awarding sanction without finding that the Defendant's action as a whole was frivolous?
7. Did the Plaintiff signed the motion for sanction without reasonable inquiry—CR 11?
8. Did the superior court violated CJC Canon 3(D)(1) in awarding sanction without recusal?
9. Did the superior court abuse its discretion in denying motion to amend when no prejudice to nonmoving party was shown?
10. Did the superior court abuse its discretion in denying motion to amend without provide any reason and explanation?
11. Did the superior court abuse its discretion in denying motion to amend to conform to evidence?
12. Did the superior court err in denying adjustment of the final judgment when it was clear that lower court's opinions contradicted with that of several binding rulings of the Supreme Court?
13. Did the superior court abuse its discretion in denying motion to amend when the case presents new cause of action or legal theory as a result of the Supreme Court's opinion?
14. Did the late presentation prejudiced the Defense by virtual of RCW62A.2-325 (Yes)?
15. Did the Plaintiff fail to establish facts upon which relief can be granted, RAP 2.5(a)(2)?

E STATEMENT OF THE CASE

This case is about the right and obligation of parties to a

transaction involving a transferable letter of credit. So it is crucial to identify the parties and their rights/obligations in this transaction as defined by contract and statutes. 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**), and collectively “**SIMCO**”, all with Alan Sidell as the principle.

SIMCO was a dominating player in the Seattle area shredded scrap metal market. In around July 2005, Giant approached SIM on behalf of some Chinese companies including SHANGHAI QIANGSHENG IMPORT & EXPORT CO. (**QIANGSHENG**), *CP 132:46A, App-15(for Appendix-15)*, to purchase 2,000Metric Ton of shredded steel scrap. *CP7-9 (App.10-12)*. The contract GMHD07092005(“**2kcontract**”) was signed on July 13, 2005, *Id.*

To avoid confusion, statement of fact made by party in pleading is admission such fact exists and is admissible against such party in favor of his adversary. *Neilson v. Vashon Island School Dist. No. 402, 87 Wn.2d 955, 558 P.2d 167 (1976)*. This **2kcontract** was pleaded as “a true and correct copy”, *CP 4*, by the Plaintiff and was admitted by the defense, *CP 11*. There was no other amended pleading from the Plaintiff. So this **2kcontract** shall be the one in this brief. An immediate conclusion we can read from this **2kcontract** is that all original documents of clause 5, *CP 8*,

APP-11, are required and shall be given to the Defendant. This never happen and the documents are still in Plaintiff's possession. So this is *continuing breach* of the contract.

a. The sale contract + the Letter of Credit = *the Contract*

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

When an LOC is expressed designated as "transferable", *RCW62A.5-112(1)*, the beneficiary may request the bank to transfer all or part of the credit 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 SIMCO, which became *second beneficiary*) for the *first beneficiary* (Giant). The transfer creates a '*direct relationship*' between the issuer (Bank of Shanghai in this case) and the second beneficiary (SIMCO). *Banca Del Sempione v. Provident Bank of Maryland*, 160 F.3d 992 (4th Cir. 1998)

The final Letter of Credit transferred to and advised by the US Bank that SIMCO found acceptable is in *CP 130-134*, ("*USLOC*"). The

master version of this LOC is in CP 255-260¹ (“**WFLOC**”). By accepting this **USLOC**, SIMCO committed itself as shipper for C & F delivery to Shanghai Qiangsheng as the applicant and buyer, CP 667:46A, which is part of the LOC terms. **USLOC**, which listed the terms that the Plaintiff must obey in order to get paid, defines the *direct relationship* between the Plaintiff and Bank of Shanghai via Wells Fargo and was received by the Plaintiff only. The defendant was never given a copy, CP 658, of **USLOC**. The Defendant’s obligation was only in **WFLOC**. So it would be absurd for the Plaintiff to blame the defendant for not performing specific duty in **USLOC**.

Both LOC are almost identical except that **USLOC** have earlier expiration date and document presentation day. This is to give extra time for the Wells Fargo Bank to notify the issuing Bank (Bank of Shanghai). But the payment decision was based on terms of **WFLOC**.

For **USLOC**, the **applicant/customer/buyer** is QIANGSHENG; the **issuer** is Bank of Shanghai; the **first beneficiary** is Giant, CP 131:50 and the **second beneficiary/Seller** is SIMEXCO, CP 131:59. With this **USLOC**, QIANGSHENG appeared as the

¹ From the master **WFLOC** (CP 671-676, APP-18-23), Giant transferred the amount for 1,000MT to SIMCO (per SIMCO’s demand) with the amount for another 1,000 MT to be transferred any moment if SIMCO was ready. For the 1,000MT value transferred, only SIMCO 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 SIMCO 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 185).

principle/applicant/customer/buyer² and Giant as the agent. The shipments in this case were performed according to the terms listed in this *USLOC*. Giant transferred the *duty of payment* to QIANGSHENG and the *duty of goods delivery and document presentation* to SIMCO.

This *USLOC* listed the key agreement (“*the contract*”): Seattle Iron & Metals Export Corp. (a dissolved company that is not represented in this case, *CP 666:59, APP-14*) would be paid by a Transferable Letter of Credit from Bank of Shanghai if it Deliver metals CNF to QiangSheng Shanghai, with Qiangsheng as consignee, and duly present the documents to bank of Shanghai via Wells Fargo Bank.

b. Plaintiff breached *the contract* when it failed to duly present payment documents.

On August 30, 2005, two containers were shipped and a bill of lading (NA1080776) issued, *CP 224-225*. On August 31, 2005, 41 containers shipped and a bill of lading (008610) was to be issued by the ship forwarder CU Transport³, *CP 184*. However, there were some

² There are special 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.**.....

³ In this case, CU Transport was the forwarder for *QIANGSHENG*. Giant did not have contractual agreement with CU Transport or any other ship forwarders as is the case with many exporters. You treat the forwarder very much the same as you deal with the Taxi cab. You call them when you need to order. No prior contract is necessary. Giant never saw the original bill of lading from this forwarder prior to this shipment since this was the first time we used CU Transport. The relationship between shippers (SIMCO and Giant) and CU Transport was the same based on the disclaimers printed on the back of the original bill of lading *CP 484-488*.

discrepancies in the draft bills of lading and need correction. After several rounds of intense communications, the final bill of lading was received on September 15, 2005, *CP 227-228*.

On that same day, Giant attempted to deliver documents to Wells Fargo Bank. The bank found the delivery incomplete because several key documents were in the possession of SIMCO and the second beneficiary has the duty to present documents, *CP 185*. Giant then went to SIMCO's business office to ask for all the required documents in SIMCO's possession and told Mike Dollard that those documents must be presented the same day to satisfy the LOC terms, *CP 185*. This was confirmed by Mike's hand note, "Bill of Lading presented to me on the same day it was due at Bank", *CP 299*. So the Plaintiff was fully aware the fact that it need to presented all the documents that same day or will not get paid.

At this critical point, there were two choices for SIMCO. 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 *WFLOC*; 2) Continued to present all documents to Bank of Shanghai via Wells Fargo for payment with QIANGSHENG as the buyer.

SIMCO told me that they would present the documents to Wells Fargo Bank themselves that same day, *CP 658*. SIMCO did not give Giant "Original Invoice" and "CCIC inspection report" among others, *CP 132*. SIMCO also declined Giant's offer to drive to Wells Fargo together but promised to deliver the documents itself on the same day, *Id.* It was

later recognized that, for some mysterious reason, SIMCO delivered documents in two lots to US Bank, *CP 261*, and *CP 263* on September 15, 2005 and September 21, 2005 respectively. Such two-week delay in presentation was the reason, *CP 186:9* that the bank of Shanghai repudiated the LOC payment⁴.

The Plaintiff hid the details of this two-week delay from the Defendant for years and was found out only after the summary judgment motion. This was to prevent the Defendant to find out that the Plaintiff was liable. The motion for summary judgment, *CP 365-383*, presented as if the September 15, 2005, delivery, *CP 261*, was the only one. After the Defendant, pointed it out in the Response brief, *CP 233*, the September 21, 2005, *CP 263*, delivery, the Plaintiff in reply brief admitted such delay but created a fictitious “one parcel rule”, *CP 397:9*, to claim that *USLOC* required such delay. Such theory is unsupported by fact and is unbelievable and should not be allowed as support for summary judgment.

SIMCO’s decision not to make that short drive to Wells Fargo was a failure of consideration because SIMCO botched the last opportunity to fulfill its contractual duty of duly presentment against Giant’s stern

⁴ Only Bank of Shanghai as issuer could decide whether to pay or not. US Bank and Wells Fargo, as advisor, simply just received and passed on the documents. From *CP 263*, 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. SIMCO also distorted Dr. Lin Xie’s deposition, *CP 371:23*. Xie just wanted SIMCO to go to Wells Fargo at same moment. Wells Fargo just needed those documents in the possessions of second beneficiary but never specifically mentioned who must do the physical presentation, *CP 659*.

warning and offering to help. So SIMCO was estopped from alleging that Giant was responsible for the late presentment, *CP 247:9*, since *USLOC* is binding on the Plaintiff only and Giant was not aware of the detail terms on it including the September 14, 2005 expiration date. More details for such delay were within the knowledge of the Plaintiff and shall come out if this case goes to trial. For one thing, SIMCO decided to ignore this line in *CP133:47B*: “This letter of credit is restricted for presentation of documents to Wells Fargo HSBC Trade Bank.”

c. Both Parties worked together to collect from third parties.

Following that Giant hired Mr. Robert J. Adolph to check on some legal options. SIMCO also considered Mr. Adolph as being here to assist Giant and SIMCO together, *CP 299* and had frequent private communications with the Adolph Law Group, *CP 300*. Even at this point, the Plaintiff did not disclose anything about the September 21, 2005, *CP 263*, delivery. Otherwise, all the legal attention would have been pointed at the Plaintiff rather than at the Banks and others.

Then Giant and SIMCO had several meeting to find solutions. Giant would like that SIMCO fulfill its obligation for the 2,000MT contract which was the main reason that QIANGSHENG did not want to waive the duly presentment requirement to Bank of Shanghai, *CP80:page167*. QIANGSHENG took cash deposit from the steel mill and then issued *WFLOC* in the amount of \$406,000 for 2,000MT scrap metals, *CP 665, APP-13*. SIMCO’s failure to deliver 2,000MT put

QIANGSHENG in default and Giant in difficult position, *CP 80:page 167*.

In addition, both parties discussed Mr. Adolph's opinion on a very similar case, *Voest-Alpine Trading v. Bank of China*, 142 F.3d 887, affirmed, 167 F. Supp. 2d 940, where the bank lost in court and had to pay for Letter of Credit plus legal fee, *CP 404-410*.

Soon after the transaction several key employees from SIMCO, who were involved with this transaction, left the companies for mysterious reason including Deeanna Curnew (Traffic controller, *CP 470*), Michael Dollard (account executive, *CP 544*) and Chris Berge (Marketing Manager, *CP 9*).

On November 2, 2005, Giant's Lawyer sent a legal letter to SIMCO, *CP 538-539*, demanding that SIMCO took responsibility for its failure to timely present documents. No respond was received, from SIMCO on this letter⁵ and Giant considered SIMCO's silent as consent and waiver.

d. Plaintiff hired new lawyer and sued the first beneficiary.

On June 11, 2007 SIMCO's new attorney wrote to Giant, *CP 540-541* demanding payment and providing some response to the Giant's

⁵ Giant paid Adolph Law Group for the legal service at that time and SIMCO considered Adolph as working for them as well *CP 299*. There was mutual understanding that both parties were collecting from Banks and others. Giant was never informed by SIMCO that they would collect from and charge Giant 12% legal interest on top of the principle own by the bank, *CP 418*.

November 2, 2005 letter. This was the first ever notice from SIMCO seeking direct payment from Giant, CP 659. So SIMCO's notice for payment was sent almost two years after the payment repudiation by Bank of Shanghai due to SIMCO's late presentation. SIMCO decided to sue the weak and vulnerable instead of the party at wrong. The amended complaint, CP 14-17, 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 amended complaints on March 13, 2008, CP18-20. In the answer, CP 20, Giant asserted affirmative defense "fails to state a claim upon which relief can be granted", "damages were caused by Plaintiff or third parties", "doctrines of waiver and estoppel", "doctrines of unclean hands" and "failure to mitigate damages".

The properly asserted defense "*fails to state a claim upon which relief can be granted*" and "damages were caused by Plaintiff or third parties", CP 20, was never directly attacked by the Plaintiff or the court. They were just ignored. We shall demonstrate later that RCW 62A.5-115 and *Alhadeff, 167 Wash.2d 601* define certain material facts like laches, "perfect tender" and "seasonable notice". Those facts would in turn determine whether relief would be available for Plaintiff's contract breach claim under RCW 62A.2-325. By totally ignoring such facts, the Plaintiff therefore failed to state a claim upon which relief can be granted.

Around this time, SIMEXCO, the second beneficiary, CP 517:59 (APP- 14), was dissolved (see CP 627 under conversion), 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 SIMCO’s attempt to evade liability.

SIMCO filed the motion for Partial Summary Judgment on August 29, 2008, *CP 26-47* in which SIMCO used Dr. Lin Xie’s deposition and Alan Sidell’s affidavit as the primary source of evidence. The Plaintiff acknowledged (respondent’s brief 46 footnote 30 (1) of the last appeal) that this affidavit was not based on “personal knowledge”. In fact, Mr. Alan Sidell said that 1) “Don’t know whether Bank of Shanghai, Wells Fargo or US Bank rejected the presentation documents”, *CP 308*; 2) “Don’t know who from SIMCO sent the documents to which Bank, *CP 310*”. The *Decision* use Mr. Sidell’s declaration, *CP 51:1*, as the key evidence to support that “seasonable notice” was given. This statement is in total contradiction with the Defendant’s affidavit under oaths *CP 659*.

The motion requested summary judgment on two causes of action (breach of contract and unjust enrichment). Giant pointed out in its response that it was SIMCO who breached its contractual obligation when it failed to timely present documents, *CP 241:17*. Then, Giant enumerated and explained in great details affirmative defenses it properly asserted in the amended answer like estoppel, *CP 246*, waiver, *CP 247*, unclean hand *CP248* and failure to mitigate damages, *CP249*. Most importantly, Giant provided detailed analysis to show that SIMCO was estopped from collecting money directly from Buyer by *RCW 62A.2-325* because SIMCO breached its obligation to duly present document, *CP 240-244*. Giant did

not ask for summary judgment on *RCW 62A.2-325*. As such, well settled court rule prevent trial court from making summary judgment on this issue that was no mentioned in the Plaintiff's motion for summary judgment.

SIMCO discussed *RCW 62A.2-325* in its reply brief, *CP 388-397*, which also raised a new theory "*Defendant's course of conduct modified his contractual obligation*", *CP 395:22*. Against the court rule CR 56(c), the trial court considered and granted summary judgment on issues raised in SIMCO's reply brief in favor of respondent on the breach of contract and denied the unjust enrichment claim, *CP 265 (APP-7)*. The trial court never provided any explanation as to why it was necessary to break the court rule.

Giant filed a motion for reconsideration on October 6, 2008. *CP 271-283*. 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, *CP 412*.

The trial court refused Giant's request to strike SIMCO's motion for final judgment, *CP 454*, for KCLR 7⁶ violation and also gave no response to Giant's motion for extension of time to file response (this

⁶ 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.

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, *CP 588-589*. The Appeal followed.

In *Decision*, this Court identifies *RCW 62A.3-325* as a valid issue of first impression law in the Washington State that Giant does not waive because the Defendant has the right "to controvert the opposing party's prima facie case as determined by applicable substantive law". By the same analysis all the UCC Article 2 requirements would also be appropriate issues on contract dispute including "perfect tender", *RCW 62A.2-601(a)*.

However, the *Decision* was wrong in using Giant's statement in its claims against CU Transport as evidence for the purpose of summary judgment. Giant accurately blamed the CU Transport for negligent delivering the Bill of Lading late. This was based on the usual business practice and expectation in the industry. The CU Transport's delivery was just on time for *WFLOC* but was well behind the usual expectation. In addition, Giant was on the same side as *SIMCO* to claim against CU Transport. Giant's statement has no Res Judicia value in the current case because it involved different parties—a basic requirement for Res Judicia and that case was never ruled on.

F ARGUMENT

a. Summary of Issues

RAP 2.5(c)(2) codified certain restrictions on the law of the case doctrine: (2) Prior Appellate Court Decision. The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review. *86 Wn.2d 1152*

First, application of the doctrine may be avoided where the prior decision is **clearly erroneous**, and the erroneous decision would work a manifest injustice to one party. See, e.g., *First Small Bus. Inv. Co. of Cal. v. Intercapital Corp. of Or.*, *108 Wn.2d 324, 333, 738 P.2d 263 (1987)*. This common sense formulation of the doctrine assures that an appellate court is not obliged to **perpetuate its own error**.

The Defendant is compelled to show here that the trial court's ruling is **clearly erroneous**, unjust and manifest injustice to the Defense. Giant was supposed to make \$3,000-\$4,000, *CP 462*, commission as an agent helping a big scrap yard SIMCO to open its export market. Giant did all it was supposed to do under the laws and contract. But now, without a chance for a fair trial and with nearly \$200,000.00 paid into the Plaintiff's pocket, in a dispute originated from the Plaintiff's negligent and contract breach, the Defendant has yet to see any sign of the product and to receive

a single original document listed as required in the **2kContract**, CP 8. The Plaintiff is still continuing breaching the **2kContract** by holding on to those original documents that are now the Defendant's property.

The core reason for such unjust result is that the **Decision** based its argument entirely on a version of "*independent principle*" as was promoted in, *Alhadeff v. Meridian on Bainbridge Island, LLC* (2008), 144 *Wash.App.* 928, and used this tool to artificially separate parties' integrated contract terms. The end result is that all the benefit went to the Plaintiff and the Defendant got all the responsibility. This is clearly unjust and this court should use its inherent equity power to correct such unjust situation. Since now *Alhadeff*, 167 *Wash.2d* 601 has rejected such erroneous interpretation of the "*independent principle*", this case at bar fits right into the next exception.

Second, application of the doctrine may also be avoided where there has been an intervening change in controlling precedent between trial and appeal. See RAP 2.5(c)(2) (authorizing appellate courts to review prior decisions on the basis of the law "at the time of the later review"). This exception to the law of the case doctrine also comports with federal law. *1B JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE* 0.404 *1*, at II-6-II-7 (2d ed. 1996) ("It is clear, for example, that a decision of the Supreme Court directly in point, irreconcilable with the decision on the first appeal, and rendered in the interim, must be followed on the second appeal, despite the doctrine of the law of the case.") (footnote omitted); cf.

Crane Co. v. Am. Standard, Inc., 603 F.2d 244, 249 (2d Cir. 1979)

(concluding that law of case did not preclude trial court reconsideration of whether plaintiff had a cause of action when reexamination is appropriate in light of an intervening United States Supreme Court decision). An appellate court's discretion to disregard the law of the case doctrine is at its apex when there has been a subsequent change in controlling precedent on appeal. That is exactly the situation for the case at bar. So now is the chance for this court to address the irreconcilable differences between *Decision* and *Alhadeff*, 167 Wash.2d 601.

This court has perfected appeal for the issues listed on the Notice of Appeal, *APP-31*. These issues were properly authorized by RAP rule.

1) RAP 2.5(a)(2) allow the appellant to raise error of “failure to establish facts upon which relief can be granted”. We will do so as a matter of right.

2) A post-judgment order would be appeal able under *RAP 2.2(a)(13)* (final order after judgment).

3) RAP 12.9 (a) The rule also gives the party claiming noncompliance the option of initiating a new review proceeding to test whether the judgment entered by the trial court after the appeal, or other action by the trial court, complies with the appellate court's opinion.

4) RAP 2.2. Decisions Of The Superior Court That May Be Appealed, (13) Final Order After Judgment. Any final order made after

judgment that affects a substantial right.

5) *CP 687, APP-1* is an order denying a motion for permission to file a second motion for a new trial pursuant to CR 59(j) was held appealable under RAP 2.2(a)(13). *Alpine Industries, Inc. v. Gohl, 101 Wn.2d 252, 676 P.2d 488 (1984)*.

6) A party's appeal from a post-judgment order imposing *CR 11* sanctions will bring up the final judgment for review. *Franz v. Lance, 119 Wn.2d 780, 836 P.2d 832 (1992)*.

7) *RAP 2.4(b)* provides for review of issues not designated in the notice of appeal if the trial court's ruling *prejudicially affects* the decision designated in the notice. Here, the trial court's determination on the "breach of contract" by Giant, *CP 265, APP-7*, is clearly decisive, and review of the issue is appropriate.

b. The Trial Court Abused Its Discretion in Awarding CR 11 Fee

CR 11 provides that the signature of a party or an attorney on a pleading, motion, or memorandum constitutes a certification by the party or attorney that:(1) it is well grounded in fact; (2) it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law;

RCW 4.84.185 allows for recovery of attorney fees and costs for the prevailing party where the lawsuit is found to be "frivolous." The

statute requires that the action be frivolous in its entirety. *Biggs v. Vail*, 119 Wn.2d 129, 133, 830 P.2d 350 (1992). Thus, if any one of the claims asserted was not frivolous, then the action is not frivolous. *Biggs*, 119 Wn.2d at 137.

1. ***This is a case of first impression that presents debatable issues of substantial public importance.***

Cases of first impression, particularly those that present debatable issues of substantial public importance, may be maintained without violating the rule. *Collinson v. John L. Scott, Inc.*, 55 Wash. App. 481, 778 P.2d 534 (Div. 1 1989); *Moorman v. Walker*, 54 Wn.App. 461, 773 P.2d 887, review denied, 113 Wn.2d 1012, 779 P.2d 730 (1989).

In this case, on two first impression issues, namely, RCW 62A.5-115 and RCW 62A.2-325, the Plaintiff, the trial court and the court of appeal relied heavily on a legal theory that was reversed by the Supreme Court decision *Alhadeff*, 167 Wash.2d 601. As a result the obvious question would be “is the trial court’s original ruling still valid?”

The Court of Appeals does not have the authority to rule contrary to Supreme Court precedents. The Court of Appeals errs when it fails to follow directly controlling Supreme Court authority, *Virginia Ltd. P'ship v. Vertecs Corp*, 158 Wn.2d 566. The **Decision** did not even attempt to use the Supreme Court opinion and the inferences it may lead to in favor of the Defendant.

The controlling law is *Alhadeff*, 167 Wash.2d 601 which states:

“Whether the auxiliary cause of action displaces *Alhadeff*'s

common law claims, thereby rendering them claims that ‘arise under’ Article 5 and are subject to its limitations period, accordingly depends on whether his claims are based on an underlying contract or promise between KCU and *Alhadeff*, or some independent duty owed by KCU to *Alhadeff*. If so, the warranty merely supplements his claims and the statute of limitations does not apply to them. If not, the warranty displaces his claims and the statute of limitations applies to and bars them.”

The Supreme Court’s controlling decision clearly states that the common law claim for the underlying contract has been displaced by the Article 5 claims. The Plaintiff has abandoned his other claims of “unjust enrichment, fault and negligence”, *CP 5-6*, and has shown no other independent duties own by Giant. In fact, there is no authority that supports the notion that the independent principle will reduce the legal effect of the agreement between applicant and beneficiary or in between two beneficiaries. So Plaintiff’s claims are based on the underlying contract and promise between Giant and SIMCO. In short, the Plaintiff’s claim is about “right and obligations of parties in a letter of credit transaction”. There is absolutely no allegations or claims on any breach of independent duty owned by Giant to SIMCO. Therefore, if the common law claims are based on an underlying contract or promise between the beneficiary and the applicant, then the auxiliary cause of action (from *RCW 62A.5-110* or *RCW 62A.5-111*) displaces the claims and the one-year limitation period of *RCW 62A.5-115* applies to them. i.e. the remedies claims of *RCW 62A.5-111* displaces SIMCO’s contract breach claim.

Another controlling authority deal with independent principle and

the terms of LOC as part of the contract, *Kenney v. Read*, 100 Wn. App. 467, which reads:

“The only documents in the record are the letter of credit and the TBA. When several instruments are made as part of one transaction, they will be read together and construed with reference to each other. *Boyd v. Davis*, 127 Wash.2d 256, 261, 897 P.2d 1239 (1995). This is true even when the instruments do not refer to each other and when the instruments are not executed by the same parties. *Id.*; *Turner v. Wexler*, 14 Wash.App. 143, 146, 538 P.2d 877, review denied, 86 Wash.2d 1004 (1975). Thus, we will look to these two documents to gain an understanding of the underlying suretyship agreement.”

So the contract (TBA—Time Brokerage Agreement) and the Letter of Credit must be read together to understand the parties agreement. These controlling Supreme Court decisions would invalidate the foundation of the *Decision*.

2. The Trial Court orders did not comply with the court of appeal mandate.

The sanction order essentially ruled that all Giant’s claims, including cause of actions happened after the summary judgment, were frivolous and without merit. Such sweeping decision is far beyond the mandate. The trial court (Juvenile Court when the order was made) has no jurisdiction to make such ruling without obtaining leave from the Court of Appeal. Superior courts must strictly comply with directives from an appellate court which leave no discretion to the lower court, *Harp v. Am. Sur. Co. of N.Y.*, 50 Wn.2d 365, 368, 311 P.2d 988 (1957).

The Court of Appeal was in support of this statement: “defendants

may have a claim for damages related to the allegedly wrongful failure to present the documents”, *Decision* at 12.

The Appeal Court also mentioned that the Defendant should raise issues to the trial court first because it would confine to review to “issues and arguments properly raised in the trial court”, *Decision at 7, footnote 11*. This is exactly what we did to raise these claims to the trial court.

3. *There is no finding of “Bad Faith”.*

A court may not use its inherent authority to sanction a party for litigation conduct until it enters a finding that the party's conduct amounted to bad faith. Otherwise, a remand is required. *State v. S.H.*, 102 Wn.App. 468, 8 P.3d 1058 (2000) (noting that finding of “inappropriate and improper” conduct is tantamount to finding of bad faith).

Did the superior court err in awarding CR 11 without specifying the offending conduct and a finding of how such filings constituted a violation? An order imposing CR 11 sanctions must specify the offending conduct, explain the basis for the sanction imposed, and quantify any amounts awarded with reasonable precision. With respect to each violation, the trial court must make a finding that either the claim is not grounded in fact or law and the attorney or party failed to make a reasonable inquiry into the law or facts, or the paper was filed for an improper purpose. *Biggs v. Vail*, 124 Wn.2d 193 (1994).

The findings should also correspond the amount, type, and effect

of the sanction to the specific violations at issue. *MacDonald v. Korum Ford*, 80 Wn.App. 877, 912 P.2d 1052 (1996). The absence of proper findings will require, at a minimum, a remand to the trial court for entry of explicit findings as to which filings violated CR 11, how such filings constituted a violation, or for a recalculation of the amount of the award. See *Blair v. GIM Corp., Inc.*, 88 Wn.App. 475, 945 P.2d 1149 (1997).

The moving party has the burden to justify the request for sanctions. The party seeking sanctions must show the motion was both baseless and signed without reasonable inquiry. *Eugster v. City of Spokane*, 110 Wn.App. 212, 39 P.3d 380 (2002).

To avoid being swayed by the benefit of hindsight, the trial court should impose sanctions only when it is patently clear that a claim has absolutely no chance of success. *Skimming v. Boxer*, 119 Wn.App. 748, 82 P.3d 707 (2004).

Bringing a frivolous claim is not enough, there must be evidence of an "intentionally frivolous [claim] brought for the purpose of harassment." *In re Recall of Pearsall-Stipek*, 136 Wn.2d 255, 267 & n.6, 961 P.2d 343 (1998). Because there was no finding of improper motive, the trial court abused its discretion in awarding fees, *Id.* While recognizing that the court's "inherent equitable powers authorize the award of attorney fees in cases of bad faith," the Supreme Court reversed the fee award because there was no finding of "bad faith", *Id.*

Finally, in imposing CR 11 sanctions, it is incumbent upon the court to specify the sanctionable conduct in its order. The court must make

a finding that either the claim is not grounded in fact or law and the attorney or party failed to make a reasonable inquiry into the law or facts, or the paper was filed for an improper purpose. CR 11. In this case, there were no such findings

4. ***The Plaintiff violated CR 11 by signing the motion for sanction without reasonable inquiry.***

The standard for “reasonable inquiry” is by objective standard.

First the Plaintiff’s proposed order, *CP 687*, cited a non-existent statute, RCWA 4.84.105. How can the defendant violate a statute that does not exist?

Second, the Plaintiff did not specify all the elements required by CR 11 sanction. In fact, the Plaintiff, in its response Motion, *CP 680*, clearly told the Juvenile Court that he did not want to discuss the merit of the Defendant’s claims. So the trial court did not considered the merit of the claims when it ruled that they are frivolous.

Third, the Plaintiff’s now statements contradicted with its earlier presentation to this court. To justify that the Plaintiff did not cause any prejudice toward the Defendant. This is what Plaintiff said in the summary judgment hearing, “MR. WYATT: Mr. Xie has the same rights against his end buyers as we do against Mr. Xie...Mr. Xie for the thousand metric tonswe delivered to him, he can sue his end buyer. He has 6 years to so under the written contract”, *RP 34*. But now, the same Plaintiff said in its response that this claim was “frivolous” and “It is too late for the

arguments”. The Plaintiff shows disrespect toward court by deliberately providing wrong, misleading and inaccurate statements.

Fourth, we have supported our claim with very specific details and declaration under oath but the Plaintiff did not declare under oath that what we have alleged is not true. Such silence should be considered admission for the purpose of summary dismissal.

Finally, the Plaintiff should not be allowed to shift its legal fee used to defend its own breach of the contract to the Defendant.

5. *The Code of Judicial Conduct requires disqualification of the trial judge.*

First, the juvenile court is not a proper court for such contract dispute involving several first impression issues especially when the judge has shown that he had a predetermined mind on the Letter of Credit issue, *RP 36:16*, namely, the Letter of Credit was not in anyway affecting the original contract. The court also repeated refused to follow binding opinions from the Supreme Court. By reading the *Decision* even before the defendant received it, the trial judge should be fully informed that the one-year statute of limitation under *RCW 62A.5-115* shall apply to the Plaintiff’s claims.

Second, after reading the *Decision* and realized that the Defendant raised a lot issues on abuse of discretion by the trial court. The court should excuse himself from ruling on sanction since the court has a vested interested in shutting down the discussion.

“If, as in this case, the trial judge is of the opinion that the integrity of the court has been attacked and CR 11 sanctions are appropriate or contempt proceeding is warranted, then such a hearing should be conducted before another judge....Although it is unusual to require a judge to recuse himself from ruling on posttrial matters, the Code of Judicial Conduct, Canon 3(C)(1), requires judges ‘disqualify themselves in a proceeding in which their impartiality might reasonably be questioned . . .’. The trial judge should have disqualified himself and submitted that issue to another judge”,

JONES v. HALVORSON-BERG, 69 Wn. App. 117, 847 P.2d 945.

“The test for determining whether the judge's impartiality might reasonably be questioned is an objective test that assumes that "a reasonable person knows and understands all the relevant facts." ...to view the Canons of Judicial Conduct in a broad fashion and to err, if at all, on the side of caution",

State v. Graham, 91 Wn. App. 663, 960, P.2d 457 (1998)(quoting *Sherman v. State*, 128 Wn.2d 164, 205, 905 P.2d 355 (1995)).

6. *The sanction violated the Defendant's equal protection right to claim for damages caused by the Plaintiff's negligent and contract violation.*

Under the Equal Protection Clause of the United States Constitution, a classification must treat similarly situated people equally. *Cosro, Inc., v. Liquor Control Bd.*, 107 Wn.2d 754, 760, 733 P.2d 539 (1987).

But here the Plaintiff was paying one court filing fee for claims against the Defendant. However, the court orders would force the defendant to pay higher fee for claims against the Plaintiff and others even if some cause of action were new and the Plaintiff's contract breach is still

on-going.

7. The Plaintiff failed to mitigate damage by waiting too long to ask the court to release the fund.

The supersedeas bond was posted on January 8, 2009. The Plaintiff did not contest the adequacy of the bond under RAP 8.1(e) and this court confirmed the bond as adequate. There is no condition attached to the bond and the Plaintiff may ask the court to release it any time in exchange for satisfaction of the judgment, especially after the Court of Appeal confirmed the original judgment. The Defendant has no control over the bond and has considered that the judgment was paid once we deposit the fund into the court registry. The Plaintiff profited from collecting high interest on the judgment by delaying asking the court to release the fund earlier. The Plaintiff should not profit from failure to mitigate damage.

c. The Superior Court erred in not deducting Giant's damage caused by the Plaintiff's negligent and breach from the final judgment

At the minimum the \$25,297.42 plus prejudgment interest, *CP 654*, a cost the Plaintiff benefited from but did not paid for by performing the required contractual task (duly presenting the documents) should be deducted from the judgment. This is a "continuing breach". The Plaintiff has received the full payment but still yet to provide the required

documents on CP 8.

The Supreme Court abused its discretion in denying the defense's request to amend. The Defendant pleaded "set-off" in the original answer. This issue of set-off and counterclaims were raised before the trial court and were never ruled on the merit.

The Court: The case is not dismissed. I guess if there are counterclaims and such, I have't—we haven't addressed those, RP 46.

The Plaintiff has benefited from the Defendant's payment of the shipping cost from Seattle to China. Giant did not give the Plaintiff such gift for free. Such payment was contingent upon the Plaintiff's performance under the contract terms. Plaintiff therefore must pay for his failure to duly present documents that resulted in the nonpayment to Giant from Bank LOC.

1. *The Superior Court erred in dismissing the Defendant's claims without following either CR 56 or CR 12 (c).*

The trial court essentially dismissed all the Defendant's claims without following any of the court rules. This is not a Judgment on the Pleading under CR 12 (c) because matters outside the pleading, CP 622-629, were considered by the court. So this should be converted to summary judgment. But the court did not provide 28 day notice under CR 56 (c) and dismissed all claims.

2. *The Superior Court erred in totally ignoring the Supreme*

Court's controlling ruling.

The filing of the Gant's Motion consolidation and Adjustment of the final judgment is a chance for the trial court to follow the change in law from the Supreme Court and the Supreme Court decision is binding on the case at bar and should be retroactively applied to prior decision because it is remedial in nature.

A statute will apply retroactively if it is curative or remedial. *1000 Virginia*, 158 Wn.2d at 584 ;*McGee* , 142 Wn.2d at 324 . ““A statute is remedial when it relates to practice, procedure, or remedies and does not affect a substantive or vested right.”” *1000 Virginia*, 158 Wn.2d at 586 -87 (quoting *Miebach v. Colasurdo* , 102 Wn.2d 170 , 181, 685 P.2d 1074 (1984)). The legislature may shorten the time period for bringing a statutory claim and thereby terminate a pending action on such a claim without impairing any vested right, *BALLARD SQUARE CONDO. OWNERS ASS'N V. DYNASTY CONSTR. CO.*, 158 WN. 2D. 603, NOV. 2006. Of particular importance here, the legislature may do so even if the lawsuit is pending. E.g. , *Sparkman* , 78 Wn.2d at 586 (defendant's right to a usury defense provided by statute was not a vested right, and the legislature could extinguish the right to the defense by an enactment passed after trial had occurred and prior to a decision on appeal); *Hansen* , 47 Wn.2d at 826 -27 (plaintiff's right to bring a tort action created by statute was not a vested right prior to a final judgment, and the legislature could abolish the cause of action and divest the plaintiff of the action by an enactment passed while the case was pending on appeal). Just as the

legislature can divest a plaintiff of a statutory claim after suit is filed, it follows that it can shorten the time period for bringing a statutory claim and so terminate a plaintiff's action without impairing any vested right.

So the Defendant should be allowed to assert the *one-year statute of limitation* due to the change of law by *Alhadeff, 167 Wash.2d 601*.

3. *The Plaintiff has the contract and fiduciary duties to duly present documents.*

The Plaintiff has the duty of “good faith” under UCC 1-203⁷ and the fiduciary duty⁸ to inform the Defendant the true terms of the Credit and its late presentment so that Defendant/Giant may mitigate the damage. If a party to a contract violates his obligation to act in good faith by making false representations or by failing to disclose relevant information and the other contracting party justifiably acts in reliance upon such conduct, the first party may be estopped from later asserting a claim inconsistent with his prior conduct, *LIEBERGESELL v. EVANS, 93 Wn.2d 881*. The Plaintiff hid the terms of the credit it received and the fact that it delivered the full documents as late as September 21, 2005 for more than

⁷ RCW 62A.1-203: Obligation of good faith. Every contract or duty within this Title imposes an obligation of good faith in its performance or enforcement.

⁸ The Plaintiff has the fiduciary duty because it was the dominant player in this transaction. The trial court correctly pointed out that the Defendant is the broker/agent in this transaction. The Defendant would totally rely on the Plaintiff to deliver the metals and present the bank documents so that Defendant would get paid. In addition, the Plaintiff has control of the AQSIC number to apply for a CCIC certificate. Only with this certificate, will the metals be allowed to enter China.

two years.

4. *The Plaintiff breached its duties and caused damages to the defendant.*

The Defendant paid for the shipping; inspection and bank cost based on the Plaintiff's commitment to perform the contract and LOC terms. If the Plaintiff duly presented all payment documents on September 15, 2005, it would be paid about \$158,100 in its US Bank account, the invoice amount, *CP 263*, for the 1,000 ton metals, and Giant would be paid about \$25,297 in its Wells Fargo account, the amount from the master *WFLOC*, *CP 202-207*. Therefore, if the plaintiff failed to duly present all documents, it would cause damage to itself at least the amount \$158,100 and would cause damage of \$25,297 or more to Giant.

5. *The Superior Court erred in denying the Defendant's Motion to file consolidated complaints.*

First, 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')).

Second, Alhadeff, 167 Wash.2d 601 is a change of law which invalidated the trial court's legal analysis that Letter of Credit Terms would be ignored in contract dispute. As such it raises new cause of action after the original final judgment.

Third, the Defendant is entitled to amend to conform to the evidence/proof and to relation back. Amendment to make pleading conform to proof may be allowed for first time in Supreme Court. *McCallum v. McCallum, 153 Wash. 1, 279 P. 88 (1929)*. Where, prior to first appeal, defendants had not had opportunity to present any evidence, and no issues had yet been tried, and case was not remanded for retrial of specific issues and there was nothing in opinion of reviewing court to suggest that retrial was to be limited, it was not error to permit amendment of answer after remand, and two months before retrial, to include entirely new defense; and, in any event plaintiffs were not prejudiced by ruling. *Ennis v. Ring, 56 Wn.2d 465, 353 P.2d 950 (1960)*.

Fourth, the amendment was specifically authorized by the trial court and those offset and counter-claims were not being ruled upon. Many claims will relation back. This is the only chance for the court of appeal to consider the merit of such claims We simply just want to make sure that the affirmative defenses be correctly be designated as counter-claims because the Plaintiff's failure to deliver "Perfect tender" and "duly

presentment” not only invalidate the Plaintiff’s Claims, it also cause damage to Giant due to the statute of limitation and Laches.

Finally, it is still within the period when the defendant may ask for vacation of the judgment within a year⁹.

d. The Summary/Final Judgment Prejudicially Affect the Post-Judgment Orders.

The order granting partial summary judgment, *CP 265*, and order denying the Defendant’s motion to file amended answer, *CP 588*, of January, 2009, prejudicially affected the post-judgment order and the order for sanction. So those original orders are proper for consideration in this current appeal. The final judgment was wrong in light of the Supreme Court decision, a decision that was not available for reference in the parties’ legal briefs when the last time this case was on appeal with this court.

“The award therefore must stand or fall based on the findings and conclusions the trial court entered in support of the 1990 judgment”, *Franz v. Lance*, 119 Wn.2d 780, 836 P.2d 832 (1992).

⁹ “In the case of *In re Shilshole Avenue*, 101 Wash. 136, 172 Pac. 338, we held that this court will, upon a proper showing made within the year (from the time the original judgment or order was made), grant leave to apply to the lower court for the vacation of a judgment affirmed by this court, for all or any of the causes set forth in Rem. Code, § 303, or for any or all of the causes set forth in the chapter of the code included within §§ 464-473”, *GRACE KOSTE v. INGLIS FLEMING*, 17 Wn.2d 500.

1. ***The Supreme Court Decision Overturn the Main Foundation of the Final Judgment.***

The trial court and the *Decision* use the “independent principle” to artificially separate valid integrated contract terms involving letter of credit and as a result creating unpredictable and ridiculer result. Like in this case, the Defendant did not receive any of the original payment documents as required by *2kcontract*, CP 472, APP-11, and *USLOC*, CP667, APP-15. The Supreme Court rejected such misuse of independent principle, APP-29, *Alhadeff*, 167 Wash.2d 601 and replaced with a more harmonious approach, namely, the remedies claims of RCW 62A.5-111 displace SIMCO’s contract breach claim. Therefore, the trial court’s rulings and *Decision* were shaken to the core.

2. ***The affirmative defense (RCW 62A.5-115), tried by express or implied consent of parties, affects defense’s right to maintain the action.***

First, the supreme court has consistently stated that a new issue can be raised on appeal **“when the question raised affects the right to maintain the action.”** *Bennett v. Hardy*, 113 Wn.2d 912, 918, 784 P.2d 1258 (1990) (quoting *Maynard Inv. Co. v. McCann*, 77 Wn.2d 616, 621, 465 P.2d 657 (1970)); see also *Jones v. Stebbins*, 122 Wn.2d 471, 479, 860 P.2d 1009 (1993).

This is also the so called the New Meadows exception from *New Meadows Holding Co. v. Washington Water Power Co.*, 102 Wn.2d 495, 498, 687 P.2d 212 (1984)

Situation in the case at bar fit squarely with such exception in RAP

RAP 2.5(a). If the defendant had not raised this *RCW 62A.5-115* defense, the trial court would award summary judgment and dismiss all remaining claims. The court of appeal would have affirmed the court's dismissal. Therefore, giant's argument was essential to maintain the action so the exception from New Meadows applies *fair and square*.

Second, this argument is actually in total agreement with the *Decision*, where the court of appeal agree with the Supreme Court on the principle of "*maintain the action*" but have reservation that the trial court need to have a chance to consider the raise issue. In our case, the trial court at the time to rule on the orders *CP 684-687*, had read the *Decision* long before and was fully informed of the issue. So the best way to alleviate the concern and to prevent "surprise" is to remand the case to trial.

Third, in addition the trial court discussed the one-year statute of limitation extensively during the summary hearing.

The Court: "...which I understand is more than a year, which means that the *statute of limitation* is now, would preclude him from taking action to protect his interests", RP 33.

The Court: "...Well within the year that you seek of as being the *statute of limitations?*", RP 37

Mr. Smith: "But there is a one-year *statute of limitations* on the letter of credit that has already passed", RP 39.

The Court: "Really something that both, everyone knew for the entire period of time", RP 39.

The Court: If that happen within the year that you mentioned is the *statute of limitation*”, RP 43.

The Court:, “that if Mr. Xie knew of problems with the Letter of Credit within the one-year period”, RP 44.

So like the *New Meadows Holding*, situation, the trial court did have a chance to rule on the *RCW 62A.5-115* issue if he wanted to.

Fourth, the reservation in *Decision* was not necessary because since *New Meadows Holding*, the supreme court had consistently ruled that new issue can be raised on appeal “when the question raised affects the right to maintain the action” even in situation where no parties ever raised the issue to the trial court. *Bennett v. Hardy*, 113 Wn.2d 912, *Jones v. Stebbins*, 122 Wn.2d 471, *Pulcino v. Federal Express*, 141 Wn.2d 629, *Roberson v. Perez*, 156 Wn.2d 33.

Fifth, in *Bennett v. Hardy*, *supra*, in addition to the “affect the right to maintain action” exemption, another exception was exactly on point with the case at bar:

“The other issue which defendant maintains was not raised below and therefore is not properly before this court is plaintiffs' argument that RCW 49.44.090 and RCW 49.60 create separate and distinct causes of action. The record does not reveal any specific request by plaintiffs that the trial court consider these statutes independently from one another. In fact, no mention of RCW 49.44.090 is found in plaintiffs' memorandum opposing summary judgment. However, a statute not addressed below but pertinent to the substantive issues which were raised below may be considered for the first time on appeal. *STATE v. FAGALDE*, 85 Wn.2d 730, 732, 539 P.2d 86 (1975)”

The is no dispute that the trial court discussed *RCW 62A.5-115* and

its one-year bar for claims extensively, *RP 33, 37, 39, 43, 44*. The Plaintiff's contention is that the trial court did not ruled specifically whether it applies to the Plaintiff's contract breach claim. This is obviously pertinent or very similar to the court's discussion.

Sixth, the Supreme Court also uphold such exceptions based on substantial rights of the parties and CR 8(c):

“It is to avoid surprise that certain defenses are required by CR 8(c) to be pleaded affirmatively. In light of that policy, federal courts have determined that the affirmative defense requirement is not absolute. Where a failure to plead a defense affirmatively does not affect the substantial rights of the parties, the noncompliance will be considered harmless. *Tillman v. National City Bank*, 118 F.2d 631, 635 (2d Cir. 1941). Also, objection to a failure to comply with the rule is waived where there is written and oral argument to the court without objection on the legal issues raised in connection with the defense. *Joyce v. L.P. Steuart, Inc.*, 227 F.2d 407 (D.C. Cir. 1955). There is a need for such flexibility in procedural rules. In the present case, the record shows that a substantial portion of plaintiff's trial memorandum and the entire substance of the hearing on summary judgment concerned the effect of the liquidated damages clause. To conclude that defendants are precluded from relying upon that clause as a defense would be to impose a rigid and technical formality upon pleadings which is both unnecessary and contrary to the policy underlying CR 8(c), and we refuse to reach such a result”,

Mahoney v. Tingley, 85 Wn.2d 95, 100-01, 529 P.2d 1068 (1975).

Here the Plaintiff's substantial right was not affected because the Defendant was not asking for Summary Judgment on the Statute of Limitation. So the case can just go to trial and the Plaintiff may still present his theory that the one-year statute of limitation does not apply in the trial.

There was no surprise in this issue. The Plaintiff planned from day one in anticipation of statute of limitation defense. 1) In the complaint, *CP 3-9*, the Plaintiff tried to blame the Defendant for fraudulent concealment and use this reason to toll the “statute of limitation”¹⁰. The only way to cause “detriment” to SIMCO is by running out the “statute of limitation”. Otherwise, 12% interest can only benefit the Plaintiff; 2) The Plaintiff did not object to the issue of *RCW62A.5-115* during the summary judgment hearing and therefore waived this objection. In fact, all parties were fully aware of the fact that the then controlling law was that the “one-year statute of limitation may not apply under the then current law”; 3) The Plaintiff’s key submissions centered on Letter of Credit, UCC Article 5, *Alhadeff, 144 Wash.App. 928*. By doing so, Plaintiff implicitly consent with discussion the issue of *RCW 62A.5-115*.

Finally, in the case at bar, the court should consider the “statute of limitation” issue as amended because here both parties were aware that the trial court was considering defense of limitations as though it had been pleaded and plaintiff did not request a continuance or show how such amendment would be to his prejudice or that he was in any manner deceived.

¹⁰ In the initial legal letter, *CP 331*, “you made numerous false statements to SIMCO in an effort to keep it from taking action against you for the balance owned under the contract You have knowingly made false and misleading statements to SIMCO which it relied upon to its detriment”. In the complain, “In an effort to induce SIMCO to forego collection activities against Defendants....SIMCO was justifiably induced, among other things, not to act to collect unpaid balance from Defendant..”.

“A trial court may consider the pleadings amended so as to conform to issues presented by the evidence without a formal motion to amend and without expressly stating that an amendment has been granted”, *EDWARD STUECKLE, V. SCEVA STEEL BUILDINGS, INC, 1 Wn. App. 391.*

3. *Alhadeff, 167 Wash.2d 601 and RCW 62A.2-325 defined specific relieve- predicting facts.*

First, the Defendant properly asserted the affirmative defense, “the complaint fails to state a claim upon which relief can be granted”, *CP 20*, and the Plaintiff did not directly attack this defense. RAP 2.5 (a)(2) allow the defendant to raise the error “failure to establish facts upon which relief can be granted” for the first time on review as a matter of right.

Second, in *Roberson v. Perez, 156 Wn.2d 33*, the Supreme Court, in addition to the “affecting the right to maintain action” exception, specifically stated yet another exception that match right to teeth with this case:

“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 "[a]ppel 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)*. For purposes of RAP 2.5(a), the terms "failure to establish facts upon which relief can be granted" and "failure to state a claim" are largely interchangeable. See 1 WASH. COURT RULES ANN. RAP 2.5

cmt. (a) at 640 (2d ed. 2004) ("Exception (2) uses the phrase 'failure to establish facts' rather than the traditional 'failure to state a claim.' The former phrase more accurately expresses the meaning of the rule in modern practice.")", *Id.*

In this case, the trial court granted the Plaintiff's Motion for Summary Judgment on the issue of *RCW 62A.2-325* in violation of *CR 56(c)* because this issue was never mentioned in the Motion for summary judgment, *CP 365-386*. It was only discussed in the Plaintiff's Reply brief, *CP 388-397*. It should never be ruled upon in the Motion for Summary Hearing.

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.

Giant therefore did not have chance to raise to the trial court the issue that *RCW 62A.5-115* operates to define specific facts: 1) whether a notice after one-year is still "seasonable"; 2) Must the notice be in the form of perfect tender (considering that the required documents are still in the Plaintiff's position)? 3) The discovery, after more than one-year, of the Plaintiff's concealment of the September 21, 2005 delivery, *CP 263*, and the September 14, 2005 expiration date, *CP 666*, raise a new cause of

action for “failure to mitigate damages” and laches.

Third, Giant can only raise this issue after the *Alhadeff, 167 Wash.2d 601* ruling. Since then the prediction provided by *RCW 62A.5-115* became so much easier and clearer. One of the conclusion would be that, with this relieve predicting facts (including that fact that none of the documents have been delivered to the Defendant yet and therefore, the “perfect tender rule” *RCW 62A.2-601(a)* essentially says that the payment is not due yet), this court shall be able to conclude that under CR 12 (h)(2) that the Plaintiff failed to state a claim upon which relief can be granted and the breach of contract claim shall be dismissed. The Plaintiff needs to hand over all the original documents now before he can start asking for payment. SIMCO 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.

Fourth, to make inference most favorable toward the Defendant, this court may assume that all the UCC Article 2 requirements including “perfect tender” are necessary. But since the Plaintiff failed to discuss these issues of material facts in its motion for summary judgment, this case shall be remanded for trial.

Fifth, we need to emphasize that here the opinion of *Alhadeff, 167 Wash.2d 601* including *RCW 62A.5-115* is raised under RAP 2.5 (a)(2) not as an affirmative defense but simply as part of the “**applicable substantive law**” used to define certain facts. These facts will then controvert the Plaintiff's prima facie case and predict that no relieve is

possible for the Plaintiff's contract breach claim.

In conclusion, since the appeal is indeed the first time sufficiency of evidence may realistically be raised to support the Defense properly raised affirmative defense that "the complaints fails to state a claim upon which relief can be granted", *CP 12*, this court should consider the issue "**whether 62A.2-325 and 62A.5-115 operates to define specific facts upon which relief may be predicted**" and shall find that relief can be easily predicted as negative under *RCW 62A.2-325*.

4. ***Strong prejudice to Defendant in light of Alhadeff and RCW62A.2-325.***

The try court decided that there is no prejudice to Defendant even if the Plaintiff was late in notification, *RP 32, 33, 36*.

First of all, the trial court during the hearing insisted on that the contract shall be ***2kContract***¹¹, and the Defendant has motioned this court to strike portion of the Respondent's the Brief to remove "delivered the document per Xie's instruction". The so called "Xie's instruction" is just an amendment to change to contract terms to *USLOC*. Since such amendment was not raised in the trial court, it is waived. So the Plaintiff also waived his argument of "***USLOC is the right contract that the plaintiff performed***" since his arguments in the trial court were all based on common law contract that are totally independent of the UCC Article

¹¹ The Court: "It doesn't, or should not affect the original contract that existed between the buyer and the seller."

5's claim.

Second, the Plain language of *RCW62A.2-325* asks for “*seasonable notification to the buyer require payment directly from him*”, *APP-24*. The notice must be for “**payment directly from him**”. From the *2kContract, CP 8, App-11*, this means all original documents under clause 5 must be handed over to Giant before payment. Such documents were never received by Giant, *CP 659*. The Plaintiff never provided an affidavit under oaths showing when, how and to whom from Giant they delivered the original documents to. It is known that the Plaintiff still holding the original Bill of Lading, CCIC certificate etc. So the inference most favorable to Defense is that the documents have not been delivered to Giant as of today even after the Defendant formally requested these documents in motion, *CP 282*.

Third, Giant did have some other “notices” or “indications”. Like working with the same lawyer hired by Giant to claim from the Banks, *CP 299,300*, hid the September 21, 2005 delivery date for years, *CP 263*, and quietly dissolved the transferee company listed on the LOC, *CP 627*. This notice looks like admission of guilt rather than “request for direct payment”.

Fourth, the Plaintiff's argument “even if Xie did not receive notice within one year, Xie was still seasonably notified”, *CP 347*, is clearly wrong according to *RCW62A.5-115* and *Alhadeff, 167 Wash.2d 601*. Such delay caused prejudice to Giant.

Fifth, after the final judgment, the Plaintiff was still in “*continuing*

breach” of the **2kcontract** by refusing to deliver the original documents to the Defendant. Damage from such breach shall be deducted from the judgment. In fact the **2kcontract**, CP 7-9, would require the "perfect tender"¹² rule. So the Plaintiff must satisfy these Article 2 conditions before he is entitled for payment including, 1) “RCW 62A.2-601(a), buyer may reject non-conforming tender”; 2) “RCW 62A.2-510, risk of loss was still at the hand of SIMCO; 3) “RCW 62A.2-320(2), all documents to comply with contract required to perfect buyer’s rights”; 4) “RCW 62A.2-310(c), payment due upon tender of title documents”; 5) “RCW 62A.2-323, requiring bill of lading”; 6) “RCW 62A.2-401 (3), title passes when documents of title delivered”, CP 403(Reply Brief Seasonable Notification).

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/SIMCO.

5. *The Final Judgment was obtained with misconducts.*

This was the actual exchange in the oral argument of the last appeal in this court.

Judge Grosse: “You are not entitled to screw up payment and held

¹² 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." RCW 62A.2-510
OFFICIAL COMMENT 1

harmless either. Did you screw up the payment?"

Mr. Todd Wyatt (for Respondent): "The answer is 'no'. The Bill of Lading was provided ... on September 15, 2005. The letter of credit expired on September 14, 2005, one day before. It was already late."

First, the Plaintiff contradicted directly with what it told the Defendant on September 15, 2005 which was recorded in writing in *CP 299*, where the person with direct personal knowledge, Mr. Mike Dollard said, "*Bill of Lading presented to me on the same day it was due at Bank*".

Second, there is no dispute in this case that the master **WFLOC** was still valid for presentation on September 15, 2005, *CP 671-676,APP-18*, and the Plaintiff's delay destroyed at least this master credit because if the Plaintiff did a complete presentment on September 15, 2005, then the bank payment would be received in both parties' accounts.

Third, Plaintiff's such statements in front of the panel were false. The Plaintiff was estopped to claim that the Defendant was responsible for destroying the Credit by failing to provide the documents (Bill of Lading etc.) on September 14, 2005. Because the record shows that the Plaintiff never told the Defendant this expiration date before September 14, 2005 (it was found out only in the discovery, years later) and the Plaintiff's conduct on September 15, 2005 was consistent with the conclusion that the Plaintiff still believed that **USLOC** was still valid. If the Plaintiff knew the Credit was expired on that day, then the logical way to do business was to get paid from the master credit **WFLOC**, which we told him was still valid, to mitigate the damage by presenting all documents to the

Defendant or the Defendant's Bank (Wells Fargo) to get paid from **WFLOC**.

Finally, the Plaintiff shall be exclusively responsible for all the payment terms in **USLOC**. The Plaintiff accepted the US Bank Letter of Credit for payment. Bank did not even disclose some terms to Giant, for the same privacy reason that it did not send the Plaintiff's bank statement to us, because this **USLOC** is between bank and the 2nd beneficiary—Plaintiff.

Other misconducts: As detailed in *CP 457,522-524*, SIMCO's attorney coached Mike Dollard, the only person with "personal knowledge" of the **USLOC** matters, to say "I don't know" to most questions. There are many other misrepresentation. We are being presenting our grievances to the Washington bar association.

6. *The Superior Court substantially impaired the obligation of contract.*

The **Decision**, erred in dismissing the LOC terms as part of the Contract using the argument in *Alhadeff, 144 Wash. App 928* ("A party to an underlying contract has a separate cause of action for breach of that contract ..."). But such argument has been reversed by Supreme Court's controlling decision *Alhadeff, 167 Wash.2d 601* which states that the common law claim for the underlying contract has been displaced by the Article 5 claims. As such, the LOC and UCP are part of the

agreements.

As a result, the *Decision* substantially impaired the contract terms including *2kcontract*, LOC, UCP and “Duly presentment” against controlling authority in violation of the contract clauses of the constitution.

G CONCLUSION

In light of above analysis, this court should dismiss the Respondent’s breach of contract claim and vacate the final judgment.

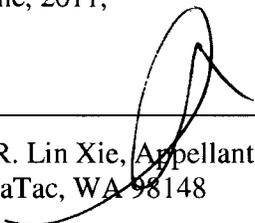
This court finds that genuine issue of material facts exists and reverse the trial court’s order granting summary judgment and final judgment;

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 awarding sanction.

This court finds that the Plaintiff is responsible for the \$25,297.42 damage plus prejudgment interest.

Respectfully submitted this 13th day of
June, 2011,



DR. Lin Xie, Appellant in Pro Per
SeaTac, WA 98148

H APPENDIX

a. Court Orders

Order Denying Defendant's Motion to File Claims and Awarding Sanctions, CP 687-688 **Appendix 1-2**

Order Granting Plaintiff's Motion to Release Fund, CP 684-685 **Appendix 3-4**

Order Denying Defendants' Motion to File Amended Answer, CP 588-589 **Appendix 5-6**

Order Granting the Plaintiff's Motion for Partial Summary Judgment, CP 265-267 **Appendix 7-9**

b. Purchase Contract, CP 471-473.

Appendix 10-12

c. Letter of Credit (*USLOC*) Transferred to and Advised by US Bank

CP 665-669 **Appendix 13-17**

d. Master Letter of Credit (*WFLOC*) Advised by Wells Fargo Bank CP 671-676 **Appendix 18-23**

e. RCW 62A.2-325, RCW 62A.5-115

Appendix 24-27

f. Hawkland and Milkler, Uniform Commercial Code Series, Rev Article 5, § 5-115:1, 2010-2011 Cumulative Supplement.

Appendix 28-30

g. Notice of Appeal—Feb 11, 2011.

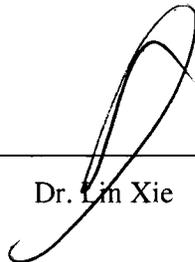
Appendix 31-32

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 13th day of June, 2011.



Dr. Lin Xie

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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)~~ *CW*
ORDER DENYING DEFENDANT'S MOTION TO "FILE AND CONSOLIDATE THIRD PARTY CLAIMS" AND AWARDING SANTIIONS

This matter having come for consideration before this Court on the motion of Defendant to "file and consolidate third party claims," the Court having reviewed the motion, Plaintiff's response to the motion, and Defendant's reply, if any, and the pleadings on file, and being fully advised in the premises, now, therefore, it is hereby.

ORDERED, ADJUDGED, AND DECREED that Defendant's motion is DENIED.

And it is further

ORDERED, ADJUDGED, AND DECREED that Defendant has filed pleadings in this action that were frivolous and/or advanced without reasonable cause within the meaning of RCW 4.84.105, and it is further

ORDER GRANTING PLAINTIFF'S MOTION TO RELEASE FUNDS FROM COURT - 1

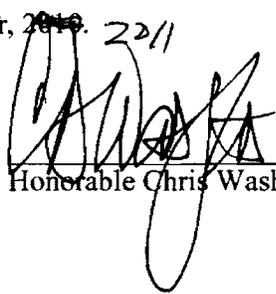
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SALTER JOYCE ZIKER, PLLC
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ORDERED, ADJUDGED, AND DECREED that Defendant shall pay Plaintiff the sum of \$ 500.00 as an appropriate sanction for the conduct of Defendant in this action. This payment shall be made within ten days of the date of this order.

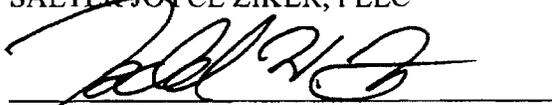
DATED this 13 day of ~~December~~ ^{January}, ~~2010~~ ²⁰¹¹



Honorable Chris Washington

Presented by:

SALTER JOYCE ZIKER, PLLC



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

Attorneys for Plaintiff

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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 TO RELEASE FUNDS FROM COURT

[Clerk's Action Required]

This matter having come for consideration before this Court on the motion of Plaintiff to release the funds held in the Court's Key Bank Public Money Market Savings Account ("Key Bank account") to Plaintiff, the Court having reviewed the motion, Defendants' response to the motion, if any, Plaintiff's reply, if any, and the pleadings on file, and being fully advised in the premises, now, therefore, it is hereby.

ORDERED, ADJUDGED, AND DECREED that Plaintiff's motion is GRANTED. The Court Clerk is hereby directed to release the funds held in the Key Bank account to Plaintiff. Pursuant to RCW 36.48.090, the Clerk will retain five percent (5%) of the interest earned upon withdrawal as an investment service fee. The remaining funds shall be released

ORDER GRANTING PLAINTIFF'S MOTION TO RELEASE FUNDS FROM COURT - 1

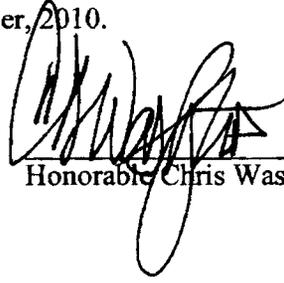
ORIGINAL

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

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and be made payable to "Seattle Iron & Metals Corporation" and delivered to Todd Wyatt, Salter Joyce Ziker, PLLC, 1601 Fifth Avenue, Suite 2040, Seattle, WA 98101. A W-9 for Seattle Iron & Metals Corporation is attached to this Order.

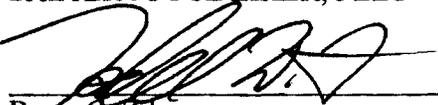
DATED this 23rd day of December, 2010.



Honorable Chris Washington

Presented by:

SALTER JOYCE ZIKER, PLLC



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

Attorneys for Plaintiff

Appendix-4

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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*

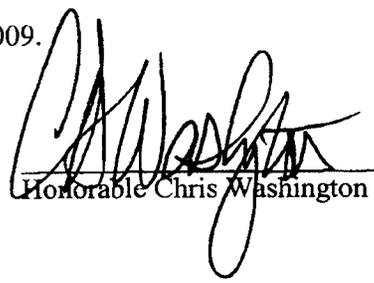
ORDER DENYING DEFENDANTS' MOTION TO FILE AN AMENDED ANSWER AND IMPOSING SANCTIONS - 1

2043 002 fa260101

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

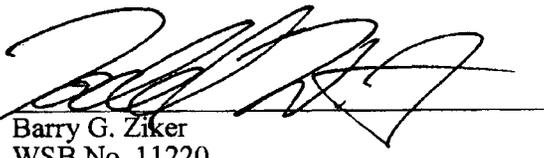
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DATED this 28th day of January, 2009.


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

Appendix-6

CP 589

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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 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 ~~and unjust enrichment claims~~ ^{against Xie and his marital community}. 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.

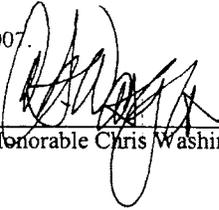
ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL
 SUMMARY JUDGMENT - 2

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

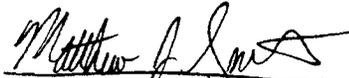
Presented by:

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

号码: NO: GMHD07092005

订购合同

日期: Date: 7/11/2005

PURCHASE CONTRACT

地点: Place: Seattle, USA

Seller 买方:

SIMCO Export Yard
 Address : 601 S. Myrtle St, Seattle, WA 98108
 Telephone No.: 1-206 682-0040
 Fax: 1-206-623-1231
 Email: chrisb@seairon.com

Buyer 卖方:

Sellers: Giant International Metal Resources
 Address: Suite 3, 19280 11th PL S. SEATTLE WA 98148
 Tel: 1-206-592-0963 Fax: 1-775-2628245

This contract is made by and between Buyers and Sellers; whereby the Buyers agree to buy and the Sellers agree to sell the under-mentioned goods subject to the terms and conditions as stipulated hereinafter

品名、规格、包装 1.Name of Commodity, Specification & Packing	数量 Quantity	单价 Unit Price	总值 Total Value
Shredded Scrap ISRI Code 211 with COPPER(Cu) (max %) 0.3%. In either 40" containers keep weight 55,100lb per can or 20" containers keep weight 44,080lb per can	2000 Metric Tons	USD175.00/MT FOB FAS Seattle port	USD350,000.00 TOTAL: USD350,000.00

2. 生产国别及制造厂商 Country of Origin & Manufacturer: USA

3. 装运 Shipment:

Quantity & Time of Shipment: Shipping start immediately after receiving letter of credit. All 2000MT will be shipped at the end of August 2005.

Port of loading: Seattle

Partial shipment: allowed, transshipment: not allowed

More or less of delivery not exceeding +/-10% allowed, settlement on basis of contracted price.

The seller shall advise the buyer by fax within 24 hours after loading.

4. 支付 Payment:

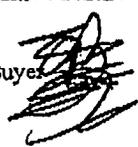
by Irrevocable Letter of Credit payable 100% at sight in favor of the Sellers within three days after signing the contract.

NO L/C ON Friday, NO DEAL!!!

Seller's Bank account

A/c Name : Seattle Iron & Metals Export Corporation

The Buyer:



The Sellers:



A/c Number:153505639715
ABA#:125000105
Bank name: U.S. Bank, National Association
Bank Address: 1420 Fifth Avenue, 11th Floor, Seattle, WA 98101, USA
SWIFT NUMBER (Advising): XXXXXX

Buyer's Bank account

A/c Name : Giant International Metal Resources
A/c Number: 3316971484
Bank name: Wells Fargo HSBC Trade Bank N.A.
Bank Address: 22037 7th Avenue South, Des Moines WA 98198
SWIFT NUMBER (Advising): WFBI US 6SLAX

5. 单据 Document Required

- Commercial Invoice
- Full set of Bills of lading
- Packing List (with the details for weight or quantity)

Other Document

- Certificate issued by CCIC at the loading port

6. 保险 Insurance:

to be covered by the Buyers the Sellers for 110% of the invoice value against decided by buyer

7. 检验 Inspection:

The Sellers shall apply to CCIC for the inspection before the time of shipment at loading port, showing that the goods are suitable for export to China.

8. 不可抗力 Force Majeure:

Neither party shall be held responsible for failure of delay to perform all or any part of this Contract due to flood , fire, earthquake, snowstorm, drought, hailstorm, hurricane, war , government prohibition, or any other events that are unforeseeable at the time of the time of the execution of this Contract and could not be controlled , avoided or overcomes by each party .However ,the party who's performance is affected by the event of Force Majeure shall give notice to the other party of this occurrence as soon as possible and a certificate of the occurrence of the Force Majeure event issued by local Chamber of Commerce shall be sent to the other party not latter than 15 days after its occurrence.

9. 索赔 Claims:

Should the quality, specification, quantity, weight, and packing be found not in conformity with the stipulations of this Contract, the Buyer shall give a notice of claims to Sellers and shall have the right to lodge claims against the Sellers within 50 days from the date of the complete of loading goods at the port.

10. 仲裁 Arbitration

All disputes arising out of or in connection with this contract shall be referred to and finally resolved by arbitration in Seattle, USA in accordance with its Arbitration Rules. The award of the arbitration shall be final and binding upon both parties undersigned.

11. 法律适用 Application of Laws

The Buyer _____

The Seller 

INT
US
CO

The laws of the USA are applicable.



Signature/Seal

Signature/Seal

The Buyer's Name/Title

Susan NG Sales manager

[Handwritten signature]

GIANT INT METAL RESOURCE
USA SOURCE
UBI.602181920

The Seller's Name/Title

Chris Sarge

Marketing Manager

The Buyer _____

The Sellers _____



U. S. Bank National Association
International Dept., PD-WA-T9IN
1420 Fifth Avenue, 9th Floor
Seattle, WA 98101 U. S. A.

SWIFT : USBKUS44SEA
Telex : 6733211USBWJ
Phone : 206-344-3711
Fax : 206-344-5374

08/05/05

LETTER OF CREDIT
ADVISING COVER LETTER

SEATTLE IRON AND METALS EXPORT
CORP.
601 SOUTH MYRTLE STREET
SEATTLE, WA 98108
ATTN: MIKE DOLLAR

U. S. Bank Reference Number	ELCSSEA47139	AVL7
Letter of Credit Number	LC0502745YK	
Amount	USD	175,000.00
Applicant	GIANT INTERNATIONAL METAL RESOURCES	
Issuing Bank	WELLS FARGO HSBC TRADE BANK N.A. TRADE SERVICES OPS-SEATTLE, 11TH FL 99 3RD AVENUE, MAC: P6540-115 SEATTLE, WA 98104	

We enclose a fax/copy of the above mentioned Letter of Credit. We hold the original Letter of Credit at our office.

This Letter of Credit is subject to the "Uniform Customs and Practices for Documentary Credits" (1993 Revision) International Chamber of Commerce Publication No. 500.

This is to serve solely as our advice to you of this Letter of Credit and conveys no obligation or engagement on our part. Please examine this Letter of Credit carefully. If you are unable to comply with its terms and conditions, please contact your buyer immediately to arrange for an amendment.

*When presenting documents for negotiation, please provide an extra copy of your Commercial Invoice and Bill of Lading for our records.

If you have any questions, please feel free to call our office at the above listed number.

Thank you for your continued business.

Authorized Signature AVL7
U. S. Bank National Association
Seattle, WA

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SIMC 0069

Printed: 2005-08-05 08:12:53 AM Central Standard Time
FileName: \\Svamn14glbs-1f\Batch\Output\00381310.prt
Message Number (File): 179

Message Number (Msg Partner): SEAOut-1310-085597

----- Instance Type and Transmission -----

Copy received from SWIFT
Priority : Normal
Message Output Reference : 0545 050805USBKUS44ASEA2289192422
Correspondent Input Reference : 0345 050805WFBIUS6SAXXX9810674562

----- Message Header -----

Swift OUTPUT : FIN 720 Transfer of a Doc Credit
Sender : WFBIUS6SXXX
WELLS FARGO NA
SAN FRANCISCO, CA US
Receiver : USBKUS44SEA
U.S. BANK
(SEATTLE INTERNATIONAL DEPARTMENT)
SEATTLE, WA US
MUR : 050805003541

----- Message Text -----

27: Sequence of Total
1/2
40B: Form of Documentary Credit
IRREVOCABLE
WITHOUT OUR CONFIRMATION
20: Transferring Bank's Reference
SWE549444T549797
21: Documentary Credit Number
LC0502745YK
31C: Date of Issue
050725
31D: Date and Place of Expiry
050914 OUR SEATTLE OFFICE, WA, USA
52D: Issuing Bank of Orig D/C-Nm&Addr
BANK OF SHANGHAI
4TH FLOOR
585 ZHONG SHAN DONGER ROAD
SHANGHAI, CN 200010
50: First Beneficiary
GIANT INTERNATIONAL METAL RESOURCES
19280- 11TH PL. S., STE 3
SEATTLE, WA 98148
59: Second Beneficiary
SEATTLE IRON AND METALS EXPORT
CORPORATION
601 SOUTH MYRTLE STREET
SEATTLE, WA 98108,US
32B: Currency Code, Amount
Currency : USD (US DOLLAR)
Amount : \$175,000.00#
39A: Percentage Credit Amt Tolerance
10/10
41D: Available With...By... - Name&Addr
WELLS FARGO BANK, N.A., SEATTLE, WA
BY NEGOTIATION
42C: Drafts at...
AT SIGHT FOR 100 PERCENT OF INVOICE
VALUE
42D: Drawee - Name & Address
DRAWN ON BANK OF SHANGHAI,
SHANGHAI, CHINA
43F: Partial Shipments

This is to be considered the original letter of Credit [redacted] under our Reference No. ELC55074729. This instrument must accompany documents prepared for negotiation.

U.S. BANK

NATIONAL ASSOCIATION
International Division

By [Signature]
Authorized Signature

Continued on next page...

Printed: 2005-08-05 08:12:53 AM Central Standard Time
FileName: \\Svamn14glbs-1f\Batch\Output\00381310.prt
Message Number (File): 179

Message Number (Msg Partner): SEOut-1310-085597

Continued from previous page...

ALLOWED
43T: Transhipment
NOT ALLOWED
44D: Shipment Period
SHIPMENT FROM: SEATTLE OR TACOMA, U.S.A.
NO LATER THAN: 050904
FOR TRANSPORTATION TO: SHANGHAI, CHINA
45A: Descriptn of Goods &/or Services
STEEL SCRAP (ISRI CODE 211)
QUANTITY: 1000MT
UNIT PRICE: USD175.00/MT
PRICE TERM: CFR SHANGHAI, CHINA
46A: Documents Required
- 1 - SIGNED COMMERCIAL INVOICE IN 3-FOLD INDICATING THIS L/C NO.
LC0502745YK AND CONTRACT NO. GMHD07092005
V C I 2 - FULL SET OF CLEAN ON BOARD OCEAN BILLS OF LADING CONSIGNED TO
SHANGHAI QIANGSHENG IMPORT N EXPORT CO., LTD. RM 2707, QIANGSHENG
BULD., 145 PUJIAN RD., SHANGHAI, CHINA MARKED 'FREIGHT PREPAID'
NOTIFYING SHANGHAI QIANGSHENG IMPORT N EXPORT CO., LTD. RM
2707, QIANGSHENG BULD., 145 PUJIAN RD., SHANGHAI, CHINA
P 3 - PACKING LIST/WEIGHT MEMO IN 3 COPIES INDICATING
QUANTITY/GROSS AND NET WEIGHTS OF EACH PACKAGE AND PACKING
CONDITIONS.
- 4 - BENEFICIARY'S CERTIFIED COPY OF FAX DISPATCHED TO SHANGHAI
QIANGSHENG IMPORT N EXPORT CO., LTD. RM 2707, QIANGSHENG
BULD., 145 PUJIAN RD., SHANGHAI, CHINA WITHIN 48 HOURS AFTER
SHIPMENT ADVISING NAME OF VESSEL, DATE, QUANTITY, WEIGHT AND
VALUE OF THE SHIPMENT.
S 5 - PRE-SHIPMENT INSPECTION CERTIFICATES ISSUED BY CCIC AT
LOADING PORT IN 1 ORIGINAL AND 3 COPIES.
- 6 - DECLARATION OF NON-WOODEN PACKAGE ISSUED BY BENEFICIARY.
48: Period for Presentation
DOCUMENTS MUST BE PRESENTED AT
PLACE OF EXPIRATION NO LATER THAN
10 DAYS AFTER DATE OF SHIPMENT AND
WITHIN L/C VALIDITY.
49: Confirmation Instructions
WITHOUT
72: Sender to Receiver Information
THIS CREDIT WAS TRANSFERRED BY
WELLS FARGO HSBC TRADE BANK, N.A.

----- Message Trailer -----

{MAC:919E401E}
{CHK:6E560002741B}

CCIC REPORT
FAX # FOR QIANGSHENG IMPORT & EXPORT
BILL OF LADING

Printed: 2005-08-05 08:12:53 AM Central Standard Time

FileName: \\svamnl4glbs-1f\Batch\Output\00381310.prt

Message Number(File): 180

Message Number(Msg Partner): SEAOut-1310-085598

----- Instance Type and Transmission -----

Copy received from SWIFT
 Priority : Normal
 Message Output Reference : 0545 050805USBKUS44ASEA2289192423
 Correspondent Input Reference : 0345 050805WFBIOUS6SAXXX9810674563

----- Message Header -----

Swift OUTPUT : FIN 721 Transfer of a Doc Credit
 Sender : WFBIOUS6SXXX
 WELLS FARGO NA
 SAN FRANCISCO, CA US
 Receiver : USBKUS44SEA
 U.S. BANK
 (SEATTLE INTERNATIONAL DEPARTMENT)
 SEATTLE, WA US
 MUR : 050805003542

----- Message Text -----

27: Sequence of Total
 2/2

20: Transferring Bank's Reference
 SWE549444T549797

21: Documentary Credit Number
 LC0502745YK

47B: Additional Conditions
 + BOTH QUANTITY AND AMOUNT 10PCT MORE OR LESS ARE ALLOWED.
 AS INSTRUCTED BY THE TRANSFEROR, THE TRANSFEREE WILL BE ADVISED
 OF ANY AMENDMENT(S) HEREAFTER MADE TO THE CREDIT ONLY TO THE
 EXTENT AUTHORIZED BY THE TRANSFEROR.
THIS LETTER OF CREDIT IS RESTRICTED FOR PRESENTATION OF DOCUMENTS
 TO WELLS FARGO HSBC TRADE BANK, N.A. FOR SUBSTITUTION. HOWEVER,
 PLEASE NOTE THAT THIS CREDIT IS AVAILABLE FOR PAYMENT AT THE
 COUNTERS OF THE ISSUING BANK AGAINST THEIR RECEIPT OF CONFORMING
 DOCUMENTS. THEREFORE, DOCUMENTS PRESENTED TO US WILL BE SENT TO
 THE ISSUING BANK FOR PAYMENT. UPON RECEIPT OF AVAILABLE FUNDS, WE
 WILL REMIT THE PROCEEDS TO YOU PER YOUR INSTRUCTIONS.
 WHETHER OR NOT THE LETTER OF CREDIT OR ANY AMENDMENT SPECIFIES
 THAT BANK CHARGES ARE FOR APPLICANT'S ACCOUNT, IF DOCUMENTS
 PRESENTED TO US CONTAIN DISCREPANCIES A HANDLING CHARGE OF USD
 75.00 TOGETHER WITH OUR RELATED OUT-OF-POCKET EXPENSES, IF ANY,
 AND ANY EXPENSES AND/OR CHARGES CLAIMED BY THE ISSUING BANK ARE
 FOR YOUR ACCOUNT.
 AN EXTRA COPY OF THE COMMERCIAL INVOICE AND TRANSPORT DOCUMENT
 MUST BE PRESENTED FOR ISSUING BANK'S RETENTION AND DISPOSAL. IF
 NOT PRESENTED, A FEE OF USD10.00 WILL BE DEDUCTED FROM PAYMENT
 PROCEEDS.
 IF ANY INSTRUCTIONS ACCOMPANYING A DRAWING UNDER THIS LETTER OF
 CREDIT REQUEST THAT PAYMENT IS TO BE MADE BY TRANSFER TO AN
 ACCOUNT WITH US OR AT ANOTHER BANK, WE AND/OR SUCH OTHER BANK MAY
 RELY ON AN ACCOUNT NUMBER SPECIFIED IN SUCH INSTRUCTIONS EVEN IF
 THE NUMBER IDENTIFIES A PERSON OR ENTITY DIFFERENT FROM THE
 INTENDED PAYEE.
 THIS LETTER IS SOLELY AN ADVICE OF A LETTER OF CREDIT ISSUED BY
 THE ABOVE-MENTIONED OPENING BANK AND CONVEYS NO ENGAGEMENT BY US.
 DRAFT(S) MUST INDICATE THE NUMBER AND DATE OF THIS CREDIT.
DOCUMENTS MUST BE PRESENTED TO WELLS FARGO HSBC TRADE BANK, N.A.
 TRADE SERVICES OPS - SEATTLE, 999 3RD AVENUE, 11TH FLOOR, MAC:
 P6540-115, SEATTLE, WA 98104, VIA COURIER IN ONE PARCEL.
 PLEASE CALL (206)292-3491 REGARDING ANY INQUIRIES ON
 NEGOTIATIONS.

Continued on next page...

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Message Number(File): 180

Message Number(Msg Partner): SEAOUt-1310-085598

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ALL BANKING CHARGES INCLUDING OURS ARE FOR ACCOUNT OF THE BENEFICIARY. THEREFORE, THE FOLLOWING CHARGES WILL APPLY AT TIME OF PAYMENT:

NEGOTIATION/PAYMENT/EXAMINATION FEE 1/8+ MIN. USD 125.00, AMENDMENT FEE, IF ANY, USD 75.00, FEDWIRE FEE USD 35.00, CABLE FEE USD 30.00, POSTAGE AND HANDLING FEE, IF ANY AS APPROPRIATE, WHICH CHARGES ARE SUBJECT TO CHANGE WITHOUT NOTICE.

NOTWITHSTANDING THE PROVISIONS OF ARTICLE 13 AND 14 OF UCP500, IN THE EVENT THAT DOCUMENTS ARE PRESENTED TO US WITH DISCREPANCIES AND UNLESS EXPRESSLY ADVISED BY YOU TO THE CONTRARY, WE WILL FORWARD DOCUMENTS TO THE OPENING BANK FOR APPROVAL UNDER ADVICE TO YOU.

DOCUMENTS OTHER THAN DRAFTS AND COMMERCIAL INVOICES MUST NOT SHOW UNIT PRICE, VALUE OF GOODS OR TRANSFERRING BANK'S REFERENCE NUMBER.

TO AVOID DELAY IN OBTAINING PAYMENT(S) UNDER THIS CREDIT STRICT COMPLIANCE WITH ITS TERMS IS REQUIRED. IF YOU ARE UNABLE TO COMPLY WITH THOSE TERMS, WE SUGGEST THAT YOU COMMUNICATE WITH YOUR BUYER IMMEDIATELY TO ARRANGE FOR ANY AMENDMENTS.

THE AMOUNT OF EACH DRAFT NEGOTIATED UNDER THIS CREDIT MUST BE ENDORSED ON THE REVERSE OF THIS CREDIT BY THE NEGOTIATING BANK AND THE PRESENTATION OF ANY SUCH DRAFT TO THE DRAWEE BANK SHALL BE A WARRANTY BY THE NEGOTIATING BANK, THAT SUCH ENDORSEMENT HAS BEEN MADE.

YOU AND ALL OTHER PERSONS OR ENTITIES INVOLVED IN THIS LETTER OF CREDIT ARE ADVISED THAT FROM TIME TO TIME THE U.S. GOVERNMENT IMPOSES (I) SANCTIONS AGAINST CERTAIN SPECIALLY DESIGNATED OR BLOCKED PERSONS AND ENTITIES AND CERTAIN COUNTRIES, AS WELL AS PERSONS AND ENTITIES LOCATED IN OR NATIONALS OF OR RELATED TO SUCH COUNTRIES, AND (II) PROHIBITIONS AGAINST PERFORMING ACTIONS WHICH IN ANY WAY SUPPORT BOYCOTTS OF CERTAIN COUNTRIES. UNDER THESE SANCTIONS AND PROHIBITIONS, WE ARE NOT ABLE TO ENGAGE IN TRANSACTIONS THAT IN ANY WAY INVOLVE SUCH COUNTRIES OR PERSONS AND ENTITIES OR VIOLATE SUCH SANCTIONS OR PROHIBITIONS. IN HANDLING THIS LETTER OF CREDIT AND ANY TRANSACTIONS UNDER THIS LETTER OF CREDIT WE WILL ACT IN ACCORDANCE WITH THE THEN CURRENT SANCTIONS AND PROHIBITIONS. IF WE IN GOOD FAITH BELIEVE THAT THESE SANCTIONS OR PROHIBITIONS REQUIRE US TO TAKE OR NOT TAKE AN ACTION IN CONNECTION WITH THIS LETTER OF CREDIT, WE WILL NOT BE LIABLE TO YOU OR ANY OTHER PERSON OR ENTITY INVOLVED IN THIS LETTER OF CREDIT FOR TAKING OR NOT TAKING SUCH ACTION.

THIS CREDIT IS SUBJECT TO THE UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS (1993 REVISION), INTERNATIONAL CHAMBER OF COMMERCE, PUBLICATION NUMBER 500.

PLEASE CONTACT IRENE WU BY TELEPHONE AT 626-573-6071 OR BY FAX AT (626)572-4610 OR OUR HELPLINE AT 1-800-798-2815 OPTION 1 REGARDING ANY INQUIRIES.

----- Message Trailer -----

{MAC:6999521F}
{CHK:342C22CD836F}

Operations Group
Southern California
9000 Flair Drive, 3rd Floor
El Monte, CA 91731



Post-It® Fax Note	7671	Date	# of pages
To	Lin Xie	From	S. Koh
Co./Dept.	Giant Int'l	Co.	WFB
Phone #		Phone #	626-573-6643
Fax #	714-262-8245	Fax #	

DATE OF ADVICE: JULY 25, 2005

ADVISE OF CORRESPONDENT'S
IRREVOCABLE DOCUMENTARY CREDIT
NUMBER: LC0502745YK
DATED: JULY 25, 2005
OUR ADVICE NUMBER: SWE549444

DATE OF EXPIRY: SEPTEMBER 24, 2005
PLACE OF EXPIRY: USA

OPENING BANK:
BANK OF SHANGHAI
4TH FLOOR
585 ZHONG SHAN DONGER ROAD
SHANGHAI, CN 200010

APPLICANT:
SHANGHAI QIANGSHENG IMPORT N EXPORT
CO., LTD.
RM 2707, QIANGSHENG BULD., 145 PUJIAN
RD., SHANGHAI, CHINA, CHINA

BENEFICIARY:
GIANT INTERNATIONAL METAL RESOURCES
19280- 11TH PL. S., STE 3
SEATTLE, WA 98148

AMOUNT: ABOUT USD 406,000.00
ABOUT FOUR HUNDRED SIX THOUSAND AND
00/100'S US DOLLARS

AT THE REQUEST OF THE ABOVE MENTIONED BANK(S), WE ENCLOSE AN EXACT COPY OF THE ABOVE LETTER OF CREDIT OPENED IN YOUR FAVOUR. PLEASE NOTE THAT FOR YOUR CONVENIENCE WE WILL RETAIN THE ORIGINAL LETTER OF CREDIT SO THAT IT IS READILY AVAILABLE AT THE TIME YOU PRESENT DOCUMENTS TO US FOR NEGOTIATION/COLLECTION. IF YOU DO NOT INTEND TO PRESENT DOCUMENTS TO US FOR NEGOTIATION/COLLECTION, WE WILL HAVE THE ORIGINAL LETTER OF CREDIT RELEASED TO YOU AGAINST PAYMENT OF OUR OUTSTANDING CHARGES.

WHEN PRESENTING DRAFT(S) AND THE SPECIFIED DOCUMENTS PLEASE SUBMIT AN ADDITIONAL COPY SET OF ALL DOCUMENTS FOR OUR FILES.

TO AVOID DELAYS IN OBTAINING PAYMENT(S) UNDER THIS CREDIT, STRICT COMPLIANCE WITH ITS TERMS IS REQUIRED. IF YOU ARE UNABLE TO COMPLY WITH THOSE TERMS, WE SUGGEST THAT YOU COMMUNICATE WITH YOUR BUYER IMMEDIATELY TO ARRANGE FOR ANY AMENDMENTS.

PLEASE NOTE BENEFICIARY'S NAME AND ADDRESS IN ALL DOCUMENTS MUST APPEAR EXACTLY AS PER THE ATTACHED LETTER OF CREDIT.

IF THE CREDIT REQUIRES PRESENTATION OF MARINE OR OCEAN BILLS OF LADING AND IF, UNLESS PROHIBITED BY THE TERMS OF THE CREDIT, YOU PRESENT TRANSPORT DOCUMENTS INDICATING A PLACE OF RECEIPT OR TAKING IN CHARGE DIFFERENT FROM THE PORT OF LOADING THE ON BOARD NOTATION MUST ALSO INCLUDE THE NAME OF THE VESSEL ON WHICH THE GOODS HAVE BEEN LOADED AND THE NAME OF THE PORT STIPULATED IN THE CREDIT. THIS PROVISION ALSO APPLIES WHENEVER LOADING ON BOARD THE VESSEL IS INDICATED BY

Original

Operations Group
Southern California
9000 Flair Drive, 3rd Floor
El Monte, CA 91731



THIS IS AN INTEGRAL PART OF ADVICE NUMBER: SWE549444

RE-PRINTED WORDING ON THE BILL OF LADING.

LEASE NOTE THAT THE TERMS OF THIS LETTER OF CREDIT PROVIDE THAT DRAWINGS ARE AVAILABLE FOR FACE AMOUNT ONLY AT THE OFFICE OF THE OPENING BANK WHICH HAS UNDERTAKEN TO EFFECT PAYMENT UPON ITS RECEIPT OF CONFORMING DOCUMENTS. HEREOF, DOCUMENTS PRESENTED TO US WILL, AFTER PRELIMINARY EXAMINATION BY US, BE FORWARDED BY US TO THE OPENING BANK FOR FINAL APPROVAL AND PAYMENT WILL BE MADE TO YOU ONLY UPON OUR RECEIPT OF AVAILABLE FUNDS FROM THE OPENING BANK.

IF ANY INSTRUCTIONS ACCOMPANYING A DRAWING UNDER THIS LETTER OF CREDIT REQUEST THAT PAYMENT IS TO BE MADE BY TRANSFER TO AN ACCOUNT WITH US OR AT ANOTHER BANK, WE AND/OR SUCH OTHER BANK MAY RELY ON AN ACCOUNT NUMBER SPECIFIED IN SUCH INSTRUCTIONS EVEN IF THE NUMBER IDENTIFIES A PERSON OR ENTITY DIFFERENT FROM THE INTENDED PAYEE.

DOCUMENTS MUST BE PRESENTED TO WELLS FARGO HSBC TRADE BANK, N.A., TRADE SERVICES
PS - SEATTLE, 999 3RD AVENUE, 11TH FLOOR, MAC: P6540-115, SEATTLE, WA 98104,
BY AIR COURIER IN ONE PARCEL.

PLEASE CALL (206)292-3491 REGARDING ANY INQUIRIES ON NEGOTIATIONS.

THIS LETTER IS SOLELY AN ADVICE OF A LETTER OF CREDIT ISSUED BY THE ABOVE-MENTIONED OPENING BANK AND CONVEYS NO ENGAGEMENT BY US.

THIS CREDIT IS SUBJECT TO THE UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS (1993 REVISION), INTERNATIONAL CHAMBER OF COMMERCE, PUBLICATION NUMBER 500.

YOU AND ALL OTHER PERSONS OR ENTITIES INVOLVED IN THIS LETTER OF CREDIT ARE ADVISED THAT FROM TIME TO TIME THE U.S. GOVERNMENT IMPOSES (I) SANCTIONS AGAINST CERTAIN SPECIALLY DESIGNATED OR BLOCKED PERSONS AND ENTITIES AND CERTAIN COUNTRIES, AS WELL AS PERSONS AND ENTITIES LOCATED IN OR NATIONALS OF OR RELATED TO SUCH COUNTRIES, AND (II) PROHIBITIONS AGAINST PERFORMING ACTIONS WHICH IN ANY WAY SUPPORT BOYCOTTS OF CERTAIN COUNTRIES. UNDER THESE SANCTIONS AND PROHIBITIONS, WE ARE NOT ABLE TO ENGAGE IN TRANSACTIONS THAT IN ANY WAY INVOLVE SUCH COUNTRIES OR PERSONS AND ENTITIES OR VIOLATE SUCH SANCTIONS OR PROHIBITIONS. IN HANDLING THIS LETTER OF CREDIT AND ANY TRANSACTIONS UNDER THIS LETTER OF CREDIT WE WILL ACT IN ACCORDANCE WITH THE THEN CURRENT SANCTIONS AND PROHIBITIONS. IF WE IN GOOD FAITH BELIEVE THAT THESE SANCTIONS OR PROHIBITIONS REQUIRE US TO TAKE OR NOT TAKE AN ACTION IN CONNECTION WITH THIS LETTER OF CREDIT, WE WILL NOT BE LIABLE TO YOU OR ANY OTHER PERSON OR ENTITY INVOLVED IN THIS LETTER OF CREDIT FOR TAKING OR NOT TAKING SUCH ACTION.

[Handwritten Signature]

AUTHORIZED SIGNATURE

Original

Operations Group
Southern California
9000 Flair Drive, 3rd Floor
El Monte, CA 91731



PAGE: 3

THIS IS AN INTEGRAL PART OF ADVICE NUMBER: SWE549444

LEASE CONTACT SU KOH BY TELEPHONE AT 626-573-6648 OR BY FAX AT (626)572-4610 OR
JR HELPLINE AT 1-800-798-2815 OPTION 1 REGARDING ANY INQUIRIES.

Original

INCOMING SWIFT MESSAGE

07/25/05

SENDER WFT ADDRESS	RECEIVER SWFT ADDRESS	MSG TYPE	L/C ID	DOC TRACK ID	STATUS	ERROR FOUND
OSHCNSHAXXX	WFBIUS6SALAX	700	00000000549444	00000001860285	UPL	NO

MESSAGE RECEIVED FROM :
 BANK OF SHANGHAI
 11TH FLOOR
 85 ZHONG SHAN DONGER ROAD
 SHANGHAI CN 200010

27 : SEQUENCE OF TOTAL
 : 1/1

40A: FORM OF DOCUMENTARY CREDIT
 : IRREVOCABLE TRANSFERABLE

20 : DOCUMENTARY CREDIT NUMBER
 : LC0502745YK

31C: DATE OF ISSUE
 : 050725

31D: DATE AND PLACE OF EXPIRY
 : 050924USA

50 : APPLICANT
 : SHANGHAI QIANGSHENG IMPORT N EXPORT
 : CO., LTD.
 : RM 2707, QIANGSHENG BULD., 145 PUJIAN
 : RD., SHANGHAI, CHINA

59 : BENEFICIARY
 : GIANT INTERNATIONAL METAL RESOURCES
 : SUITE 3, 19280 11TH PLS. SEATTLE WA
 : 98148
 : TEL: 1-206-592-0963, F: 1-775-2628245

32B: CURRENCY CODE, AMOUNT
 : USD406000,00

39A: PERCENTAGE CREDIT AMOUNT TOLERANCE
 : 10/10

41D: AVAILABLE WITH ... BY ...
 : ANY BANK
 : BY NEGOTIATION

42C: DRAFTS AT...
 : AT SIGHT FOR 100,00 PCT OF
 : INVOICE VALUE

42D: DRAWEE
 : US

43P: PARTIAL SHIPMENTS
 : ALLOWED

THIS CABLE COPY HAS BEEN
 AUTHENTICATED BY US AND
 IS TO BE CONSIDERED THE
 OPERATIVE INSTRUMENT.
 WELLS FARGO HSBC TRADE BANK, N.A.
 OUR REF. SWETGAL44

Please note: documents will not
 be honored when not accompanied
 by this letter of credit:
 WELLS FARGO HSBC TRADE BANK, N.A.
[Signature]
 Authorized Signature

43T: TRANSHIPMENT
: PROHIBITED
:
44A: LOADING ON BOARD/DISPATCH/TAKING IN CHARGE AT/FROM ...
: SEATTLE OR TACOMA, U.S.A.
:
44B: FOR TRANSPORTATION TO ...
: SHANGHAI, CHINA
:
44C: LATEST DATE OF SHIPMENT
: 050909
:
45A: DESCRIPTION OF GOODS AND/OR SERVICES
: STEEL SCRAP (ISRI CODE 211)
: QUANTITY: 2000MT
: UNIT PRICE: USD203.00/MT
: PRICE TERM: CFR SHANGHAI, CHINA
:
46A: DOCUMENTS REQUIRED
: + SIGNED COMMERCIAL INVOICE IN 3-FOLD INDICATING THIS L/C NO. AND
: CONTRACT NO. GMHDO7092005
: + FULL SET OF CLEAN ON BOARD OCEAN BILLS OF LADING CONSIGNED TO
: THE APPLICANT MARKED 'FREIGHT PREPAID' NOTIFYING
: THE APPLICANT WITH FULL NAME AND ADDRESS.
: + PACKING LIST/WEIGHT MEMO IN 3 COPIES INDICATING QUANTITY/GROSS
: AND NET WEIGHTS OF EACH PACKAGE AND PACKING CONDITIONS.
: + CERTIFICATE OF QUANTITY IN 1 COPY ISSUED BY CCIC, INDICATING THE
: ACTUAL SURVEYED QUANTITY/WEIGHT OF SHIPPED GOODS AS WELL AS THE
: PACKING CONDITION.
: + CERTIFICATE OF QUALITY IN 1 COPY ISSUED BY CCIC.
: + BENEFICIARY'S CERTIFIED COPY OF FAX DISPATCHED TO THE
: ACCOUNTTEES WITHIN 48 HOURS AFTER SHIPMENT ADVISING NAME OF
: VESSEL, DATE, QUANTITY, WEIGHT AND VALUE OF THE SHIPMENT.
: + PRE-SHIPMENT INSPECTION CERTIFICATES ISSUED BY CCIC AT LOADING
: PORT IN 1 ORIGINAL AND 3 COPIES.
: + DECLARATION OF NON-WOODEN PACKAGE ISSUED BY BENEFICIARY.
:
47A: ADDITIONAL CONDITIONS
: + BOTH QUANTITY AND AMOUNT ~~LOPCT~~ MORE OR LESS ARE ALLOWED.
: + AN ADDITIONAL SET OF DOCS IS REQUIRED. THE NEGOTIATING
: BANK/PRESENTING BANK MUST SEND TO US FOR OUR FILES ALONG WITH THE
: ORIGINAL DOCS, OTHERWISE, USD10,00 WILL BE DEDUCTED FROM PAYMENT
: + DISCREPANT DOCUMENTS WILL BE REJECTED. BUT IF FURTHER
: INSTRUCTIONS ARE NOT RECEIVED BY THE TIME THE APPLICANT HAVE
: ACCEPTED OR PAID FOR THEM, DOCUMENTS MAY BE RELEASED TO
: APPLICANT. IN SUCH EVENT, BENEFICIARY/NEGOTIATING
: BANK/PRESENTING BANK SHALL HAVE NO CLAIM AGAINST ISSUING BANK.
:
71B: CHARGES
: ALL BANKING CHARGES INCLUDING
: REIMBURSING CHARGE, IF ANY, OUTSIDE
: OPENING BANK ARE FOR THE ACCOUNT OF
: BENEFICIARY.
:
48: PERIOD FOR PRESENTATION
: DOCUMENTS MUST BE PRESENTED WITHIN
: 15 DAYS AFTER THE DATE OF SHIPMENT
: RWT WITHIN THE VALIDITY OF THIS
: CREDIT.

49 : CONFIRMATION INSTRUCTIONS
: WITHOUT
:
78 : INSTRUCTIONS TO THE PAYING/ACCEPTING/NEGOTIATING BANK
: + THE AMOUNT OF ALL UTILIZATIONS UNDER THIS CREDIT MUST
: BE ENDORSED ON THE BACK OF THE LETTER OF CREDIT BY THE
: NOMINATED BANK.
: + ALL DOCUMENTS AND DRAFTS MUST BE SENT THROUGH BANK IN ONE LOT
: BY EXPRESS AIRMAIL TO US. OUR ADDRESS: 4TH FLOOR, BILLS CENTER,
: NO.585, ZHONGSHANDONGER RD., SHANGHAI 200010 CHINA.
: + A HANDLING COMMISSION OF USD75.00 OR EQUIVALENT WILL BE
: DEDUCTED FROM PROCEEDS FOR EACH SET OF DOCS WITH DISCREPANCIES
: PRESENTED UNDER THIS L/C.
: + WE HEREBY UNDERTAKE THAT ALL DRAFTS DRAWN UNDER AND IN
: COMPLIANCE WITH THE TERMS OF THIS CREDIT WILL BE DULY HONORED
: ON PRESENTATION AT THIS OFFICE.
:
:
:



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ANNOTATED REVISED CODE OF WASHINGTON
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*** STATUTES CURRENT THROUGH THE 2010 REGULAR AND SPECIAL SESSIONS SECTIONS ***
*** EFFECTIVE THROUGH APRIL 30, 2010 ***

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 (2010)

§ 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.

"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.



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ANNOTATED REVISED CODE OF WASHINGTON
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*** STATUTES CURRENT THROUGH THE 2010 REGULAR AND SPECIAL SESSIONS SECTIONS ***
 *** EFFECTIVE THROUGH APRIL 30, 2010 ***

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 (2010)

§ 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.

JUDICIAL DECISIONS

GENERALLY.

From an applicant's suit against a credit union after a contractor's construction loan defaulted, to whom the applicant had issued a letter of credit, as no underlying contract existed between the applicant and the credit union, the applicant's breach of contract actions were wholly displaced by the chapter 62A.5 RCW warranty and as a result were barred by the one-year statute of limitations. *Alhadeff v. Meridian on Bainbridge Island, LLC*, 167 Wn.2d 601, 220 P.3d 1214 (2009).

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

UNIFORM COMMERCIAL CODE SERIES

2010-2011 Cumulative Supplement

(Issued in December 2010)

Volume 6B

Article 5: Letters of Credit

William D. Hawkland

*Chancellor Emeritus of Louisiana State
University Law Center and Boyd Professor
Louisiana State University*

Frederick H. Miller

*George Lynn Cross Research Professor Emeritus
University of Oklahoma College of Law
Of Counsel, Phillips Murrah, P.C.
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Director, Institute of International Banking Law & Practice*

Revised Article 5: Letters of Credit

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Article 6: Bulk Transfers & Revised Article 6: Bulk Sales

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Mat #40841570

Appendix-28

U.C.C. § 5-115 [Rev]. Statute of Limitations

§ 5-115:1 [Rev] Statute of limitations generally

Add the following new sentence at the end of the paragraph:

U.C.C. § 5-115 [Rev] is new to Article 5. As noted by Official Comment 1, it is drawn from corresponding provisions in U.C.C. Articles 4 (Bank Deposits and Collections) and 2 (Sale of Goods). 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 provision³. The limitations period operates differently on every person who acts under a credit, so that the time of accrual for the issuer will differ from that applicable to the confirmer or other person.⁴

³Importantly, even if statute of limitations on a claim has run, a party seeking to invoke it in a letter of credit dispute may lose the opportunity to do so. Under local procedure, failure to raise statute of limitations of U.C.C. § 5-115 [Rev] at the trial court level waives that claim.

⁴See, e.g., *Seattle Iron & Metals Corp. v. Lin Xie*, 155 Wash. App. 1049, 71 U.C.C. Rep. Serv. 2d 635 (Div. 1 2010) (deciding that beneficiary waived the statute of limitations under U.C.C. § 5-115 claim because beneficiary did not raise the argument below and because no party with identical interest had made the argument below at the trial level).

§ 5-115:2 [Rev] Scope

Replace the third and fourth text paragraph with text at the end of the second paragraph:

The ultimate appellate decision in *Alhadeff v. Meridian on Bainbridge Island, LLC* reached a similar result.²

²*Alhadeff v. Meridian on Bainbridge Island, LLC*, 167 Wash. 2d 601, 220 P.3d 1214, 70 U.C.C. Rep. Serv. 2d 460 (2009) (applying Washington U.C.C. Art. 5 [Rev]). The intermediate appellate court had distinguished between claims that were based on breach of the U.C.C. Article 5 [Rev] warranty and those grounded in breach of contract, noting that the actions were parallel and not subsumed in the U.C.C. § 5-110 [Rev] warranty. The intermediate appellate court criticized the result in *Krause* as having "failed to recognize the separate nature of a contract underlying a letter of credit transaction." It stated that "[a]lthough these claims may rely on the same alleged conduct that would be subject to an Article 5 warranty claim, the claims are based on the alleged contract, not Article 5's warranty." These claims "supplement Alhadeff's Article 5 warranty rights and the one-year statute of limitations does not bar them." The Washington state Supreme Court rejected this analysis.

What the *Alhadef* 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. It did so because it placed undue emphasis on the traditional verbiage about the tripartite distinction between the letter of credit, application, and underlying contract, even going so far as to question the situation where a surety applies for a letter of credit (an arrangement that it called a "four party letter of credit"). If the U.C.C. Article 5 [Rev] limitations period can intrude into the application agreement with respect to a claim for wrongful honor, why can it not also intrude into the underlying contract with respect to a claim against the beneficiary for a breach of the contract by virtue of a wrongful drawing?

U.C.C. § 5-116 [Rev]. Choice of Law and Forum

§ 5-116:1 [Rev] Choice of law and forum generally

Add footnote to end of the first sentence in the fourth paragraph, "To some extent, the effect . . ."

²See, e.g., *Trans Pacific Nat. Bank v. UBS AG*, 2010 WL 2354165 (N.D. Cal. 2010) (applying Cal. U.C.C. Article 5 [Rev]) (question of subrogation to beneficiary's rights under insurance policy subject to law of forum regardless of choice of law clause in LC).

Add at the end of section:

Neither U.C.C. § 5-116 [Rev] nor any other section of the statute addresses questions of jurisdiction including the power of a court over the issuer, confirmer, beneficiary, or applicant. The constitutional rules regarding minimal contacts apply. In *International Shoe Co. v. State of Wash.*, Office of Unemployment Compensation and Placement, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95, 161 A.L.R. 1057 (1945), the U.S. Supreme Court established that a defendant must have "minimum contacts" with that state "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice" to give rise to personal jurisdiction under the Due Process clause of the U.S. Constitution. Generally speaking, neither advice of a letter of credit into a jurisdiction nor the payment of funds under an LC is insufficient to give rise to jurisdiction over an issuer which has no further contact in that jurisdiction.³

³*See, e.g., B.V. v. Rayan*, 15 So. 3d 734 (Fla. Dist. Ct. App. 3d Dist. 2009), review denied, 23 So. 3d 1182 (Fla. 2009) (payment of funds on an LC and related banking transfers in Florida not sufficient contacts to give personal jurisdiction for claims due to an unrelated sale of tainted fever medicine

LETTERS OF CREDIT
 allegedly read
 § 5-116:5
 Add footnote to paragraph "familiar."
 Only to letter of credit its actions p aspect to the 2010 WL 231 ter of credit § 5-117 [Rev].
 § 5-116:5
 Even wh to exercis convenien discretion the appli transactio
 'Shin- (N.Y. Sup. Ct. 2004) (N.Y. wrongful d domiciled in FUNB v. A (Not appar by trial co confirmer even thou Salle Natic parent if a case occur bank AG N.Y.S.2d forum non by a corre for a payt injunction fraud in th of Sauli A part and action by LC under practice

Notice of Appeal (Trial Court Decision)
(Rule 5.3(a), RAP 2.2(a)(13), RAP 2.2(a)(9), RAP 2.4,)

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

SEATTLE IRON & METALS)	
CORPORATION, a Washington Corporation)	
Plaintiff,)	No. 07-2-27492-8 SEA
)	Notice of Appeal to
v.)	Court of Appeals
)	
LIN XIE, individually and dba GIANT,)	
INTERNATIONAL METAL RESOURCES,)	
and the marital community and LH HIGHTECH)	
CONSULTING LLC, a Washington limited)	
liability company,)	
)	
Defendant.)	

Lin Xie, Giant International Metal Resources, and LH Hightech Consulting LLC (collectively, "Defendants"), seeks review by the designated appellate court of the "Order Denying Defendant's Motion to 'File and Consolidate Third Party Claims' and Awarding Sanctions", entered on January 13, 2011, "Order Granting Plaintiff's Motion to Release Funds from Court" entered on December 23, 2011 and other issues as allowed by RAP rule including RAP 2.2(a)(13), RAP 2.2(a)(9), RAP 2.4.

A copy of the decisions is attached to this notice. We are being motioning the Court of Appeal to define whether this appeal is covered by "Recall of Mandate" to correct mistake and Require Compliance with Decision, RAP 12.9 (a),(b) or should be a new appeal with new round of briefings allowed. A modified Notice of Appeal is expected to be filed when order on scope from the court of Appeal is issued.

February 11, 2011

Signature

Dr. Lin Xie
Defendant in Pro Per

Attorney for the Plaintiff

Barry G. Ziker, WSBA No. 11220; Todd W. Wyatt, WSBA No. 31608
Salter Joyce Ziker, PLLC, 1601 Fifth Avenue, Suite 2040, Seattle, Washington 98101,
Tel:206-957-5960