

No. 62713-9-I

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

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

v.

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

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**REPLY BRIEF OF APPELLANT**

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

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STATE OF WASHINGTON  
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## C SUMMARY INTRODUCTION

This case is about *rights and obligations arising out of a transaction involving letter of credit*. So it is crucial to identify the parties and their rights/obligations in this *transaction*.

Respondent, Seattle Iron and Metals Co. (collectively **SIM**), did not disclose to the court that Seattle Iron and Metals Co. (**SIMCO**) was not the beneficiary of the letter of credit but Seattle Iron and Metals Export Co. (**SIMEXCO**) was, CP 184:59, nor did SIM explain why SIMCO was entitled to the payment under the concerned letter of credit.

By identifying the wrong issuer/applicant/beneficiary, using the “independent principle” in the exact opposite context and changing “*the contract*” several times, the Respondent is compromising his creditability on any Article 5 augments. In addition, SIM failed to identify and provide the right contract, the right legal theory for relieve, the right evidences and the right meaning of the relevant statues.

In the Respondent’s Brief (“**RB**”), SIM failed to even mention “*perfect tender*” rule RCW 62A.2-601(a) discussed in the Appellant’s Open Brief (“**AB**”), AB 31, and did not provide any direct defense on Giant’s conclusion that the risk of loss (of those metals) was still at the hand of SIM, RCW 62A.2-510 OFFICIAL COMMENT 1.

By conceding that Alan Sidell’s affidavit, CP 104, was not based on “personal knowledge,” RB 46 footnote 30 (1), SIM lost the only evidence (however questionable for the purpose of summary judgment) to

support its claim that it delivered any Originals of invoices to the Appellant (**Giant**).

Because the Supreme Court granted review to the *Alhadeff v. Meridian on Bainbridge Island*, 144 Wash. App 928, review granted, 165 Wash.2d 1015, for RCW 62A.5-115, as an issue of substantial public interest, RAP 13.4 (b) (4). This represents change in the law <sup>1</sup> that provides direct answer to SIM's new theory (in plaintiff's response to reasonable notification motion, CP 400, and in the Respondent's Brief, RB 42) that "*a notice after one-year is still reasonable*". SIM's claims were barred by the doctrine of Laches and statute of limitation. Our line of argument on RCW 62A.5-115 is similar to that of the petitioner (*Meridian/Kitsap Credit Union*) in *Alhadeff*.

Although RCW 62A.5-115 is just a statute relevant to Giant's asserted affirmative defenses, it is an Issue of Public Importance and there is No Existing Authority. "*An issue involving a matter of significant interest to the public and government decision makers and concerning which there is no existing authority is one that may properly be considered for the first time on appeal in the best interest of wise use of judicial resources.*" *Home Builders Ass'n of Kitsap County v. City of Bainbridge Island*, 137 Wn. App. 338, Feb. 2007.

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<sup>1</sup> A change in the applicable law occurring while the case is under consideration by the court may constitute surprise requiring a new trial. *Allen v. Chambers*, 18 Wash. 341, 347-49, 51 P. 478 (1897).

The Respondent's Brief was full of untruthful and misleading statements that it will take more than 25 pages (the limit for Reply Brief) just to list all of them with corrections. As such, Giant has to attach the list of inaccuracies in the Respondent's Brief as appendix and dedicate this reply brief on legal arguments. In fact, this court should ignore and should not have to go through all the Respondent's misstatements and rationale. Rather, where laches bars an action, efficient use of judicial resources, *Home Builders Ass'n*, *supra*, dictate that the court may choose to avoid the substantive issues for the purpose of summary judgment.

The Plaintiff's original Motion for Summary Judgment did not mention any UCC issues even though this is clearly a UCC case. "Courts are created to ascertain the facts in a controversy and to determine the rights of the parties according to justice. Courts should not be confined by the issues framed or theories advanced by the parties if the parties ignore the mandate of a statute or an established precedent. A case brought before this court should be governed by the applicable law even though the attorneys representing the parties are unable or unwilling to argue it." *MAYNARD INV. CO. v. MCCANN*, 77 Wn.2d 616, 623, 465 P.2d 657 (1970).

## **D ARGUMENT**

Summary judgment is appropriate 'if the pleadings . . . together with the affidavits, if any, show that there is *no genuine issue* as to any

*material fact* and that the moving party is entitled to a judgment as a matter of law.' CR 56(c). Summary judgments should be reviewed de novo, viewing all facts and reasonable inferences in the light most favorable to the nonmoving party. *Allstate Ins. Co. v. Raynor*, 143 Wn.2d 469, 475, 21 P.3d 707 (2001).

When ruling on a motion for summary judgment, the court will view the evidence and all reasonable inferences from the evidence in the light most favorable to the nonmoving party. *Roger Crane & Associates v. Felice*, 74 Wn.App. 769, 875 P.2d 705 (1994).

It has often been said that any doubts as to the existence of a genuine issue of material fact should be resolved against the moving party, and in favor of allowing the case to go to trial. See, e.g., *Ely v. Hall's Motor Transit Co.*, 590 F.2d 62 (3d Cir. 1978).

**a. Genuine Issues of Material Facts Exist for all Giant's Affirmative Defenses Preserved for Review by this Court.**

1. *Affirmative defenses were properly asserted in the trial court.*

Giant asserted these affirmative defense in the amended answer, CP 208, 1) *fails to state a claim upon which relief can be granted*; 3) claims are barred under doctrines of waiver and estoppel; 4) Claims are barred under doctrines of unclean hands; 5) *Plaintiff's damages were caused by acts or omissions of Plaintiff or third parties over which Defendants had no control*; 6) failure to mitigate damages.

All legal arguments advanced by Giant fit right into these affirmative defenses and therefore are all proper for consideration by appeal court. For affirmative defense 1) and 5), SIM failed to provide any direct attack. So the trial court's decision violated Giant's due process right for a fair trial for these defenses.

<b>SIM's Acts or Omissions</b>	<b>Fit Giant's Affirmative Defenses</b>
SIM's late presentation	1), 3), 4), 5), 6)
No "perfect tender"	1), 3), 5)
Late action, Laches	1), 3), 5), 6)
No Seasonable Notice	1), 3), 5), 6)

The principle of equity and the affirmative defense that Plaintiff's claims are barred under doctrines of waiver and estoppel were discussed extensively in Briefs.

Plaintiff is estopped from alleging its claim because its failure to perform 2,000MT contractual duties, CP 157.

Giant relied on SIM's continued effort to review and revise several letter of credit amendments after July 15, 2005 causing around \$1,000 fee for each amendment, totaling the amount of profit Giant was supposed to get out of this transaction. So SIM is estopped from alleging, RB 5, that the July 13, 2005 contract, CP 60-62 was not in force<sup>2</sup>, CP 300.

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<sup>2</sup> Giant did react to that new term, CP 129, "No L/C, No deal" by email and phone call that Giant will issue LC according to normal banking practice. SIM never sent any notice that the 2k contract was cancelled.

Giant relied upon SIM's statement on September 15, 2005 that presentation would be done that same date, and was injured when SIM finish the presentation on September 21, 2005. Thus, SIM was estopped from alleging that Giant was responsible for the late presentation, CP 300.

SIM was estopped from alleging claim against Giant when it failed to provide the "seasonable notice" of direct cash payment from Giant as well as from Qiangsheng (the buyer/applicant), CP 298, required by RCW 62A.2-325 because RCW 62A.2-325 bar SIM from collecting from buyer, CP 295. Such delay caused injure to Giant because Giant spent legal fee fighting Banks and others on SIM's behalf.

SIM was estopped from alleging contract breach claim against Giant when such claim was barred by the doctrine of laches and statute of limitation of RCW 62A.5-115.

SIM asserted new theory "*notice after one year was still seasonable*" in CP 400, RB 42. So it was proper for Giant to Response to this *new theory* in AB 33-41 using the new development in WA Supreme Court on RCW 62A.5-115 showing that such claim was barred by the doctrine of laches and the statute of limitation.

Because Giant did properly assert the affirmative defense that "*Plaintiff's damages were caused by Plaintiff or by third parties over which Giant had no control, CP 299, CP 208*" and "*The Complaint fails to state a claim upon which relief can be granted*", SIM's claim should either go to trial or be dismissed by the doctrine of waiver, estoppel , laches and statue of limitation.

**2. SIM did not cross-appeal the trial court's denial of its motion to strike Giant's "seasonable notice" defense.**

SIM tried to strike Giant's affirmative defenses, CP 299, of estoppel, waiver, unclean hand, CP 94, and mitigate damages, CP 95. The court did not strike Defendants' affirmative defenses, CP 332, and they were therefore proper issues for consideration by appeal court.

RCW 62A.2-325 is clearly a statute relevant to Giant's asserted defenses. In its over-length Reply Brief together with an unsigned deposition of Alan Sidell<sup>3</sup>, SIM discussed the issue of RCW 62A.2-325 for the first time<sup>4</sup> and motioned to strike this UCC statute from consideration, CP 658. Giant disagreed with SIM's attempt to make a new motion in its reply brief, CP 659. The trial court did not strike the UCC but considered the merit of it<sup>5</sup>.

In the Respondent's Brief, SIM recycled this idea, RB 34, which was without merit because SIM accepted the benefits, RAP 2.5(b), of a

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<sup>3</sup> Unsigned affidavits should not be considered in ruling on summary judgment motions, *Our Lady of Lourdes Hosp. v. Franklin County*, 120 Wn.2d 439, 842 P.2d 956 (1993).

<sup>4</sup> A trial court may not grant summary judgment to the moving party on issues that are first raised in rebuttal. *Molloy v. City of Bellevue*, 71 Wn. App. 382, 385, 859 P.2d 613 (1993).

<sup>5</sup> A party moving for summary judgment must raise in its motion papers all issues that arguably justify summary judgment. The moving party may not ambush the other side by presenting new theory for the summary judgment in its rebuttal materials, thereby denying the opposing party a fair opportunity to response. A court may not rely on additional grounds presented in rebuttal materials as a basis for granting summary judgment. *Truck Ins. Exch. Of Farmers Ins. Group v. Cnetury Indem. Co.*, 76 Wn.App. 527, 887 P.2d 455, review denied, 127 Wn.2d 1002 (1995).

trial court decision and wanted to review that same decision without putting down any security, RAP 2.5 (b)(2). In addition, there was no cross-appeal and there was no assignment of error in the Respondent's Brief. By the laws of case doctrine (collateral estoppel or issue preclusion), *Clark v. Baines*, 150 Wn.2d 905, 912-13, 84 P.3d 245 (2004), SIM was prevented from relitigating its motion to strike RCW 62A.2-325 issue in this court.

**3. *SIM did not provide the necessary notices— conditions precedent required by RCW 62A.2-325.***

SIM did not provide written notice on 1) Letter of credit “dishonor”; 2) “Seasonable Notice” for direct cash payment from Giant. It would be a very simple issue of fact, if SIM just produced the written notices and that would be end of the matter.

The provision of UCP precluding the issuer from objecting to a presentation defect of which it did not give notice satisfies the requirement of fairness, appendix 51. So it is obvious that when SIM said that the letter of credit was “dishonored”, the beneficiary SIMEXCO would need to have a written notice from the issuer. The Respondent did not submit to the court this notice. Could it be that SIMEXCO got it but SIMC did not?

If the beneficiary did not have a written notice from issuer, it would be in the context of UCP that the letter of credit was not rejected. If the beneficiary/ SIMEXCO had the notice but refused to show, it would

put its “dishonor” story in double. If SIMEXCO got it but SIMC did not, it would put the standing of SIMC to claim the fund into question.

Since SIM did not produced this bank written notice, for the purpose of summary judgment, the reasonable inference in the light most favorable to the nonmoving party must be that such notices do not exist.

Similar analysis can be done to the “Seasonable Notice” since SIM did send a written notice on June 11, 2007, CP 593-594, and clearly understand that a notice for payment of such big amount must be in writing. So SIM’s statement that it had another notice prior to that day, without giving the exact time and manor of the notice, should be treated as *hearsay* for the purpose of summary judgment.

For such large amount, it would be reasonable to expect that SIM would at least try to perfect its tender with the Originals of Invoices or send collection letters. There was nothing in the record indicating that any written notice other than CP 593-594.

Such “Seasonable Notice” is a condition precedent, so SIM has the burden to prove that it provided such notice. Instead, SIM tried to place the burden back to Giant to prove that Giant did not receive it, RB 39-40. The trial court erred in awarding the prejudgment interest without knowing the exact date of such notice, a condition precedent under RCW 62A.2-325.

4. *SIM wrongly identify all parties to the letter of credit*

SIM misled the court by naming *Giant as the applicant and Wells Fargo as the Issuer, RB 7*. It also concealed the fact that SIMC was not the beneficiary but SIMEXCO was, CP 184:59. This is an irresponsible and fatal mistake which may cause bank to refuse payment because the letter asks that, CP 255, *“Please note beneficiary’s name and address in all documents must appear exactly as per the attached letter of credit.”* SIM did not provide any information as to whether it used the right name and address in the presentation.

By doing so, SIM was trying to deny the fact that SIM failed to perform its obligations required by the letter of credit leading to the payment repudiation by Bank of Shanghai.

RCW 62A.5-102, Appendix 30-34, defined parties to a letter of credit transaction. For letter of credit LC0502745YK, Wells Fargo was the nominated/negotiation bank, CP 272:41D, CP 184:41D, appendix 42. Bank of Shanghai was the issuer, CP 272:52D, CP 184:52D, CP 184:42D, appendix 40. This is very important because Wells Fargo Bank would not be responsible for the payment nor would they decide whether the presentation submitted by SIM was conforming or not. It was Bank of Shanghai who repudiated the payment.

The terms, CP 186:47B, of the transferred letter clearly provides: *“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 ... This letter is*

solely an advise of a letter of credit issued by the above-mentioned opening bank and conveys no engagement by us.”

Same terms are also in the Wells Fargo’s original letter, CP 256: “Therefore, 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. ... This letter is solely an advise of a letter of credit issued by the above-mentioned opening bank and conveys no engagement by us.”

As the issuer, Bank of Shanghai, CP 184:52D, had the obligation to honor its letter of credit on the presentation of complying documents, appendix 41. When documents are presented, some response is required but the bank may take a required interim action, appendix 38. In this case, Bank of shanghai took an interim action by asking the applicant (Qiangsheng) to waive the discrepancies in the presentation<sup>6</sup>.

As the applicant, Qinagsheng has the key obligation of reimburse the issuer (Bank of Shanghai), appendix 52, approval of the text of the letter and waiver of any discrepancies, appendix 53. Because Giant as well as Wells Frago had no right to modify the text of the letter and there was no reimburse agreement between Wells Fargo and Giant, therefore Wells Fargo could not be the issuer and Giant could not be the applicant, appendix 5.

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<sup>6</sup> SIM did not provide court or Giant with a copy of the bank “dishonor” notice even though it was required by UCP and Giant’s request for production. It would be a non-issue if SIM simply supplied a copy of the Bank “dishonor” notice letter. Without this letter, SIM had to resort to some *hearsay* and *conjecture* to argue that the letter was dishonored. Also, SIM could not provide an exact date when the letter was dishonored for the purpose of RCW 62A.2-325. As such the trial court’s award for prejudgment interest before the dishonor and before there was “seasonable notice” was clearly wrong.

SIM also produced the theory that Wells Fargo issued another letter of credit (back-to-back letter of credit, appendix 54) for this transaction, RB 6. But such uncorroborated statement is without merit because the terms in the letter cited above disputed this since Wells Fargo had *no engagement* in this transaction. In fact, SIM did not produce any evidence that any banks in the State of Washington would ever issue such risky back-to-back letter of credit.

The place of presentation is equally critical as that of expiration date. If the credit indicates the place or address of the nominated bank, that term control, appendix 43. The terms in the letter of credit says, CP 186:

“This letter of credit is restricted for presentation of documents to wells Fargo HSBC Trade Bank, N.A. for substitution.... Documents must be presented to Wells Fargo HSBC Trade Bank, N.A., Trade Service OPS—Seattle, WA 98104.”

Delivery to or receipt by any other bank or entity does not constitute presentation, appendix 39. i.e. SIM’s delivery to US Bank was not presentation. Only when Wells Fargo received the documents on September 21, 2005 did “presentation” happen but it was too late.

The terms of the letter of credit were clear. “When a letter of credit is not ambiguous, a court must follow the intent manifested by the terms of the letter of credit,” appendix 50, *Westwind Exploration, Inc. v. Homestate Sav. Ass’n*, 696 S.W.2d 378, 42 U.C.C. Rep.Serv.271 (Tex. 1985).

To justify its late presentation and delivery to the wrong place, RB 9-10, SIM resorted to distorting Mr. Adolph and Dr. Lin's statement. Dr. Lin just acknowledged that, CP 146, there was such sentence in the Lawyer's letter, CP 20, but never agreed that the documents must go to US Bank. SIM was quoting out of context. In fact, just two paragraph down in the same letter, it said, CP 21, "*Wells Fargo relayed to Giant that the documentary letter of credit required Giant's transferee, Seattle Iron & Metals or its bank to present the documents.*" Without mentioning this fact, SIM tried to mislead this court and rendered its defense useless. A document (other than an affidavit or declaration from a person with personal knowledge) is potentially objectionable as *hearsay* if it is offered to prove the truth of the matter asserted. *Robinson v. Avis Rent A Car System, Inc.*, 106 Wn.App. 104, 22 P.3d 818 (2001)

SIM was clearly aware that the documents must be sent to Wells Fargo, but invented the theory of *one parcel rule*, CP 53, 85, to justify its two-week delay in sending in the documents. This is nothing more than an excuse and has no merit<sup>7</sup>.

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<sup>7</sup> See CP, 186, the second line from bottom, "...courier in one parcel..." simply says that all documents for this shipment should be in one parcel. In the export industry each shipment is indicated by its own bill of lading. The letter of credit was partial shipment allowed, CP 184:43P and each shipment had its own deadline for presentation, CP 185:48. So it was pure stretch of imagination for SIM to say that the Bill of Lading (NA1080776) for the Vessel CSCL SYDNEY, CP 542 must be combined with the Bill of Lading (008610) for the Vessel OOCL FRANCE. These two bills of lading belonged to two different ship lines: CMA/CGM and NYK.

If SIM was in such confusion, they should have asked such questions when Dr. Lin Xie was in its office (SIM came up with this excuse only after the lawsuit started) on September 15, 2005 for the documents and should have called the HELPLINE number,

Footnote continued on next page

SIM said that even if SIM was solely at fault for the late presentation, it could still claim for breach of contract against Giant, RB 28. This is not true. In *Correspondence,, Buyer's Liability under Letter of Credit*, 12 Int'l Fin. L. Rev. 45 1993 (citing *Ronstan International Ltd v. R C Marine Corp* (1993)4 NZBLC 103, 112), the judge stated:

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

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

In *SAMSUNG America, INC, v. Yugoslav-Korean consulting*, 248 A.D.2d 290, 670 N.Y.S.2d 466, it says:

"if they are able to establish that it was plaintiff's fault that the letters were dishonored, defendants may have a claim for damages related to the allegedly wrongful failure to present the documentation."

SIM failed to correctly identify the roles of parties to the Letter of credit transaction in this case and misunderstood the concept of "independent principle." As such, the Respondent's legal arguments on letter of credit are inaccurate and absurd.

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Footnote continued from previous page  
CP 187. So the conclusion has to be that this is simply an excuse used by SIM to explain away its delay.

**5. SIM still cannot correctly identify *the contract* that was breached by Giant because such breach never happen**

SIM could not make up its mind as to which contract it had performed and which one had been breached.

First it was the “true and correct copy of”, CP 68:11, contract, CP 60-62. Second, it was the *New contract*, CP 90:6, or the *modification of the original contract* in the Motion for Partial Summary Judgment, CP 89:24, CP 178, CP 181<sup>8</sup>. But CP 178/CP 181 was not a contract. It simply changed terms for some work orders that Giant did not have and did not consented to. Giant agreed this work order as the first installment of 1,000MT and more was to come, CP 262.

Third, it was the “Defendant’s course of conduct modified his contractual obligation”, CP 51:22, in SIM’s over-length Reply Brief. However, for all these contract or work orders, "perfect tender" rule<sup>9</sup> of RCW 62A.2-601(a) still apply and SIM did not perform “perfect tender”.

Four, realizing that it could not claim for contract breach when SIM did not perform the condition precedent of that contract, SIM produced the new theory for the first time in the Respondent’s brief, namely “SIMC delivered the metal *per Xie’s instruction*”, RB 7, footnote

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<sup>8</sup> RB 23 also repeated this argument. The motion for summary judgment quoted Exs. G&H. It was probably mistaken for Exs F & G. RB 23 listed CP 180, a cover page. This is an error due to that SIM did not check against the Record on Appeal.

<sup>9</sup> 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.

6, RB 50. Such new contract theory was complete confusing and was too late for the purpose of summary judgment. So this court should ignore it.

Finally, SIM avoided mentioning that *the contract* by which SIM did the C&F term delivery to Qiangsheng with the Bill of Lading, CP 277-281, was the letter of credit. SIM's late presentation breached the terms of the letter of credit.

**b. The Respondent's Claims Were Barred by the Doctrine of Laches and One-year Statue of Limitation**

1. *The Respondent mischaracterizes the "independent principle"*.

The "independent principle" presents that the issuing bank's obligation to the beneficiary of a letter of credit is independent of the beneficiary's performance on the underlying contract. *Kenney v. Read*, 100 Wn. App. 467. However, the doctrine of independence only prohibits an attack on the issuing bank's distribution to the beneficiary; *it does not address claims respecting the underlying contract. In re BRADLEES STORES, INC*, 313 B.R. 565, 54 UCC Rep.Serv.2d 817.

SIM used this "independent principle" throughout as its key legal theory to address its underlying contract claim and to attack Giant. Even its open introduction on letter of credit was totally against the real "independent principle", RB 3. As such, SIM was using the principle in the wrong context and produced absurd result that undermine its

credibility. SIM also disputed that the Letter of credit was not part of the total agreement, RB 26, footnote 18.

**2. SIM breached “the agreement” -- Letter of Credit governed by Article 5.**

UCP governs the letter of credit used in this transaction. So it is part of the “agreement/contract” for this transaction by both parties and is binding obligation. In particular, UCP requires SIM to duly present documents<sup>10</sup>. Such obligation is also plainly written in the Letter of Credit CP 185:48,CP 259:48.

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

SIM’s claims are all concern about the rights and obligations of SIM and Giant under the letter of credit.

RCW 62A.5-110 (1)(b) provides:

*“(1) If its presentation is honored, the beneficiary warrants: ... (b) To the applicant that the drawing does not violate any agreement between the applicant and beneficiary or **any other agreement intended by them to be augmented by the letter of credit**”*

---

<sup>10</sup> UCP ARTICLE 43: Limitation on the Expiry Date A. In addition to stipulating an expiry date for presentation of documents every Credit which calls for a transport document(s) should also stipulate a specified period of time after the date of shipment during which presentation must be made in compliance with the terms and conditions of the Credit.

So it is clear that the agreement (contract) between the applicant and beneficiary shall be augmented by the letter of credit. So the letter of credit terms shall be part of the agreement which SIM breached.

“This warranty has primary application in standby letters of credit or other circumstances where the applicant is **not a party to an underlying contract with the beneficiary.**” RCW 62A.5-110 Official Comment 2 (emphasis added)”

So SIM must warrant to the applicant (Qinagshen), regardless whether it is a party to the underlying contract. By breaching the terms of the letter of credit (LC0502745YK), SIM also breached the warranty.

If the Article 5 warranty applies “where the applicant is not a party to an underlying contract with the beneficiary,” then what is warranted? The plain text of RCW 62A.5-110 provides the obvious answer: in the present case, this “agreement” is the letter of credit (LC0502745YK). The letter of credit itself sets forth all the relevant obligations for SIM and Giant in the Article 5 transaction.

The letter of credit (with UCP terms govern) required SIM to duly present the payment documents and it failed to do so.

SIM’s misguided application of “independent principle” renders RCW 62A.5-111 and RCW 62A.5-115 meaningless by allowing SIM to allege as contract, tort, and equitable claims-outside of Article 5’s one-year statute of limitation-what in reality are wrongful reputation claims.

Official Comment 2 to RCW 62A.5-115 confirms that this statute of limitation applies to claims made under RCW 62A.5-111. Official Comment 3 clarifies that

*“The statute of limitations, like the rest of the statute, applies ... only to transactions, events, obligations, or duties arising out of or associated with such a letter.”* RCW 62A.5-115 official Comment 3 (emphasis added)”

Respondent argued below: “SIMC is not alleging Xie breached the letter of credit provisions, or some warranty under Article 5. SIMC’s claim against Xie for breach of contract...”, RB at 47.

However, the Respondent can point to no duty-independent from or meaningfully different than any duty arising under Article 5 that may have been breached. In fact, SIM cannot identify any contracts (after it changed its definition of *the contract* several times) other than the letter of credit that has been breached. Because no duty arising *outside* of Article 5 has been breached, there is no basis for a common law breach of contract claim. In addition, SIM relied on the case of *Alhadeff v. Meridian on Bainbridge Island, LLC* (2008) 144 Wash.App. 928, review granted, 165 Wash.2d 1015. The Washington State Supreme Court’s acceptance for review of this case indicates change in the law on RCW 62A.5-115.

UCC scholar support appellant’s argument that Article 5’s statute of limitation must not be evaded by labeling the wrongful repudiation claim as some other cause of action. Hawkland & Miller advise:

“What is a right or obligation arising under Article 5 is somewhat problematic.... The answer should be that the fact any right or obligation under Article 5 is replicated in an agreement or in standard practice with the effect of an agreement is irrelevant as to the applicability of the statute of limitation in Article 5 which should apply; otherwise the uniformity goal of the statute will be compromised.” Hawkland & Miller UCC Series § 5-115:1 (Rev Art 5)”

Indeed, any contract that SIM has been identifying would involve rights and obligations expressly and specifically covered by Article 5, it follows that the contract would be subject to Article 5's one-year statute of limitations<sup>11</sup>.

Respondent argued below that "SIMC's claim against Xie's for breach of contract is independent of whatever rights SIMC may or may not have against the banks for breach/dishonor of the letter of credit.", RB at 47. The trial court also promoted multiple litigations for this same transaction, RP 39:4, RP 40:9.

To the contrary, RCW 62A.5-115, its comments, and the above (as well as in the Appellant's Brief) UCC scholars indicate that Article 5's

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<sup>11</sup> As usual, the Respondent accused the Appellant for misleading the court, RB 26, footnote 18, when he could not win in the topic. Since SIM could not find out correctly who were the issuer, applicant and beneficiary, could not be true to the meaning of "independent principle" and could not point to the ever changing "**the contract**" that he alleged that Giant breached, then what would be the chance that he could be right on RCW 62A.5-115 a first impression statute being reviewed by the supreme court?

First, the sentence next to the one quoted by SIM, RB: appendix 29, reads, "However, the distinction between the two is not always clear. Nor is the manner in which the action is framed." It then went on, using, *Kraus v. Stroh Brewery Co.*, 240 F. Supp. 2d 632, to explain that sometime court will use the statute of limitation of RCW 62A.5-115 to bar breach of contract claim.

Second, SIM try to find fault with Giant's citation of , AB 22, *L. Lawrence, Anderson on the Uniform Commercial Code*, Vol. 7A § 5-108:30, claiming that it did not support "letter of credit replaces the underlying contractual obligation to pay." But this was not what Giant said. SIM then, RB: appendix 31, show the court in plain language exactly what Giant would like to argue, namely "letter of credit and the underlying contract are to be read together as a single agreement". This single agreement would be "**the contract**" which SIM breached. We provided the full text of *In re BRADLEES STORES, INC, supra*, at appendix 57-70.

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

SIM wrongly pretended<sup>12</sup> that it had no recourse to seek payment. RCW62A.5-111 provides SIM (second beneficiary) and Giant (first beneficiary) the proper remedies to claim against issuer (Banks) and RCW 62A.2-325 set the requirement to claim for direct payment from Qiangsheng (applicant). But SIM slept over its right for too long.

3. *SIM's delay in initiating an action causing damages to Giant*

In General, the doctrine of laches applies as a defense if the plaintiff's unreasonable delay in commencing the action, despite knowing facts constituting the cause of action or having a reasonable opportunity to discover such facts, resulted in damage to the defendant, *CLIFFORD W. DAVIDSON v. THE STATE OF WASHINGTON* 116 Wn.2d 13.

First, Giant suffered damages because of the loss of evidence due to the fact that SIMEXCO was dissolved and all the previous employee could only provide "I don't know and I cannot remember" as answers to many key questions. For purposes of the doctrine of laches, a defendant is

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<sup>12</sup> SIM also pretended that it did not have opportunity for discovery, RB 45. Record did not support this statement. SIM chose to strike out majority of the depositions from the Record on Appeal. Out of about 850 pages of depositions with exhibits, only 222 pages were in the record on Appeal. Just go and use the existing depositions. Of course, SIM may never be able to find evidences to support its ever changing and misguided legal theory.

prejudiced by an unavoidable loss of evidence caused by the plaintiffs delay in initiating an action, *Id.*

Second, SIM's delay caused Giant to lose its claim against the Banks due to RCW 62A.5-115. In fact, the trial court essentially discuss such damage (laches due to statute of limitation), RP 33.

Last, Giant would lose its capability to claim against Qiangsheng due to RCW 62A.5-115. QIANGSHENG may also assert the same doctrine of laches because Qiangsheng took cash deposit from the steel mill and then issued LOC (LC0502745YK) in the amount of \$406,000 for 2,000MT scrap metals, CP 513, CP 258. Such delay would caused damages to Qiangsheng as well.

**c. Other Issues in Respondent's Brief**

**1. *Facts Respondent did not dispute***

1) SIM did not do "perfect tender", AB 30;

2) SIM did not dispute Giant's affirmative defense: "fails to state a claim upon which relief can be granted", CP 208;

3) SIM did not dispute Giant's affirmative defense: "Plaintiff's damages were caused by acts or omissions of Plaintiff or third parties over which Defendants had no control", CP 208;

4) Current case is "first impression in the State of Washington" for RCW 62A.5-115 and RCW 62A.2-325., AB 1;

5) SIM's affidavit was not based on "personal knowledge", RB 46, footnote 30<sup>13</sup>.

**2. Issues Respondent try to dispute without evidences and authorities**

1) The definition of "dishonor" from Article 5 shall be used to replace that of Article 2 in reading RCW 62A.2-325;

2) Giant's payment established new obligation, RB 40. (*Comment: this is without any merit. Giant simply perform its duty as the agent in the transaction to pass on the fund received.* );

3) Giant never raised to trial court that RCW 62A.5-115 bar SIMC's claims. (*Comment: Law changed in the WA Supreme Court while this case is under review.*)

**3. New Issues Respondent Raised in Brief**

1) SIM delivered according to "Xie's instruction", RB 7, RB 50;

2) Giant opened another letter of credit from Wells Fargo (back-to-back letter of credit), RB 6;

3) Giant was the applicant and Wells Fargo was the issuer, RB 7.

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<sup>13</sup> CR 56(C) specifies that affidavits (or declarations) must be based upon personal knowledge. *Overton v. Consolidated Insurance Co.*, 145 Wn. 2d 417, 38 P.3d 322 (2002). An affidavit based upon "information and belief" is insufficient. *Klossner v. San Juan County*, 93 Wn.2d 42, 605 P.2d 330 (1980).

**4. *The Respondent should be held responsible to his former position of “I don’t know”***

In several briefs and motions, SIM made numerous assertions on issues of material facts related to the transaction when not under oath. However, when indeed under oath, key witnesses from SIM answered “I don’t know” or “I cannot remember, CP 27-29, 38-41, 345-348, 359-364” to most of the same questions. This court should hold SIM to its prior position of “I don’t know” to key material facts for the purpose of summary judgment.

**E CONCLUSION**

SIM, after changing *the contract* three to four times without giving Giant the chances to amend answer, failed to prove with clarity that Giant breached any *contract* and to show that SIM delivered the metals to Giant with “perfect tender” instead of to Qiangsheng.

SIM did not want to acknowledge the fact that the letter of credit was the *conforming agreement* based on which SIM delivered the metals directly to Qiangsheng (consignee) but failed to duly present the documents. Then SIM alleged that the metals were sent to the Giant (the co-shipper listed on the Bill of Lading, CP 537-541).

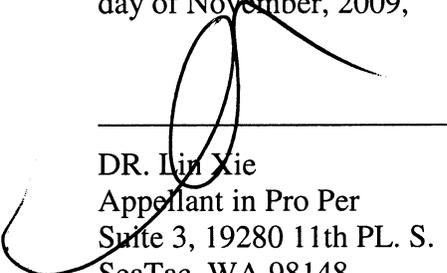
In fact, the real theory of SIM’s claim was not for *contract breach*, but for product (scrap metals) received, RB 39, by the applicant (Qiangsheng) disguised under the breach of contract claim. SIM also recycled some statements, RB 30, asserted previously for fault and

misrepresentation claim. But SIM has voluntarily withdrawn the unjust enrichment, fault and misrepresentation claims.

Because SIM had breached *the contract* that it asked this court to enforce, the principles of equity, estoppel (including its special form Laches) and statutes barred the breach of contract claim by SIM.

So this court should dismiss the *breach of contract* claim as required by the principle of **fundamental justice**, *Green v. N.W. National Insurance*, 36 Wn. App.330.

Respectfully submitted this 24<sup>th</sup>  
day of November, 2009,



---

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

**Disclosure:** Lin Xie (Ph.D. in Electrical and Computer Engineering) was represented in the trial court by Kevin Steinacker and Matthew J. Smith of Dickson Steinacker LLP and is in PRO PER on appeal. The SEATTLE IRON & METALS CORPORATION is represented by Barry G. Ziker and Todd W. Wyatt of Salter Joyce Ziker, PLLC.

**F APPENDIX**

**a. Motion to Strike and List of Respondent's Untruthful and Misleading Statements**

**Appendix 1-26**

**b. RCW 62A.5-102. Definitions.**

**Appendix 30-34**

**c. Hawkland UCC Series § 5-102 [Rev](2009), Beneficiary, Issuer, Nominated person, Place of presentation, Applicant**

§ 5-102:32 Beneficiary	<b>Appendix 35-37</b>
§ 5-102:108 Issuer	<b>Appendix 40-41</b>
§ 5-102:150 Nominated person	<b>Appendix 42</b>
§ 5-102:173 Place of presentation	<b>Appendix 43</b>
§ 5-102:29 Applicant	<b>Appendix 52-53</b>

**d. L. Lawrence, Anderson on the Uniform Commercial Code, Vol.7A § 5 (3rd ed. 2008)**

	<b>Appendix 44-51</b>
§ 5-102:5 Adviser	<b>Appendix 44</b>
§ 5-102:7 Applicant	<b>Appendix 45</b>
§ 5-102:8 Beneficiary	<b>Appendix 46-47</b>
§ 5-102:22 Issuer	<b>Appendix 48</b>
§ 5-102:31 Nominated person	<b>Appendix 49</b>
§ 5-103:51 Intent of parties clear	<b>Appendix 50</b>
§ 5-108:44 Notice under UCP	<b>Appendix 51</b>

**e. 3 James J. White and Robert S. Summers, Uniform Commercial Code, § 26-11, at 215(5th ed. 2006)**

**Back-to-back Letter of credit** **Appendix 54**

**f. RCW 62A.5-110. Warranties.**

**Appendix 55-56**

**g. In re BRADLEES STORES, INC, 313 B.R. 565, 54 UCC  
Rep.Serv.2d 817.**

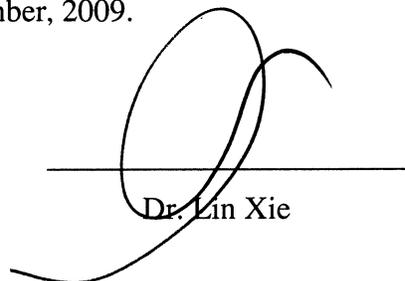
**Appendix 57-70**

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 24<sup>th</sup> day of November, 2009.

  
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Dr. Lin Xie

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No. 62713-9-I

COURT OF APPEALS, DIVISION I OF THE STATE OF WASHINGTON

LIN XIE and the marital community etc.

No. 62713-9-I

Appellant,

**Motion to Strike Portions of Respondent's  
Brief and for Sanction**

v.

SEATTLE IRON & METALS  
CORPORATION, a Washington Corporation,

Respondent.

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**1. IDENTITY OF MOVING PARTY**

Appellant asks for the relief designated in Part 2.

**2. STATEMENT OF RELIEF SOUGHT**

1) The Appellant respectfully seeks order striking portions of Respondent's Brief from consideration by this court for misleading and egregious inaccuracies. RAP 10.3 (5) and attach the corrections to the record;

**Motion to Strike Portions of Respondent's  
Brief and for Sanction**

Suite 3, 19280 11<sup>th</sup> PL. S.  
SeaTac, WA

1           2) Impose monetary sanction and other sanction necessary;

2           3) Because this case has been delayed several times, the Appellant is requesting that  
3 this court do not give the Respondent the third chance to rewrite the whole Respondent's brief  
4 without prejudice. Otherwise, it will take the Appellant the allowed whole 30 days to write  
5 another reply brief and it will be improper for the Respondent to respond to the Appellant's  
6 reply brief. *Griffith v. Centex Real Estate Corp.*, 93 Wn.App. 202, 969 P.2d 486 (1998).

7           **3. FACTS RELEVANT TO MOTION**

8           We received the second submission of the Respondent's Brief (**RB**) on November 9, 2009  
9 which should "answer the brief of appellant" RAP 10.3 (b). But the Respondent used the words like  
10 "undisputed" through out for facts that were clearly disputed numerous times in the Appellant's Brief  
11 (**AB**). The respondent's statements are not "fair statement of the facts and procedure relevant to the  
12 issues presented for review" required by RAP 10.3 (a) (5).

13           There are so many misleading statements in the Respondent's Brief that would require more  
14 than 25 pages (allowed for the appellant's reply brief) just to correct the errors and inaccuracies. He  
15 also makes numerous assertions without any citations.

16           In many occasions, the Respondent would quote a Clark's Paper and then make an assertion  
17 directly opposed to that same record.

18           If the Respondent will file another Brief of Respondent, we shall then be entitled to  
19 file another Reply Brief in 30 days after the Respondent's Brief is served RAP 10.2 (d).

20           **4. GROUNDS FOR RELIEF AND ARGUMENT**

21           RAP 10.3 (5). Egregious inaccuracies in a brief merit sanctions under RAP 10.7.

22           *HURLBERT v. GORDON*, 64 Wn. App. 386, 824 P.2d 1238. The Respondent willfully  
23 makes extensive untruthful and misleading statements. Waste of the judicial resources and  
24 the Appellant's time to verify every single misleading statement against the record. The  
25 respondent was warned about this issue and still willfully submitted such statements.  
26

November 24, 2009

Motion to Strike Portions of Respondent's  
Brief and for Sanction

Suite 3, 19280 11<sup>th</sup> PL. S.  
SeaTac, WA

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Respectfully submitted,

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Signature

Appellant, IN PRO PER

Dr. Lin Xie

Suite 3, 19280 11<sup>th</sup> PL. S. SeaTac, WA 98148

Tel: 206-592-0963

1 **5. Appendix: List of Respondent's Untruthful and Misleading Statements.**

2  
3 1) RB at 1,

4 **It is undisputed that SIMC delivered the steel. It is also undisputed**  
5 **that Xie has not paid SIMC in full. Distilled, Xie's argument is that,**

6 **Comment:** This is an untruthful and misleading statement because, Giant stated many times  
7 that the Metals were not delivered and no "perfect tender", AB 30. Giant specifically asserted  
8 affirmative defense that third parties are responsible for SIM's payment/Damages not Giant.  
9 Because, SIM did not do the "perfect tender" to Giant, a condition precedent for payment, the  
10 payment is due from the Bank not from Giant.

11 2) RB at 3,

12 **"beneficiary"—performed under the contract. Once the conditions are**  
13 **met, the beneficiary receives the funds from the issuer, and if not received,**

14 **Comment:** No citation or authority for this statement as required. This is an untruthful and  
15 misleading statement because it is the directly opposite of the "independent principle" used  
16 through out by the Respondent.

17 3) RB at 6,

18 **this last version, and therefore agreed that the total quantity due from**  
19 **SIMC was 1,000 metric tons. Xie also signed a sales order confirming the**

20 **Comment:** This is an untruthful and misleading statement because Record indicated that  
21 Giant agreed with this shipment immediately with another 1,000MT to come.  
22

23 4) RB at 6,  
24  
25  
26

1                   Employing the right to those same funds, Xie and his bank—Wells  
2 Fargo—transferred to SIMC, via another letter of credit that relied upon  
3 the validity of the first letter of credit from Xie’s buyer and Xie’s buyer’s  
4 bank, the right to receive funds for shipping 1,000 metric tons of scrap

5 **Comment:** This is nothing but a lie from the Respondent. See CP 272:21 the unique letter of  
6 credit number LC0502745YK identifies it as the same letter of credit as that of CP 258-260,  
7 with Bank of Shanghai as the issuer, 52D, Giant as the first beneficiary and Seattle Iron and  
8 Metals Export Corporation as the second beneficiary. The respondent was trying to frame this  
9 letter of credit as a “Back-to-back” letter of credit. But Wells Fargo Bank as well as most  
10 USA banks never issues such letter of credit. The respondent did not produce any evidence to  
11 support this claim.

12 5) RB at 6,

13                   work orders.” AB at 11. First, there is no evidence in the record to support Xie’s  
14 statement. Second, even if there were, the objective meaning of the documents is  
15 undisputable. The facsimile that was signed by Xie reads, above his signature

16 **Comment:** Those documents are partial and incomplete and SIM failed to produce the whole  
17 set of documents for Giant (even during discovery ) because SIM tried to hide the existence of  
18 other work orders that will complete the 2,000 MT contract. Giant clearly disputed SIM’s  
19 argument.

20 6) RB at 7,

21                   Xie was the applicant, Wells Fargo was the issuer, and SIMC was the  
22 beneficiary. CP 271.<sup>5</sup>

23 **Comment:** Once again this is a lie. The Respondent would think that this court would not  
24 take the time to read into such details. See CP 272:59, Seattle Iron and Metals Export  
25 Corporation (SIMEXCO) was the beneficiary not Seattle Iron and Metals Corporation.  
26

1 SIMEXCO was dissolved shortly after SIM filed the current case. Record from the secretary  
2 of the state and Alan Sidell's deposition indicated that Seattle Iron and Metal Export Inc was  
3 the successor who is not a party in the case.

4 [http://www.secstate.wa.gov/corps/search\\_detail.aspx?ubi=600401318](http://www.secstate.wa.gov/corps/search_detail.aspx?ubi=600401318)

5 [http://www.secstate.wa.gov/corps/search\\_detail.aspx?ubi=602746387](http://www.secstate.wa.gov/corps/search_detail.aspx?ubi=602746387)

6 SIM never submitted to this court with evidences that it is the right beneficiary of the letter of  
7 credit and therefore entitle to the payment.

8  
9 7) RB at 7,

10 agreement with Xie. After the freight was weighed and shipped, SIMC  
11 sent invoices to Xie demanding \$158,100.90 for the metal that was sold to  
12 Xie. CP 106, 108.<sup>6</sup>

13 **Comment:** This is an untruthful and misleading statement because Giant never received the  
14 originals of invoices. SIM failed to provide any evidences that they were delivered. CP  
15 106,108 was sent to US Bank not Giant.

16 8) RB at 7,

17 Xie, in turn, sold the metal to his buyer in China, was not  
18 immediately paid in full by the buyer, and accordingly refused to pay

19 **Comment:** This is an untruthful and misleading statement because LC0502745YK is the  
20 letter of credit with the Chinese buyer Qiangsheng as the applicant and SIMEXCO as the  
21 second beneficiary. SIM directly sent the metals to Shanghai, China. There was no immediate  
22 payment from Bank of Shanghai because SIM breached it contractual duty to perform the  
23 duly presentment of the payment documents, a conditional precedent.

24  
25 9) RB at 7,  
26

1 SIMC. At his deposition, *Xie admitted that if he eventually received full*  
2 *payment, SIMC also is entitled to full payment of the amount due.* CP 139,

3 **Comment:** Dr. Lin said that bank would pay not Giant. This is an untruthful and misleading  
4 statement because as second beneficiary of the letter of credit LC0502745YK, SIMEXCO  
5 will receive the fund directly from Bank of Shanghai via Wells Fargo. Giant will never  
6 receive such fund. Also only SIMEXCO not SIMC would get the money.

7  
8 10) RB at 7,

9 *applicant. CP 271. Wells Fargo issued that letter of credit, and it was Xie who*  
10 *requested that Wells Fargo do so. See RCW 62A.5-102(1)(b) (defining an*

11 **Comment:** No reference to Record to support this statement. This is an untruthful and  
12 misleading statement because Wells Fargo was the nominated/negotiation bank, CP 272:41D  
13 not the issuer (Bank of Shanghai is, 272:52D). This is very important because Wells Fargo  
14 Bank would not be responsible for the payment nor would they decide whether the  
15 presentation submitted by SIM was conforming or not. It was Bank of Shanghai who  
16 repudiated the payment.

17 11) RB at 7,

18 *delivered the metal per Xie's instructions. See, e.g., CP 104, 106, 108, 113, 158*  
19 *(line 24), 190 (lines 5-6), 285 (lines 22-24); AB at 13.*

20 **Comment:** This is an untruthful and misleading statement because all the references cited  
21 only indicated that SIM shipped the metals as the shipper and Qiangsheng as the consignee.  
22 The "Xie's instructions" was not defined and was never in any record. It was raised for the  
23 first time on appeal by the Respondent.

24  
25 12) RB at 8,  
26

1 payment is due. In this case, Wells Fargo—Xie’s bank—required bills of  
2 lading be sent to it (along with other documents) by U.S. Bank—SIMC’s  
3 bank—in one package by September 14, 2005, or the letter of credit would  
4 expire. CP 183 (at line “31D”), 185 (second line up from the bottom).

5 **Comment:** This is an untruthful and misleading statement because all the cited two places did  
6 not say by US Bank. CP 183 was mistaken for CP 184 and CP 185 just mentioned that Wells  
7 Fargo is the transferring bank.

8 13) RB at 8,

9 obtain a bill of lading before Wells Fargo’s September 14 deadline, but

10 **Comment:** This is an untruthful and misleading statement because this date was asserted by  
11 US Bank who did not have the right to repudiate the payment. SIM did not sue US Bank for  
12 wrongful advising. Wells Fargo would not know this date. The only date that matter is the  
13 actual date that the presentation must be received by the nominated person/negotiation bank  
14 (Wells Fargo) --- Sept 15, 2005, CP 259:48.

15 14) RB at 9,

16 credit required all the documents to be delivered by U.S. Bank (SIMC’s  
17 bank) in one parcel. CP 138 (XD at 195:8-25), 183, 185. Xie then drove  
18

19 **Comment:** This is an untruthful and misleading statement because those quoted pages just  
20 say need documents from Seattle Iron and Metals. Did not mention must from US Bank.

21 15) RB at 9,

22 196:1-197:2). SIMC, that same day, delivered the bill of lading and other  
23

24 **Comment:** This is an untruthful and misleading statement because another letter from SIM  
25 identify that CP 316, the presentment was complete on September 21, 2005. The Plaintiff  
26 never explains this fact. The Brief, RB 9, was hiding this fact.

1  
2  
3 16) RB at 9,  
4

5 **Critically, Xie admitted in his deposition that SIMC did the correct**  
6 **thing, for Wells Fargo *required* delivery of the original documents directly**

7 **Comment:** This is an untruthful and misleading statement because SIM was distorting Dr.  
8 Lin's statement. Dr. Lin just acknowledged that there was this sentence in the Lawyer's letter  
9 but SIM was quoting out of context. In the very next paragraph in the same letter, it said, CP  
10 21, "*Wells Fargo relayed to Giant that the documentary letter of credit required Giant's*  
11 *transferee, Seattle Iron & Metals OF its bank to present the documents.*" Without  
12 mentioning this fact, SIM tried to mislead this court. A lawyer's statement (without personal  
13 knowledge) cannot be used for the purpose of summary judgment.

14 17) RB at 10,

15 **delivery of the documents from U.S. Bank to Wells Fargo was not only**  
16 **required by Wells Fargo, it is also typical in the industry for the**  
17 **payee/advising bank to deliver the documents to the payor/issuing bank.**  
18 **CP 27.**

19 **Comment:** This is an untruthful and misleading statement designed to confuse the court.  
20 Wells Fargo is not the issuing Bank and did not have the authority to make payment for this  
21 letter of credit. CP 27 was Alan Sidell's deposition, where Alan said that he did not have  
22 personal knowledge on the details of the presentation. Alan also admitted that he did not have  
23 any knowledge about UCP. So he cannot be quoted to support industry practice.

24 18) RB at 10,  
25  
26

1 ~~of credit itself is also clear that Giant Bank would not~~  
2 retained the original letter of credit. CP 182-85. Furthermore, if Xie wished to  
3 contradict the point, he could have submitted a declaration below expressly  
4 rebutting these assertions. He did not do so.

5 **Comment:** This is an untruthful and misleading statement designed to confuse the court.  
6 Giant stated in several brief that SIM sent to the wrong bank and late in presentation. Dr. Lin  
7 did made an affidavit on this, AB at 20.

8 19) RB at 11,

9 **Xie initially was not paid anything by his buyer for the metal Xie**

10 **Comment:** This is an untruthful and misleading statement. The transaction was contracted to  
11 be paid by the Bank of Shanghai. Initially, Giant was not supposed to be paid by the  
12 applicant/QiangSheng directly.

13 20) RB at 11,

14 **discussed the unpaid letter of credit, the amount owing from Xie, and**

15 **Comment:** This is an untruthful and misleading statement. Giant never discussed this. Both  
16 parties were working/discussing collection payment from the Banks and Qiangsheng. No  
17 quotation to record here.

18 21) RB at 13,

19 **he confirmed that, other than what was listed in his discovery answers,**  
20 **there were no other errors made by SIMC in this case. CP 146 (XD**  
21 **at 250:2-251:2).**

22 **Comment:** This is an untruthful and misleading statement. CP 146 just disputed this grossly  
23 distorted statement. Dr. Lin simply said that discovery was on -going.

1 22) RB at 15,

2 **but never actually opposed the filing of the over-length reply brief.**

3 **Comment:** This is an untruthful and misleading statement. Giant did objected to portions of  
4 the reply brief that exceed the scope of a reply brief, CP 658 where it did not rebut  
5 Defendant's opposition brief. Giant also objected to the use of unsigned deposition transcript  
6 as part of the record in a summary judgment as well as the Plaintiff's new theory of  
7 "Defendant's course of conduct modified Defendants' contractual obligations".

8 SIM claimed that following issues were not raised in the trial court. But the record tells a  
9 different story.

10  
11 23) RB at 18,

12 **made to the trial court: (1) SIMC's claim is barred by the one-year statute**

13 **Comment:** This is an untruthful and misleading statement. Giant did discuss this same topic  
14 in the oral argument for the summary judgment. The trial court did acknowledged that SIM's  
15 delay made it too late to file any claims against the Banks. This is essentially the same  
16 argument that SIM's delayed caused damages to Giant because Giant lost the capability to  
17 claim the fund from Banks and the applicant (Qinagsheng) by virtue of the new development  
18 in law since the supreme court had agreed to review *Alhadeff v. Meridian on Bainbridge*  
19 *Island, LLC* (2008) 144 Wash.App. 928, review granted ,165 Wash.2d 1015 for RCW 62A.5-  
20 115. It is about a statute related to the defense of estoppel we discussed extensively in the trial  
21 court

22  
23 24) RB at 19,

24 **(2) Xie was an agent of SIMC and/or his end-buyer,**

1 **Comment:** This is an untruthful and misleading statement. The trial court itself had discussed  
2 and agreed that Giant was indeed the agent (middle person), RP 26:2, RP 19:4. So the trial  
3 court was aware of this issue.

4 25) RB at 19,

5 **(3) SIMC was represented by Xie's attorney for purposes of collection,**  
6

7 **Comment:** This is an untruthful and misleading statement. This was clearly on the record, CP  
8 352, top of the page. So the trial court was aware of this issue.

9 26) RB at 19,

10 **AB at 15-17; (4) SIMC is not the correct party-in-interest and/or failed to**  
11 **join a necessary party, see AB at 5-8, 18, 45; (5) evidence supplied by**

12 **Comment:** This is an untruthful and misleading statement. This was clearly on the record,  
13 CP 510-513, indicating that SIM failed to claim against other contract parties and banks that  
14 were at fault. Also in Giant amended answer, CP 617-627. By abusing its discretion in  
15 denying the motion for amended answer without any reason, the trial court was aware of this  
16 issue.

17 27) RB at 19,

18 **(7) by not responding to a letter from Xie's lawyer, SIMC consented to the**  
19 **lawyer's position, see AB at 16-17; (8) SIMC breached its obligations of**

20 **Comment:** This is an untruthful and misleading statement. This was in the record, CP 7:page  
21 235. The court was aware at least that there was nothing on the record that show SIM object  
22 to Giant's lawyer letter until the current action started.

23 28) RB at 19,

24 **good faith and fair dealing, see AB at 23; (9) Xie never accepted the**  
25 **metal, see AB at 7-8, 28-30; 46; (10) the unsigned deposition transcript of**

1 **Comment:** This is an untruthful and misleading statement. Giant stated many times, CP  
2 298:24, CP 137:page 189 that the metals were never delivered to Giant but to Shanghai  
3 directly, with Qiangsheng as consignee. No delivery and of course no acceptance.

4  
5 29) RB at 19,

6 metal, see AB at 7-8, 28-30; 46; (10) the unsigned deposition transcript of  
7 Alan Sidell—the President of SIMC—was improperly used, see AB

8 **Comment:** This is an untruthful and misleading statement. This is in the record, CP 657:14,  
9 CP 663:14. Giant stated clearly that unsigned deposition transcript should not be used for  
10 summary judgment. The trial court was properly briefed on this.

11 30) RB at 19,

12 at 18 n10, 44; (11) SIMC improperly refused to provide Xie documents,

13 **Comment:** This is an untruthful and misleading statement. This is in the record, CP 238:1,  
14 showing that SIM refused Giant's request for documents and such refusal resulted in the  
15 delay, 286:14. The court was properly briefed.

16  
17 31) RB at 19,

18 see AB at 14-15; (12) SIMC is estopped from claiming Xie breached his  
19 contract with SIMC, see AB at 15; and (13) SIMC's claim is barred by

20 **Comment:** This is an untruthful and misleading statement. First of all, Giant's statement was  
21 "So SIM was estopped from alleging that Giant was responsible for the late presentment".

22 Second, this is in the record, CP 238:1, showing that SIM refused Giant's request for  
23 documents and such refusal resulted in the delay, 286:14. The court was properly briefed.

24  
25  
26 32) RB at 22,

**Motion to Strike Portions of Respondent's  
Brief and for Sanction**

**Suite 3, 19280 11<sup>th</sup> PL. S.  
SeaTac, WA**

1 sell approximately 1,000 metric tons to Xie. CP 178-80. SIMC delivered  
2 the metal and was only paid \$60,000, leaving an outstanding principal

3 **Comment:** This is an untruthful and misleading statement. CP 178-80 are work orders, never  
4 supported the assertion that the metals were delivered to Giant. Wrong citation or no citation.

5  
6 33) RB at 22,

7 **balance owed by Xie of at least \$98,100.90.**

8 **Comment:** This is an untruthful and misleading statement. No reference to record to support  
9 that Giant owed any money when no “perfect tender”, a condition precedent for payment,  
10 was done.

11 34) RB at 22,

12 ***Xie agreed in writing that***

13 **Comment:** This is an untruthful and misleading statement. Giant only agreed that the first  
14 shipment was 1,000MT and more shipments to come, CP 262.

15  
16 35) RB at 22,

17 **Xie did not object to this condition.**

18 **Comment:** This is an untruthful and misleading statement. Giant did not consent with this  
19 extra terms but had communicated to SIM that Giant will stick to the normal bank schedule  
20 and practice for opening a letter of credit. CP 129:page 113:15.

21  
22 36) RB at 23,

23 **115:5-10). Because this condition precedent was not met, SIMC had no**  
24 **obligation to ship 2,000 metric tons of metal. *Ross v. Harding*, 64 Wn.2d**

1 **Comment:** This is an untruthful and misleading statement. Giant did not consent with this  
2 extra terms and SIM's delivery of metals waived any such claim.

3  
4 37) RB at 23,

5 **accordingly, was a new contract, and SIMC's only obligation was to ship**  
6 **1,000 metric tons, which it did.**

7 **Comment:** This is an untruthful and misleading statement. Giant did not consent that only  
8 1,000MT for the whole contract. Giant was expecting more shipment. Even the 1,000 MT was  
9 not delivered to Giant with "perfect tender", a condition precedent for payment.

10  
11 38) RB at 23,

12 **produce a satisfactory letter of credit. *Xie agreed in writing to this***  
13 ***modification, and is accordingly bound by its terms.*<sup>16</sup>**

14 **Comment:** This is an untruthful and misleading statement. Giant did not consent that only  
15 1,000MT. Giant was expecting more shipment.

16  
17 39) RB at 23,

18 **<sup>16</sup> Relying on evidence never submitted to the trial court, Xie complains**

19 **Comment:** This is an untruthful and misleading statement. Giant's last version of the open  
20 brief used only the record approved by the court order. SIM failed to provide specifics as to  
21 which evidence were no in the record.

22  
23 40) RB at 23,

24 **Xie did *not* attempt to file an amended answer because SIMC alleged some sort**  
25 **of "new" theory of the case.**

26 **Comment:** This is an untruthful and misleading statement. Giant did multiple attempts to  
amend. CP 660, CP 617-627.

1 41) RB at 24,

2 **SIMC never had a contract with CU Transport. CP 104.**

3 **Comment:** This is an untruthful and misleading statement. CP 537-541 set out the right and  
4 obligations between the shipper (SIMCO) and the forwarder (CU Transport). CP 104 did not  
5 mention CU Transport at all. Misleading or no reference to record.

6  
7 42) RB at 24,

8 **obligation to pay what he owes SIMC for the metal SIMC delivered.**

9 **Comment:** This is an untruthful and misleading statement. Giant did not receive the metals  
10 and did not own SIM anything. No reference to record for this statement.

11 43) RB at 25,

12 **undisputed fact of SIMC's performance, SIMC would be left**  
13 **uncompensated for the goods it delivered. This cannot be.<sup>17</sup>**

14 **Comment:** This is an untruthful and misleading statement. SIM had claims against the  
15 parties at fault but did not file claim within the statute of limitation. This is a claim for  
16 product delivered (to China buyer). No a claim for contract breach.

17  
18 44) RB at 26,

19 **against the issuer (Wells Fargo) concerning the letter of credit. See, e.g.,**

20 **Comment:** This is an untruthful and misleading statement. Wells Fargo was not the issuer  
21 but Bank of Shanghai was. SIM was willfully misleading the court.

22  
23 45) RB at 26,

24 **<sup>18</sup> Xie misleads the Court on page 39 of his brief. There, he quotes from**

25 **Comment:** This is an outrageous lie. Giant was quote in block letter words by words in the  
26 same manner as that of *Alhadeff v. Meridian on Bainbridge Island, LLC* (2008) 144

1 Wash.App. 928, review granted, 165 Wash.2d 1015. Was SIM also accusing that Hawkland  
2 was lying?

3  
4 46) RB at 27,

5 **HAWKLAND does address Xie's argument, and directly refutes it.**

6 **Comment:** This is an untruthful and misleading statement. SIM failed to understand that this  
7 is an issue of first impression in the state of Washington. Hawkland as well as many other  
8 scholars support Giant's position.

9 47) RB at 27,

10 **does not mean, however, is that a letter of credit *replaces* the underlying**  
11 **contractual obligation to pay. Indeed, Xie did not provide this Court with the**

12 **Comment:** This is an untruthful and misleading statement. SIM misquoted Giant's original  
13 Brief which said: "Although the letter of credit may have been a contract separate from the  
14 parties' purchase orders, they are to be read together as a single agreement, provided that they  
15 are part of a single transaction and appear, in combination, to constitute the entire  
16 understanding of the parties. *In re BRADLEES STORES, INC*, 313 B.R. 565, 54 UCC  
17 Rep.Serv.2d 817."

18 This argument was supported by multiple authorities.

19 48) RB at 28,

20 **were true—which is doubtful, because of instead of transferring the letter of**  
21 **credit, Xie applied for and had Wells Fargo issue a *new* letter of credit in favor of**  
22 **SIMC—that merely establishes rights in favor of SIMC with respect to the letter**  
**of credit, it does *not* compromise SIMC's *independent* right to seek**

23 **Comment:** This is an untruthful and misleading statement. SIM failed to understand that  
24 Wells Fargo never issued any Letter of Credit but transferred the letter of Credit from Bank of  
25 Shanghai. This is very important because as the nominated person, Wells Fargo did not have  
26 the right to make the payment decision. Also Giant was not the applicant because Giant did

1 not have the right to tell Wells Fargo to draft the text/terms of the letter of credit. The  
2 transferred letter must use the exact terms and text. Only the applicant/Qiangsheng and the  
3 issuer/Bank of Shanghai could change the terms. SIM's fundamental failure to even identify  
4 the right parties and its misguided interpretation of the "independent principle" rendered its  
5 arguments on Letter of Credit without any credibility.

6 49) RB at 29,

7 **of credit. Xie has an obligation to pay SIMC for the metal it delivered.**

8 **Comment:** This is an untruthful and misleading statement. SIM never delivered any metals  
9 to Giant.

10  
11 50) RB at 30,

12 **defendant's prior behavior[.]"). SIMC reasonably relied upon Xie's**  
13 **agreement to make "full payment" for the obligations owed.<sup>20</sup>**

14 **Comment:** This is an untruthful and misleading statement. Giant never consented with such  
15 "agreement". No record to support this. This is a phrase SIM recycled from its answer to the  
16 Defense's first interrogatories and request for production which SIM had motioned to remove  
17 from the record. SIM also dismissed its claim for fault and misrepresentation. SIM should  
18 remove this line of statements from the respondent's brief or file the claims again so that  
19 Giant can answer them.

20 51) RB at 31,

21 **SIMC delivered the original bill of lading to U.S. Bank *on the same day***  
22 **that SIMC received it from Xie. CP 113, 209-10. Xie claims that SIMC**

23 **Comment:** This is an untruthful and misleading statement. See statement 15). Another letter  
24 from SIM identify that CP 316, the presentment was complete on September 21, 2005. The  
25 Plaintiff never explains this fact. The Brief, RB 9, was hiding this fact.

1  
2  
3  
4 52) RB at 32,

5 **September 15, one day *after* the letter of credit expired.**

6 **Comment:** This is an untruthful and misleading statement. September 15, 2005 is the last  
7 day for presentment. Giant can still get paid by presenting documents to Wells Fargo before  
8 the deadline (for this case September 15, 2005, CP 238) .

9  
10 53) RB at 32,

11 **These undisputed facts cannot form the basis for an affirmative**  
12 **defense of estoppel. Estoppel requires a showing by a defendant of**

13 **Comment:** This is an untruthful and misleading statement. NO reference to the Record.  
14 These are not facts but rather SIM's fabrications.

15  
16 54) RB at 33,

17 **SIMC's breach of contract claim. There was no delay by SIMC, and no**

18 **Comment:** This is a lie. (See statement 15) and 51)). One letter from SIM identify that CP  
19 316, the presentment was complete on September 21, 2005. The Brief, RB 9, was hiding this  
20 fact.

21  
22 55) RB at 33,

23 **have been avoided. The bill of lading was already late, and Xie admitted**  
24 **that it had to be delivered by U.S. Bank, not SIMC. Accordingly, the only**

1 **Comment:** These are two untruthful and misleading statements. The Bill of Lading was due  
2 that same day, September 15, 2005 and Giant demanded SIM to deliver the documents to  
3 Wells Fargo that same day but SIM refused.

4  
5  
6  
7 56) RB at 34,

8 **In sum, because SIMC proved that Xie failed to fully pay—an**  
9 **undisputed fact—and because Xie’s non-waived affirmative defenses are**

10 **Comment:** These are two untruthful and misleading statements. SIM did not provide any  
11 evidence and no reference to record. Giant disputed this in the Open Brief.

12  
13 57) RB at 34,

14 **E. Xie’s Seasonable Notification Argument Was Waived and Is**  
15 **Without Merit.**

16 **Comment:** This is an untruthful and misleading statement. SIM’s motion to strike Giant’s  
17 affirmative defense was no granted by the trial court and the court considered the merit of the  
18 affirmative defenses. SIM did not cross appeal and no assignment of error was asserted. So  
19 this issue is not preserved for appeal.

20 58) RB at 37,

21 **But Xie ignores the fact that the errors were not the fault of SIMC.**

22 **Comment:** This is an untruthful and misleading statement. Unsupported statement. No  
23 reference to record. SIM was fully responsible for the late presentation.

24  
25 58) RB at 37,

1 on the undisputed evidence, SIMC did everything it could to properly  
2 present the documents. The UCC provides that in a situation like this,

3 **Comment:** This is an untruthful and misleading statement. Unsupported statement. No  
4 reference to record. SIM could present documents on-time on September 15, 2005 but chose  
5 not to do so against Giant's warning.

6  
7  
8 59) RB at 37,

9 presentment has been made because SIMC employed reasonable  
10 diligence. See RCW 62A.3-504(a)(i) & (v); see also RCW 62A.3-502,

11 **Comment:** This is an untruthful and misleading statement. Unsupported statement. No  
12 reference to record. SIM could present documents on time on September 15, 2005 but  
13 delayed to September 21, 2005. This is not "reasonable diligence".

14  
15 60) RB at 40,

16 distinction is as fictional as it is illogical. There is *nothing in the record*—  
17 no declaration or any other evidence—that supports Xie's contention that  
18 he was unaware SIMC wanted to be paid by Xie.

19 **Comment:** This is an untruthful and misleading statement. Unsupported statement. No  
20 reference to record. Giant stated many times that SIM failed to provide this notice, a  
21 condition precedent required by RCW 62A2-325. CP 298, CP 331, CP 374-375 (SIM never  
22 attempted to do the "perfect tender" by delivering the entire necessary document to Giant if it  
23 really considered Giant as the buyer).

24 61) RB at 40,

25 First, SIMC issued invoices to Xie for the amount due. CP 106,  
26

1 **Comment:** This is an untruthful and misleading statement. Unsupported statement. No  
2 reference to record. Giant never received the originals of invoices.

3  
4 62) RB at 40,

5 **Those invoices are all that is needed in a commercial transaction to**

6 **Comment:** This is an untruthful and misleading statement. Unsupported statement. All  
7 require payment documents must be tendered.

8  
9 63) RB at 41,

10 **obtain funds? The record shows that SIMC kept in contact with Xie**  
11 **because SIMC wanted to be paid by Xie, as Xie was the only party who**  
12 **owed SIMC money.**

13 **Comment:** This is an untruthful and misleading statement. Unsupported statement.  
14 The Record indicated that both parties worked together to collect from the Banks and the  
15 applicant (Qiangsheng) using the same lawyer paid by Giant, CP 353, 33-35.

16 64) RB at 42

17 **regarding the unpaid amount. CP 591-92. On appeal, Xie for the first time**  
18 **claims that SIMC's lack of response to this letter somehow means SIMC**  
19 **consented to its contents. Placing that erroneous and unsupported argument**

20 **Comment:** This is an untruthful and misleading statement. Unsupported statement.  
21 The Record indicated that Giant stated this fact several times to the court, CP 375:24, CP  
22 508:7.

23  
24 65) RB at 42

25 **Why did the attorney write this? Because it was clear that SIMC wished to be**  
26 **paid by Xie.**

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**Comment:** This is an untruthful and misleading statement. Unsupported statement.  
The Record indicated that Giant and SIM were working together to collect payment from Banks and Applicant (Qiangsheng), CP 375:25.

66) RB at 43

Here, Xie has suffered no prejudice as a result of any alleged delay in notification. Xie had three possible parties from which to seek

**Comment:** This is an untruthful and misleading statement. Unsupported statement.  
Because of SIM’s delay in claim, Giant lost the chances, among others, to seek payment from bank and Applicant (Qiangsheng), RCW 62A.5-115/RCW 62A.2-325.

67) RB at 44

It short, Xie’s theory in this case is that the bank acted *properly* in refusing payment under the letter of credit. Accordingly, any delay by

**Comment:** This is an untruthful and misleading statement. Unsupported statement.  
This is the exact opposite of what Giant said, AB 41, “*Issuing bank’s notice of discrepancies and disposition of presentation documents was insufficient under Uniform Customs and Practices for Documentary Credits (UCP) to constitute notice of refusal to honor letter of credit, where notice did not expressly state that it was rejecting presentation documents, and issuing bank stated that it would contact applicant to determine if it would waive discrepancies*”, CP 455, foot note 3 and in CP 457-463. Did the Respondent ever read Giant’s open Brief?

68) RB at 44

1 this motion, and out of an abundance of caution, SIMC provided Xie with  
2 an extra day to respond. The full story can be reviewed at CP 596-97,

3 **Comment:** This is an untruthful and misleading statement. Unsupported statement.

4 Record did not support this statement. Giant did not receive this notice by mail until the  
5 deadline for response to the motion had expired, CP 506-507.

6 69) RB at 45

7 Xie's disregard of the rules regarding issues on appeal has placed SIMC in  
8 the unenviable position of rebutting contentions on which SIMC never had  
9 an opportunity to seek discovery or present a record to the trial court.

10 **Comment:** This is an untruthful and misleading statement. Unsupported statement.

11 Record did not support this statement. SIM chose to strike out majority of the depositions  
12 from the Record on Appeal. Out of about 850 pages of depositions with exhibits, only 222  
13 pages were in the record on Appeal. Just go and use the existing depositions. Of course, SIM  
14 may never be able to find evidences to support its ever changing and misguided legal theory.

15 70) RB at 46

16 strike—was not based upon personal knowledge, see AB at 44. But SIMC did  
17 not use Sidell's declaration for the point Xie raises; Sidell merely authenticated

18 **Comment:** This is an untruthful and misleading statement. Unsupported statement.

19 SIM used CP 104 many times as the sole evidence to support that the metals and invoices  
20 were sent. This evidence was not true and was not based on "personal knowledge".

21 71) RB at 46

22 at 5-8. The record simply does not support Xie's claim. SIMC is the party  
23 entitled to relief. CP 106, 108, 176, 178, 180. Indeed, Xie has already  
24 recognized as much. CP 195, 283 (lines 13-15), 235 (lines 11-13);

25 **Comment:** This is an untruthful and misleading statement. Unsupported statement.

1 SIMCO was not the beneficiary to the letter of credit but SIMEXCO was. This is the key  
2 issue for this case. SIM never even try to inform this court why SIMEXCO was dissolved and  
3 why the successor was not jointed in the case. The quotation for CP 195, 283, 235 did not  
4 provide any answers to this.

5  
6  
7 72) RB at 46

8 **breach of SIMC's contract with Xie, see AB at 15. But there is nothing in the**  
9 **parties' agreement which conditions SIMC's right to payment on due**  
10 **presentation of documents for the letter of credit. CP 174-76, 178, 180. Nor**

11 **Comment:** This is an untruthful and misleading statement. Unsupported statement.  
12 UCP governs the letter of credit used in this transaction. So it is part of the  
13 "agreement/contract" by both parties.

14 ARTICLE 43: Limitation on the Expiry Date A. In addition to stipulating an expiry  
15 date for presentation of documents every Credit which calls for a transport document(s)  
16 should also stipulate a specified period of time after the date of shipment during which  
17 *presentation must be made* in compliance with the terms and conditions of the Credit.  
18 This is also in the Letter of Credit CP 259:48.

19 73) RB at 48

20 **In various incarnations, Xie argues for the first time on appeal that**  
21 **he was only acting as an agent (it is not clear for whom), that there was a**

22 **Comment:** This is an untruthful and misleading statement. Unsupported statement.  
23 Same as statement 24), the trial court itself had discussed and agreed that Giant was indeed  
24 the agent (middle person), RP 26:2, RP 19:4. So the trial court was aware of this issue.  
25  
26

1 74) RB at 49

2 To help prove his new agency theory, Xie raises another novel and  
3 unsupported allegation never raised before the trial court: that Xie never  
4 received or accepted the metal. See AB at 7-8, 28-30, 46. There is simply  
5

6 **Comment:** This is an untruthful and misleading statement. Unsupported statement.

7 Same as statement 28), Giant stated many times, CP 298:24, CP 137:page 189 that the metals  
8 were never delivered to Giant but to Shanghai directly, with Qiangsheng as consignee. No  
9 delivery and of course no acceptance.

10 75) RB at 49

11 below and he never asked for any other relief because of it—such as an  
12 extension to respond to SIMC’s summary judgment motion. Even if one  
13

14 **Comment:** This is an untruthful and misleading statement. Unsupported statement.

15 The truth was SIM rejected Giant’s request for extension of the hearing date for the summary  
16 judgment, CP 661:1.

17 76) RB at 50

18 SIMC shipped the steel per Xie’s instructions.  
19

20 **Comment:** This is an untruthful and misleading statement. Unsupported statement.

21 SIM raised this point for the first time in the Respondent’s Brief. There was no such term in  
22 “the contract”. This term is no well defined and can mean anything that SIM wants.  
23  
24  
25  
26



4 of 20 DOCUMENTS

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

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

**GO TO REVISED CODE OF WASHINGTON ARCHIVE DIRECTORY**

*Rev. Code Wash. (ARCW) § 62A.5-102 (2009)*

§ 62A.5-102. Definitions

(1) The definitions in this section apply throughout this Article unless the context clearly requires otherwise:

(a) "Adviser" means a person who, at the request of the issuer, a confirmer, or another adviser, notifies or requests another adviser to notify the beneficiary that a letter of credit has been issued, confirmed, or amended.

(b) "Applicant" means a person at whose request or for whose account a letter of credit is issued. The term includes a person who requests an issuer to issue a letter of credit on behalf of another if the person making the request undertakes an obligation to reimburse the issuer.

(c) "Beneficiary" means a person who under the terms of a letter of credit is entitled to have its complying presentation honored. The term includes a person to whom drawing rights have been transferred under a transferable letter of credit.

(d) "Confirmer" means a nominated person who undertakes, at the request or with the consent of the issuer, to honor a presentation under a letter of credit issued by another.

(e) "Dishonor" of a letter of credit means failure timely to honor or to take an interim action, such as acceptance of a draft, that may be required by the letter of credit.

(f) "Document" means a draft or other demand, document of title, investment security, certificate, invoice, or other record, statement, or representation of fact, law, right, or opinion (i) which is presented in a written or other medium permitted by the letter of credit or, unless prohibited by the letter of credit, by the standard practice referred to in *RCW 62A.5-108(5)* and (ii) which is capable of being examined for compliance with the terms and conditions of the letter of credit. A document may not be oral.

(g) "Good faith" means honesty in fact in the conduct or transaction concerned.

(h) "Honor" of a letter of credit means performance of the issuer's undertaking in the letter of credit to pay or deliver an item of value. Unless the letter of credit otherwise provides, "honor" occurs:

(i) Upon payment;

(ii) If the letter of credit provides for acceptance, upon acceptance of a draft and, at maturity, its payment; or

(iii) If the letter of credit provides for incurring a deferred obligation, upon incurring the obligation and, at maturity, its performance.

(i) "Issuer" means a bank or other person that issues a letter of credit, but does not include an individual who makes an engagement for personal, family, or household purposes.

(j) "Letter of credit" means a definite undertaking that satisfies the requirements of RCW 62A.5-104 by an issuer to a beneficiary at the request or for the account of an applicant or, in the case of a financial institution, to itself or for its own account, to honor a documentary presentation by payment or delivery of an item of value.

(k) "Nominated person" means a person whom the issuer (i) designates or authorizes to pay, accept, negotiate, or otherwise give value under a letter of credit and (ii) undertakes by agreement or custom and practice to reimburse.

(l) "Presentation" means delivery of a document to an issuer or nominated person for honor or giving of value under a letter of credit.

(m) "Presenter" means a person making a presentation as or on behalf of a beneficiary or nominated person.

(n) "Record" means information that is inscribed on a tangible medium, or that is stored in an electronic or other medium and is retrievable in perceivable form.

(o) "Successor of a beneficiary" means a person who succeeds to substantially all of the rights of a beneficiary by operation of law, including a corporation with or into which the beneficiary has been merged or consolidated, an administrator, executor, personal representative, trustee in bankruptcy, debtor in possession, liquidator, and receiver.

(2) Definitions in other Articles applying to this Article and the sections in which they appear are:

"Accept" or "Acceptance" RCW 62A.3-409

"Value" RCW 62A.3-303, RCW 62A.4-211.

(3) Article 1 contains certain additional general definitions and principles of construction and interpretation applicable throughout this Article.

**HISTORY:** 1997 c 56 § 3; 1965 ex.s. c 157 § 5-102.

**NOTES:**

**OFFICIAL COMMENT**

1. Since no one can be a confirmer unless that person is a nominated person as defined in Section 5-102 (a) (11), those who agree to "confirm" without the designation or authorization of the issuer are not confirmers under Article 5. Nonetheless, the undertakings to the beneficiary of such persons may be enforceable by the beneficiary as letters of credit issued by the "confirmer" for its own account or as guarantees or contracts outside of Article 5.

2. The definition of "document" contemplates and facilitates the growing recognition of electronic and other nonpaper media as "documents," however, for the time being, data in those media constitute documents only in certain circumstances. For example, a facsimile received by an issuer would be a document only if the letter of credit explicitly permitted it, if the standard practice authorized it and the letter did not prohibit it, or the agreement of the issuer and beneficiary permitted it. The fact that data transmitted in a nonpaper (unwritten) medium can be recorded on paper by a recipient's computer printer, facsimile machine, or the like does not under current practice render the data so transmitted a "document." A facsimile or SWIFT message received directly by the issuer is in an electronic medium when it crosses the boundary of the issuer's place of business. One wishing to make a presentation by facsimile (an electronic medium) will have to procure the explicit agreement of the issuer (assuming that the standard practice does not authorize it). Where electronic transmissions are authorized neither by the letter of credit nor by the practice, the beneficiary may transmit the data electronically to its agent who may be able to put it in written form and make a conforming presentation.

3. "Good faith" continues in revised Article 5 to be defined as "honesty in fact." "Observance of reasonable standards of fair dealing" has not been added to the definition. The narrower definition of "honesty in fact" reinforces the "independence" principle in the treatment of "fraud," "strict compliance," "preclusion," and other tests affecting the performance of obligations that are unique to letters of credit. This narrower definition -- which does not include "fair dealing" -- is appropriate to the decision to honor or dishonor a presentation of documents specified in a letter of credit. The narrower definition is also appropriate for other parts of revised Article 5 where greater certainty of obligations is necessary and is consistent with the goals of speed and low cost. It is important that United States letters of credit have continuing vitality and competitiveness in international transactions.

For example, it would be inconsistent with the "independence" principle if any of the following occurred: (i) The beneficiary's failure to adhere to the standard of "fair dealing" in the underlying transaction or otherwise in presenting documents were to provide applicants and issuers with an "unfairness" defense to dishonor even when the documents complied with the terms of the letter of credit; (ii) the issuer's obligation to honor in "strict compliance in accordance with standard practice" were changed to "reasonable compliance" by use of the "fair dealing" standard; or (iii) the preclusion against the issuer (Section 5-108 (d)) were modified under the "fair dealing" standard to enable the issuer later to raise additional deficiencies in the presentation. The rights and obligations arising from presentation, honor, dishonor, and reimbursement, are independent and strict, and thus "honesty in fact" is an appropriate standard.

The contract between the applicant and beneficiary is not governed by Article 5, but by applicable contract law, such as Article 2 or the general law of contracts. "Good faith" in that contract is defined by other law, such as Section 2-103 (1) (b) or *Restatement of Contracts 2d, Section 205*, which incorporate the principle of "fair dealing" in most cases, or a state's common law or other statutory provisions that may apply to that contract.

The contract between the applicant and the issuer (sometimes called the "reimbursement" agreement) is governed in part by this title (e.g., Sections 5-103 (c), 5-108 (i), and 5-111 (b)) and partly by other law (e.g., the general law of contracts). The definition of good faith in Section 5-102 (a) (7) applies only to the extent that the reimbursement contract is governed by provisions in this title; for other purposes good faith is defined by other law.

4. Payment and acceptance are familiar modes of honor. A third mode of honor, incurring an unconditional obligation, has legal effects similar to an acceptance of a time draft but does not technically constitute an acceptance. The practice of making letters of credit available by "deferred payment undertaking" as now provided in UCP 500 has grown up in other countries and spread to the United States. The definition of "honor" will accommodate that practice.

5. The exclusion of consumers from the definition of "issuer" is to keep creditors from using a letter of credit in consumer transactions in which the consumer might be made the issuer and the creditor would be the beneficiary. If that transaction were recognized under Article 5, the effect would be to leave the consumer without defenses against the creditor. That outcome would violate the policy behind the Federal Trade Commission Rule in 16 C.F.R. Part 433. In a consumer transaction, an individual cannot be an issuer where that person would otherwise be either the principal debtor or a guarantor.

6. The label on a document is not conclusive; certain documents labeled "guarantees" in accordance with European (and occasionally, American) practice are letters of credit. On the other hand, even documents that are labeled "letter of credit" may not constitute letters of credit under the definition in Section 5-102 (a). When a document labeled a letter of credit requires the issuer to pay not upon the presentation of documents, but upon the determination of an extrinsic fact such as applicant's failure to perform a construction contract, and where that condition appears on its face to be fundamental and would, if ignored, leave no obligation to the issuer under the document labeled letter of credit, the issuer's undertaking is not a letter of credit. It is probably some form of suretyship or other contractual arrangement and may be enforceable as such. See Sections 5-102 (a) (10) and 5-103 (d). Therefore, undertakings whose fundamental term requires an issuer to look beyond documents and beyond conventional reference to the clock, calendar, and practices concerning the form of various documents are not governed by Article 5. Although

Section 5-108 (g) recognizes that certain nondocumentary conditions can be included in a letter of credit without denying the undertaking the status of letter of credit, that section does not apply to cases where the nondocumentary condition is fundamental to the issuer's obligation. The rules in Sections 5-102 (a) (10), 5-103 (d), and 5-108 (g) approve the conclusion in *Wichita Eagle and Beacon Publishing Co. v. Pacific Nat. Bank*, 493 F.2d 1285 (9th Cir. 1974).

The adjective "definite" is taken from the UCP. It approves cases that deny letter of credit status to documents that are unduly vague or incomplete. See, e.g., *Transparent Products Corp. v. Paysaver Credit Union*, 864 F.2d 60 (7th Cir. 1988). Note, however, that no particular phrase or label is necessary to establish a letter of credit. It is sufficient if the undertaking of the issuer shows that it is intended to be a letter of credit. In most cases the parties' intention will be indicated by a label on the undertaking itself indicating that it is a "letter of credit," but no such language is necessary.

A financial institution may be both the issuer and the applicant or the issuer and the beneficiary. Such letters are sometimes issued by a bank in support of the bank's own lease obligations or on behalf of one of its divisions as an applicant or to one of its divisions as beneficiary, such as an overseas branch. Because wide use of letters of credit in which the issuer and the applicant or the issuer and the beneficiary are the same would endanger the unique status of letters of credit, only financial institutions are authorized to issue them.

In almost all cases the ultimate performance of the issuer under a letter of credit is the payment of money. In rare cases the issuer's obligation is to deliver stock certificates or the like. The definition of letter of credit in Section 5-102 (a) (10) contemplates those cases.

7. Under the UCP any bank is a nominated bank where the letter of credit is "freely negotiable." A letter of credit might also nominate by the following: "We hereby engage with the drawer, indorsers, and bona fide holders of drafts drawn under and in compliance with the terms of this credit that the same will be duly honored on due presentation" or "available with any bank by negotiation." A restricted negotiation credit might be "available with X bank by negotiation" or the like.

Several legal consequences may attach to the status of nominated person. First, when the issuer nominates a person, it is authorizing that person to pay or give value and is authorizing the beneficiary to make presentation to that person. Unless the letter of credit provides otherwise, the beneficiary need not present the documents to the issuer before the letter of credit expires; it need only present those documents to the nominated person. Secondly, a nominated person that gives value in good faith has a right to payment from the issuer despite fraud. Section 5-109 (a) (1).

8. A "record" must be in or capable of being converted to a perceivable form. For example, an electronic message recorded in a computer memory that could be printed from that memory could constitute a record. Similarly, a tape recording of an oral conversation could be a record.

9. Absent a specific agreement to the contrary, documents of a beneficiary delivered to an issuer or nominated person are considered to be presented under the letter of credit to which they refer, and any payment or value given for them is considered to be made under that letter of credit. As the court held in *Alaska Textile Co. v. Chase Manhattan Bank, N.A.*, 982 F.2d 813, 820 (2d Cir. 1992), it takes a "significant showing" to make the presentation of a beneficiary's documents for "collection only" or otherwise outside letter of credit law and practice.

10. Although a successor of a beneficiary is one who succeeds "by operation of law," some of the successions contemplated by Section 5-102 (a) (15) will have resulted from voluntary action of the beneficiary such as merger of a corporation. Any merger makes the successor corporation the "successor of a beneficiary" even though the transfer occurs partly by operation of law and partly by the voluntary action of the parties. The definition excludes certain transfers, where no part of the transfer is "by operation of law" -- such as the sale of assets by one company to another.

11. "Draft" in Article 5 does not have the same meaning it has in Article 3. For example, a document may be a draft under Article 5 even though it would not be a negotiable instrument, and therefor would not qualify as a draft under Section 3-104 (e).

RESEARCH REFERENCES

ALR.

What is a letter of credit under *UCC §§ 5-102, 5-103. 44 ALR4th 172.*

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

**D. Beneficiary****§ 5-102:32 [Rev] Beneficiary subsection (a)(3)**

“Beneficiary” means a person who under the terms of a letter of credit is entitled to have its complying presentation honored. The term includes a person to whom drawing rights have been transferred under a transferable letter of credit.<sup>1</sup>

◆ **Reminder:** Sources and Cross References for the definition of Beneficiary are found in materials following the official comments to § U.C.C. 5-102 [Rev].

**§ 5-102:33 [Rev] Context in letter of credit practice**

A modern letter of credit is a definite undertaking to pay a specific person as opposed to anyone to whom the LC is delivered by the applicant as was the older traveler’s letter of credit. Therefore, its signal characteristic is that its promise runs to a unique, named person or persons known as the “beneficiary”. This provision defines the term for its use in U.C.C. Article 5 [Rev].<sup>1</sup>

**§ 5-102:34 [Rev] Comparison with definitions in letter of credit rules**

The term “beneficiary” is defined in both the UCP and ISP98. UCP600 (2007) Article 2 (Definitions) ¶ 4 is the first formal UCP definition of “beneficiary.” It defines “beneficiary” in terms of the entity to whom (“in whose favour”) the letter of credit is issued which is the person named in the credit as the person to whom the issuer’s obligation runs. While UCP500 does not define “beneficiary” as such, UCP500 (1993) Article 2 does indicate the meaning of “beneficiary” in a parenthetical in its definition of “letter of credit” as including an obligation by the issuer “to make a payment to or to the order of a third party (“the Beneficiary”).” ISP98 Rule 1.09(a) (Definitions) defines a “beneficiary” as “a named

**[Section 5-102:32 [Rev]]**

<sup>1</sup>U.C.C. § 5-102(a)(3) [Rev].

**[Section 5-102:33 [Rev]]**

<sup>1</sup>Cases quoting or citing the definition in U.C.C. § 5-102(a)(3) [Rev]: M.A. Walker Co., Inc. v. PBK Bank, Inc., 95 S.W.3d 70, 49 U.C.C. Rep. Serv. 2d 589 (Ky. Ct. App. 2002) (Kentucky U.C.C. Article 5 [Rev]).

**[Section 5-102:34 [Rev]]**

<sup>1</sup>UCP600 (2007) Article 2 (Definitions) ¶ 4 provides that a “beneficiary” is “the party in whose favour a credit is issued.”

than one beneficiary of a credit.<sup>1</sup> For convenience and simplicity, the same approach is used in this treatise with respect to the beneficiary.

Where there are multiple beneficiaries, an issuer would expect that the drawing would be in all their names unless the credit expressly provided for a drawing by only one of the named beneficiaries. Any documents required to be issued by the "beneficiary" would have to be issued by all named beneficiaries and any payment would be made to them jointly unless otherwise provided.

#### § 5-102:38 [Rev] Obligations of the beneficiary

Since the undertaking embodied in the LC is a conditional promise and not a contractual obligation, the beneficiary has no obligation under the LC to present documents. It may, of course, have an obligation to perform under the underlying contract which may involve an LC presentation but this obligation does not arise under LC law and does not run to the issuer. Therefore, there is no section of U.C.C. Article 5 [Rev] on the obligations of the beneficiary. By virtue of the issuance of the credit, however, there are certain rights that accrue to the beneficiary, namely that if the credit is irrevocable, it cannot be amended or terminated without the consent of the beneficiary until it is exhausted or expires.<sup>1</sup>

When the beneficiary does make a presentation, however, some rights, obligations, and duties arise. Its entitlement is independent of the underlying transaction that gave rise to the LC,<sup>2</sup> the beneficiary can look to the adviser for the accuracy and apparent authenticity of the advice,<sup>3</sup> and it can recover notwithstanding its failure to make a complying pre-

#### [Section 5-102:37 [Rev]]

<sup>1</sup>U.C.C. Article 1 expressly requires this result unless the text otherwise requires. See Prior U.C.C. § 1-102(5)(a) and U.C.C. § 1-106(1) [Rev].

#### [Section 5-102:38 [Rev]]

<sup>1</sup>U.C.C. § 5-106 [Rev].

<sup>2</sup>U.C.C. § 5-103(d) [Rev] states the "[r]ights and obligations of an issuer to a beneficiary or a nominated person under a letter of credit are independent of the existence, performance, or nonperformance of a contract or arrangement out of which the letter of credit arises or which underlies it, including contracts or arrangements between the issuer and the applicant and between the applicant and the beneficiary."

<sup>3</sup>U.C.C. § 5-107(c) [Rev].

practice. However, there are occasions where they act in presenting documents or discounting them even though they are not nominated or, having been so nominated, are not acting pursuant to their nomination. In such a case, they are said to stand in the shoes of the beneficiary. This statement is only partially correct. They are not able to draw under the letter of credit and any drawing must be in the name of the named beneficiary. However, where they act as the presenting bank, any proceeds of the credit that are sent to them for the account of the beneficiary and how they disburse of these proceeds is subject to agreements between them and the beneficiary. Where there is LC fraud, however, such banks are not protected and, in this sense, they can be said to stand in the shoes of the beneficiary.

**§ 5-102:43 [Rev] Assignee of proceeds**

Although U.C.C. Article 5 [Rev] does not define an assignee of proceeds, it is not a beneficiary and must be distinguished from it, unlike a transferee of drawing rights. An assignee of proceeds is, in effect, the assignee of whatever right there is to be paid under a letter of credit but has no right to draw under the LC in its own name. The assignee of proceeds is subject to any defenses that may be asserted against the beneficiary and also takes subject to other persons with higher priority to the proceeds of the credit. The assignee of proceeds is discussed in this treatise in connection with U.C.C. § 5-114 [Rev] (Assignment of Proceeds).

**§ 5-102:44 [Rev] Confirmer**

The beneficiary is not only the beneficiary of the LC promises of the issuer but also of any confirmer that adds its promise to that of the issuer. In the normal course of practice, a beneficiary will make presentation under its letter of credit to the confirmer which is usually in its immediate geographical vicinity and the confirmer will look to the issuer for reimbursement. U.C.C. § 5-111(a) & (c) [Rev] provides for remedies by the beneficiary against the confirmer for wrongful dishonor, anticipatory repudiation, and other defaults or breaches of its obligations.

**§ 5-102:45 [Rev] Use of the exact beneficiary name as it appears in the LC**

Because the promise embodied in the LC runs to the named beneficiary, the drawing must be made in the name of the named beneficiary and not in another name. Because

passive lack of action in which the preclusion rule of U.C.C. § 5-108(b) (Issuer's Rights and Obligations) is operative, dishonor most commonly occurs when the issuer or confirmer sends a notice of refusal. "Failure", therefore, must be understood to be either the lack of action or an affirmation of action refusing to honor. The focus of the drafting is not on the failure but on the distinction between an action when payment is due either on presentation in the case of a sight drawing, a matured acceptance or deferred payment credit, or a negotiation credit which is due to be negotiated at sight by the issuer or confirmer, on the one hand, and an interim action. In this sense, perhaps "failure to honor" is not the best phrase but in context it connotes what was intended.

**§ 5-102:74 [Rev] Failure to take a required interim action**

There is an interim stage between honor and dishonor that is addressed by U.C.C. § 5-102(a)(5) [Rev] "Dishonor", namely the situation where there is an obligation to pay over time. An issuer or confirmer that has made an undertaking to accept or incur a deferred payment obligation but refuses to do so technically has not failed to "honor" if both elements are necessary or, at least not until maturity since "Honor" encompasses both incurring the obligation and paying. Of course, not having incurred an undertaking or accepted a draft is not auspicious in terms of paying at maturity. U.C.C. § 5-102(a)(5) [Rev] provides that it will have "dishonored" since "dishonor" includes not only a refusal to honor at maturity but also at the outset. It uses the phrase of "an interim action" to address this issue.

As indicated, the concept of dishonor (and, to an extent, honor) can have phases where the LC requires stages of action. When documents are presented, some response is required but an additional response may be required as well. Dishonor can occur at either stage. Honor can occur in a complete sense only at maturity but it is common to speak of an acceptance as constituting "honor" even though full honor will not occur until payment at maturity.

**§ 5-102:75 [Rev] Wrongful dishonor**

As indicated, dishonor is not necessarily wrongful. Where the beneficiary has failed to comply with the terms and conditions of the letter of credit, dishonor is proper. Where, however, there is compliance, dishonor is wrongful. Wrong-

examining it and refusing on the basis of the missing document. Where the issuer or confirmer elects to hold the documents, they do not constitute a presentation for purposes of the expiration of the credit until the presentation is complete because the presentation has been qualified by the beneficiary. As to other deadlines, they are not met until the presentation is complete even if, for example, transport documents are presented before the last day for their presentation. This result is proper because the documents are not available to the applicant until the presentation is complete and the purpose of the rule is to assure the applicant that there will not be undue delays in forwarding the transport documents to it, seeking thereby to avoid demurrages and other similar charges. Although these results reflect standard international letter of credit practice, it is prudent to set them forth in a communication to the beneficiary or presenter so as to avoid any misunderstandings.

**§ 5-102:177 [Rev] Delivery to someone other than issuer or nominated person**

Delivery to or receipt by any other bank or entity does not constitute presentation even though that entity may become a "presenter" when it presents documents to the issuer or nominated bank. Some of the consequences of "presentation", namely the tolling of any deadline and the eventual obligation of a bank that is obligated on the credit to either refuse or honor, follow from the first presentation of documents to any nominated bank or the issuer. Other consequences, namely the obligation of a bank that is obligated on the credit to give notice of refusal not later than the close of the seventh banking day (or whatever time period is imposed by applicable rules)<sup>1</sup> following the day of presentation (and possibly to examine the documents in "a maximum of" seven

**[Section 5-102:177 [Rev]]**

<sup>1</sup>U.C.C. § 5-108(b) [Rev] (Issuer's Rights and Obligations) provides that a bank has a reasonable time not to exceed seven days. UCP600 (2007) Article 16(d) (Discrepant Documents, Waiver and Notice) on the other hand, provides that a bank has five banking days, with no reasonable time requirement. ISP98 Rule 5.01 (Timely Notice of Dishonor) provides that a bank must give notice within a time that is not unreasonable and provides that "[n]otice given within three business days is deemed to be not unreasonable and beyond seven business days is deemed to be unreasonable."

**J. Issuer****§ 5-102:109 [Rev] "Issuer" subsection (a)(9)**

"Issuer" means a bank or other person that issues a letter of credit, but does not include an individual who makes an engagement for personal, family, or household purposes.<sup>1</sup>

There is a need for a name for the bank that initiates the LC and that is chiefly liable on it. While banks that initiate the LC undertaking were commonly known as "opening banks" in the time immediately following World War I, this usage has been replaced by the name "issuing bank" which is universally recognized and which, in the form of "issuer" was used in Prior U.C.C. § 5-103(1)(c). That definition was refined in U.C.C. § 5-102(a)(9) [Rev] to exclude consumers. U.C.C. § 5-102(a)(9) [Rev] defines an "issuer" as a "bank or other person that issues a letter of credit" but excludes a consumer.<sup>2</sup>

This definition is addressed in ¶ 5 of the Official Comment which should be given appropriate deference in interpreting and applying it.

◆ **Reminder:** Sources and Cross References for the definition of Issuer are found in materials following the official comments to § U.C.C. 5-102 [Rev].

**§ 5-102:110 [Rev] Bank**

U.C.C. § 5-102(a)(9) [Rev] states that an "issuer" is "a bank or other person". Except for U.C.C. § 5-116 [Rev] (Choice of Law and Forum), this reference is the only instance in U.C.C. Article 5 [Rev] that refers to a bank. The term is defined in U.C.C. § 1-201(a) (4) [Rev] as "a person engaged in the business of banking" and is specifically said to include savings

**[Section 5-102:109 [Rev]]**

<sup>1</sup>U.C.C. § 5-102(a)(9) [Rev]. See also Official Comment paragraph 5 in Sec. 5-102.

<sup>2</sup>Cases using or citing the definition of "Issuer" in U.C.C. § 5-102(a)(9) [Rev]: *M.A. Walker Co., Inc. v. PBK Bank, Inc.*, 95 S.W.3d 70, 49 U.C.C. Rep. Serv. 2d 589 (Ky. Ct. App. 2002) (Kentucky U.C.C. Article 5 [Rev]); *Alhadeff v. The Meridian on Bainbridge Island*, 183 P.3d 1197 (Wash. App. 2008) (Washington U.C.C. Article 5 [Rev]).

of banking organizations and regulations and of business associations. Under letter of credit law, a bank is liable on a credit in the capacity in which it acts and separate branches are separate entities for purposes of the letter of credit.<sup>3</sup> Thus, if a distant branch is asked to advise but not nominated to act, forwarding documents to that branch does not constitute presentation which does not occur until the documents are received by the issuer or a nominated bank, if any. Where the advising bank is also nominated, it is not unusual for courts to confuse the roles of the parties.

**§ 5-102:118 [Rev] Obligation of an issuer**

The obligation of an issuing bank is not only its obligation to honor its letter of credit on the presentation of complying documents. It is obligated on a letter of credit both to the beneficiary and to other banks that add their undertaking or act pursuant to a nomination. That undertaking is explained in U.C.C. § 5-108 [Rev] (Issuer's Rights and Obligations). In addition to its undertaking with respect to the credit as "issuer", an issuing bank has responsibilities with respect to proposed amendments, pre-advice, examination of documents, exercise of its discretion or deference to the exercise of discretion by a nominated bank with respect to an amount in the invoice greater than the balance available under the credit, notice of refusal of non-complying documents, reimbursement of nominated banks, and obligations regarding a transferred transferable credit.

**§ 5-102:119 [Rev] Variation of the definition of "issuer": non-variable per § 5-103(c)**

The definition of the term "Issuer" is one that cannot be varied under U.C.C. § 5-103(c) [Rev]. Attempts to vary a definition are not wise and, unless modest and commercially justified, will probably not be successful, with the definition of Issuer the statute does not allow any variation.

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branch of the issuer that elects not to act on its nomination but forwards the documents to the issuer is liable as if it were the issuer.

<sup>3</sup>ISP98 Rule 2.02 (Obligation of Different Branches, Agencies, or Other Offices) provides that "For the purposes of these Rules, an issuer's branch, agency, or other office acting or undertaking to act under a standby in a capacity other than as issuer is obligated in that capacity only and shall be treated as a different person." UCP600 (2007) Article 3 (Interpretations) ¶ 5 is similar although it is confined to branches in different countries.

Rev. Art. 5-198

**L. Nominated person**

**§ 5-102:150 [Rev] "Nominated person" subsection (a)(11)**

"Nominated person" means a person whom the issuer (i) designates or authorizes to pay, accept, negotiate, or otherwise give value under a letter of credit and (ii) undertakes by agreement or custom and practice to reimburse.<sup>1</sup> This definition is addressed in ¶ 7 of the Official Comment which should be given appropriate deference in interpreting and applying it.

◆ **Reminder:** Sources and Cross References for the definition of Nominated Person are found in materials following the official comments to § U.C.C. 5-102 [Rev].

**§ 5-102:151 [Rev] Context in letters of credit practice**

The notion of nominated banks evolved in order to categorize all banks named to act in the credit except the issuer and advising bank. It replaced the earlier usage "negotiating bank" which was used in connection with a "circular" credit or one that involved other banks authorized to act besides the issuer<sup>1</sup> and includes confirming banks, paying banks, and negotiating banks. A nominated bank may be a bank that is specifically named, any bank in a named geographical region or any bank in general. U.C.C. § 5-102(a)(11) [Rev] (Definitions) generalizes the name into "nominated person", recognizing that there is no requirement of a bank, and indicates that it signifies a designation or authorization to act under the credit and an obligation to reimburse for having done so.<sup>2</sup>

A nominated person is an intermediary who is empowered, authorized, and requested to fulfill some of the issuer's

**[Section 5-102:150 [Rev]]**

<sup>1</sup>U.C.C. § 5-102(a)(11)[Rev] See also Official Comment paragraph 7 in Sec. 5-102.

**[Section 5-102:151 [Rev]]**

<sup>1</sup>Although the term "circular" has fallen out of use, its counterpart remains in use "straight" which refers to a credit under which documents may only be presented to the issuer.

<sup>2</sup>Cases citing or reiterating the definition: U.S. Material Supply, Inc. v. Korea Exchange Bank, 417 F. Supp. 2d 652, 58 U.C.C. Rep. Serv. 2d 1064 (D.N.J. 2006) (New Jersey Rev. U.C.C. Article 5) ("no one can be a confirmer unless that person is a nominated").

As to paper documents, the definition is not altogether satisfactory either since it refers only to paper "instruments", documents of title, and chattel paper. While some commercial credits will require documents of title, not all do and many standbys do not require any of these papers but other types of paper.

Nonetheless, the principle enunciated of voluntary transfer is a useful guide for other types of paper. The transfer, however, must have been received. For letter of credit purposes, delivery is the receipt of documents by the person to whom the delivery is made, either at the physical or electronic address indicated or at that address at which they do business in a form that is accessible.

**§ 5-102:173 [Rev] Place of presentation**

Because delivery on or before the expiration date is critical, the location to which it must be made is equally critical. General principles of law shed some light on this question but they are overshadowed by principles of letter of credit practice which should inform any determination of the place of presentation and whether presentation has been made to the proper place.

With respect to presentation to the issuer, it is expected that presentation will be made to the issuer's place from which the credit is issued, provided that it states an address if the credit does not indicate a place for presentation. Where there is neither a designated place for presentation nor an address, the beneficiary may make presentation to the issuer at any place at which it transacts business.

If the credit indicates the place or address of the nominated bank, that term controls. Where it does not, however, the determination of the place for presentation is more complex. If the nominated bank is also the advising bank and the advice states the place for presentation, then it would be expected that presentation would be made at that place. In the absence of such a statement, it is expected that presentation would be made to the address stated on the advice, if any.<sup>1</sup> If there is no address for the nominated bank, then presenta-

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**[Section 5-102:173 [Rev]]**

<sup>1</sup>On initial consideration, it may seem odd that the advice can supply a mandatory term. In many respects, such as with respect to documents required under the credit, it cannot. However, with regard to practi-

merger makes the successor corporation the "successor of a beneficiary" even though the transfer occurs partly by operation of law and partly by the voluntary action of the parties. The definition excludes certain transfers, where no part of the transfer is "by operation of law"—such as the sale of assets by one company to another.

11. "Draft" in U.C.C. Article 5 does not have the same meaning it has in U.C.C. Article 3. For example, a document may be a draft under U.C.C. Article 5 even though it would not be a negotiable instrument, and therefore would not qualify as a draft under U.C.C. Section 3-104(e).

#### § 5-102:2 [Rev] Local Statutory Citations and Variations

Local Code variations can be found in the Local Code Variations pamphlet.

#### § 5-102:3 [Rev] Scope and suggestions

U.C.C. § 5-102 [Rev] sets forth definitions applicable to U.C.C. Article 5 [Rev] and lists definitions in other Articles of the U.C.C. which are applicable to U.C.C. Article 5 [Rev].

In addition, the general definitions and principles of construction set forth in U.C.C. Article 1 are applicable to U.C.C. Article 5 [Rev].<sup>1</sup>

#### § 5-102:4 [Rev] Scope and suggestions—Particular applications

A New Jersey court could not assume personal jurisdiction over a Korean bank in an action on a letter of credit issued by the bank that was brought by the letter of credit's beneficiary, a New Jersey corporation. In so ruling, the court noted that the only contact between the bank and the state was the naming of the New Jersey Company as the beneficiary of the letter of credit, which letter of credit was issued in Korea. The court also noted that the beneficiary did not ask that the issuer's letter of credit be confirmed by a state bank or that New Jersey be selected as the forum for resolving disputes. Thus, traditional notions of fair play and substantial justice would be offended by asserting jurisdiction over the Korean bank merely because it issued the letter of credit.<sup>1</sup>

#### § 5-102:5 [Rev] Adviser

An "adviser" is a person who, at the request of the issuer, a confirmer, or another adviser, notifies, or requests another

[Section 5-102:3 [Rev]]

<sup>1</sup>U.C.C. § 5-102(b), (c) [Rev].

[Section 5-102:4 [Rev]]

<sup>1</sup>U.S. Material Supply, Inc. v.

adviser to notify the beneficiary that a letter of credit has been issued, confirmed or amended.<sup>1</sup>

The action taken by the adviser is to advise the beneficiary of a letter of credit that the letter of credit has been issued, confirmed, or amended.<sup>2</sup> The adviser takes such action upon the request of the issuer of the letter of credit, a confirmer of the letter of credit, or another adviser.<sup>3</sup>

An adviser may be any person as defined in U.C.C. § 1-201(30)[U.C.C. § 1-201(b)(27) [Rev], whether or not the person is a bank.<sup>4</sup>

#### § 5-102:6 [Rev] Adviser—Particular applications

Using a letter of credit, the high bidder in a judicially ordered sale of real property lost the bid to a third party's lower value cash bid because the letter of credit contained a condition that could not be satisfied by the special master conducting the sale. The letter of credit guaranteed that the funds would be paid by the bank upon receiving "clear title" to the land parcels being bid upon. However, the special master could only convey such title as was vested in her by the court order appointing her.<sup>1</sup>

#### § 5-102:7 [Rev] Applicant

An "applicant" is the person who either requests the issuer to issue the letter of credit or for whose account the letter of credit is issued.<sup>1</sup> Under original U.C.C. Article 5, this person would have been called the "customer" or "account party."

An applicant includes a person who requests the issuer to issue a letter of credit on behalf of another when such request is coupled with a promise to reimburse the issuer for any payments properly made under the requested letter of credit.<sup>2</sup>

An applicant can include a bank which acts on behalf of its customer in obtaining from another bank (or person) the issuance or confirmation of a letter of credit.

◆ **Example:** Microsoft, in making a purchase from a French

Korea Exchange Bank, 417 F. Supp. 2d 852, 58 U.C.C. Rep. Serv. 2d 1064 (D.N.J. 2006).

[Section 5-102:6 [Rev]]

<sup>1</sup>U.C.C. § 5-102(a)(1) [Rev].

<sup>2</sup>U.C.C. § 5-102(a)(1) [Rev].

<sup>3</sup>U.C.C. § 5-102(a)(1) [Rev].

<sup>4</sup>U.C.C. § 1-201(30); U.C.C. § 1-

201(b)(27) [Rev].

[Section 5-102:6 [Rev]]

<sup>1</sup>Hataway v. Nicholls, 893 So. 2d 1054, 56 U.C.C. Rep. Serv. 2d 576 (Miss. 2005)

[Section 5-102:7 [Rev]]

<sup>1</sup>U.C.C. § 5-102(a)(2) [Rev].

<sup>2</sup>U.C.C. § 5-102(a)(2) [Rev].

company, is required under the terms of the contract to obtain a letter of credit confirmed by Banque de Paris. Bank of America, on behalf of Microsoft, obtains Banque de Paris' confirmation of the letter of credit. Both Bank of America (if it promises to reimburse Banque de Paris for any payments made) and Microsoft are applicants.

Absent a contrary agreement by the parties, there may be only one applicant at a time on a letter of credit. Thus, where a bank that issued a letter of credit alleged that two drawers on the letter of credit breached the underlying contract between the drawers and the payees because the conditions for a proper draw had not been met, and the bank sought to be reimbursed by the corporation that enlisted the bank to issue the letter of credit, there was no merit to the bank's contention that both the corporation and the payees were "applicants" and that the bank was thus subrogated to both the corporation's and the payees' rights against the drawers. Since the corporation requested the issuance of the letter of credit and undertook the obligation to reimburse the issuer in the event of a draw, the corporation was the applicant.<sup>3</sup>

#### § 5-102:8 [Rev] Beneficiary

The beneficiary of a letter of credit is the person who is named, or described by class, as being entitled to draw on the letter of credit upon making a proper presentation.<sup>1</sup>

#### § 5-102:9 [Rev] Beneficiary—Particular applications

Holder of a materialman's lien secured by a particular tract of land under development by debtor was not a third-party beneficiary of a letter of credit from the bank that guaranteed construction of the roads in the development, even though the materialman's lien was for non-payment of rock used to construct the roads. A "beneficiary" (of a letter of credit) is a "person who under the terms of a letter of credit is entitled to have its complying presentation honored," including "a person to whom drawing rights have been transferred under a transferable letter of credit." Lienholder was not named as a beneficiary under the terms of the letter of credit and, thus, did not meet the statutory defini-

<sup>3</sup>In re Enron Corp., 59 U.C.C. [Section 5-102:8 [Rev]]  
Rep. Serv. 2d 359 (Bankr. S.D. N.Y.  
2006).

<sup>1</sup>U.C.C. § 5-102(a)(9) [Rev].

tion of a beneficiary under a letter of credit.<sup>1</sup>

**§ 5-102:10 [Rev] Beneficiary—Transferee of beneficiary:  
Right to draw**

U.C.C. Article 5 [Rev] recognizes a limited right of the beneficiary of a letter of credit to substitute another person in its place as the beneficiary. U.C.C. § 5-112 [Rev] provides under what circumstances a beneficiary can transfer its rights to draw upon the letter of credit. The definition of "beneficiary" includes a person "to whom drawing rights have been transferred under a transferable letter of credit."<sup>1</sup>

There is nothing to indicate whether this provision is operative only when the original beneficiary has transferred all its rights to the transferee or whether it is effective when the transferee is merely given the right to draw up to a specified maximum amount.

A party other than a beneficiary can present a draw. Nothing in U.C.C. Article 5 [Rev] prescribes that when someone other than the beneficiary presents a draft, an established protocol is to be followed. Accordingly, an issuer's argument that an original beneficiary, rather than a substituted beneficiary, who was a subsidiary of the original beneficiary, inappropriately presented a sight draft was without merit where nothing in the express language of the letter of credit prevented a party, other than the substituted beneficiary, from presenting the draft nor did the issuer provide any authority for the proposition that only a beneficiary can present a draft.<sup>2</sup>

**§ 5-102:11 [Rev] Beneficiary—Transferee of beneficiary:  
Right to draw—Assignee of completed  
draw excluded**

A beneficiary who has made a proper draw under the letter of credit may, before receiving payment from the issuer, assign the right to payment of the draw to a third person. Such an assignment is called an "assignment of proceeds" and is covered by U.C.C. § 5-114 [Rev]. An assignee of proceeds is not a beneficiary for purposes of U.C.C. Article 5 [Rev].

[Section 5-102:9 [Rev]]

<sup>1</sup>M.A. Walker Co., Inc. v. PBK Bank, Inc., 95 S.W.3d 70, 49 U.C.C. Rep. Serv. 2d 589 (Ky. Ct. App. 2002).

<sup>2</sup>Travelers Indem. Co. v. U.S. Bank Nat. Ass'n, 59 U.C.C. Rep. Serv. 2d 786 (Conn. Super. Ct. 2006).

[Section 5-102:10 [Rev]]

<sup>1</sup>U.C.C. § 5-102(a)(3) [Rev].

for in U.C.C. § 5-102(a)(8)(iii) [Rev].<sup>2</sup>

§ 5-102:22 [Rev] Issuer

With one exception, an issuer is any bank or other person that issues a letter of credit.<sup>1</sup> The exception is that a consumer may not issue a letter of credit.<sup>2</sup>

§ 5-102:23 [Rev] Issuer—Exclusion of consumers

A consumer cannot issue a letter of credit in a consumer transaction. The definition of "consumer" expressly includes "an individual who makes an engagement for personal, family, or household purposes."<sup>1</sup> This exclusion prevents creditors from depriving consumers of the benefits of consumer protection laws by requiring them to issue letters of credit for the amounts owed by them.<sup>2</sup>

§ 5-102:24 [Rev] Letter of credit

A letter of credit under U.C.C. Article 5 [Rev] must satisfy the following requirements:

- (1) It must be a definite undertaking that satisfies U.C.C. § 5-104 [Rev];
- (2) The undertaking must be by an issuer;
- (3) The undertaking must be to a beneficiary;
- (4) The undertaking must be at the request of, or for the account of, an applicant (which can be the financial institution itself); and
- (5) (5) The undertaking must be to honor a documentary presentation by payment or delivery of an item of value.<sup>1</sup>

§ 5-102:25 [Rev] Letter of credit—Requirements of [Rev] U.C.C. § 5-104

Although an undertaking must satisfy the requirements of U.C.C. § 5-104 [Rev] to qualify as a letter of credit,<sup>1</sup> little is required under U.C.C. § 5-104 [Rev].

It is only necessary that the undertaking:

<sup>2</sup>U.C.C. § 5-102(a)(8) [Rev] and Official Comment 4.

[Section 5-102:22 [Rev]]

<sup>1</sup>U.C.C. § 5-102(a)(9) [Rev].

<sup>2</sup>U.C.C. § 5-102(a)(9) [Rev].

[Section 5-102:23 [Rev]]

<sup>1</sup>U.C.C. § 5-102(a)(9) [Rev].

<sup>1</sup>U.C.C. § 5-102 [Rev], Official Comment 5.

[Section 5-102:24 [Rev]]

<sup>1</sup>U.C.C. § 5-102(a)(10) [Rev] and Official Comment 6.

[Section 5-102:25 [Rev]]

<sup>1</sup>U.C.C. § 5-102(a)(10) [Rev].

**§ 5-102:29 [Rev] Letter of credit—Definiteness**

A letter of credit must include a "definite undertaking."<sup>1</sup> This is a practical necessity that runs through both the U.C.C. and the non-U.C.C. law. If the undertaking is too indefinite, it is not given effect either as a letter of credit or as a contract under non-U.C.C. law.<sup>2</sup>

**§ 5-102:30 [Rev] Letter of credit—Identity of beneficiary**

The beneficiary of a letter of credit may be a third person, that is one who is neither the applicant nor the issuer. If the issuer is a "financial institution" the issuer may name itself as beneficiary.<sup>1</sup> Both U.C.C. Article 5 [Rev] and UCP (500) allow two-party letters of credit in which the financial institution is both the issuer and the applicant.<sup>2</sup>

Although the U.C.C. does not define "financial institution," clearly banks and finance companies qualify as "financial institutions."

In contrast, questions will arise as to whether "hybrid" companies, such as insurance companies, are "financial institutions." It is to be expected that, in the interest of furthering trade and business, courts will resolve any doubtful question in favor of concluding that a given enterprise is a "financial institution."

**§ 5-102:31 [Rev] Nominated person**

A nominated person is designated, or authorized, to act with respect to the letter of the credit by the issuer.<sup>1</sup>

A person who is not selected by the issuer is not a nominated person within the meaning of U.C.C. Article 5 [Rev]. Consequently, a silent confirmer, a person selected by the applicant or beneficiary without any action by the issuer, is not a nominated person.

A nominated person can be named or authorized to perform any act required by the letter of credit. That is, it may be designated or authorized to pay, accept, negotiate, or otherwise

[Section 5-102:29 [Rev]]

<sup>1</sup>U.C.C. § 5-102(a)(10) [Rev].

<sup>2</sup>U.C.C. § 5-102 [Rev], Official Comment 6.

[Section 5-102:30 [Rev]]

<sup>1</sup>U.C.C. § 5-102(a)(10) [Rev] and

Official Comment 6.

<sup>2</sup>U.C.C. § 5-102 [Rev], Official Comment 6; UCP (500) U.C.C. Art 2.

[Section 5-102:31 [Rev]]

<sup>1</sup>U.C.C. § 5-102(a)(11) [Rev] and Official Comment 7.

favor flexibility so as to permit the expanding use of letters in new business situations that may arise.<sup>4</sup>

**§ 5-103:51 [Rev] Where intent of parties clear**

When a letter of credit is not ambiguous, a court must follow the intent manifested by the terms of the letter of credit.<sup>1</sup>

An ambiguity will not be found in a letter of credit by making a strained construction of a clear provision. A letter of credit is not ambiguous when there is only one reasonable meaning to its terms.<sup>2</sup>

The meaning of a letter of credit must be determined by the words used by the parties.<sup>3</sup>

A letter of credit is not subject to judicial construction when it is unambiguous; the words of the letter of credit are to be given their ordinary meaning.<sup>4</sup>

A provision in a letter of credit that payment is to be made against "drafts" does not require the production of negotiable drafts, as a draft may be either negotiable or nonnegotiable.<sup>5</sup>

In interpreting a letter of credit, the court will imply terms in those situations in which it would be justified in so doing in interpreting an ordinary contract. While the court may not rewrite the letter of credit, the court is not limited to the literal meaning of the words in determining the intent of the parties. While words will not be implied in an otherwise clear and specific contract, the terms of the contract may themselves show an intent, on the part of the parties, to imply the omitted terms.<sup>6</sup>

Terms that are not included in a letter of credit do not exist as

<sup>4</sup>*Chuidian v. Philippine Nat. Bank*, 976 F.2d 561, 18 U.C.C. Rep. Serv. 2d 1006 (9th Cir. 1992).

[Section 5-103:51 [Rev]]

<sup>1</sup>*Westwind Exploration, Inc. v. Homestate Sav. Ass'n*, 696 S.W.2d 378, 42 U.C.C. Rep. Serv. 271 (Tex. 1985).

<sup>2</sup>*Insurance Co. of North America v. Cypress Bank*, 663 S.W.2d 122 (Tex. App. Houston 1st Dist. 1983), on reh'g, 674 S.W.2d 781 (Tex. App. Houston 1st Dist. 1984); *Travis Bank & Trust v. State*, 660 S.W.2d 851, 38 U.C.C. Rep. Serv. 300 (Tex. App. Austin 1983).

<sup>3</sup>*Stringer Const. Co., Inc. v. American Ins. Co.*, 102 Ill. App. 3d 919, 58 Ill. Dec. 59, 430 N.E.2d 1, 32 U.C.C. Rep. Serv. 1167, 25 A.L.R.4th 230 (1st Dist. 1981).

<sup>4</sup>*Lennox Industries, Inc. v. Mid-American Nat. Bank and Trust Co.*, 49 Ohio App. 3d 117, 550 N.E.2d 971, 10 U.C.C. Rep. Serv. 2d 1344 (6th Dist. Wood County 1988).

<sup>5</sup>*Travis Bank & Trust v. State*, 660 S.W.2d 851, 38 U.C.C. Rep. Serv. 300 (Tex. App. Austin 1983).

<sup>6</sup>*Willow Bend Nat. Bank v. Commonwealth Mortg. Corp.*, 722 S.W.2d 12, 3 U.C.C. Rep. Serv. 2d 718 (Tex. App. Dallas 1986), writ refused n.r.e. (Mar. 4, 1987).

discrepancies that is given to the presenter or whether the issuer even gave notice of any discrepancy to the presenter:

1. Fraud as defined by U.C.C. § 5-109(a) [Rev].
2. Forgery as defined by U.C.C. § 5-109(a) [Rev].
3. Expiration of the letter of credit.<sup>1</sup>

**§ 5-108:43 [Rev] Preclusion by failure to give notice of discrepancy—Particular applications**

Since the letter of credit required a written demand for payment, the issuer was not to make payment under the letter of credit if no written demand was timely submitted, even if all other required documents were in order. Since the letter of credit's written demand requirement was not satisfied, the issuer was not precluded from raising the absence of a timely written demand by reason of issuer's failure, upon receipt of beneficiary's letter, to notify beneficiary of the need for such a written demand. No preclusion could be deemed to arise from issuer's inaction since, in the absence of any demand for payment, the letter of credit could not be deemed to have constituted a presentation triggering an obligation on issuer's part to notify beneficiary of discrepancies within a reasonable time.<sup>1</sup>

**§ 5-108:44 [Rev] Notice under UCP**

A rejection notice given by the issuer under the UCP must clearly and specifically identify the defect in the presentment document or else the notice has no effect.<sup>1</sup> The issuer may not place upon the beneficiary the burden of speculation as to the reason for the issuer's rejection.<sup>2</sup>

The provision of UCP precluding the issuer from objecting to a presentation defect of which it did not give notice satisfies the requirement of fairness particularly when the parties involved were sophisticated parties who were familiar with the notice requirement.

When the rejection notice given by the issuer fails to satisfy the UCP, the issuer may cure the defect by a supplementary no-

**[Section 5-108:42 [Rev]]**

<sup>1</sup>U.C.C. § 5-108(d).

**[Section 5-108:43 [Rev]]**

<sup>1</sup>J.P. Doumak, Inc. v. Westgate Financial Corp., 4 A.D.3d 62, 776 N.Y.S.2d 1, 52 U.C.C. Rep. Serv. 2d 991 (1st Dep't 2004).

**[Section 5-108:44 [Rev]]**

<sup>1</sup>Toyota Tsusho Corp. v. Comerica Bank, 929 F. Supp. 1065, 30 U.C.C. Rep. Serv. 2d 619 (E.D. Mich. 1996).

<sup>2</sup>Toyota Tsusho Corp. v. Comerica Bank, 929 F. Supp. 1065, 30 U.C.C. Rep. Serv. 2d 619 (E.D. Mich. 1996).

ment agreement depends on the rules<sup>1</sup> and the terms of the agreement. U.C.C. Article 5 [Rev] would apply unless excluded and the definition would apply in any event unless it, too, was modified or excluded.

Although the application is not a letter of credit, it is common for it to contain statements that it is subject to rules of practice. Unless this statement is nuanced, it may require some determination as to what result is appropriate. It is also likely that an application will indicate that it is subject to local law. This law may be the law of contracts except where the issue touches on letter of credit issues in which case it will be subject to U.C.C. Article 5 [Rev]. To the extent that the issue touches on letter of credit or letter of credit reimbursement, courts should look to U.C.C. Article 5 [Rev] or applicable practice rather than to general contract law.

#### § 5-102:29 [Rev] Obligations of the applicant

The obligations of the applicant are not addressed in any one provision in U.C.C. Article 5 [Rev]. They are mentioned in U.C.C. §§ 5-106(a) [Rev] (Issuance, Amendment, Cancellation, and Duration), 5-108(i)(1) (Issuer's Rights and Obligations), and 5-117(b) (Subrogation of Issuer, Applicant, and Nominated Person). The chief questions about an applicant involve the obligation of the applicant to reimburse the issuer, the extent to which the applicant can insist on applica-

#### [Section 5-102:28 [Rev]]

<sup>1</sup>ISP98 is more express about its application to the applicant. ISP98 Rule 8.01 (Right to Reimbursement) provides

"a. Where payment is made against a complying presentation in accordance with these Rules, reimbursement must be made by: i. an applicant to an issuer requested to issue a standby; and ii. an issuer to a person nominated to honour or otherwise give value.

b. An applicant must indemnify the issuer against all claims, obligations, and responsibilities (including attorney's fees) arising out of: i. the imposition of law or practice other than that chosen in the standby or applicable at the place of issuance; ii. the fraud, forgery, or illegal action of others; or iii. the issuer's performance of the obligations of a confirmer that wrongfully dishonours a confirmation.

c. This Rule supplements any applicable agreement, course of dealing, practice, custom or usage providing for reimbursement or indemnification on lesser or other grounds." UCP500 is much more circumspect about its application to the applicant and many bankers would say that it does not apply to the applicant. UCP600 (2007) Article 2 (Definitions) ¶ 2 provides that an applicant is a "party" to the credit but does not explain or define the meaning of "party" which operates as the equivalent of "person" or "entity".

that of a surety. Under suretyship law, anyone who undertakes to satisfy the debt of another is a surety. The surety's obligation depends on the terms of its suretyship undertaking and may require it to pay whether or not demand has been made on the principal. As regards reimbursement for the letter of credit, a surety can be either primarily liable to the issuer (that is, required to reimburse without demand on the person who needed the LC and who is the principal) or secondarily (that is, obligated to pay after demand on the principal has been refused). In the former case, it is apparent that the credit has been issued for the account of the issuer. In the latter, it is less clear.

**§ 5-102:26 [Rev] Legal effect of being an applicant**

While an applicant is not the person to whom a letter of credit runs, it is an entity that is significantly impacted by the LC and which, in turn, impacts it. An applicant requests the text of the LC to be issued, its approval is necessary to retain the issuer's right of reimbursement for amendments to the credit and it is normal for amendments to be requested by the applicant, the applicant's approval is necessary to retain the issuer's right of reimbursement for waiver of any discrepancies, the applicant has standing to bring an action to enjoin payment under a letter of credit or to attach its proceeds,<sup>1</sup> or to bring an action for breach of warranty under U.C.C. § 5-110 [Rev] (Warranties), and may be entitled to

The Restatement of Security § 82 states "[s]uretyship is the relation which exists where one person has undertaken an obligation and another person is also under an obligation or other duty to the obligee, who is entitled to but one performance, and as between the two who are bound, one rather than the other should perform."

**[Section 5-102:26 [Rev]]**

<sup>1</sup>In *SouthTrust Bank of Alabama, N.A. v. Webb-Stiles Co., Inc.*, 931 So. 2d 706, 58 U.C.C. Rep. Serv. 2d 60 (Ala. 2005) (Alabama U.C.C. Article 5 [Rev]), the Alabama Supreme Court concluded that a surety for the applicant (a subcontractor) whose name appeared as "guarantor" on the reimbursement application and may have so appeared on the LC itself—see Footnote 3 in the opinion and accompanying text—had an adequate remedy at law. The trial court had concluded that there was no adequate remedy because the contract that was supported by a local guarantee in support of which the standby had been issued was subject to Indian law. In concluding that the trial court had exceeded its discretion, the appellate court concluded that there was an adequate remedy because the surety could claim reimbursement from its principal on the suretyship contract which was subject to the law of a U.S. state. The decision did not





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

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

**GO TO REVISED CODE OF WASHINGTON ARCHIVE DIRECTORY**

*Rev. Code Wash. (ARCW) § 62A.5-110 (2009)*

§ 62A.5-110. Warranties

(1) If its presentation is honored, the beneficiary warrants:

(a) To the issuer, any other person to whom presentation is made, and the applicant that there is no fraud or forgery of the kind described in RCW 62A.5-109(1); and

(b) To the applicant that the drawing does not violate any agreement between the applicant and beneficiary or any other agreement intended by them to be augmented by the letter of credit.

(2) The warranties in subsection (1) of this section are in addition to warranties arising under Articles 3, 4, 7, and 8 because of the presentation or transfer of documents covered by any of those Articles.

**HISTORY:** 1997 c 56 § 11; 1965 ex.s. c 157 § 5-110.

**NOTES:**

**OFFICIAL COMMENT**

1. Since the warranties in subsection (a) are not given unless a letter of credit has been honored, no breach of warranty under this subsection can be a defense to dishonor by the issuer. Any defense must be based on Section 5-108 or 5-109 and not on this section. Also, breach of the warranties by the beneficiary in subsection (a) cannot excuse the applicant's duty to reimburse.

2. The warranty in Section 5-110 (a) (2) assumes that payment under the letter of credit is final. It does not run to the issuer, only to the applicant. In most cases the applicant will have a direct cause of action for breach of the underlying contract. This warranty has primary application in standby letters of credit or other circumstances where the applicant is not a party to an underlying contract with the beneficiary. It is not a warranty that the statements made on the presentation of the documents presented are truthful nor is it a warranty that the documents strictly comply under Section 5-108 (a). It is a warranty that the beneficiary has performed all the acts expressly and implicitly necessary under any underlying agreement to entitle the beneficiary to honor. If, for example, an underlying sales contract authorized the beneficiary to draw only upon "due performance" and the beneficiary drew even though it had breached the underlying contract by delivering defective goods, honor of its draw would break the warranty. By the same token, if the underlying contract authorized the beneficiary to draw only upon actual default or upon its or a third party's determination of default by the applicant and if the beneficiary drew in violation of its authorization, then upon honor of its draw the warranty would be breached. In many cases, therefore, the documents presented to the issuer will contain inaccurate statements (concerning the goods delivered or concerning default

or other matters), but the breach of warranty arises not because the statements are untrue but because the beneficiary's drawing violated its express or implied obligations in the underlying transaction.

3. The damages for breach of warranty are not specified in Section 5-111. Courts may find damage analogies in Section 2-714 in Article 2 and in warranty decisions under Articles 3 and 4. Unlike wrongful dishonor cases -- where the damages usually equal the amount of the draw -- the damages for breach of warranty will often be much less than the amount of the draw, sometimes zero. Assume a seller entitled to draw only on proper performance of its sales contract. Assume it breaches the sales contract in a way that gives the buyer a right to damages but no right to reject. The applicant's damages for breach of the warranty in subsection (a) (2) are limited to the damages it could recover for breach of the contract of sale. Alternatively assume an underlying agreement that authorizes a beneficiary to draw only the "amount in default." Assume a default of \$200,000 and a draw of \$500,000. The damages for breach of warranty would be no more than \$300,000.

#### JUDICIAL DECISIONS

##### APPLICABILITY.

Not all of an applicant's claims against a credit union with respect to a letter of credit that the applicant authorized his bank to issue to the credit union arose under U.C.C. Art. 5 because the exchange of letters between him and the credit union created a contract that the credit union allegedly breached. *Alhadeff v. Meridian on Bainbridge Island, LLC*, 144 Wn. App. 928, 185 P.3d 1197 (2008).

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

313 B.R. 565, 54 UCC Rep.Serv.2d 817  
(Cite as: 313 B.R. 565)

**H**

Briefs and Other Related Documents

United States District Court,  
S.D. New York.  
In re **BRADLEES STORES, INC.**, et al., Debtors.  
Leading Manufacturer Pte. Ltd., et al., Appellants,  
v.  
Bradlees Stores, Inc., et al., Appellees.  
**No. 04 Civ. 0599(RWS).**

Aug. 27, 2004.

**Background:** Foreign clothing manufacturers filed claims based on obligations arising from Chapter 11 debtor-retailers' postpetition cancellation of purchase orders. Debtors objected and sought expungement of the claims. The Bankruptcy Court, Burton R. Lifland, J., granted debtors' motion for summary judgment, and manufacturers appealed.

**Holdings:** The District Court, Sweet, J., held that: (1) manufacturers' failure to submit "approval sample certificates" to the court did not vitiate the validity of the parties' contracts, and (2) material questions of fact existed as to whether manufacturers were required to have fulfilled any conditions precedent at the time of cancellation and, thus, whether debtors anticipatorily breached the parties' contracts under Massachusetts law.

Vacated and remanded.

West Headnotes

**[1] Bankruptcy 51**  **3786**

51 Bankruptcy  
51XIX Review  
51XIX(B) Review of Bankruptcy Court  
51k3785 Findings of Fact  
51k3786 k. Clear Error. Most Cited Cases  
Bankruptcy court's findings of fact are reviewed under a "clearly erroneous" standard.

**[2] Bankruptcy 51**  **3782**

51 Bankruptcy  
51XIX Review  
51XIX(B) Review of Bankruptcy Court  
51k3782 k. Conclusions of Law; De Novo Review. Most Cited Cases  
Conclusions of law reached by a bankruptcy court are reviewed de novo.

**[3] Bankruptcy 51**  **2826**

51 Bankruptcy  
51VII Claims  
51VII(A) In General  
51k2826 k. Effect of State Law, in General. Most Cited Cases  
State law governs the nature and amount of claims under Title 11.

**[4] Bankruptcy 51**  **2826**

51 Bankruptcy  
51VII Claims  
51VII(A) In General  
51k2826 k. Effect of State Law, in General. Most Cited Cases  
Creditors' entitlements in bankruptcy arise in the first instance from the underlying substantive law creating the debtor's obligation, subject to any qualifying or contrary provisions of the Bankruptcy Code.

**[5] Sales 343**  **85(3)**

343 Sales  
343II Construction of Contract  
343k85 Conditions and Provisos  
343k85(3) k. Inspection and Approval. Most Cited Cases  
Under Massachusetts law, foreign clothing manufacturers' failure to submit to the court "approval sample certificates," documents that, pursuant to manufacturers' contracts with retailers, they were required to present to retailers' representative in or-

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der to draw on a letter of credit posted by retailers, did not vitiate the validity of the contracts.

**[6] Contracts 95 ⚡313(1)**

95 Contracts

95V Performance or Breach

95k313 Renunciation

95k313(1) k. In General. Most Cited

Cases

**Sales 343 ⚡151**

343 Sales

343IV Performance of Contract

343IV(C) Delivery and Acceptance of Goods

343k151 k. Ability and Readiness to Deliver. Most Cited Cases

**Sales 343 ⚡194**

343 Sales

343IV Performance of Contract

343IV(D) Payment of Price

343k194 k. Effect of Default or Delay.

Most Cited Cases

Outside of the context of the section of the Uniform Commercial Code (U.C.C.) governing anticipatory repudiation of contracts, Massachusetts has not generally recognized the doctrine of anticipatory repudiation. M.G.L.A. c. 106, § 2-610.

**[7] Sales 343 ⚡174**

343 Sales

343IV Performance of Contract

343IV(C) Delivery and Acceptance of Goods

343k171 Excuses for Default or Delay in Delivery

343k174 k. Default of Buyer. Most

Cited Cases

**Sales 343 ⚡195**

343 Sales

343IV Performance of Contract

343IV(D) Payment of Price

343k195 k. Excuses for Default or Delay.

Most Cited Cases

Under Massachusetts law, retailers' cancellation of the parties' contracts would have excused any further performance on the part of manufacturers if manufacturers had fulfilled all conditions precedent up to that point.

**[8] Contracts 95 ⚡313(1)**

95 Contracts

95V Performance or Breach

95k313 Renunciation

95k313(1) k. In General. Most Cited

Cases

Under Massachusetts law, where one party to a contract expressly or by implication repudiates the contract before the time for his or her performance has arrived and before a default justifying the repudiation has occurred, the other party is relieved from performance on his or her side; in other words, an anticipatory repudiation of contractual duties by one party to the contract excuses performance by the other. M.G.L.A. c. 106, § 2-610.

**[9] Contracts 95 ⚡313(1)**

95 Contracts

95V Performance or Breach

95k313 Renunciation

95k313(1) k. In General. Most Cited

Cases

Under Massachusetts law, an anticipatory repudiation of contractual duties by one party to the contract excuses performance by the other, and the fact that the contract may contain conditions precedent, the performance of which post-date the cancellation, does not alter this proposition. M.G.L.A. c. 106, § 2-610.

**[10] Contracts 95 ⚡313(2)**

95 Contracts

95V Performance or Breach

95k313 Renunciation

95k313(2) k. Acts Constituting Renunci-

ation and Liabilities Therefor. Most Cited Cases  
Under Massachusetts law, an anticipatory breach of a contract has not occurred if the non-repudiating party failed to satisfy one or more conditions provided in the contract, in which case the repudiating party never became obligated to close the transaction. M.G.L.A. c. 106, § 2-610.

**[11] Contracts 95 ⚡313(2)**

95 Contracts

95V Performance or Breach

95k313 Renunciation

95k313(2) k. Acts Constituting Renunciation and Liabilities Therefor. Most Cited Cases  
Under Massachusetts law, to demonstrate that an anticipatory breach of contract did not occur, it is sufficient to show the failure of applicable conditions precedent, whether or not that failure was stated as a reason by the allegedly repudiating party, or indeed whether the alleged failure was that party's actual reason for cancellation of the contract. M.G.L.A. c. 106, § 2-610.

**[12] Contracts 95 ⚡313(1)**

95 Contracts

95V Performance or Breach

95k313 Renunciation

95k313(1) k. In General. Most Cited

Cases

Failure of a condition precedent demonstrates that the non-repudiating party is not "ready, able and willing to perform" under the contract, which is a necessary element of a cause of action for anticipatory repudiation under Massachusetts law. M.G.L.A. c. 106, § 2-610.

**[13] Contracts 95 ⚡348**

95 Contracts

95VI Actions for Breach

95k347 Evidence

95k348 k. Presumptions and Burden of

Proof. Most Cited Cases

Under Massachusetts law, although the non-

repudiating party may suspend performance following cancellation of the contract, to establish that an anticipatory breach occurred the non-repudiating party is nevertheless required to show that performance would have happened absent cancellation. M.G.L.A. c. 106, § 2-610.

**[14] Contracts 95 ⚡348**

95 Contracts

95VI Actions for Breach

95k347 Evidence

95k348 k. Presumptions and Burden of

Proof. Most Cited Cases

Under Massachusetts law, the burden to establish that an anticipatory breach of contract occurred is on the party asserting it. M.G.L.A. c. 106, § 2-610.

**[15] Contracts 95 ⚡348**

95 Contracts

95VI Actions for Breach

95k347 Evidence

95k348 k. Presumptions and Burden of

Proof. Most Cited Cases

**Contracts 95 ⚡350(1)**

95 Contracts

95VI Actions for Breach

95k347 Evidence

95k350 Weight and Sufficiency

95k350(1) k. In General. Most Cited

Cases

Under Massachusetts law, as an essential element of the doctrine of anticipatory breach of contracts, the party spurned by an anticipatory breach must demonstrate by a preponderance of the evidence that he had the ability to tender performance when due. M.G.L.A. c. 106, § 2-610.

**[16] Contracts 95 ⚡348**

95 Contracts

95VI Actions for Breach

95k347 Evidence

95k348 k. Presumptions and Burden of

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Proof. Most Cited Cases

**Sales 343** ⚡181(1)

343 Sales

343IV Performance of Contract

343IV(C) Delivery and Acceptance of Goods

343k181 Evidence

343k181(1) k. Presumptions and Burden of Proof. Most Cited Cases

**Sales 343** ⚡381

343 Sales

343VII Remedies of Seller

343VII(F) Actions for Damages

343k380 Evidence

343k381 k. Presumptions and Burden of Proof. Most Cited Cases

Under both common law and the Massachusetts Uniform Commercial Code (UCC), a spurned party's right of action for anticipatory breach of contract depends on his shouldering the burden of demonstrating his readiness, willingness, and ability to tender performance when due. M.G.L.A. c. 106, § 2-610.

**[17] Bankruptcy 51** ⚡2164.1

51 Bankruptcy

51II Courts; Proceedings in General

51II(B) Actions and Proceedings in General

51k2164 Judgment or Order

51k2164.1 k. In General. Most Cited Cases

Genuine issues of material fact existed as to whether foreign clothing manufacturers were required to have fulfilled any conditions precedent at the time of retailers' cancellation of the parties' contracts and, thus, whether, under Massachusetts law, retailers anticipatorily breached the contracts, precluding summary judgment in proceeding in which retailers sought expungement of claims brought by manufacturers in retailers' bankruptcy case. M.G.L.A. c. 106, § 2-610.

**[18] Banks and Banking 52** ⚡191.15

52 Banks and Banking

52III Functions and Dealings

52III(F) Exchange, Money, Securities, and Investments

52k191 Letters of Credit

52k191.15 k. Justification for Dishonor; Relation to Underlying Transaction. Most Cited Cases

**Sales 343** ⚡59

343 Sales

343II Construction of Contract

343k59 k. Construing Instruments Together.

Most Cited Cases

Although letter of credit may have been a separate contract from the parties' purchase orders, under Massachusetts law they may have been read together as a single agreement, provided that they were part of a single transaction and appeared in combination to constitute the entire understanding of the parties.

**[19] Banks and Banking 52** ⚡191.15

52 Banks and Banking

52III Functions and Dealings

52III(F) Exchange, Money, Securities, and Investments

52k191 Letters of Credit

52k191.15 k. Justification for Dishonor; Relation to Underlying Transaction. Most Cited Cases

Under Massachusetts law, the issuer bank of a letter of credit generally must honor the letter of credit when presented with the proper drawing documents, regardless of any disputes that may exist with respect to the underlying agreement. U.C.C. § 5-108(f).

**[20] Banks and Banking 52** ⚡191.15

52 Banks and Banking

52III Functions and Dealings

52III(F) Exchange, Money, Securities, and Investments

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#### 52k191 Letters of Credit

52k191.15 k. Justification for Dishonor; Relation to Underlying Transaction. Most Cited Cases

Under Massachusetts law, the doctrine of independence protects only the distribution of the proceeds of a letter of credit; it prohibits an attack on the issuing bank's distribution to the beneficiary and does not address claims respecting the underlying contract.

#### [21] Sales 343 ↪151

#### 343 Sales

##### 343IV Performance of Contract

##### 343IV(C) Delivery and Acceptance of Goods

343k151 k. Ability and Readiness to Deliver. Most Cited Cases

Where "approval sample certificates," that is, documents that foreign clothing manufacturers were required to present to retailers' representative in order to draw on a letter of credit posted by retailers, were provided to manufacturers by retailers, retailers' failure to issue a certificate, or to acknowledge the issuance of a certificate, when all other requirements for performance under the parties' contract had been fulfilled by manufacturers, would not have prevented manufacturers' establishment of a claim for anticipatory breach of contract under Massachusetts law. M.G.L.A. c. 106, § 2-610.

\*567 Robert E. Michael & Associates, By Robert E. Michael, Of Counsel, New York, for Appellants.

Cadwalader, Wickersham & Taft, By Adam C. Rogoff, John H. Bae, Nathan A. Haynes, Of Counsel, New York, for Appellees.

#### OPINION

SWEET, District Judge.

Easy & Joytex Corporation ("E & J"), Leading Manufacturer Pte. Ltd. ("Leading"), Lekim Textile Industries Pte. Ltd. ("Lekim") and Maxlin Garments Sdn. Bhd. ("Maxlin") (collectively the

"Appellants") have appealed the memorandum decision and order of the United States Bankruptcy Court (Lifland, B.J.), entered November 13, 2003, as amended by errata order entered November 17, 2003, granting the motion for summary judgment of Bradlees Stores, Inc., Bradlees, Inc. and New Horizons of Yonkers, Inc. (collectively, "Bradlees" or the "Debtor"), on their objection to the Appellants claims and expunging those claims.

For the reasons set forth below, the decision is vacated and remanded.

#### *The Parties*

Bradlees operated 105 discount stores in seven northeastern states, offering, among other things, apparel and accessories, home products and convenience goods. On December 26, 2000, Bradlees commenced a case under Chapter 11 of the Bankruptcy Code (the "petition") and have continued to wind-down their businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

The Appellants were among the foreign manufacturers with whom the Debtors \*568 regularly contracted for the purchase of clothing through Li & Fung (Trading) Limited ("Li & Fung"), which acted as an intermediary between the manufacturers and Debtors.

#### *Prior Proceedings*

After the initiation of the bankruptcy proceedings, on December 18, 2001, the Bankruptcy Court entered an order confirming the Debtors' third amended joint plan of liquidation, together with the official committee of unsecured creditors, under Chapter 11 of the Bankruptcy Code, dated November 7, 2001 (the "Plan"). The effective date of the Plan was December 28, 2001.

Leading filed its claim on April 27, 2001, and amended the claim on October 17, 2001. The claim

is in the aggregate amount of \$855,371.78, consisting of a general, unsecured claim in the amount of \$217,881.60 and an unsecured priority claim in the amount of \$637,490.18 based on goods that were allegedly ordered. Objections to the claim were filed and discovery proceeded.

Lekim filed its claim on April 30, 2001, and amended the claim on October 17, 2001. The claim is in the aggregate amount of \$1,117,912.00, which consists of a general, unsecured claim in the amount of \$117,561.60 and an unsecured priority claim in the amount of \$1,000,350.40 based on goods that were allegedly ordered by the Debtors and partially based on goods that were allegedly ordered and actually shipped to Bradlees. Objections to the Lekim claim were filed and discovery proceeded.

E & J filed its claim on April 16, 2001, and amended the claim on October 17, 2001. The claim is in the amount of \$708,715.90 based on goods that were allegedly ordered by the Debtors. Objections were filed and discovery proceeded.

Maxlin filed its claim on April 27, 2001, and amended the claim on October 17, 2001. The claim is in the aggregate amount of \$649,450.68, which consists of a general, unsecured claim in the amount of \$106,922.80, and an unsecured priority claim in the amount of \$542,527.88 based on goods that were allegedly ordered by Bradlees and partially based on goods that were ordered and actually shipped to the Debtors. Objections were filed and discovery proceeded.

In December 2001, the Appellants, with the exception of E & J, sought administrative treatment of their claims based upon Bradlees' purported post-petition breach of pre-petition contracts. The Bankruptcy Court reclassified all of the Appellants' claims as general unsecured claims. The Appellants appealed, and both this Court and the Second Circuit Court of Appeals affirmed Judge Lifland's decision. *In re Bradlees Stores, Inc.*, 02 Civ. 896, 2003 WL 76990 (S.D.N.Y. Jan.9, 2003), *aff'd*

*without opinion*, 78 Fed.Appx. 166, 2003 WL 22367525 (2d Cir. Oct.17, 2003).

After discovery was completed, Bradlees moved for summary judgment dismissing the claims on the basis of their objections.

On November 5, 2003, after the motion was fully briefed, argued and *sub judice*, the Appellants sent a letter to the Bankruptcy Court on behalf of Appellant Leading, attaching an affidavit on behalf of Leading, alleging that Leading had located additional documentary material, in particular approval sample certificates in support of a portion of its claim, and that Leading was shipping copies of them from Singapore to New York. The Bankruptcy Court disregarded these submissions on the grounds that the submissions constituted inexcusable circumvention of the Federal Rules of Civil Procedure and the Bankruptcy Court's August 29, 2003 discovery order, parties opposing summary \*569 judgment are required to place all their evidence before the court, and the record on the motion was closed; and the "putative reworked submissions" were offered without the opportunity for further examination by the Debtors on matters previously covered in depositions.

The Decision entered November 13, 2003, as amended by errata order entered November 17, 2003, granted Bradlees' summary judgment on its objections seeking entry of an order, pursuant to section 502 of Title 11 of the United States Code (the "Bankruptcy Code"), and Rule 3007 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), expunging the claims filed by Leading, Lekim and E & J, and partial summary judgment with respect to a portion of the claim filed by Maxlin.

Appeal was taken to this Court on January 26, 2004. The Appellants' claims represent the entirety of the unresolved claims in these bankruptcy cases, and their claims have been fully reserved against by Bradlees. Once the Appellants' claims are resolved, the Debtors plan to make a final distribution to their

legitimate creditors.

Argument was heard on the appeal on April 7, 2004, at which time the appeal was fully submitted.

### *The Transaction At Issue*

At the outset, a representative of Bradlees traveled abroad and met with manufacturers to examine the manufacturers' operations and products, to price clothing and obtain other information or ideas relative to Bradlees' clothing needs. Bradlees' representative also met with Li & Fung as an intermediary to pair the buyer with an appropriate manufacturer and to facilitate the transactions.

Bradlees' representative returned to the U.S. and in coordination with purchasing and other departments, determined Bradlees' needs and then prepared a product specification memorandum (the "Specification Memo") describing the clothing Bradlees was interested in purchasing. The Specification Memo was forwarded to the appropriate manufacturer through Li & Fung.

After Bradlees issued a Specification Memo, Li & Fung would issue a Placement Memorandum to the Appellants stating the amount and cost of the garments. The Placement Memorandum stated that it is subject to Bradlees' approval of samples and provided for a date certain for shipment of the goods.

Bradlees and the manufacturers would engage in two to four or more stages of sampling, depending on Bradlees' comments, requirements and quality control testing. In the event the samples failed to meet Bradlees' expectations or specifications in any regard, Bradlees ceased negotiations and terminated the proposed transaction. If the proposed sample completed the process of testing, comment and analysis, Bradlees' Vendor Compliance Department would issue an Approval Sample Certificate. Thereafter, the goods were to be shipped by the "Ship By" date indicated in the Placement Memorandum.

In the normal course, Bradlees would post a letter of credit for the benefit of Li & Fung, who would thereafter transfer the letter of credit to the respective Appellants. In order to draw on the letter of credit, the Appellants were required to present a number of documents, including a copy of an applicable Approval Sample Certificate.

Prior to the petition, the Appellant and Bradlees engaged in a series of transactions for the sale of finished goods to Bradlees. The claims at issue resulted from Placement Memoranda issued by Li & Fung on behalf of Bradlees.

**\*570** The only Placement Memorandum in the record required Maxlin to ship the merchandise by November 20, 2000. (Appendix p. 44).

On or about December 18, 2000, approximately one week before the petition was filed, Li & Fung sent a fax to E & J, advising on Bradlees' behalf that Bradlees was in great financial difficulty and that E & J should begin the process of finding other purchasers for the goods manufactured for Bradlees. E & J understood the fax to mean that its contracts with Bradlees had been unilaterally cancelled.

Li & Fung sent cancellation notices to Leading, Lekim, and Maxlin on or about January 29, 2001, April, 27, 2001, and April 24, 2001, respectively, stating that the cancellation was due to the liquidation of Bradlees.

No Approval Sample Certificates relating to these transactions were produced during discovery except for Maxlin which produced Approval Sample Certificates relating to goods in the amount of \$305,400. That portion of the Maxlin claim was approved. Each of the Appellants, however, submitted affidavits stating that all conditions of the contracts had been fulfilled up until the date the contracts were cancelled.

As set forth above, Leading submitted an affidavit, post-discovery and after argument in the Bankruptcy Court, stating that it had found Approval

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Sample Certificates relating to a majority of its claims.

### ***The Standard of Review***

[1][2] A bankruptcy court's findings of fact are reviewed under a clearly erroneous standard. *Key Mechanical Inc. v. BDC 56 LLC (In re BDC 56 LLC)*, 01 Civ. 10169, 2002 WL 449856, at \*2 (S.D.N.Y. Mar.22, 2002), *aff'd*, 330 F.3d 111, 119 (2d Cir.2003); *Lomas Financial Corp. v. Northern Trust Co. (In re Lomas Financial Corp.)*, 117 B.R. 64, 66 (Bankr.S.D.N.Y.1990). Conclusions of law reached by a bankruptcy court are reviewed *de novo*. See *Gulf States Exploration Co. v. Manville Forest Prods. (In re Manville Forest Prods. Corp.)*, 896 F.2d 1384, 1388 (2d Cir.1990); *Lomas*, 117 B.R. at 66.

### ***The Applicable Law***

[3][4] State law governs the nature and amount of claims under Title 11:

Creditors' entitlements in bankruptcy arise in the first instance from the underlying substantive law creating the debtor's obligation, subject to any qualifying or contrary provisions of the Bankruptcy Code. See *Butner v. United States*, 440 U.S. 48, 55, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979); *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 161-162, 67 S.Ct. 237, 91 L.Ed. 162 (1946). The "basic federal rule" in bankruptcy is that state law governs the substance of claims, *Butner, supra*, at 57, 99 S.Ct. 914, Congress having "generally left the determination of property rights in the assets of a bankrupt's estate to state law," 440 U.S. at 54, 99 S.Ct. 914 (footnote omitted).

*Raleigh v. Illinois Department of Revenue*, 530 U.S. 15, 20, 120 S.Ct. 1951, 1953, 147 L.Ed.2d 13 (2000).

The state substantive law governing the sale of

goods, as in this case, is Article 2 of the Uniform Commercial Code ("UCC"). See *e.g., AEL Industries, Inc. v. Loral Fairchild Corp.*, 882 F.Supp. 1477, 1485 n. 6 (E.D.Pa.1995) (applying New York law). UCC § 2-102 provides, in pertinent part: "Unless the context otherwise requires, this Article applies to transactions in goods." UCC § 2-105 defines "goods" in pertinent part as:

all things (including specially manufactured goods) which are movable at the time of identification to the contract for \*571 sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action.

See also *Architectronics, Inc. v. Control Systems, Inc.*, 935 F.Supp. 425, 432 (S.D.N.Y.1996). Bradlees has not disputed that the basis for the claims was (i) goods sold and not paid for, and (ii) damages arising from the cancellation of contracts for the sale of goods. As noted in the Decision (D-2, pp. 2-3):

Prior to the Petition Date, [Appellants] and [Appellees'] agent in the Far East, [Li & Fung], engaged in a series of negotiations for the sale to [Appellees] of finished goods. The negotiations resulted in purchase orders or "Placement Memoranda." Upon filing their bankruptcy cases, the [Appellees] cancelled the Placement Memoranda.... The Claims were for obligations arising from those Placement Memoranda that were cancelled by [Appellees] after the Petition Date.

According to the Appellants, the substantive law that applies to the issue of the validity and amount of the claims is Article 2 of the UCC.

Bradlees maintained a "Vendor Logistics Program" that established its requirements for contracting with manufacturers and the issuance and acceptance of purchase orders for clothing or other merchandise. In accordance with the Vendor Logistics Program, the rights of the debtors and manufacturers are "governed by the laws of the Commonwealth of Massachusetts." Vendor Logistics Program ¶ 16. Each of the Appellants, however, have submitted

affidavits stating that they were never advised of the Vendor Logistics Program, nor was a copy of its requirements sent to them. Nevertheless, both Bradlees and the Appellants have relied upon state law, most particularly that of Massachusetts. The Appellants have done so because “the UCC of the States of Massachusetts and New York appear to be identical for all relevant purposes...” Appellants' Reply Brief, at 2 n. 2.

***There is a Material Question of Fact Whether Bradlees' Anticipatorily Breached the Contracts***

The Appellants' principal argument for reversal was the failure of the Bankruptcy Court to recognize that Bradlees had anticipatorily breached the contracts established by the Placement Memoranda. This issue was presented at the hearing of the summary judgment below in a somewhat abbreviated fashion and was disposed of in a footnote of the Decision.

Remarkably, Claimants' counsel argued that Debtors' cancellation was actually an anticipatory repudiation triggering section 2-610 of the Uniform Commercial Code and therefore, the Claimants were relieved of their duties to fulfill the conditions precedent. The Claimants have not offered any evidence to support their theory of an anticipatory breach. Moreover, this argument does not lie with the Claimants' avowal that they fully performed their obligations under the Placement Memoranda. If, as they claim, they satisfied the conditions precedent before the Debtors cancelled, then an anticipatory breach is not possible.

D-2, p. 7, n. 1.

While this principal issue raised on appeal by the Appellants was not presented in the same detail to the Bankruptcy Court in the opposition to Bradlees' motion for summary judgment, the argument that Bradlees had anticipatorily breached its contracts had been made to the Bankruptcy Court from at

least December 2001, as shown by motion papers submitted by Appellants.

\*572 The Decision relied on the failure of the Appellants to establish a requirement for payment, namely, the Approval Sample Certificates, and viewed that requirement as a condition precedent.

[5] The Appellants correctly note, however, the distinction between the formation of a contract and the requirements to establish liability under the contract. See *Oppenheimer & Co., Inc. v. Oppenheim, Appel, Dixon & Co.*, 86 N.Y.2d 685, 690, 636 N.Y.S.2d 734, 660 N.E.2d 415 (1995) (“Most conditions precedent describe acts or events which must occur before a party is obliged to perform a promise made pursuant to an existing contract, a situation to be distinguished conceptually from a condition precedent to the formation or existence of the contract itself.”); *A Treatise on the Law of Contracts by Samuel Williston* (4th Ed.), Richard A. Lord, ed., § 38:4, at 381 (hereafter, *Williston*) (“The fact that no duty of performance on either side can arise until the happening of the condition does not ... make the validity of the contract depend upon its happening.”). Any failure of the Appellants to submit Approval Sample Certificates does not, therefore, vitiate the validity of the contracts.

The Appellants do not dispute that the contracts at issue evidenced by the Placement Memoranda, required certain steps to be taken by Appellants in order for them to be paid. The most important step, of course, was the delivery of conforming goods to Appellees' agents as specified in the contracts and Appellants do not dispute that intermediate performance criteria are also set out in the Placement Memoranda.

Appellants argue, however, that the requirements that needed to be fulfilled in order for Bradlees to have an obligation to pay are not the same as the requirements that Appellants had at the time of the cancellation of the contract. The Appellants have argued that they have fulfilled the latter. It was therefore incorrect of the Bankruptcy Court to state

Appellants were claiming “that they fully performed their obligations under the Placement Memoranda.” D-2, p. 7, n. 1.

[6] Uniform Commercial Code § 2-610, entitled “Anticipatory Repudiation,” in relevant part, provides:

When either party repudiates the contract with respect to a performance not yet due the loss of which will substantially impair the value of the contract to the other, the aggrieved party may

\* \* \* \* \*

(b) resort to any remedy for breach ...; and

(c) in either case suspend his own performance or proceed in accordance with the provisions of this Article on the seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods (section 2-704).

General Laws of Massachusetts, Chapter 106, Section 2-610. Outside of the context of § 2-610, “Massachusetts has not generally recognized the doctrine of anticipatory repudiation...” *Cavanagh v. Cavanagh*, 598 N.E.2d 677, 679, 33 Mass.App.Ct. 240, 244 (1992).

The critical issue between the two parties is whether the Appellants had fulfilled the conditions precedent required under the contracts at the time the contracts were cancelled. The Bankruptcy Court elided the difference between conditions precedent to the Appellants being paid under the contract and conditions precedent at the time of cancellation. *See* D-2, p. 7. It therefore did not consider that the failure to produce an Approval Sample Certificate or other evidence of sampling may not necessarily indicate the nonperformance\*573 of a condition precedent which the Appellants were obligated to perform before the contracts were cancelled.

[7][8][9] Bradlees' cancellation of the contracts excuses any further performance on the part of the Appellants if the Appellants have fulfilled all con-

ditions precedents up to that point:

Where one party to a contract expressly or by implication repudiates the contract before the time for his or her performance has arrived and before a default justifying the repudiation has occurred, the other party is relieved from performance on his or her side. In other words, an anticipatory repudiation of contractual duties by one party to the contract excuses performance by the other.

*Williston*, § 39:37, at 663; *see also The Eliza Lines*, 199 U.S. 119, 129, 26 S.Ct. 8, 50 L.Ed. 115 (1905) (“By the general principles of contract, an open cessation of performance, with the intent to do no more, even if justified, excuses the other party from further performance on his side.”); *Fortune v. National Cash Register Co.*, 373 Mass. 96, 107, 364 N.E.2d 1251 (1977) (“Where [one party] repudiates or nullifies procedures established by the contract, the [other party] is excused from performance of the conditions imposed on him.”); UCC § 2-610(c) (when anticipatory repudiation occurs “the aggrieved party may ... suspend his own performance...”); Restatement (Second) of Contracts § 253(2). The fact that the contract may contain conditions precedent the performance of which post-date the cancellation does not alter this proposition. *See Williston*, § 39:39 (“if before the time for the performance of a condition by a promisee, the promisor leads the promisee to stop performance by personally manifesting an intention not to perform, even though the condition is fulfilled, ‘it is not necessary for the first to go further and do the nugatory act.’ ”) (quoting *Jones v. Barkley*, (1781) 2 Doug (Eng) 684).

[10][11][12][13] An anticipatory breach has not occurred, however, if the Appellants “failed to satisfy one or more conditions provided in the [contract], in which case [Bradlees] never became obligated to close the transaction.” *Rus, Inc. v. Bay Indus., Inc.*, 322 F.Supp.2d 302, 309 (S.D.N.Y.2003). Appellants argue, without supporting authority, that Bradlees was required to have stated at the time of cancellation that the failure to fulfill conditions pre-

cedent was the cause of cancellation. They argue that because Bradlees gave no reason for cancellation (other than its financial difficulties), an anticipatory repudiation can be found on those facts alone. It is sufficient, however, in order to demonstrate that an anticipatory breach did not occur, to show the failure of applicable conditions precedent, whether or not that failure was stated as a reason by Bradlees, or indeed whether the alleged failure was the reason for cancellation. The failure of a condition precedent demonstrates that the non-repudiating party is not “ready, able and willing to perform” under the contract, *Vander Realty Co. v. Gabriel*, 334 Mass. 267, 271, 134 N.E.2d 901, 903 (Mass.1956), which is a necessary element of a cause of action for anticipatory repudiation.<sup>FN1</sup>

FN1. The Appellants argue, incorrectly, that the language of § 2-610 exempts them from the “ready, able and willing” requirement. Although the non-repudiating party may suspend performance following cancellation, the Appellants are required to show that performance would have happened absent cancellation. See *Decor by Nikkei Intern., Inc. v. Federal Republic of Nigeria*, 497 F.Supp. 893, 908 (S.D.N.Y.1980), *aff'd sub nom. Texas Trading & Mill. Corp. v. Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir.1981) (holding that after the enactment of § 2-610, “New York courts appear to have continued to require proof of readiness, willingness, and ability to perform.”) (citing *Ufitec, S.A. v. Trade Bank & Trust Co.*, 21 A.D.2d 187, 249 N.Y.S.2d 557 (1st Dep't 1964), *aff'd*, 16 N.Y.2d 698, 261 N.Y.S.2d 893, 209 N.E.2d 551 (1965)). Massachusetts caselaw does not address this issue.

\*574 [14][15][16] The burden to establish that an anticipatory breach occurred is on the party asserting it. *PDM Mechanical Contractors, Inc. v. Suffolk Const. Co., Inc.*, 35 Mass.App.Ct. 228, 618 N.E.2d

72, 77 (1993) (“the judge correctly placed the burden upon [the nonbreaching party] to show that it could have met the conditions of the contract, rather than requiring [the breaching party] to prove that [the nonbreaching party] lacked the ability to [perform]”); *In re Friday Afternoon, Inc.*, 73 B.R. 940, 943 (Bankr.D.Mass.1987) (nonbreaching party “has the burden of showing that it was ready willing and able to” perform). As an essential element of the doctrine, the party spurned by an anticipatory breach must demonstrate by as preponderance of the evidence that he had the ability to tender performance when due. *Reprosystem, B.V. v. SCM Corp.*, 522 F.Supp. 1257, 1278 (S.D.N.Y.1981), *aff'd in part, rev'd in part on other grounds*, 727 F.2d 257 (2d Cir.), *cert. denied*, 469 U.S. 828, 105 S.Ct. 110, 83 L.Ed.2d 54 (1984). “[U]nder both common law and the UCC, the spurned [party's] right of action for anticipatory breach depends on his shouldering the burden of demonstrating his readiness, willingness and ability to tender performance when due ...” *Id.*; see also *Tradax Energy, Inc. v. Cedar Petrochemicals, Inc.*, 317 F.Supp.2d 373, 377 (S.D.N.Y.2004) (holding that under § 2-610 and New York law, “the party asserting the anticipatory repudiation bears the burden of persuasion.”).

It is not disputed that valid contracts were formed by the Placement Memoranda,<sup>FN2</sup> and the Bankruptcy Court found that “[u]pon filing their bankruptcy cases, the debtors cancelled the Placement Memoranda.” D-2, at 2. See also *In re Chateaugay Corp.*, 104 B.R. 637, 644 (S.D.N.Y.1989) (“The Uniform Commercial Code, in comment 1 to section 2-610, ‘appears to retain the common law requirement that a statement of intention not to perform must be positive and unequivocal.’”) (quoting J. White & R. Summers, *Uniform Commercial Code* 239 (3d ed.1988)). Nor is there a question that the requirement of § 2-610 that the alleged repudiation “substantially impair the value of the contract to the other” is fulfilled, as the contracts were cancelled in their entirety, resulting in claims totaling nearly three million dollars after mitigation.

FN2. According to the Decision, the Appellants also argued before the Bankruptcy Court that “confirmed worksheets” negotiated between the Appellants, Li & Fung and, “occasionally, a representative of [Bradlees]” were “binding upon both parties without any other contracts or instruments being signed.” D-2, pp. 4-5. The Bankruptcy Court dismissed this argument without discussion, holding that the Placement Memorandum “is the underlying contract upon which the Claimants have based their claims.” *Id.* at p. 7. The Appellants have not contested this holding on appeal, apparently conceding that the only valid contracts are those formed by the issuance of Placement Memoranda.

[17] Bradlees argues that the Appellants have failed to meet their burden of establishing anticipatory repudiation because Appellants did not present any evidence “in the Bankruptcy Court to establish that [Bradlees’] purported breach occurred prior to the time when Appellants were required to obtain approvals of samples.” Bradlees’ Brief at 5. In response, the Appellants argue that either samples were not required to be approved\*575 before cancellation took place or that samples had been submitted and approved. Documentary evidence of the approval of samples was not submitted to the Bankruptcy Court until after the summary judgment motion was *sub judice*.

The record on appeal does not permit a clear determination as to when samples were required to be approved by Bradlees for each of the contracts that are the subject of Appellants’ claims. The one Placement Memorandum in the record is dated September 13, 2000, and requires Maxlin to ship its merchandise by November 20, 2000. Bradlees did not cancel its contracts with Maxlin until April 2001. Because the approval of samples would necessarily precede the shipment date, such approval would be a condition precedent for the contract evidenced by this Memorandum. For such a con-

tract, and any other contract with a required shipping date which pre-dates the relevant notice of cancellation, the Appellants are required to provide evidence of their compliance with the stated conditions. Although the Appellants state that they have “provided the actual correspondence ... establishing the contracts (the Placement Memoranda) ...” Appellants’ Reply Brief at 3, the record on appeal contains only the one Placement Memorandum negotiated between Maxlin and Bradlees.

Bradlees also argues that the testimonial evidence submitted by Maxlin and Lekim is insufficient to establish that samples were submitted or approved, and that Leading and E & J have not even attempted to submit such testimony. It is true that in the depositions of the representatives of Maxlin and Lekim, there is no statement that the samples of the goods which are the subjective of their respective claims were actually submitted or approved. But as noted above, it is also not clear from the record that the submission or approval of samples was required on all relevant contracts at the time of cancellation.

In the absence of evidence in the record on appeal of when samples were required to be submitted and/or approved, or when an Approval Sample Certificate should have issued, it is impossible to tell when any of the conditions precedent to the contract became effective, or if the Appellants were required to show their willingness to perform under the contract by the submission of samples. Construing the lack of evidence in Appellants’ favor, as is required on a summary judgment motion by Bradlees, there is a genuine issue of material fact as to whether Appellants were required to have fulfilled any conditions precedent at the time of cancellation. The decision of the Bankruptcy Court is accordingly vacated and remanded for a determination as to when sample submission or approval was required in relation to the date the contracts were cancelled.

Although the language of the Placement Memoranda contains no specific date on which approval of samples is required, approval must occur at least by

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the shipment date listed on each Memorandum, and likely somewhat earlier. Even if the submission or approval of samples is not an express or even a constructive condition precedent, the failure to submit samples or to have them approved at the time of the cancellation may constitute evidence of an unwillingness or unreadiness to perform under the contract.

Because the motion is remanded for further proceedings, it is not necessary to determine whether the Bankruptcy Court properly ruled that the Appellants could not supplement the record after the motion was *sub judice*.

The Bankruptcy Court held that requirements in letters of credit issued by a \*576 third party bank for the account of Bradlees to their agent Li & Fung and transferred to Claimants applied to obligations of the parties under the contracts of sale between Bradlees and Appellants. The most important of these obligations was the presentation of an Approval Sample Certificate. The Bankruptcy Court further held that submission of the Approval Sample Certificates to Li & Fung was a condition precedent under the contracts between Appellants and Bradlees, and that the Appellants' failure to produce any certificates was further proof that the Appellants had failed to fulfill the condition.

[18] As discussed above, the fact that the certificates may have been conditions precedent to Bradlees' obligation to pay the Appellants does not mean that the submission of the certificates was a condition precedent when the contracts were cancelled. Apart from the issue of how the requirements in the Letter of Credit were interpreted, however, it was not improper for the Bankruptcy Court to have considered the Letters of Credit as setting out the requirements in order for the Appellants to be paid. Although, as Appellants argue, the Letter of Credit may be a separate contract from the Placement Memorandum, they may be read together as a single agreement “[w]here two or more contracts are part of a single transaction and appear in combination ... to constitute the entire understand-

ing of the parties...” *Kittredge Equip. Co., Inc. v. Ted's Victorian Pub & Restaurant, LLC*, No. 01WAD002, 2001 WL 1012205, at \*2 (Mass.App.Div. Aug.28, 2001).

The Appellants argue that the UCC and the “Uniform Customs and Practice for Documentary Credits, 1993 Revision, ICC Publication No. 500,” International Chamber of Commerce, 1993 (the “UCP”), to which the letters of credit are subject, both require that letters of credit be treated independently from the underlying contract because “[a]n issuer [bank of a letter of credit] is not responsible for ... (1) the performance or nonperformance of the underlying contract, arrangement, or transaction.” UCC § 5-108(f); *see also* UCC § 5-103; UCP Articles 3a, 4.

[19][20] However, the UCC and UCP provisions cited by the Appellants merely stand for the proposition that, as a general rule, the issuer must honor a letter of credit when presented with the proper drawing documents regardless of any disputes that may exist with respect to the underlying agreement. “[T]he doctrine of independence protects only the distribution of the proceeds of the letter of credit. It prohibits an attack on the issuing bank's distribution to the beneficiary and does not address claims respecting the underlying contract.” *In re Graham Square, Inc.*, 126 F.3d 823, 827-28 (6th Cir.1997). The Appellants' invocation of the doctrine of independence is inapposite here as the dispute in this litigation relates not to distribution of the proceeds of any of the Letters of Credit but to the underlying requirements which Appellants must fulfill for Bradlees to be obligated to pay.

[21] Because the Approval Sample Certificates are provided to the Appellants by Bradlees, however, the failure to by Bradlees to issue a certificate, or to acknowledge the issuance of a certificate, when all other requirements for performance under the contract have been fulfilled by the Appellants shall not prevent the establishment of a claim for anticipatory breach. *See Kooleraire Service & Installation Corp. v. Board of Ed. of City of New York*, 28

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N.Y.2d 101, 106, 268 N.E.2d 782, 784, 320 N.Y.S.2d 46, 48 (1971) (“The general rule is, as it has been frequently stated, that a party to a contract cannot rely on the failure of another to perform a condition precedent where he has frustrated\*577 or prevented the occurrence of the condition.”); Restatement (Second) of Contracts § 245.

***Conclusion***

For the reasons set forth above, the decision of the Bankruptcy Court is vacated and remanded for a determination as to when the submission or approval of samples listed in the Placement Memoranda was required in relation to the date the contracts were cancelled.

It is so ordered.

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