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STATE OF WASHINGTON  
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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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**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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## C SUMMARY INTRODUCTION

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

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

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

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<sup>1</sup> RAP 13.4 (b)(4) provides as follow:

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

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

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

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

The trial court reached its decision based on Plaintiff's insufficient pleading, unsigned depositions, conflicting affidavit, changing legal theory and issues raised in the first time in reply brief. In addition, the court was also influenced by the Plaintiff's misguided interpretation of the "independent principle" as promoting multiple law sue for the same transaction and piece-meal interpretation of integrated contractual agreement. The trial court did not provide any tangible legal analysis and cite any authorities. As such the summary judgment was premature. The appeal will be the first time that insufficient evidences can be raised.

First of all, the trial court granted the Plaintiff's Motion for Partial

Summary Judgment on his breach of contract claim even though the mover, who had the burden to prove that no genuine legal issues exist, failed to mention RCW 62A.5-115, RCW 62A.2-325 and two other affirmative defenses in the motion. Instead, the mover raised RCW 62A.2-325 issue for the first time in his reply memorandum. The court ruled on the contract breach claim but failed to identify the Plaintiff's default on *conditions precedent* and **the contract** that was the breached.

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

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<sup>2</sup> This is a potential legal problem that the SIM failed to address for the purpose of Summary Judgment. Discharge of Underlying Contractual Obligation and its effect on Judicial Estoppel. A bankruptcy petitioner who fails to disclose a potential asset, the accrual of which depends on the party's fulfillment of a contractual obligation that is discharged in the bankruptcy, may be judicially estopped from subsequently pursuing an action to obtain the benefit of the asset. *DeAtley v. Barnett* 479 127 Wn. App. 478.

<sup>3</sup> For example, Alan Sidell's affidavit is inaccurate and may be based on hearsay, CP 104:2. Giant never received the Originals of invoices, CP 137:page 189, and the metals. The record only indicated that the originals were sent to US Bank, CP 348:page 74.

Lastly, to compensate for his shortcoming in facts and issues, the Respondent engaged in multiple court rule violations and witness interference. All these bad behaviors appeared to be paid off when, before the final judgment, the trial court abused its discretion and granted all motions and (proposed) Orders from the Plaintiff and denied (or ignored) all motions and (proposed) Orders from the Defendant without providing any reason and explanation. For example, the court granted leave to the Plaintiff to file over-length reply brief that raised new issues for the first time while rejected the Defendant's several request/motions for leave to file amendment, CP 660. As such the trial court's decisions are unfair and unjust.

## **D ASSIGNMENT OF ERRORS AND ISSUES**

### **a. ASSIGNMENT OF ERROR**

- 1. The Superior Court erred in granting partial summary judgment.**
- 2. The Superior Court erred in granting final judgment, CP 609-616.**
- 3. The Superior Court erred in denying the Defendant's Motion regarding seasonable notification, CP 465.**
- 4. The Superior Court abused its discretion in implicitly granting leave for plaintiff to file over length reply brief and considering issues raised for the first time there but denying the Defendant's request for response, CP 660.**
- 5. The Superior Court abused its discretion in implicitly denying the Defendant's motion to reconsider without providing any reason,**

**CP 321-335.**

**6. The Superior Court abused its discretion in denying the Defendant's Motion to file amended answer without providing any reason, CP 641 when necessary parties to contract (SIMEXCO, QIANGSHENG) were not jointed.**

**b. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.**

**1. Did the superior court err in considering and granting summary judgment on issues (RCW62A.2-325) raised for the first time in the reply brief without deciding whether Seller had performed conditions precedent, RP 40:20(ASSIGNMENT OF ERROR 1-6)?**

**2. Did the court err in granting the motion for partial summary judgment, CP 479, on breach of "Contract" claim when it failed to identify "*the contract*" and the Plaintiff's breach of contractual duty(ASSIGNMENT OF ERROR 1-6)?**

**3. Were the claims barred by laches and the one-year statute of limitation imposed by RCW62A.5-115(ASSIGNMENT OF ERROR 1-6)?**

**4. Must the court allow trial on affirmative defenses (Plaintiff's damage were caused by Plaintiff or third parties, CP 334:23,failure to state a claim upon which relief can be granted, CP 299:23) that Plaintiff 's motion did not address(ASSIGNMENT OF ERROR 1-6)?**

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

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

**7. Did the Respondent fail to prove that the Letter of Credit payment documents were duly presented and seasonable notice required by RCW62A.2-325/RCW62A.5-115 was given (ASSIGNMENT OF ERROR 1-3)?**

**8. Was the Pleading Insufficient when the *new contract*, CP 90:7, in the motion for summary judgment was not the *true and correct***

**contract, CP 68:11, in the amended complaints (ASSIGNMENT OF ERROR 1)?**

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

**10. Did the superior court err in saying that Giant should collect from Bank, RP 38, when Giant did not have standing to collect from issuer and the applicant after assignment of contract right (ASSIGNMENT OF ERROR 1, 2 and 6)?**

**11. Did the superior court err in saying that there was not a proper letter of credit, RP 21, when even the Plaintiff agreed that a proper letter of credit was opened (ASSIGNMENT OF ERROR 3)?**

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**13. Did the superior court err in saying that the letter of credit cannot affect the original contract, RP 36, when the letter of Credit itself was the conforming contract that SIM relied upon for its delivery and the letter of credit imposed the one-year statue of limitation(ASSIGNMENT OF ERROR 1, 2)?**

**14. Did the superior court err in accepting inadmissible evidence—unsigned deposition transcript in Supplemental Declaration of Todd Wyatt, CP 1-44 (ASSIGNMENT OF ERROR 1, 2)?**

**15. Did the superior court err in stating that bank's notice for payment delay is the "Seasonable Notice" required by RCW 62A.2-325, RP at 41:7 (ASSIGNMENT OF ERROR 1, 3)?**

**16. Did the Superior Court abuse its discretion in denying Giant's motion for continuance when the respondent failed to provide six day motion notice in violation of LCR7, CP 506 (ASSIGNMENT OF ERROR 2)?**

**17. Did the Superior Court err in granting final judgment without any ruling or explanation on the Defendant's motion for reconsidering, CP507, 321 (ASSIGNMENT OF ERROR 2, 5)?**

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

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

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## **E STATEMENT OF THE CASE**

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

SIM was a dominating player in the Seattle area shredded scrap metal market. In around July 2005, in order to promote trade and to reduce the US trade deficit with China, Giant approached SIM on behalf of some Chinese companies including SHANGHAI QIANGSHENG IMPORT & EXPORT CO. (QIANGSHENG), CP 185:46A, to purchase 2,000Metric Ton of shredded steel scrap. CP 60-62(AP4-6). The contract GMHD07092005 was signed on July 13, 2005, *Id.*

This contract price at \$175 per metric ton was an attractive price and very soon the market for scrap metal started to rise quickly and stayed high for the next two-three years, CP 158:24 (Appendix(AP) at 26). This turned out to be the root cause for all of the troubles in this transaction. As such Giant soon felt the excuse and extra demand from SIM. CP 132:Page163, CP134:Page173.

After Giant signed and faxed back the contract, SIM wrote by hand on the contract “No L/C on Friday, No deal!!!” and faxed it to Giant. CP 60-62. By the time Giant received the fax, it was nearly the end of Wednesday afternoon.

Giant understand these extra words as confirmation that only *letter of credit (LOC)* was the allowed payment instrument and no cash was to be used because SIM would not trust a new customer. Giant then told SIM staff that LC will be open as soon as possible by the bank rule, CP 129:P113, CP 128:page 112, and did not receive any verbal or written objection at the time. On July 21, 2005, the first LOC (DTSGSM302305) was sent to SIM for approval. CP 246-248. Then SIM requested multiple

amendments, CP 251-253, to move back the shipment date and to make the LOC terms simpler.

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

Some definitions are essential to describe the relationship among parties in a transferable LOC. Letters of credit are well described by the Fourth Circuit:

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

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

When an LOC is expressed designated as “transferable”, RCW62A5-112(1), the beneficiary may request the bank to transfer all or part of the credit due to one or more transferees (third parties) up to the total value of the original LOC. The respective rights under the credit are passed to the transferee who ***must*** comply with the terms and conditions of the transferred credit in order to receive payment. A transferable LOC is

often used when the beneficiary is not the ultimate supplier of merchandise but the middleperson between the supplier and a buyer.

A transfer effectively substitutes the *transferee* (in this instance SIM, which became *second beneficiary*) for the *first beneficiary* (Giant). The transfer creates a ‘*direct relationship*’ between the issuer (Bank) and the second beneficiary (SIM). *Banca Del Sempione v. Provident Bank of Maryland*, 160 F.3d 992 (4<sup>th</sup> Cir. 1998)

In the heat of the contract negotiation, SIM was not confident about its capability to handle Letter of credit and was about to cancel the whole contract, CP 532. On July 28, 2005, Dr. Xie from Giant and Alan Sidell, President of SIMCO (at that time Executive President of SIMCO) met to express Giant’s concern on SIM’s delay in performance, CP284. That meeting could be described as “tense” and “unequal bargain power”, CP 132:page163. SIM wanted to cancel or scale down the contract but Giant did not agree with the request, CP 134:page 173.

At or around that meeting, Giant and SIM exchanged and signed some forms. Giant agreed to accept 1,000MT immediately, with another 1,000 MT to be delivered at a future time, CP 262. SIM issued numerous sales order for this transaction. The contract (GMHD07092005) was never mentioned in those forms. Giant understood and consented that these forms as the internal work orders between SIMCO and SIMEXCO and all the work orders as a whole would implement the contract

GMHD07092005. Giant was allowed access to some forms CP 178, CP 181 and was refused to others<sup>4</sup>. So Giant can not consent to and sign on to forms that were not given to us as whole.

SIM delayed a few days and decided that they did not like LOC DTSGSM302305 and asked Giant to cancel it and to consider cash deal, CP 266. Giant then made the position clear that we shall stick to LOC as the only possible or absolute payment instrument or no deal, CP 265. Giant then forward another LOC (LC0502745YK) for the total 2,000MT contract (GMHD07092005). For this one, SIM did some more amendments, CP 265, and the final transferred version that SIM finally found acceptable is in CP 271-275. The master version of this LOC is in CP 255-260<sup>5</sup>. By accepting this LOC, SIM committed itself as shipper for C & F delivery to Shanghai which is part of the LOC terms.

For LOC (LC0502745YK), the **applicant/customer/buyer** is

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<sup>4</sup> Giant received Sales Order 4789 (CP 181). But Sales Order 4740, 4784 (which were revealed by CP 178) and Sales Order 4827 (mentioned in CP 106) were within SIM's knowledge. These work orders would show that SIM got internal orders for 2,000 MT of scrap but only completed 1,000 MT. i.e. there were some incomplete work orders. In fact, SIM's invoice D42527, CP 108, indicated that for work order 4740, only two containers were delivered and 48 containers were still outstanding. This work order 4740 was the "new contract" designated in SIM's motion for summary judgment. CP 90.

<sup>5</sup> From the master LOC (CP 255-260), Giant transferred the amount for 1,000MT to SIM (per SIM's demand) with the amount for another 1,000 MT to be transferred any moment SIM gave permission. For the 1,000MT value transferred, only SIM can present the documents to Wells Fargo as the second beneficiary. However, Giant still had the right to present documents under the master LOC for the remaining credit. So if SIM really believed that Giant was the buyer and provided all payment documents to Giant, Giant can still get paid by presenting documents to Wells Fargo before the deadline (for this case September 15, 2005, CP 238).

QIANGSHENG; the **issuer** is Bank of Shanghai; the **first beneficiary** is Giant, CP 184:50 and the **second beneficiary/Seller** is SIMEXCO, CP 184:59.

With this LOC, QIANGSHENG appeared as the principle/applicant/customer/buyer<sup>6</sup> and Giant as the agent. The shipments in this case were performed according to the terms listed in this LOC. Giant transferred *duty of payment* to QIANGSHENG and *duty of goods delivery and document presentation* to SIM.

So this LOC has augmented the sales contract and should read together to understand the agreement. Contract(GMHD07092005) + LOC (LC0502745YK) +UCP +UCC = the agreement (*the contract*), which shall be binding upon both parties.

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

On August 30, 2005, two containers were shipped and a bill of lading (NA1080776) issued, CP 542-544. On August 31, 2005, 41 containers shipped and a bill of lading (008610) was to be issued by the ship forwarder CU Transport<sup>7</sup>, CP 237. However, there were some

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<sup>6</sup> There are special terms in this LOC: 46A: 2 – Full set of clean on board ocean bills of lading consigned to **SHANGHAI QIANGSHENG IMPORT & EXPORT CO., ltd.** .....; 4 – Beneficiary’s certified copy of fax dispatched to **SHANGHAI QIANGSHENG IMPORT & EXPORT CO., ltd.**.....

<sup>7</sup> In this case, CU Transport was the forwarder for *QIANGSHENG*. Giant did not have contractual agreement with CU Transport or any other ship forwarders as it the case with many exporters. Giant never saw the original bill of lading from this forwarder prior to this shipment since this was the first time we used CU Transport. The relationship  
Footnote continued on next page

discrepancies in the draft bills of lading and need correction. After several rounds of intense communications, the final bill of lading was received on September 15, 2005, CP 545-546.

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

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

SIM got the final chance and was just one step away from the goal—Wells Fargo. But for some reason, SIM decided to make a detour in the last minute.

SIM did not give Giant "Original Invoice" and "CCIC inspection report" among others, CP 238. SIM also declined Giant's offer to drive to

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Footnote continued from previous page  
between shippers (SIM and Giant) and CU Transport was the same based on the disclaimers printed on the back of the original bill of lading CP 537-541.

Wells Fargo together but promised to deliver the documents itself on the same day, Id. It was later recognized that SIM delivered documents in two lots to US Bank, CP 314, and CP 316 on September 15, 2005 and September 21, 2005 respectively. In fact, SIM admitted such delay and use the fictitious “one parcel rule”, CP 53:9, to justify its action. Such two-week delay in presentation was the reason, CP 239:9 that the bank of Shanghai repudiated the LOC payment<sup>8</sup>.

SIM’s decision not to make that short drive to Wells Fargo was a failure of consideration because SIM botched the last opportunity to fulfill its contractual duty of duly presentment against Giant’s stern warning and offering to help. So SIM was estopped from alleging that Giant was responsible for the late presentment, CP 300:9. More details for such delay were within the knowledge of the Respondent who failed to remove the delay issue from the list of material facts. For one thing, SIM decided to ignore this line in CP186:47B: “This letter of credit is restricted for presentation of documents to Wells Fargo HSBC Trade Bank.”

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

Bank of Shanghai repudiated the LOC payment and sent Giant via

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<sup>8</sup> Only Bank of Shanghai as issuer could decide whether to pay or not. US Bank and Wells Fargo, as advisor, simply just received and passed on the documents. From CP 316, some documents were sent on September 21, 2005 which was too late for even sending directly to Wells Fargo. So the issue is *delay* rather than which Bank to send the presentment. SIM also distorted Dr. Lin Xie’s deposition, CP 85:23. Xie just wanted SIM to go to Wells Fargo at same moment. Wells Fargo just needed those documents in the possessions of second beneficiary but never specifically mentioned who must do the presentation.

Wells Fargo some notice saying that the LOC has not being paid as of that day, CP 139:12.

Following that Giant hired Mr. Robert J. Adolph to conduct some legal action. SIM also considered Mr. Adolph as being here to assist Giant and SIM, CP 352 and had frequent private communications with the Adolph Law Group, CP 353, 33-35. Then Giant and SIM had several meeting to find solutions. Giant would like that SIM fulfill its obligation for the 2,000MT contract which was the main reason that QIANGSHENG did not waive those discrepancies to Bank of Shanghai, CP 7:page234, CP133:page167. 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. SIM's failure to deliver 2,000MT put QIANGSHENG in default and Giant in difficult position, CP 133:page 167.

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

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

On November 2, 2005, Giant's Lawyer sent a legal letter to SIM, CP 591-592, demanding that SIM took responsibility for its failure to

timely present documents. No respond was received, CP 7:page 235, from SIM on this letter<sup>9</sup> and Giant considered SIM's silent as consent.

**d. Respondent changed his position and sued the first beneficiary.**

On June 11, 2007 SIM's new attorney wrote to Giant, CP 593-594 demanding payment and providing some response to the Giant's November 2, 2005 letter. This was the first notice from SIM seeking direct payment from Giant. So SIM's notice for payment was sent almost two years after the payment repudiation by Bank of Shanghai. SIM decided to sue the weak and vulnerable instead of the party at wrong. The amended complaint, CP 67-70, was filed on February 28, 2008. The complaints contained four causes of action (breach of contract, unjust enrichment, fraud and negligent misrepresentation). Giant filed the answer to amended complaints on March 13, 2008, CP206-208 (AP 1-3). In the answer, CP 207:2.4, Giant clearly disputed the assertion that SIM fully performed the contract and Giant breached the contract, CP 68:2.4. Giant also asserted affirmative defense of "fails to state a claim upon which relief can be granted", CP 208, "doctrines of waiver and estoppel", "doctrines of unclean hands" and "failure to mitigate damages". This equity and estoppel defenses will be explained more precisely in the Argument

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<sup>9</sup> Giant paid Adolph Law Group for the legal service at that time and SIM considered Adolph as working for them as well CP 352. There was mutual understanding that both parties were collecting from Banks and applicant. Giant was never informed by SIM that they would collect from and charge Giant 12% legal interest on top of the principle, CP 471-473.

section under the doctrine of laches. Around this time, SIMEXCO, the second beneficiary, CP 184:59 (AP 12), was dissolved<sup>10</sup>, without sending the required RCW 23B.14.060 notice to Giant for “known claims”, *Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co.* 158 Wn. 2d. 603. Giant considered this as SIM’s attempt to evade liability.

SIM filed the motion for Partial Summary Judgment on August 29, 2008, CP 79-97 in which SIM used Dr. Lin Xie’s deposition and Alan Sidell’s affidavit as the primary source of evidence. The motion was timed in a way that Giant could not use three out of the four depositions conducted three-four weeks before, CP 660:23. SIM also refused Giant’s request to postpone the summary judgment hearing to allow additional time to conduct discovery, CP 661:2.

The motion requested summary judgment on two causes of action (breach of contract and unjust enrichment). Giant pointed out in its response that it was SIM who breached its contractual obligation when it failed to timely present documents, CP 294:17. Then, Giant enumerated and explained in great details affirmative defenses it properly asserted in

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<sup>10</sup> It was Alan Sidell who, during deposition, disclosed the fact that SIMEXCO was dissolved. Such details were verified by the Washington Secretary of State’s official web site. [http://www.secstate.wa.gov/corps/search\\_detail.aspx?ubi=600401318](http://www.secstate.wa.gov/corps/search_detail.aspx?ubi=600401318)

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

Giant could not use such information in its Response for Summary judgment because Alan’s deposition was not signed or signature waived and therefore not part of the record for Giant’s Response. Even though now this is in the Record on Appeal folder, Giant cannot cite it here because of the Motion to strike from the Respondent and the court order.

the amended answer like estoppel, CP 299, waiver, CP 300, unclean hand CP301 and failure to mitigate damages, CP302. Most importantly, Giant provided detailed analysis to show that SIM was estopped from collecting money directly from Buyer by RCW 62A.2-325 because SIM breached its obligation to duly present document, CP 293-297.

Because the appellant pointed out some genuine issues (including RCW 62A.2-325) that the Motion for summary judgment failed to address, SIM filed its reply brief, CP 44-53, to contain issues raised in the first time including RCW 62A.2-325 and “*Defendant’s course of conduct modified his contractual obligation*”, CP 51:22. In the Supplemental Declaration of Todd W. Wyatt, CP 1-43, SIM used Alan Sidell’s deposition that was not signed. CP 24-29. The trial court considered issues raised in the first time in SIM’s reply brief and granted summary judgment in favor of respondent on the breach of contract and denied the unjust enrichment claim, CP 479 (AP 78).

Giant filed a motion for reconsideration on October 6, 2008. CP 324-335(AP 66-77). The court did not have any response or explanation on this motion after repeated requests from both parties.

The trial court rejected Giant’s motion for “Seasonable Notification” on November 10, 2008 and once again without reason and explanation, CP 465 (AP 81)

The trial court refused Giant's request <sup>11</sup> to strike SIM's motion for final judgment, CP 507, for KCLR 7<sup>12</sup> violation and also gave no response to Giant's motion for extension of time to file response (this motion disappeared in the court system).

The trial court denied Giant's motion to file amended answer on January 28, 2009 in the same manor: No reason and no explanation, CP 641 (AP 87).

**e. Declaration of Dr. Lin Xie to clarify some hearsay**

I, Lin Xie, under penalty of perjury pursuant to the laws of the state of Washington, declare and states as follows:

1. I am over the age of 18 years and was President of "Giant International Metal Resources" ("**Giant**"), and have *personal knowledge* of the facts contained in this declaration, CP 234.

2. On September 15, 2005, Giant attempted to deliver the bill of

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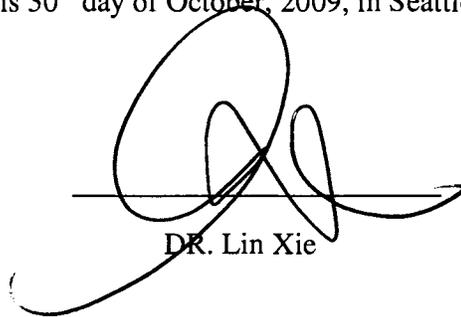
<sup>11</sup> On December 2, 2008, Giant's attorney received SIM's Motion for voluntary partial dismiss and entry of final judgment, CP 522, only five court days before the hearing date December 9, 2008. Giant never agreed to be served by fax, and the parties have previously delivered original documents to each other within the time constraints of the civil rules, CP 521. After repeated complaints from the defendant and the fact that the Giant's consul was in the process of withdraw from appearance and Giant was yet to obtain the legal files, the respondent push to a new hearing date of December 10, 2008. But the new notice was not received by mail before 12:00 moon On Monday, December 8, 2008 when the defendant's response was due. Plaintiff's motion does not comply with KCLR 7.

<sup>12</sup> Rule 7 requires a party filing a motion to "serve and file all motion documents no later than six court days before the date the party wishes the motion to be considered." KCLR 7(b)(3). Civil Rule 5 defines how the document may be served: Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, filing with the clerk of the court an affidavit of attempt to serve.

lading etc. to Wells Fargo Bank, CP 238. The bank advised that they need all of the documents, CP 185(AP13), listed in the letter of credit from the second beneficiary (SIMCO). Many of those documents were still possessed by SIMCO. I did not recall that the Wells Fargo Bank specifically required certain person or entity to present those documents but rather the bank just wanted those documents quick.

3. Giant never received the originals of Invoices, CP 335, as shown in CP106-108 nor did Giant receive any scrap metals in the "SHIP TO" address listed in those invoices, CP 298, CP 137. Giant never received the CCIC inspection certificate as well as other original documents from SIMCO, CP 348. Giant got copy of those documents through discovery. We were told by Wells Fargo Bank that all the original documents were returned to the second beneficiary and SIMCO is still in possession of them as of today, CP 335.

**EXECUTED** this 30<sup>th</sup> day of October, 2009, in Seattle,  
Washington.



DR. Lin Xie

## **F ARGUMENT**

### **a. Summary**

Giant is compelled to show here that the trial court's ruling is

unfair and unjust. Giant was supposed to make \$3,000-\$4,000, CP 515, commission as an agent helping a big scrap yard SIM to open its export market. Giant did all it was supposed to do under the laws and contract. But now the court ordered Giant to pay up to \$200,000.00, CP 615-616(AP 85-86) (principle and interest when this appeal is done) for damage caused by SIM's negligent and contract breach and without a chance for a fair trial.

*L. Lawrence, Anderson on the Uniform Commercial Code, Vol. 7A*  
§ 5-108:30 (3<sup>rd</sup> ed. 2008), reads:

Although the letter of credit may have been a contract separate from the parties' purchase orders, they are to be read together as a single agreement, provided that they are part of a single transaction and appear, in combination, to constitute the entire understanding of the parties. *In re BRADLEES STORES, INC*, 313 B.R. 565, 54 UCC Rep.Serv.2d 817.

We shall demonstrate why the trial court's ruling was against the principle of fundamental justice and the statute with these *genuine issues*.

1) SIM failed to perform the *conditions precedent* to ***the contract*** and RCW 62A.2-325, CP 373. It raised this issue for the first time in its Reply Brief which was too late for summary judgment; 2) SIM is guilty of laches since all its claims were barred by the one-year statute of limitation imposed by RCW 62A.5-115; 3) Respondent's submissions and standing failed to establish facts<sup>13</sup> upon which relief can be granted; 4) To

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<sup>13</sup> Most importantly, SIM failed to show that Giant instead of QIANGSHENG or Bank of Shanghai was liable for the payment and damages. SIM never address this affirmative defense in the Motion for Summary Judgment, CP299 (AP61) foot note 9.

compensate for its shortcoming in facts and issues, SIM resorted to court rule violation and witness interference.

RCW 62A.1-203, Obligation of good faith, states that: “Every contract or duty within this Title imposes an obligation of good faith in its performance or enforcement.” We shall reveal in below that SIM failed such obligation. Here, we follow many of the equity arguments (waiver and estoppel etc.) in “Response to Motion for Partial Summary Judgment, CP 282-303 (AP 44-65)”, “Motion for Reconsideration, CP324-335 (AP66-77)” and “Defendants’ Reply Brief Regarding Seasonable Notification”, CP451-456(AP16-21) with in depth legal analysis of relevant statutes in this section.

Summary judgment is appropriate 'if the pleadings . . . together with the affidavits, if any, show that there is *no genuine issue* as to any *material fact* and that the moving party is entitled to a judgment as a matter of law.' CR 56(c). Summary judgments should be reviewed de novo, viewing all facts and reasonable inferences in the light most favorable to the nonmoving party. *Allstate Ins. Co. v. Raynor*, 143 Wn.2d 469, 475, 21 P.3d 707 (2001).

**b. The Respondent raised RCW 62A.2-325 issue for the first time in his reply memorandum**

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

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

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

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

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

notification to the buyer require payment directly from him.

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

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

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

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

We can basically stop here: *Duly presentment of the instrument* is required. To complete the analysis, “*dishonor*” is defined in RCW 62A.3-502 and details can be found in CP 295-297,329-330(AP 57-59, 71-72). Here we can summarize it: A letter of credit is an unaccepted documentary draft unless signed by issuer to pay. *An unaccepted draft which is payable on demand is dishonored if presentment for payment is duly made to the drawee and the draft is not paid on the day of presentment.* RCW 62A.3-502(c) expands this rule to unaccepted documentary draft and UCC § 5-112 further expands this rule to letter of credit but the period is now “seven days”<sup>14</sup>. The UCC makes clear that

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<sup>14</sup> OFFICIAL COMMENTS for RCW 62A.3-502. Dishonor: 5. Subsection (c) gives drawees an extended period to pay documentary drafts because of the time that may be  
Footnote continued on next page

when presentment is not duly made, a bank may refuse payment without dishonor:

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

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

**2. *QIANGSHENG was the applicant/customer/buyer and to whom SIM delivered the metals.***

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

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

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needed to examine the documents. The period prescribed is that given by Section 5-112 in cases in which a letter of credit is involved.

<sup>15</sup> The Respondent, in its *reply brief*, contended without citing any authority that, CP 50, the definition of “dishonor” in Article 5 should be used to defend RCW 62A.2-325 and the motion for summary judgment. But this is a self-defeating proposition. The Respondent has been framing his claims as common law cause outside Article 5. Now he agrees that the claim arise out of Article 5 and so RCW 62A.5-115 shall apply. The Respondent should simply show the court the Bank dishonor notice which is required by UCP, CP455:25 instead of saying “I don’t know” in deposition, CP361.

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

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

Secondly, there is consent between SIM and QIANGSHENG<sup>16</sup>. SIM had chances to refuse delivery to QIANGSHENG after receiving the LOC, CP 183(AP11) but SIM decided to consent with the LOC terms.

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

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<sup>16</sup> There is explicit written consent from SIM in the Defendant's first interrogatories as Exhibit for Alan Sidell Deposition in the Appeal court case folder. But we did not list it here to comply with this court's order.

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

In the course of performance, SIM asked for the Fax number of QIANGSHENG and Giant supplied it to SIM, CP 185(hand-written notes) this was after SIM refused to let Giant pass on documents but insist on doing it directly, CP 137. Then SIM had several private communications with QIANGSHENG to provide documents (Giant did not see the content of such communications<sup>17</sup> until the discovery). By using these documents to obtain the cargo, QIANGSHENG consented with the contract but failed to pay. So there was *privity of contract* here.

Lastly, we shall have a look at the Seller's actual performance. SIM never delivered anything conforming to contract GMHD07092005 (no 2,000MT and no documents received) or Sales Order4789, CP 181

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<sup>17</sup> For example, CP 115-116, SIM submitted the AQSIQ certificate to the applicant to make sure that he could pick up the metals, CP 137:page 191. SIM also faxed to QIANGSHENG within 48 hours after the shipment advising "Name of Vessel, Date, Quantity, weight and value of the shipment", CP 185:46A:4. See CP 287, foot note 4.

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

(Giant never received any metals at the listed address and no documents received).

In summary, only SIM can be the Seller (need CCIC/AQSIQ) and only QIANGSHENG can be the buyer<sup>18</sup>. Giant simply did not have that large credit for such transaction. By breaching contractual duty of duly presentment, CP 294, SIM was estopped or suspended from asking payment directly from Buyer and SIM was required to send “seasonable notice” to QIANGSHENG which it did not do.

3. *Giant was the agent.*

Here Giant acted as the agent<sup>19</sup> for QIANGSHENG. It has long been the law that an undisclosed principal may enforce a contract made through an agent on his behalf. This rule is set forth in *Columbia Security Co. v. Aetna Accident & Liability Co.*, 108 Wash. 116, 126-27, 183 P. 137 (1919):

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

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<sup>18</sup> SIM misrepresented to the trial court in numerous occasions, CP 83, that it delivered metals to Giant and then Giant sent to another buyer in China. As we informed the court several times, CP 298:24, CP 335:8, that Giant never received any metals and the CCIC inspection certificate, CP 285:19. SIM did C&F terms directly to QIANGSHENG on the LOC terms.

<sup>19</sup> The trial court recognized the fact that Giant was the agent (middle person), RP 26:2, RP 19:4, but was wrong in describing the nature of the transferable letter of credit. Such credit was secure and well established by UCP and the commercial banks.

to the same extent as if his name had originally appeared as a contracting party, and the fact that the agent has made the contract in his own name does not preclude the principal from suing thereon as the real party in interest."

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

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

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

The scrap metals as well as the documents were not delivered to Giant. The CCIC report was presented to Giant during the discovery

process. They were delivered to the applicant/customer (metals) and Bank (documents), CP 348, so SIM has valid claims for conversion and unjust enrichment against him.

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

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

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

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

The metals were sent to Shanghai and the documents were sent to Bank of Shanghai. After SIM received the returned documents from the issuer, they should tender documents to Giant if they really intended to

treat the first beneficiary as the “new buyer”. But Giant never received those documents, CP 335. Without any chance to inspect the metals or the CCIC inspection report, Giant had the right to say “*no tender and no acceptance*”. Therefore the risk of Loss is still with the Seller/SIM.

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

The trial court clearly erred by stating that a notice to first beneficiary from Wells Fargo saying that the LOC was not paid yet pending applicant’s waiver constituted the “Seasonable Notice” required by RCW 62A.2-325, RP at 41:7. SIM did not provide the required seasonable notice to the applicant/buyer (QIANGSHENG). The first notice demanding payment from Giant was sent on June 11, 2007, CP 593-594. By providing late notice and take late action, SIM is guilty of laches<sup>20</sup>.

To ask the first beneficiary Giant for direct payment, SIM would have to finish the “perfect tender” by delivering all the required documents to Giant and then sent seasonable notice to ask for direct cash payment. The next section will show that a “notice after a year” is too late.

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<sup>20</sup> Laches is an equitable defense based on estoppel. The doctrine of laches must affirmatively establish: (1) knowledge by plaintiff of facts constituting a cause of action or a reasonable opportunity to discover such facts; (2) unreasonable delay by plaintiff in commencing an action; and (3) damage to defendant resulting from the delay in bringing the action. *Hayden v. Port Townsend*, 93 Wn.2d 870, 874-75, 613 P.2d 1164 (1980).

**c. The respondent's claims were barred by laches and the one-year statute of limitation**

This section basically is just a follow up discussion on when "seasonable notice" shall become too late. It is about a statute related to the defense of estoppel we discussed extensively in the trial court. A statute not brought before a trial court but pertinent to the substantive issues which were raised before the court may be considered for the first time on appeal. *STATE v. FAGALDE*, 85 Wn.2d 730, 732, 539 P.2d 86 (1975).

Under the Rules of Appellate Procedure, an "appellate court may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a). "However, this rule does not apply when the question raised affects the right to maintain the action." *New Meadows Holding Co. v. Washington Water Power Co.*, 102 Wn.2d 495, 498, 687 P.2d 212 (1984).

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

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

This section applies to all claims for which there are remedies under Section 5-111 and to other claims made under this title, such as claims for breach of warranty under Section 5-110. Because it covers all claims under Section 5-111, the statute of limitations

applies not only to wrongful dishonor claims against the issuer but also to claims between the issuer and the applicant arising from the reimbursement agreement. These might be for reimbursement (issuer v. applicant) or for breach of the reimbursement contract by wrongful honor (applicant v. issuer).

There are remedies provided by RCW 62A5-111(1):

If an issuer wrongfully dishonors or repudiates its obligation to pay money under a letter of credit before presentation, the beneficiary, successor, or nominated person presenting on its own behalf may recover from the issuer the amount that is the subject of the dishonor or repudiation.

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

In the case at bar, the issuer repudiated the payment and failed to provide speedy and sufficient notice. So the issuer is liable to the beneficiaries for payment. SIM's main cause of action in this case is simply "*no payment received*".

SIM attempts to avoid the obvious application of Article 5 to the lawsuit by couching its causes of action as common law contract, tort, and equitable claims outside the scope of Article 5. However, SIM fails to point to the existence of any contract, tort, or equitable obligation that would give SIM any right or benefit that is in any way meaningfully different from the right or benefits that he was otherwise entitled to as the letter of credit second beneficiary in an Article 5 transaction. This is especially true that in this case LOC (LC0502745YK) itself is the conforming contract that SIM based upon for his delivery and the fact that SIM breached its contractual duties, CP 335, CP 294:17. It will be absurd

to claim that the Letter of Credit itself is not governed by Article 5 of UCC. Because no duty arising *outside* of Article 5 has been breached and the Respondent can cite no claim that is meaningfully different from what respondent could have asserted as remedies under RCW 62A.5-111(1).

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

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

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

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

year.

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

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

UCC scholars support the appellant's argument that Article 5's statute of limitations must not be evaded by labeling the repudiated payment claim as some other cause of action. *L. Lawrence, Anderson on the Uniform Commercial Code*, Vol. 7A § 5-115:5 (3<sup>rd</sup> ed. 2008), p. 642, is instructive in explaining "Claims arose out of an Article 5 transaction":

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

There are some significant differences between *Alhadeff* and the case at bar. 1) The current case is about bank repudiation claim under RCW 62A.5-111(1) while the *Alhadeff* case is for warranty under RCW 62A.5-110; 2) The *Alhadeff* case involved some warranty agreement negotiated for extra protection in addition to the letter of credit itself. But in current case, the contract only indicates that the letter of credit is “irrevocable and payable 100% at sight”, CP 60, and all other terms are part of the letter of credit itself. There is no Extra consideration.

*Alhadeff* is relevant to the case at bar inasmuch as a showing that RCW 62A.5-115 is a relevant statute of public interest and the respondent cannot simply just ignore it in his motion for summary judgment. Washington Supreme court may reach its decision before the case at bar and will set the case law for RCW 62A.5-115.

The issuer, Bank of Shanghai, repudiated LOC (LC0502745YK) mainly because of the late presentment by SIM plus some minor discrepancies.

If literal compliance is the watchword for letter of credit transaction, then all parties involved must bear the risk that the literal and

exacting nature of the transactions may at time operate to their disadvantage. *Paramount Export Company v. Asia Trust Bank*, 193 Cal. App. 3d 1474. In the instance case, SIM was the last “dancer” who failed to properly “pirouette down the path” prescribed by UCP article 43<sup>21</sup>. The respondent was therefore estopped from asserting that appellant did not comply with the terms and condition (right and obligations) of the letter of credit.

**2. SIM is guilty of laches by sleeping over available remedies well past the one-year statute of limitation.**

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

The fatal defect here is the late presentment by SIM. However, Bank of Shanghai did not provide timely and proper notice of dishonor/repudiation, so it was liable for payment as discussed in CP 455, foot note 3 and in CP 457-463. The current case is identical to *Voest-*

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<sup>21</sup> 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.

*Alpine Trading v. Bank of China* on this point: “Issuing bank’s notice of discrepancies and disposition of presentation documents was insufficient under Uniform Customs and Practices for Documentary Credits (UCP) to constitute notice of refusal to honor letter of credit, where notice did not expressly state that it was rejecting presentation documents, and issuing bank stated that it would contact applicant to determine if it would waive *discrepancies.*”

By filing claims too late, SIM is guilty of laches, *ALICE MCKNIGHT et al. v. CHARLES BASILIDES*, 19 Wn.2d 391, because it will be too late to collect from Banks and QiangSheng by virtue of RCW 62A.2-325 and RCW 62A.5-115.

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

This affirmative defense was asserted in the amended answer, CP 208(AP 3), but the Respondent failed to address it in the motion for summary judgment, CP 299:23. So it was properly raised in the trial court. In addition to its discretionary nature, RAP 2.5(a) contains several express exceptions from its general prohibition against raising new issues on appeal, including the "failure to establish facts upon which relief can be granted." This exception is fitting inasmuch as "appeal is the first time sufficiency of evidence may realistically be raised." *State v. Hickman*, 135 Wn.2d 97, 103 n.3, 954 P.2d 900 (1998).

Because the entire key employee from SIM who were involved in this transaction left the dissolved company SIMEXCO, the evidences

submitted with the motion for summary judgment were very sketchy on details. The SIM failed to establish these specific facts upon which relief may be predicated. *GROSS v. LYNNWOOD*, 90 Wn.2d 395, 583 P.2d 1197. a) Whether the product was delivered to Giant according to the contract and was accepted; b) The reasonable notice required by RCW 62A.2-325 was given; c) Claims were not barred by RCW 62A.5-115; d) Did SIM duly present the documents to the right bank and why? e) Why the real Seller (SIMEXCO, the contract party and the second beneficiary) and the real Buyer (QIANGSHENG) were not jointed? As a general rule, courts construing contracts require that parties to the contract be joined. See, e.g., *Aungst v. Roberts Const. Co., Inc.*, 95 Wash. 2d 439, 625 P.2d 167 (1981) (citing *Lomayaktewa v. Hathaway*, 520 F.2d 1324, 20 Fed. R. Serv. 2d 843 (9th Cir. 1975)).

1. ***Insufficient Evidence.***

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

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

**2. *Insufficient Pleading.***

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

Although inexpert pleading is permitted, insufficient pleading is not. Id. "A pleading is insufficient when it does not give the opposing party fair notice of what the claim is and the ground upon which it rests." Id. (citing *Williams v. W. Sur. Co.*, 6 Wn. App. 300, 492 P.2d 596 (1972)).

SIM claimed, for at least three times in writing, that CP 60-62 or contract (GMHD07092005) is *the true and correct copy* of the "contract". But later, SIM claimed that CP 178, 181 (Sales Order4789) is the "*New Contract*" or "modification of the original contract" and SIM had no obligation to ship 2,000 metric tons of metal, CP90.

SIM was making a "veiled attempt" to amend his complaint to fit his new theory for summary judgment, CP 90, without allowing the Defendant a chance to amend answer and counter-claims.

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

### 3. *Insufficient Affidavit.*

Alan Sidell's affidavit is insufficient because it was *not* based on "personal knowledge" as required by CR 56 (e). It was based on knowledge of other people (*hearsay*) who all left the dissolved company (SIMEXCO) shortly after the transaction<sup>22</sup>.

This is crucial because SIM's motion for summary judgment failed to explain, with *personal knowledge*, why SIM did not deliver all the documents on 9/15/2005 and why SIM claimed that it delivered the "Original Invoices" when Giant did not receive them, CP 335.

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

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

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<sup>22</sup> "I don't know" was the answer from Alan Sidell to key questions, CP 27, CP 360-362.

**e. Due process violation and Abuse of Discretion.**

Bearing in mind the words of Mr. Justice Frankfurter that fairness of procedure is due process in the primary sense, *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 161, 71 S.Ct.624, 95 L.Ed.817 (1951)(concurring opinion). In the case at bar, the trial court, by awarding summary judgment and denying appellant's requests for response or amended answer without any explanations, *even though there were affirmative defenses that were never addressed by the Plaintiff*, CP 334, CP 299, denied the appellant's right for a fair trial. Summary judgment procedure is not designed to deprive a litigant of trial on disputed issue of fact. *Meadows v. Grant's Auto Brokers, Inc.*, 71 Wn. 2d 874,431 P.2d 216 (1967).

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

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

First, genuine issue of material fact as to whether LOC (LC0502745YK) was repudiated solely due to SIM's failure to duly present necessary document to bank preclude summary judgment with respect to damage to Giant caused by SIM's contract breach. *SAMSUNG*

*America, INC, v. Yugoslav-Korean consulting*, 248 A.D.2d 290, 670 N.Y.S.2d 466 . In fact, the Respondent did not address the affirmative defense that Plaintiff's damages were caused by Plaintiff or by third parties, CP 334:23.

Second, whether SIM is guilty of laches by abandoning its LOC security interest, in unseasonable notice to the end buyer and in two-year delay in taking action. All three acts caused damages to Giant.

Last, we have the classic example of conflicting affidavits. SIM claimed, without *personal knowledge* that the metals were delivered and invoice sent. But none were delivered to Giant and were accepted, CP298, CP 335. If the affidavits and counter-affidavits submitted by the parties conflict on material facts, the court is essentially presented with an issue of credibility, and summary judgment will be denied. See, e.g., *Riley v. Andres*, 107 Wn. App. 391, 27 P.3d 618 (2001); *Meadows v. Grant's Auto Brokers, Inc.*, *supra*.

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

The trial court should keep intact the rights, obligations and remedies dictated by the parties' contract (including UCC) instead of treating ***the contract*** as many unrelated pieces, RP 36, promoting multiple law sue, RP 39, and shifting the loss from the second beneficiary to the first beneficiary, RP 40. The trial court's ruling is not contract interpretation but judicial draftsmanship.

SIM cannot enforce specific performance of ***the contract*** against

Giant while in default its terms. *Kiefer v. Carter Contracting & Hauling Co.*, Wash. 108, 109 Pac. 332; *Smith v. Barber*, 97 Wash. 18, Pac. 873.

The only causes of action for SIM are remedies against the issuer for wrongful repudiation and against the applicant for conversion/unjust enrichment. But SIM failed to take advantage of such remedies.

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

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

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

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

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

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

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

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

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

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

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

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

*Correspondence*, 25 Mod. L. Rev. 639, 1962. Here SIM requested that "No L/C, No Deal", CP 60. Just before the issue of LOC (LC0502745YK), SIM asked whether it was possible to do cash deal, CP 266, but QIANGSHENG refused to consider, CP 265. It was then "take this L/C or no deal". So it was the meeting of mind for all parties that "LOC (LC0502745YK) was the *exclusive* or *absolute payment* instrument for this transaction". Without this LOC there would be *no transaction and no case* for SIM.

Here Giant fulfilled its contractual obligation by transferring a letter of credit to SIM that SIM approved. SIM was clearly warned that

the documents must be sent to Wells Fargo that day, CP 238, but invented the theory of *one parcel rule*, CP 53, 85, to justify its two-week delay in sending in the documents in defy of Dr. Lin Xie's demand. This is nothing more than an excuse and has no merit.

3. *Attorney misconduct.*

Other than violation of court rules on motion and practice, SIM also tried to prevent key witness from talking. As detailed in CP 575-577 (AP 89-91), SIM's attorney coached Mike Dollard to say "*I don't know*" to most questions.

4. *Abuse of discretion.*

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

This is true to all section D especially to Assignment of Error (4, 5, 6) and to Issues (4, 17, 18, 19).

## G CONCLUSION

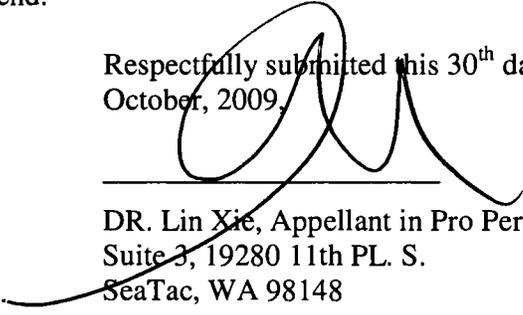
Respondent seeks to avoid the application of specific Article 5 provisions dealing with remedies and statute of limitation by trying to make this lawsuit what it is not. The factual allegations behind appellant's contract breach cause of action boil down to allegation of payment repudiation on the letter of credit. The legislature has provided beneficiaries with a remedy: remedies pursuant to RCW 62A.5-111(1). Respondent sought his remedy too late and all his claims are barred by laches and Article 5 one year statute of limitations. This court should dismiss the Respondent's breach of contract claim;

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

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

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

Respectfully submitted this 30<sup>th</sup> day of  
October, 2009.



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

## **H APPENDIX**

- a. **Defendants' First Amended Answer**  
**Appendix 1-3**
  
- b. **Purchase Contracts.**  
Exhibit A for the Plaintiff's Complaints, **Appendix 4-6**  
  
Work Orders, the so called "New Contract" in the Plaintiff's  
Motion for Summary Judgment, **Appendix 7-10**
  
- c. **Letter of Credit (LC0502745YK) Transferred to US Bank**  
CP 183-187 **Appendix 11-15**
  
- d. **Defendants' Reply Brief Regarding Seasonable Notification**  
CP 451-456 **Appendix 16-21**
  
- e. **Answers to Plaintiff's First Interrogatories and Request for  
Production**  
CP 154-169 **Appendix 22-37**
  
- f. **RCW 62A.5-115, RCW 62A.2-325, RCW 62A.3-502**  
**Appendix 38-43**
  
- g. **Response to Motion for Partial Summary Judgment**  
CP 282-303 **Appendix 44-65**
  
- h. **Defense's Motion for Reconsideration**  
CP 324-335 **Appendix 66-77**
  
- i. **Orders Granting Plaintiff's Motion for Partial Summary  
Judgment and Others**
  - 1) Order Granting Plaintiff's Motion for Partial Summary  
Judgment, CP 479-481 **Appendix 78-80**
  
  - 2) Order Denying Defendants' Motion Regarding Seasonable  
Notification and Imposing Terms, CP 465-466  
**Appendix 81-82**

3) Order Granting Plaintiff's Motion for Voluntary Partial Dismissal and Entry of Final Judgment. CP 607-608  
**Appendix 83-84**

4) Judgment against Defendants Lin Xie etc al. CP 615-616  
**Appendix 85-86**

5) Order Denying Defendants' Motion to file an amended Answer, CP 641-642  
**Appendix 87-88**

**j. Photos of Alan Sidell, attorney and Mike Dollard**  
Cell phone Photos taken by Dr. Lin Xie who was shut outside the deposition conference room shortly before the deposition time of 12:00PM noon. Mr. Alan Sidell and attorney were shown to coach Mike Dollard, A Defense witness, and to ask him to read the Plaintiff's legal folder.  
CP 575-577. **Appendix 89-91**

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 30<sup>th</sup> day of October, 2009.

A handwritten signature in black ink, consisting of a large, stylized 'L' followed by a series of loops and a final flourish.

Dr. Lin Xie

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**SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR KING COUNTY**

SEATTLE IRON & METALS  
CORPORATION, a Washington Corporation

NO. 07-2-27492-8 SEA

**DEFENDANTS' FIRST  
AMENDED ANSWER**

Plaintiff,

vs.

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

Defendants.

**COMES NOW** Defendants, LIN XIE and LH HIGHTECH CONSULTING LLC, by  
and through their attorneys of record, and answers Plaintiff's Complaint as follows:

- 1.1 Admit.
- 1.2 Deny.
- 1.3 Admit.
- 1.4 Admit.
- 2.1 Deny.

First Amended Answer  
Page 1 of 3  
031208 - 7337  
07-2-27492-8 SEA

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

**ORIGINAL**

CP 206

1           2.2    Admit that Giant International Metal Resources executed the contract attached  
2 as Exhibit A to the Complaint. Deny that Lin Xie executed the contract in an individual  
3 capacity.

4           2.3    Deny.

5           2.4    Defendant admits that a payment of \$60,000 was made. Defendant denies the  
6 remaining allegations of paragraph 2.4.  
7

8           2.5    Deny.

9           2.6    Deny.

10          2.7    Deny.

11          3.1    Defendants admit and deny as stated above.

12          3.2    Deny.

13          3.3    Deny.

14          4.1    Defendants admit and deny as stated above.

15          4.2    Deny.

16          4.3    Deny.

17          5.1    Defendants admit and deny as stated above.

18          5.2    Deny.

19          5.3    Deny.

20          6.1    Defendants admit and deny as stated above.

21          6.1 (sic) Deny.

22          6.2    Deny.

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**AFFIRMATIVE DEFENSES**

WHEREFORE, having answered Plaintiff's Complaint, Defendants now assert the following affirmative defenses:

- 1. The Complaint fails to state a claim upon which relief can be granted.
- 2. The Complaint fails to allege fraud with particularity as required by CR 9(b).
- 3. Plaintiff's claims are barred under the doctrines of waiver and estoppel.
- 4. Plaintiff's claims are barred under the doctrine of unclean hands.
- 5. Plaintiff's damages, if any, were caused by acts or omissions of Plaintiff himself or of third parties over which Defendants had no control.
- 6. Plaintiff has failed to mitigate its damages.

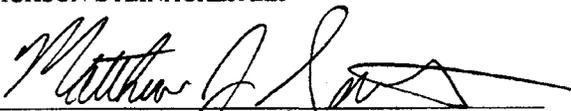
**PRAYER**

WHEREFORE, having answered Plaintiff's Complaint, and asserted affirmative defenses, Defendant prays for relief as follows:

- 1. For dismissal of Plaintiff's Complaint with prejudice;
- 2. For an award of fees and costs incurred in defending this action; and
- 3. For such other relief as the Court deems just and equitable.

DATED this 13<sup>th</sup> day of March, 2008.

DICKSON STEINACKER LLP



KEVIN T. STEINACKER, WSBA No. 35475  
MATTHEW J. SMITH, WSBA No. 33309  
Attorneys for Defendant

First Amended Answer  
Page 3 of 3  
031208 - 7337  
07-2-27492-8 SEA

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

号码: NO: GMHD07092005

日期: Date: 7/11/2005

### 订购合同

### PURCHASE CONTRACT

地点: Place: Seattle, USA

**Seller 买方:**

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

**Buyer 卖方:**

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

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

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

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

**3. 装运 Shipment:**

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

Port of loading: Seattle

Partial shipment: allowed, transshipment: not allowed

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

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

**4. 支付 Payment:**

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

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

**Seller's Bank account**

A/c Name : Seattle Iron & Metals Export Corporation

The Buyer

The Sellers

# EXHIBIT A

A/c Number: 153505539715  
 ABA#: 125000105  
 Bank name: U.S. Bank, National Association  
 Bank Address: 1420 Fifth Avenue, 11<sup>th</sup> Floor, Seattle, WA 98101, USA  
 SWIFT NUMBER (Advising): XXXXXX

Buyer's Bank account

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

5. 单据 Document Required

- Commercial Invoice
- Full set of Bills of lading
- Packing List (with the details for weight or quantity)
- Other Document
- Certificate issued by CCIC at the loading port

6. 保险 Insurance:

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

7. 检验 Inspection:

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

8. 不可抗力 Force Majeure:

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

9. 索赔 Claims:

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

10. 仲裁 Arbitration

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

11. 法律适用 Application of Laws

The Buyer \_\_\_\_\_

The Seller 

INT  
11/3/11  
9

CP 175

CP61

The laws of the USA are applicable.

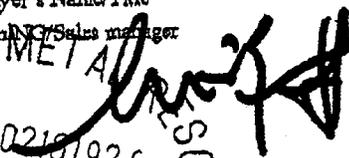


Signature/Seal

The Buyer's Name/Title

Susan NG Sales manager

GIANT INT METAL SOURCE  
USA  
UBI.602181920



The Seller's Name/Title

Chris Berg

Marketing Manager

BEST AVAILABLE IMAGE POSSIBLE

The Buyer \_\_\_\_\_

The Sellers \_\_\_\_\_

CP 176

CP 62



\*\*\*\*\*  
\*\*\* TX REPORT \*\*\*  
\*\*\*\*\*

TRANSMISSION OK

TX/RX NO 1141  
CONNECTION TEL 89017752628245  
SUBADDRESS  
CONNECTION ID  
ST. TIME 07/28 16:02  
USAGE T 00'35  
PGS. SENT 1  
RESULT OK

SEATTLE IRON & METALS CORP.  
601 South Myrtle Street  
Seattle, WA 98108  
206 682-0040 Fax 206 623-1231

### FAX TRANSMITTAL

July 28, 2005

To: Dr. Lin Xie  
Giant International Metal Resources

From Michael Dollard  
Seattle Iron and Metals Corp.

Delivered via Fax 1 775 262-8245 Total pages 1

This letter is an amendment to our sales order number 4740 dated July 7, 2005.

- The sales order quantity is hereby changed to 1,000 Metric Tons.
- An irrevocable Letter of Credit, executed and acceptable to Seattle Iron and Metals Corp. must be delivered by our bank to us no later than Friday, August 5, 2005.
- You must provide documentation supporting that your customer is BaoSteel.

This amendment cancels any and all claims and responsibilities that may have existed from sales order number 4740.

If the foregoing is in accordance with your understanding, please sign this letter and return it to us.

Call us at 206 682-0040 if you have any questions.

Appendix-8

CP 531

SIMC 0049

11



CP 181

SIMCO Export Yard  
601 S. Myrtle St.  
Seattle, WA 98108

**SALES ORDER**

**NUMBER: 4789**

EFFECTIVE DATE: 08/01/2005

COMPLETION DATE: 09/09/2005

SOLD TO:  
Giant International Metal Resources  
Suite 3, 19280 11th Pl. South  
Seattle, WA 98148

FREIGHT BASIS: Dock Seattle  
TERMS: Letter of Credit

SHIP TO:  
Suite 3, 19280 11th Pl. South  
Seattle, WA 98148

SHIP FROM:  
SIMCO Export Yard  
601 S. Myrtle St.  
Seattle, WA 98108

YOUR ORDER#:

CONFIRMING BETWEEN: Chris Berge  
AND YOUR: Ng, Susan

Quantity	U/M	Description	Unit Price
1,000	MT	Shredded Ferrous ISRI 211	\$175.00

Notes: Load loose, keep weight 44,000 - 45,000 per can.

50 X 40 Sea going cans  
A Letter of Credit, executed and acceptable to Seattle Iron & Metals must be delivered by our bank to us no later than August 5, 2005.

This contract is subject to the terms and conditions stipulated herein.

Accepted for Giant International Metal Resources

By \_\_\_\_\_

THANK YOU

SIMCO Export Yard

By \_\_\_\_\_

Appendix-10

SIMC 0063

14



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

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

08/05/05

LETTER OF CREDIT  
ADVISING COVER LETTER  
\*\*\*\*\*

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

```

=====
U. S. Bank Reference Number      ELCSSSEA47139          AVL7
Letter of Credit Number          LC0502745YK
Amount                            USD          175,000.00
Applicant                         GIANT INTERNATIONAL METAL RESOURCES
Issuing Bank                       WELLS FARGO HSBC TRADE BANK N.A.
                                     TRADE SERVICES OPS-SEATTLE, 11TH FL
                                     99 3RD AVENUE, MAC: P6540-115
                                     SEATTLE, WA 98104
=====

```

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

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

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

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

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

Thank you for your continued business.

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

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

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

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

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Message Output Reference : 0545 050805USBKUS44ASEA2289192422  
Correspondent Input Reference : 0345 050805WFBIOUS6SAXXX9810674562

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

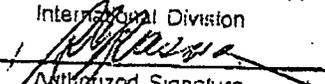
Swift OUTPUT : FIN 720 Transfer of a Doc Credit  
Sender : WFBIOUS6SXXX  
WELLS FARGO NA  
SAN FRANCISCO,CA US  
Receiver : USBKUS44SEA  
U.S. BANK  
(SEATTLE INTERNATIONAL DEPARTMENT)  
SEATTLE,WA US  
MUR : 050805003541

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

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

This is to be considered the original letter of Credit under our Reference No. ~~ELCS0747129~~ This instrument must accompany documents prepared for negotiation.

U.S. BANK  
NATIONAL ASSOCIATION  
International Division

By   
Authorized Signature

Continued on next page...

Printed: 2005-08-05 08:12:53 AM Central Standard Time  
FileName: \\Svamm14glbs-lf\Batch\Output\00381310.prt  
Message Number (File): 179

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

Continued from previous page...

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

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

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

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

Printed: 2005-08-05 08:12:53 AM Central Standard Time  
FileName: \\svamnl4glbs-1f\Batch\Output\00381310.prt  
Message Number(File): 180

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

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

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Priority : Normal  
Message Output Reference : 0545 050805USBKUS44ASEA2289192423  
Correspondent Input Reference : 0345 050805WFBTUS6SAXXX9810674563

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

Swift OUTPUT : FIN 721 Transfer of a Doc Credit  
Sender : WFBTUS6SXXX  
WELLS FARGO NA  
SAN FRANCISCO,CA US  
Receiver : USBKUS44SEA  
U.S. BANK  
(SEATTLE INTERNATIONAL DEPARTMENT)  
SEATTLE,WA US  
MUR : 050805003542

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

27: Sequence of Total  
2/2  
20: Transferring Bank's Reference  
SWE549444T549797  
21: Documentary Credit Number  
LC0502745YK  
47B: Additional Conditions  
+ BOTH QUANTITY AND AMOUNT 10PCT MORE OR LESS ARE ALLOWED.  
AS INSTRUCTED BY THE TRANSFEROR, THE TRANSFEREE WILL BE ADVISED  
OF ANY AMENDMENT(S) HEREAFTER MADE TO THE CREDIT ONLY TO THE  
EXTENT AUTHORIZED BY THE TRANSFEROR.  
THIS LETTER OF CREDIT IS RESTRICTED FOR PRESENTATION OF DOCUMENTS  
TO WELLS FARGO HSBC TRADE BANK, N.A. FOR SUBSTITUTION. HOWEVER,  
PLEASE NOTE THAT THIS CREDIT IS AVAILABLE FOR PAYMENT AT THE  
COUNTERS OF THE ISSUING BANK AGAINST THEIR RECEIPT OF CONFORMING  
DOCUMENTS. THEREFORE, DOCUMENTS PRESENTED TO US WILL BE SENT TO  
THE ISSUING BANK FOR PAYMENT. UPON RECEIPT OF AVAILABLE FUNDS, WE  
WILL REMIT THE PROCEEDS TO YOU PER YOUR INSTRUCTIONS.  
WHETHER OR NOT THE LETTER OF CREDIT OR ANY AMENDMENT SPECIFIES  
THAT BANK CHARGES ARE FOR APPLICANT'S ACCOUNT, IF DOCUMENTS  
PRESENTED TO US CONTAIN DISCREPANCIES A HANDLING CHARGE OF USD  
75.00 TOGETHER WITH OUR RELATED OUT-OF-POCKET EXPENSES, IF ANY,  
AND ANY EXPENSES AND/OR CHARGES CLAIMED BY THE ISSUING BANK ARE  
FOR YOUR ACCOUNT.  
AN EXTRA COPY OF THE COMMERCIAL INVOICE AND TRANSPORT DOCUMENT  
MUST BE PRESENTED FOR ISSUING BANK'S RETENTION AND DISPOSAL. IF  
NOT PRESENTED, A FEE OF USD10.00 WILL BE DEDUCTED FROM PAYMENT  
PROCEEDS.  
IF ANY INSTRUCTIONS ACCOMPANYING A DRAWING UNDER THIS LETTER OF  
CREDIT REQUEST THAT PAYMENT IS TO BE MADE BY TRANSFER TO AN  
ACCOUNT WITH US OR AT ANOTHER BANK, WE AND/OR SUCH OTHER BANK MAY  
RELY ON AN ACCOUNT NUMBER SPECIFIED IN SUCH INSTRUCTIONS EVEN IF  
THE NUMBER IDENTIFIES A PERSON OR ENTITY DIFFERENT FROM THE  
INTENDED PAYEE.  
THIS LETTER IS SOLELY AN ADVICE OF A LETTER OF CREDIT ISSUED BY  
THE ABOVE-MENTIONED OPENING BANK AND CONVEYS NO ENGAGEMENT BY US.  
DRAFT(S) MUST INDICATE THE NUMBER AND DATE OF THIS CREDIT.  
DOCUMENTS MUST BE PRESENTED TO WELLS FARGO HSBC TRADE BANK, N.A.,  
TRADE SERVICES OPS - SEATTLE, 999 3RD AVENUE, 11TH FLOOR, MAC:  
P6540-115, SEATTLE, WA 98104, VIA COURIER IN ONE PARCEL.  
PLEASE CALL (206)292-3491 REGARDING ANY INQUIRIES ON  
NEGOTIATIONS.

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

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

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

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

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

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

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

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

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

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

SEATTLE IRON & METALS CORP.,

Plaintiff,

vs.

LIN XIE, et al.,

Defendants.

NO. 07-2-27492-8 SEA

DEFENDANTS' REPLY BRIEF  
REGARDING SEASONABLE  
NOTIFICATION

Plaintiff contends that the supplemental briefing the Court authorized pursuant to its September 26, 2008 Order limited any such briefing to showing that Defendant Lin Xie ("Dr. Xie") did not know that the letter of credit was paid within one year. Plaintiff's Response Brief at 2. The Order is not so limiting, and Dr. Xie submitted the supplemental briefing to more fully address an issue that the Court acknowledged was an issue it had not focused on.

**A. Plaintiff does not dispute that it failed to address seasonable notification in its motion for summary judgment.**

Plaintiff's attempt to paint the relevant UCC law that applies to its cause of action as a "novel theory" and an "affirmative defense" is simply wrong. Plaintiff contends that seasonable notification is a "novel theory", one that Dr. Xie waived by not raising it in the Answer to the Complaint or during discovery. Seasonable notification is as novel a theory as the UCC itself — it is the law that Plaintiff must navigate to show that it is entitled to judgment

Defendants' Reply Brief Regarding Seasonable Notification  
Page 1 of 6  
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DICKSON STEINACKER LLP  
1401 WELLS FARGO PLAZA  
1201 PACIFIC AVENUE  
TACOMA, WASHINGTON 98402  
(253) 572-1000 - FACSIMILE (253) 572-1300

1 as a matter of law.

2 Seasonable notification is not an affirmative defense. Nowhere does CR 8(c) list the  
3 seasonable notification requirement under RCW 62A.2-325 as an affirmative defense. Under  
4 Plaintiff's interpretation, the moving party would not need to show that it is entitled to  
5 summary judgment as a matter of law; rather, the responding party would have to disprove the  
6 elements of the claim as "defenses".  
7

8 Seasonable notification is an element in a legal claim and not a fact. Thus, whether  
9 seasonable notification applies to this case is an issue of law and is beyond the scope of a lay  
10 person's discovery response. In any event, that payment was to be made by letter of credit was  
11 in the original contract as well as Plaintiff's invoices and sales orders. Contrary to Plaintiff's  
12 implication, Dr. Xie had no obligation to disclose during discovery his counsel's legal theories  
13 supporting his defenses. *See* CR 26(b)(4) (preventing discovery of work product, including  
14 "mental impressions, conclusions, opinions, or legal theories").  
15

16 Plaintiff does not dispute that it failed to address seasonable notification in its summary  
17 judgment motion. A moving party must prove that it is entitled to judgment as a matter of law.  
18 In this case, seasonable notification is an element the Plaintiff must prove *in its initial pleading*  
19 to show that it is entitled to summary judgment. Plaintiff failed to do so, and this oversight  
20 should be fatal to its motion.  
21

22 **B. Seasonable notification is a condition precedent to seeking payment directly  
23 from a buyer, and the Court should not consider prejudice.**

24 In determining whether Plaintiff provided seasonable notification to Dr. Xie, the Court  
25 considered whether Dr. Xie was prejudiced by any delay in the notification:  
26

1 THE COURT: What do you mean by seasonably? What does that mean?  
2 I think that that means eventually as long as there is no harm or advantage lost, or  
3 there is no prejudice in the delay.

4 Declaration of Todd Wyatt, Ex. A at 32.

5 However, the Court should not consider prejudice when determining whether Plaintiff  
6 provided seasonable notification to Dr. Xie. Importantly, Plaintiff does not dispute the ample  
7 authority that seasonable notification is a condition precedent to seeking payment directly from  
8 a buyer. RCW 62A.2-325. Plaintiff simply argues that prejudice is relevant to this particular  
9 condition precedent because other cases apply prejudice to interpret reasonable time, and  
10 because “if the Court adopts Xie’s theory – no payment for SIMC despite performance – the  
11 lack of prejudice should be considered.” Plaintiff’s Response at 8 & n.5. Plaintiff cites no  
12 authority that directly rebuts the conclusion in *Hintz v. Kitsap County*, 92 Wn. App. 10, 14, 960  
13 P.2d 946 (1998), which states that prejudice is not a factor when determining whether a party  
14 satisfied a condition precedent.<sup>1</sup> Instead, Plaintiff essentially begs the Court to use its equitable  
15 powers and “consider the outcome” if the Court applies the uncontroverted caselaw.

16  
17 **C. Dr. Xie did not know that Plaintiff sought payment directly from him.**

18 Whether Plaintiff provided “seasonable notification” is an issue of fact that should be  
19 left for trial. Plaintiff claims that nothing the record supports Dr. Xie’s contention that he was  
20 unaware Plaintiff wanted to be paid directly by Dr. Xie. This claim ignores the contract itself,  
21 which stated that payment was to be by “letter of credit”. Plaintiff makes unsupported perjury  
22  
23

24  
25 <sup>1</sup> Plaintiff only cites *Continental Can Co. v. Comm'l Waterway Dist. No. 1 of King County*, 56 Wn.2d 456, 460,  
347 P.2d 887 (1960). That case merely stated that the Court could not determine if the rejection of an auction bid,  
where there was no time limit on rejection, was unreasonable if there was no showing of prejudice. *Id.*

1 insinuations without providing proof that Dr. Xie received notification from Plaintiff that it  
2 sought payment directly from him.

3 Plaintiff contends that Dr. Xie “had reason to know” that Plaintiff sought payment  
4 directly from him. Plaintiff’s Response at 5. However, Plaintiff does not dispute that it  
5 provided no explicit notification to Dr. Xie until 2007, and instead relies upon reading  
6 “between the lines” and what it thinks Dr. Xie should have interpreted from that language.  
7

8 First, the invoices that Plaintiff alleges are “all that is needed” to provide notice,  
9 Plaintiff’s Response at 5, were actually sent to US Bank. Declaration of Smith in Support of  
10 Response to Plaintiff’s Motion for Partial Summary Judgment, Ex. C (letter from SIMCO to  
11 US Bank noting that package included signed commercial invoices). Moreover, the invoice  
12 dates indicate they were drafted before shipment, not after any dishonor of the letter of credit.  
13

14 Second, Dr. Xie did not pay Plaintiff directly from his own funds, but rather forwarded  
15 to Plaintiff money that he received, presumably from the end buyer. Third, Plaintiff’s  
16 December 2005 letter does not demand payment, but rather states “We confirm that we are due  
17 \$158,100.90 relating to this transaction...”, and does not state from whom they are due  
18 payment, and only talks about “inadvertently “ receiving money from Giant International.

19 Critically, the question is not whether Defendants should have known that there was no  
20 payment under the letter of credit, but rather whether Defendants were notified that Plaintiff  
21 would seek payment directly from Giant rather than through the letter of credit as specified in  
22 the contract. This court should deny summary judgment because there are issues of fact as to  
23 whether Plaintiff seasonably notified Defendants of its intent to seek direct payment.  
24  
25

1           **D. Even if the Court considers prejudice, “seasonable notification” does not**  
2           **mean notice within one year.**

3           The Court cannot grant summary judgment where genuine issues of material fact exist.  
4           Even if the Court considers prejudice, issues of fact exist. Plaintiff claims that Dr. Xie incurred  
5           no prejudice in any delay in notification.

6           Plaintiff argues that Dr. Xie could not have sued the issuing bank because Dr. Xie has  
7           contended that the bank refused payment without dishonor.<sup>2</sup> Had Plaintiff provided seasonable  
8           notification, Dr. Xie could have filed suit against both the issuing bank and Plaintiff, alleging  
9           alternatively that Plaintiff improperly submitted documents or, if Plaintiff properly submitted  
10          documents, the bank wrongfully dishonored the letter of credit. An issuing bank has seven  
11          business days or less to honor a letter of credit or give notice of discrepancies. RCW 62A.5-  
12          108(2). An issuing bank is precluded from asserting as a basis for dishonor any discrepancy if  
13          timely notice is not given. RCW 62A.5-108(3). Plaintiff still has provided no evidence of  
14          when the issuing bank gave notice of the discrepancies.<sup>3</sup>

15          Determination of prejudice and seasonable notification is an issue of fact in this case.  
16          Plaintiff’s failure to seasonably notify Dr. Xie hindered his ability to obtain payment from the  
17          end buyer. The issuing bank has no more than seven business days to provide notice of  
18          end buyer. The issuing bank has no more than seven business days to provide notice of  
19          end buyer. The issuing bank has no more than seven business days to provide notice of

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21 <sup>2</sup> Plaintiff mischaracterizes this as properly dishonoring.

22 <sup>3</sup> Thus, there is also no evidence if the issuing bank gave proper notice of dishonor. In *Voest-Alpine Trading USA*  
23 *Corp. v. Bank of China*, 288 F.3d 262 (2002), the issuing bank did not send the beneficiary a notice of refusal of  
24 the documents within seven banking days. *Id.* at ¶ 20 (citing UCP 500 Art. 14(d)). The UCP provision also  
25 governs the letter of credit used in this case. The issuing bank’s statement to the beneficiary did not explicitly  
26 state that it was rejecting the documents and stated that it was “contacting the applicant for acceptance of the  
relative discrepancy.” *Id.* at ¶ 33. This held open the possibility of acceptance upon waiver and indicated that the  
bank had not refused the documents. Here, even if Dr. Xie knew that the issuing bank was not paying the letter of  
credit, he did not know whether it had explicitly rejected the documents and provided the notice required by the  
UCP. Plaintiff has failed to provide any notification of dishonor from any bank.

1 discrepancies in a presentation, and Plaintiff seeking direct payment from Dr. Xie should be  
2 held to a similar standard. Had Plaintiff informed Dr. Xie within seven business days of its  
3 decision to seek the money directly from him, he may have approached his negotiations with  
4 the end buyer in a different manner.

5  
6 Contrary to Plaintiff's assertion, the circumstances of the case do not demonstrate the  
7 Plaintiff seasonably notified Dr. Xie. The issuing bank that dishonors presentation "shall return  
8 the documents or hold them at the disposal of, and send advice to that effect to, the presenter."  
9 RCW 62A.5-108(8). There is no evidence whether the issuing bank returned the documents or  
10 held onto them. Moreover, if the bank did dishonor the letter of credit, Plaintiff never  
11 submitted those documents that the bank returned to Dr. Xie, nor did it advise Dr. Xie of the  
12 documents' status. See RCW 62A.2-310(c) (payment due upon tender of title documents);  
13 62A.2-323 (requiring bill of lading); 62A.2-401(3) (title passes when documents of title  
14 delivered). It is not commercially reasonable to demand payment without submitting the  
15 documents required to obtain payment.

16  
17 For the foregoing reasons, the Court should vacate its Order Granting Partial Summary  
18 Judgment and deny Plaintiff's request for terms.

19 DATED this 4<sup>th</sup> day of November, 2008.

20  
21 DICKSON STEINACKER LLP

22 

23 Kevin T. Steinacker, WSBA #35475  
24 Matthew J. Smith, WSBA #33309  
25 Attorneys for Defendants

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SUPERIOR COURT OF WASHINGTON IN COUNTY OF KING

**SEATTLE IRON & METALS CORPORATION**, a Washington corporation,

Plaintiff,

vs.

**LIN XIE**, individually and doing business as **GIANT INTERNATIONAL METAL RESOURCES**, and the marital community composed of Lin Xie and Jane Doe Xie,

Defendants.

Case No. 07-2-27492-8 SEA

**ANSWERS TO PLAINTIFF'S FIRST INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS PROPOUNDED TO DEFENDANTS**

**COME NOW** Defendants, Lin Xie, d/b/a Giant International Metal Resources and the marital community composed of Lin Xie and Jane Doe Xie, by and through their undersigned attorneys Dickson Steinacker LLP, and hereby submit the following answers to Seattle Iron & Metals Corporation's First Set of Interrogatories and Requests for Production.

**GENERAL OBJECTIONS**

1. To the extent that any Interrogatory or Document Request may be construed as calling for documents or information subject to a claim of privilege, including, without limitation, the attorney-client or attorney work-product privilege, Defendants hereby claim such privilege and object to such Interrogatory or Document Request on that basis.

Answers to Interrogatories  
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07-2-27492-8 SEA

DICKSON STEINACKER LLP  
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**ANSWER TO INTERROGATORY NO. 3:**

LH HIGHTECH Consulting, LLC, a domestic corporation registered in Washington State, is doing business as Giant International Metal Resources. Dr. Xie is the CEO and General Manager of LH HIGHTECH Consulting, LLC.

**REQUEST FOR PRODUCTION NO. 1:**

Objection. The discovery sought is unduly burdensome and calls for publicly available information that is obtainable from another source that is more convenient, less burdensome, and less expensive. Also, the request for every document from the previous ten years that is related to the answer to Interrogatory No. 3 is not reasonably calculated to the discovery of relevant evidence. Without waiving the objection, see attached.

**ANSWER TO INTERROGATORY NO. 4:**

The total contract value was for delivery of 2000MT valued at \$350,000. Plaintiff performed half of the contract by delivering only 1000 MT. A Letter of Credit (No. LC0502745YK for \$175,000) was transferred to Plaintiff's bank (US Bank) on July 25, 2005 according to the Contract, attached as Exhibit A to the Complaint. The Plaintiff's shipment of 1,000MT of metals is indicative of his acceptance of the Letter of Credit terms and the terms of the Contract, attached as Exhibit A to the Complaint.

**REQUEST FOR PRODUCTION NO. 2:**

See attached. Only plaintiff would have the US Bank advised copy of the Letter of Credit. The Defendant was shown a copy of the Letter of Credit by the Plaintiff.

**REQUEST FOR PRODUCTION NO. 3:**

See attached.

**ANSWER TO INTERROGATORY NO. 5:**

Plaintiff was to sell 2,000 MT of scrap metal, pursuant to the Contract, attached as Exhibit A to the Complaint. The Plaintiff performed only fifty percent of the Contract by delivering only 1,000 MT of scrap metal.

**REQUEST FOR PRODUCTION NO. 4:**

See attached.



1           6. Plaintiff could have mitigated its damages by procuring the full amount of  
2 scrap metal due under the Contract, but failed to do so. Plaintiff also could have mitigated its  
3 damages by immediately delivering the Bill of Lading within the deadline outlined by the  
4 Letter of Credit.

5           **REQUEST FOR PRODUCTION NO. 6:**

6           See attached.

7           **ANSWER TO INTERROGATORY NO. 8:**

8           At this time Defendants have not retained an expert witness, but will supplement this  
9 Interrogatory at such time as they do.

10          **REQUEST FOR PRODUCTION NO. 7:**

11          Not applicable. See answer to Interrogatory No. 8.

12          **REQUEST FOR PRODUCTION NO. 8:**

13          Not applicable. See answer to Interrogatory No. 8.

14          **REQUEST FOR PRODUCTION NO. 9:**

15          Not applicable. See answer to Interrogatory No. 8.

16          **REQUEST FOR PRODUCTION NO. 10:**

17          See Response to Request for Production No. 3.

18          **ANSWER TO INTERROGATORY NO. 9:**

19                 For the 1<sup>st</sup> shipment of 1,000MT of scrap metal, we received zero income. Bank of  
20 Shanghai still owns the full Letter of Credit (LC) amount. Of the LC amount, the Plaintiff is  
21 the major beneficiary. After the Defendant's legal action, about \$99,980 was recovered.  
22 \$20,700 went toward legal costs. \$60,000 went to SIMCO and \$16266.18 went toward the  
23 shipping freight for containers. \$2,590.00 went towards the CCIC quality inspection  
24 certificate as required by the Contract. About, \$1,500 to \$2,500 were bank fees for advising,  
25 amendments (for shipment date and other LC conditions requested by the Plaintiff) and  
26 document delivery. The net income is negative for the Defendant.

               The Plaintiff failed to deliver the remainder of the Contract. The net loss for the  
Defendant is at least \$125,000 based on today's shredded metal export price of \$300-360 per  
Metric Ton.

Answers to Interrogatories  
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TACOMA, WASHINGTON 98402  
(253) 572-1000 - FACSIMILE (253) 572-1300



1 CERTIFICATION OF COMPLIANCE WITH CR 26(g)

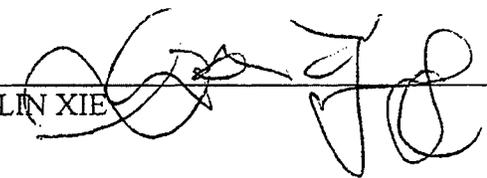
2 DICKSON STEINACKER LLP

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4 \_\_\_\_\_  
5 Kevin Steinacker, WSBA #35475  
6 Matthew J. Smith, WSBA #33309  
7 Attorneys for Defendant

8 VERIFICATION

9 STATE OF WASHINGTON )  
10 ) ss.  
11 COUNTY OF KING )

12 LIN XIE, being first duly sworn upon oath, deposes and says: That I am the  
13 Defendant in the above-entitled action. I have read the Answers to the foregoing  
14 Interrogatories, know the contents thereof, and believe the same to be true.

15  
16 \_\_\_\_\_  
17 LIN XIE 

18  
19 SUBSCRIBED and SWORN to before me this \_\_\_ day of \_\_\_\_\_, 2008.

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21 \_\_\_\_\_  
22 Print name: \_\_\_\_\_  
23 NOTARY PUBLIC in and for the State of Washington  
24 My appointment expires: \_\_\_\_\_  
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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

SEATTLE IRON & METALS CORPORATION, a Washington corporation,

Plaintiff,

v.

LIN XIE, individually and doing business as GIANT INTERNATIONAL METAL RESOURCES, and the marital community composed of LIN XIE and JANE DOE XIE;

Defendants.

Case No. 07-2-27492-8 SEA

PLAINTIFF'S FIRST SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS TO DEFENDANT

TO: Defendant, Lin Xie, d/b/a Giant International Metal Resources, and the marital community composed of Lin Xie and Jane Doe Xie

AND TO: Kevin T. Steinacker and Dickson Steinacker LLP, plaintiff's attorney of record.

Pursuant to the provisions of CR 26, 33, and 34, please answer the following interrogatories and respond to the following requests for production of documents separately and fully in writing and under oath with a copy thereof to the undersigned counsel for plaintiff within thirty (30) days after service of them upon you.

If the interrogatories cannot be answered in full, then answer to the extent possible, specifying the reason for your inability to answer the remainder, and state whatever information or knowledge you have concerning the unanswered portion.

COPY

PLAINTIFF'S FIRST SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS TO DEFENDANT - 1

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

1 In answering these interrogatories and responding to the requests for production of  
2 documents, furnish such information and documents as are available to you regardless of  
3 whether the information and documents are obtained directly by you or by your attorneys.

4 These interrogatories and requests for production of documents shall be deemed to be  
5 continuing to the date of trial and should be supplemented accordingly. If such information is  
6 not furnished, the undersigned will move at the time of trial to exclude from evidence any  
7 information requested and not furnished.

8 With respect to the following requests for production of documents, plaintiff requests  
9 that you provide for his inspection and copying those documents hereinafter described on or  
10 before the date due at the offices of Salter Joyce Ziker, PLLC, 1601 Fifth Avenue, Suite 2040,  
11 Seattle, Washington 98101.

12 **DEFINITIONS**

13 A. The singular number and the masculine gender as used herein shall embrace,  
14 and be read and applied as, the plural or the feminine or the neuter, as the circumstances may  
15 make appropriate.

16 B. The word "person" includes the plural as well as the singular and includes any  
17 natural person, firm, association, partnership, corporation, or other form of legal entity.

18 C. Each interrogatory is intended to and does request that each and every  
19 particular and part thereof be answered with the same force and effect as if each part and  
20 particular were the subject of and were asked by a separate interrogatory.

21 D. The terms "document" and/or "writing" mean and include, but are not limited  
22 to, any printed, typewritten, electronic, or handwritten matter of whatever character, and every  
23 other form of recording upon any tangible thing, including photographs, diagrams and  
24 videotape.

25 E. Whenever you are asked to identify any document or writing:

26 1. State the date it bears and the date it was prepared,

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2. State the identity of the author and/or originator,
3. State the identity of each addressee,
4. State the nature and substance thereof,
5. State the identity of the present custodian thereof, and
6. State the present location of the document.

F. Whenever you are asked to identify or describe an oral communication or conversation, state with respect thereto:

1. State the date and place thereof,
2. State whether it was in person or by telephone,
3. Identify each person who participated in or heard any part of the communication,
4. State what was said by each person, and
5. Identify any document that recorded, summarized or confirmed the oral communication.

G. Whenever you are asked to identify any person, with respect to such person:

1. State the person's name,
2. State the person's last known business address and telephone number,
3. State the person's last known residence address and telephone number,
4. State the person's present occupation and business affiliation, and
5. State the person's occupation and business affiliation of the time to which your answer relates.

**INTERROGATORIES AND REQUESTS FOR PRODUCTION**

INTERROGATORY NO. 1: Please identify each and every person who participated in any way in answering these discovery requests.

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ANSWER:

INTERROGATORY NO. 2: Please identify every current and/or former spouse of yours in the previous ten years.

ANSWER:

INTERROGATORY NO. 3: Please describe with particularity each and every fact that forms your basis for denying the allegations in paragraph 2.1 of the Complaint.

ANSWER:

REQUEST FOR PRODUCTION NO. 1: Please produce each and every document that refers or relates to your answer to the previous interrogatory, including, but not limited to, all filings Giant International Metal Resources has had with either the Washington Secretary of State or any other Secretary of State of any other state in the previous ten years.

RESPONSE:

INTERROGATORY NO. 4: Please describe each and every fact that supports your basis for denying the allegations in paragraph 2.3 of the Complaint.

ANSWER:

1           REQUEST FOR PRODUCTION NO. 2: Please produce each and every document  
2 that refers or relates to your answer to the previous interrogatory.

3           RESPONSE:  
4  
5

6           REQUEST FOR PRODUCTION NO. 3: Please produce each and every document  
7 that refers or relates in any way to the negotiation, execution, and/or performance of the  
8 contract attached as Exhibit A to the Complaint.

9           RESPONSE:  
10  
11

12           INTERROGATORY NO. 5: Please describe with particularity each and every fact  
13 that supports your denial of the allegation that plaintiff fully performed under the contract.

14           ANSWER:  
15  
16

17           REQUEST FOR PRODUCTION NO. 4: Please produce each and every document  
18 that refers or relates to your answer to the previous interrogatory.

19           RESPONSE:  
20  
21

22           INTERROGATORY NO. 6: Please identify each and every business and/or corporate  
23 entity of any kind that you have been or continue to be a principal, officer, member, partner,  
24 and/or director of in during the previous ten years.  
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ANSWER:

REQUEST FOR PRODUCTION NO. 5: Please produce each and every document that refers or relates in any way to the matter of *Giant International Metal Resources v. CU Transport Inc.*, King County Superior Court Case No. 06-2-02446-0, including, but not limited to, all pleadings, correspondence, exhibits, discovery, and/or any other document related to the matter.

RESPONSE:

INTERROGATORY NO. 7: Please describe with particularity each and every fact that forms the basis of any of your affirmative defenses.

ANSWER:

REQUEST FOR PRODUCTION NO. 6: Please produce each and every document that refers or relates in any way to your answer to the previous interrogatory.

RESPONSE:

INTERROGATORY NO. 8: Please identify by name, current address, and current employer of each and every expert witness who may be called upon by you to testify or render opinions on any issue at the time of the trial of this cause.

1           **ANSWER:**

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4           REQUEST FOR PRODUCTION NO. 7: Please produce all documents that refer or  
5 relate in any way your response to the previous interrogatory.

6           **RESPONSE:**

7  
8  
9           REQUEST FOR PRODUCTION NO. 8: Please produce all documents provided to,  
10 received from, and/or generated by or for each expert witness identified in response to  
11 Interrogatory No. 8.

12           **RESPONSE:**

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15           REQUEST FOR PRODUCTION NO. 9: Please produce a curriculum vitae or  
16 resume for each expert identified in response to Interrogatory No. 8.

17           **RESPONSE:**

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19  
20           REQUEST FOR PRODUCTION NO. 10: Please produce each and every document  
21 that refers or relates in any way to your correspondence with any third party, including, but  
22 not limited to, banks and other corporate entities, regarding the performance of the contract  
23 attached as Exhibit A to the Complaint.

24           **RESPONSE:**

1 INTERROGATORY NO. 9: Please describe the exact amount that you have received  
2 for the goods that were shipped as a result of the contract attached as Exhibit A to the  
3 Complaint.

4 ANSWER:

5  
6  
7 DATED this 15<sup>th</sup> day of November, 2007.

8 SALTER JOYCE ZIKER, PLLC

9 

10 Barry G. Ziker  
11 WSBA #11220  
12 Todd W. Wyatt  
13 WSBA #31608

14 Attorneys for Plaintiff  
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TITLE 62A. UNIFORM COMMERCIAL CODE  
 ARTICLE 5. LETTERS OF CREDIT

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

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

§ 62A.5-115. Statute of limitations

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

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

**NOTES:**

OFFICIAL COMMENT

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

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



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

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

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

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

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

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

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

**HISTORY:** 1965 ex.s. c 157 § 2-325.

**NOTES:**  
OFFICIAL COMMENT

PRIOR UNIFORM STATUTORY PROVISION: None.

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

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

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

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

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

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

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

## RESEARCH REFERENCES

## WASHINGTON LAW REVIEW.

Letters of credit in Japanese-United States trade. *38 Wash. L. Rev.* 169.  
Letters of credit -- A comparison of Article 5 of the Uniform Commercial Code and Washington practice. *37 Wash. L. Rev.* 325.

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



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

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

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

§ 62A.3-502. Dishonor

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**NOTES:**

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

**OFFICIAL COMMENT**

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

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

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

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

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

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

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

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

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

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

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

JUDICIAL DECISIONS

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

SEATTLE IRON & METALS  
CORPORATION, a Washington Corporation

Plaintiff,

vs.

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

Defendants.

GIANT INTERNATIONAL METAL  
RESOURCES

Third-Party Plaintiff,

vs.

CHINA UNITED TRANSPORT, INC., a  
foreign corporation,

Third-Party Defendant

NO. 07-2-27492-8 SEA

RESPONSE TO MOTION FOR PARTIAL  
SUMMARY JUDGMENT

**I. RELIEF REQUESTED**

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

Defendants' Response to Motion for Partial Summary Judgment  
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07-2-27492-8

DICKSON STEINACKER LLP  
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(253) 572-1000 - FACSIMILE (253) 572-1300

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

## 3 II. STATEMENT OF FACTS

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

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

18 After the parties signed the contract, Giant commenced with obtaining a letter of  
19 credit. Giant proposed a letter of credit obtained from one end buyer that had obtained a letter  
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23  
24 <sup>1</sup> LH Hightech Consulting, LLC formally became an LLC in June 2007. Xie Decl., at 2. Since at least 2005, LH  
25 Hightech Consulting used the trade name "Giant International Metal Resources." *Id.* For purposes of this  
response brief, Defendants will be collectively referred to as "Giant".

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

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

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

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

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

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

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

25 *Id.*, Ex. H, at 3.<sup>2</sup>

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

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

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

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

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

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

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

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

21  
22  
23  
24 <sup>4</sup> Although the immaterial to this motion, Giant feels compelled to rebut Plaintiff's allegation that Giant  
25 attempted some "scheme" to defraud Chinese customs. Giant never engaged in such a scheme, nor has it ever  
26 engaged in any other "scheme". Xie Decl., at 6. Plaintiff perhaps confuses this idea of a "scheme" with a  
partnership proposal Giant might have made.







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

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

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

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

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

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

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

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

5           A letter of credit has been described as

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

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

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

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

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

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

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

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

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

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

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

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

16 As the second beneficiary under the transferred letter of credit, Plaintiff assumed the  
17 responsibility to timely present accurate documents for payment. This was Plaintiff’s  
18 contractual obligation, which it breached.  
19  
20  
21  
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23 <sup>6</sup> Plaintiff claims that it delivered the documents to US Bank on September 15, 2005. Motion at 15:18–20.  
24 However, the evidence only indicates when Plaintiff sent the documents, not when the documents were received.  
25 See Smith Decl., Ex. C, D. Plaintiff presents no confirmation from US Bank or other evidence that the bank  
actually received the documents that day.

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

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

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

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

12           RCW 62A.2-325(2).

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

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

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

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

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

28           Subsection (b) of UCC § 3-310 suspends the obligation until dishonor of the instrument. Although this  
29           subsection would probably not apply, it would impose no liability upon Giant, either. The letter of credit in this  
30           case was not "dishonored", as analyzed further in this section of Giant's Response Brief. Moreover, § 3-  
31           310(b)(3) arguably discharges any obligation by Giant, because Giant transferred to Plaintiff a letter of credit  
32           that originated with a third person. RCW 62A.3-310(b)(3) ("In the case of an instrument of a third person which  
33           Defendants' Response to Motion for Partial Summary Judgment

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

3 UCC § 2-325 cmt. 1.

4 The recipient must “duly present” the letter of credit, and only if the letter of credit is  
5 “dishonored” may the seller seek payment from the buyer. In this case, which involved a  
6 documentary letter of credit, Plaintiff presented documents (to U.S. Bank) for payment under  
7 the letter of credit, but the issuing bank did not accept Plaintiff’s presentation of documents  
8 and denied payment. The UCC also provides the definition of “dishonor”, which determines  
9 whether the issuing bank in this case “dishonored” the letter of credit.  
10

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

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

18 RCW 62A.3-502(c).<sup>8</sup>

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17           Plaintiff's failure to present documents regarding the first shipment also raises  
18 material issues of fact regarding mitigation of damages. Even if Plaintiff had not procured a  
19 bill of lading from CU Transport by the deadline for presenting documents, it could have  
20 mitigated its damages by presenting the documents for the first shipment by the deadline.  
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

SEATTLE IRON & METALS  
CORPORATION, a Washington Corporation

NO. 07-2-27492-8 SEA

Plaintiff,

MOTION FOR RECONSIDERATION

vs.

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

Defendants.

**I. RELIEF REQUESTED**

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

**II. STATEMENT OF FACTS**

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

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

### 5 **III. EVIDENCE RELIED UPON**

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

### 7 **IV. STATEMENT OF ISSUES**

- 8
- 9 1. If a contract uses a letter of credit for payment, must a seller meet the  
requirements of RCW 62A.2-325 before seeking payment directly from the buyer? (Yes)
- 10 2. Did the Contract between Plaintiff and Defendant Xie require payment by letter of  
11 credit? (Yes)
- 12 3. Should the Court vacate its Order because Plaintiff failed to address RCW 62A.2-  
13 325 in its motion, which is a procedural error fatal to its motion? (Yes)
- 14 4. Did Defendant Xie provide a proper letter of credit to Plaintiff? (Yes)
- 15 5. Should the Court vacate its Order because the letter of credit was not "dishonored"  
as that term is used in RCW 62A.2-325? (Yes)
- 16 6. Should the Court vacate its Order because Plaintiff has failed to allege that, and  
17 because material issues of fact exist whether, Plaintiff seasonably notified Defendant Xie that  
Plaintiff required direct payment from him? (Yes)
- 18 7. Should the Court amend its Order and allow Defendants' affirmative defenses to  
19 remain because genuine issues of material fact exist on those issues? (Yes)
- 20 8. If the Court upholds its Order, should the Court amend the Order and instruct  
21 Plaintiff to provide to Defendants all required original documents that reflect title to the goods,  
and assign to Defendant Xie all claims Plaintiff might have against another party regarding this  
22 transaction? (Yes)

### 23 **V. LEGAL AUTHORITY AND DISCUSSION**

24 A party that moves for summary judgment bears the burden of proving that no genuine  
25 issues of material fact exist, and that the moving party is entitled to summary judgment as a matter  
26

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

24 <sup>3</sup> These subsections state:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21 Giant asked Plaintiff to present the documents directly to Wells Fargo Bank, which would  
22 have enabled payment under the master letter of credit. Plaintiff refused or neglected to do so.  
23 Plaintiff also could have mitigated its damages by quickly forwarding its AQSIQ certificate to  
24  
25  
26

1 Chinese customs when Giant first requested that it do so. Plaintiff's delay caused extra demurrage  
2 charges to the end buyer (Qiangsheng), which may have contributed to Qiangsheng's refusal to  
3 waive the discrepancies in Plaintiff's presentation of documents. Plaintiff's failure to present  
4 documents regarding the first shipment also raises material issues of fact regarding mitigation of  
5 damages.

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

18  
19 Although issues of fact exist as to whether Plaintiff waived any requirement regarding  
20 documentation the end customer was Bao Steel, the Court did not grant Plaintiff's breach of  
21 contract claim on that basis.  
22

23 Plaintiff's motion did not address the affirmative defense that Plaintiff's damages were  
24 caused by Plaintiff or by third parties. Material issues of fact exist on these matters as well.  
25 Because issues of fact exist on these affirmative defenses, and the merits of the defenses were not  
26

1 addressed at oral argument, the Court should amend its Order to allow trial on these issues

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

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

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

#### 15 VI. CONCLUSION

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

18 DATED this 6<sup>th</sup> day of October, 2008.

19 DICKSON STEINACKER LLP

20 

21 Kevin T. Steinacker, WSBA #35475

22 Matthew J. Smith, WSBA #33309

23 Attorneys for Defendants

24  
25  
26  
Motion for Reconsideration  
Page 12 of 12  
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07-2-27492-8

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

SEATTLE IRON & METALS CORPORATION, a Washington corporation,

Plaintiff,

v.

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

Defendants.

Case No. 07-2-27492-8 SEA

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

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

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

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

2043 002 eh260102

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

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

13 and being fully advised in the premises, now, therefore, it is hereby

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

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

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

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

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

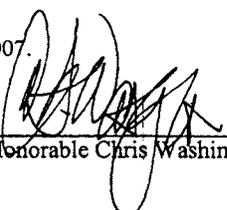
ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL  
 SUMMARY JUDGMENT - 2

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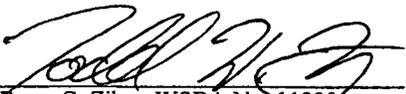
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DATED this 26<sup>th</sup> day of September, 2007.

  
\_\_\_\_\_  
Honorable Chris Washington

Presented by:  
SALTER JOYCE ZIKER, PLLC



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

Attorneys for Plaintiff



Matthew J. Smith  
Attorney for Defendants

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

2043 002 eh260102

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Honorable Chris Washington

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**NOV 18 2008**  
**DICKSON STEINACKER LLP**

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

SEATTLE IRON & METALS  
CORPORATION, a Washington corporation,

Plaintiff,

v.

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

Defendants.

Case No. 07-2-27492-8 SEA

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

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

Defendants' motion regarding seasonable notification is DENIED.

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

**ORIGINAL**

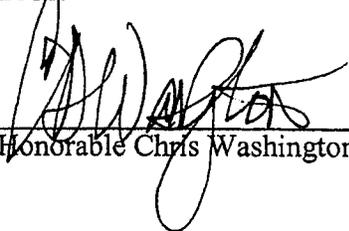
ORDER DENYING DEFENDANTS' MOTION REGARDING  
SEASONABLE NOTIFICATION AND IMPOSING TERMS - 1

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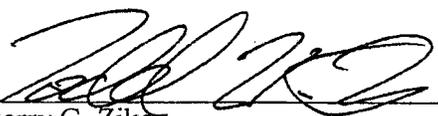
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DATED this 7th day of November, 2008.

  
Honorable Chris Washington

Presented by:  
SALTER JOYCE ZIKER, PLLC

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

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Honorable Chris Washington

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

SEATTLE IRON & METALS CORPORATION, a Washington corporation,

Plaintiff,

v.

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

Defendants.

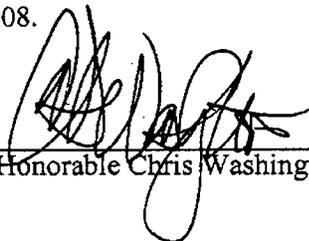
Case No. 07-2-27492-8 SEA

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

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

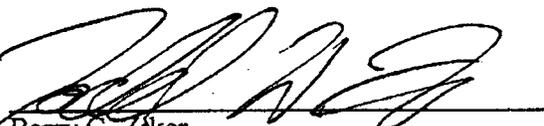
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DATED this 9th day of December, 2008.

  
Honorable Chris Washington

Presented by:

SALTER JOYCE ZIKER, PLLC



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

Attorneys for Plaintiff

Honorable Chris Washington

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

SEATTLE IRON & METALS CORPORATION, a Washington corporation,

Plaintiff,

v.

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

Defendants.

Case No. 07-2-27492-8 SEA

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

JUDGMENT SUMMARY

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

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

SALTER JOYCE ZIKER, PLLC  
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Post-judgment interest:	The total amount of judgment shall bear interest at 12% per annum from date of judgment until paid in full.
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**JUDGMENT**

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

IT IS ORDERED:

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

DONE IN OPEN COURT this 9<sup>th</sup> day of December, 2008.

JUDGE CHRIS WASHINGTON *CS*

Honorable Chris Washington

Presented by:

SALTER JOYCE ZIKER, PLLC



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

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

SEATTLE IRON & METALS CORPORATION, a Washington corporation,

Plaintiff,

v.

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

Defendants.

Case No. 07-2-27492-8 SEA

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

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

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

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

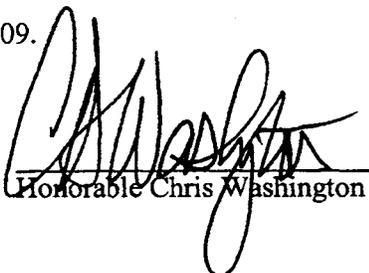
ORDER DENYING DEFENDANTS' MOTION TO FILE AN AMENDED ANSWER AND IMPOSING SANCTIONS - 1

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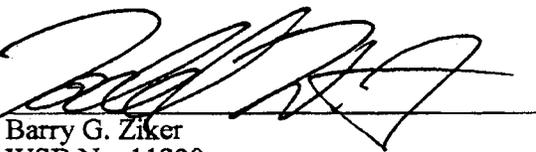
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DATED this 28<sup>th</sup> day of January, 2009.

  
Honorable Chris Washington

Presented by:

SALTER JOYCE ZIKER, PLLC



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

Attorneys for Plaintiff  
Seattle Iron & Metals Corporation

ORDER DENYING DEFENDANTS' MOTION TO FILE AN  
AMENDED ANSWER AND IMPOSING SANCTIONS - 2

2043 002 fa260101

SALTER JOYCE ZIKER, PLLC  
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Tel: 206-957-5960 / Fax: 206-957-5961



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



From left to right: Mike Dollard, , Alan Sidell



From left to right: Mike Dollard , Alan Sidell,