

No. 66619-3-I

COURT OF APPEALS DIVISION ONE
OF THE STATE OF WASHINGTON

RICHARD STABBERT, et al.,
Appellants

vs.

GLOBAL EXPLORER, LLC, et al.,
Respondents/Appellees

APPEAL FROM SUPERIOR COURT
FOR KING COUNTY

APPELLANTS' REPLY BRIEF TO GLOBAL EXPLORER'S
RESPONSE

Scott E. Stafne, WSBA # 6964
Attorney for Appellants

Stafne Law Firm
239 N. Olympic Avenue
Arlington, WA 98223
Phone: 360-403-8700
Fax: 360-386-4005

FILED
COURT OF APPEALS, DIV I
STATE OF WASHINGTON
2011 JUL 28 AM 10:27

 ORIGINAL

TABLE OF CONTENTS

INTRODUCTION	1
REPLY to: "D. Judge Canova's Decision to not Consider Untimely Declarations was within His Broad Discretion."	1
REPLY to facts and arguments related to Global Respondents' "procuring cause" theory	6
REPLY to facts and arguments related to Global Respondents' breach of the April 3, 2006 Services Agreement	13
REPLY to "C. Judge Canova Properly Rules on the Conflict of Interest Declarations, and his rulings are immaterial to the Dismissal of Appellants' claims on Summary Judgment"	18
CONCLUSION	20

TABLE OF AUTHORITIES

A. Table of Cases:

State Cases

<i>Anderson v. Farmers Ins. Co. of Washington</i> , 83 Wn. App. 725, 735, 923 P.2d 713 (1996)	2, 4
<i>Applied Indus. Materials Corp. v Melton</i> , 74 Wn. App. 73, 77, 872 P.2d 87 (1994)	3, 4, 5
<i>Bonanza Real Estate, Inc. v. Crouch</i> , 10 Wn. App. 380, 385, 517 P.2d 1371 (1974)	9
<i>Bonneville v. Pierce County</i> , 148 Wn. App. 500, 202 P.3d 309 (2008)	5
<i>Feeley v. Mullikin</i> , 44 Wn.2d 680, 269 P.2d 828 (1954)	9
<i>Int'l Ultimate, Inc. v St. Paul Fire and Marie Ins. Co.</i> 122 Wn. App. 736, 87 P.3d 774, 781 (2004)	2
<i>Keever & Associates v Randall</i> , 129 Wn. App. 733, 741, 119 P.2d 926 (2005)	18
<i>Meridian Minerals Co. v. King County</i> , 61 Wn. App. 195, 203, 810 P.2d 31 (1991)	3, 4, 5
<i>Mithoug v Apollo Radio of Spokane</i> , 128 Wn.2d 460, 463, 909 P.2d 2919 (1996)	2
<i>O'Neill v. Farmers Ins. Co. of Washington</i> , 124 Wn. App. 516, 522, 125 P.3d 134 (2004)	3
<i>Professionals 100 v. Prestige Realty, Inc.</i> , 80 Wn. App 833, 842, 911 P.2d 1358 (1996)	9, 10

<i>Sevener v. Northwest Tractor & Equip. Corp.</i> , 41 Wn.2d 1, 18-19, 247 P.2d 237 (1952)	9
<i>Shellenbarger v. Brigman</i> , 101 Wn. App. 339, 345-346, 3 P.3d 211 (2000)	4
<i>Smith v. Showalter</i> , 47 Wn. App. 245, 248, 734 P.2d 928 (1987)	5
<i>Syputa v. Druck Inc.</i> , 90 Wn. App. 638, 647-8, 954 P.2d 279 (1998)	9
<i>Walker v. Transamerica Title Ins. Co., Inc.</i> , 65 Wn. App. 399, 828 P.2d 621 (1992)	5

B. Court Rules:

CR 56 (c)	2
CR 56 (e)	2
RAP 10.3 (a)(5)	6, 13
RAP 17.7	6

INTRODUCTION

In their response briefs to plaintiffs Richard Stabbert and Global Marine Logistics, LLC (hereafter collectively referred to as "Stabbert"), Global Respondents and Deepwater both discuss the evidence which it contends the trial court considered *See e.g.*, Global Respondents Response Brief (hereafter "GR Brief") at 41; Deepwater's Response Brief at 15. Logically, this Court should determine what evidence was properly before the Court for review before considering the merits of each party's arguments. Stabbert's Reply to GR Brief first replies to the evidentiary issues raised in this appeal and then follows with an analysis of the "merits" issues.

**REPLY to: "D. Judge Canova's Decision to not Consider Untimely Declarations was within His Broad Discretion."
(G R Brief, pp 38-43).**

Global respondents portray the lower court's order denying reconsideration (CP 1753-54) as consideration of an "untimeliness" objection. *See* G R Brief at 39, 43. As discussed below, this argument is not supported by law or record because: (1) there was no "untimeliness" objection to Stafne's Declaration; but the court apparently ordered striking Stafne's declaration on basis of unidentified inadmissible hearsay (CP 1754); (2) there is no hearsay objection in the record to support the court's

striking this declaration and therefore no decision by the trial court capable of appellate review¹, and (3) under the law, unless there is an objection, the evidence is deemed admitted and should be considered by this Court. *See e.g., Anderson v. Farmers Ins. Co. of Washington*, 83 Wn. App. 725, 735, 923 P.2d 713 (1996). *See* CP 1753 ("Order where trial court notes that it considered all the materials proffered by the parties related to the Motion for Reconsideration.")

Global Respondents' argument that the lower Court struck untimely evidence is not supported by the record. GR Brief at 38. As demonstrated by the chronology of the record, the trial court did not ever rule on any objections for untimely evidence in its summary judgment orders dated October 11, 2010.

Stabbert's motion to reconsider in support of the motion for reconsideration included four new declarations and:

all the pleadings and evidence filed with this Court in support of and in opposition to defendant's motions for summary judgment, including Stabbert's October 3, 2010 filing which does not appear to be a part of the record.

¹ The trial court should have specifically identified those exhibits to Stafne's declaration which it considered hearsay. This is because the normal rules of authentication do not apply to submissions made by attorneys pursuant to motions for summary judgment. CR 56(e) allows an attorney to base his or her affidavit on documents properly before the court. And this includes documents already in the court files, as well as additional documents presented by the parties in a motion for summary judgment. CR 56(e). *See also Int'l Ultimate, Inc. v St. Paul Fire and Marie Ins. Co.* 122 Wn. App. 736, 87 P.3d 774, 781 (2004); *Mithoug v Apollo Radio of Spokane*, 128 Wn.2d 460, 463, 909 P.2d 2919 (1996); ("CR 56(c) refers to judgments rendered on the 'pleadings, depositions, answers to interrogatories, and admissions *on file*, together with the affidavits, if any'").

[***] Stabbert also relies on the following pleadings already before this Court, including the all pleadings and evidence (including sealed pleadings and declarations which at this time do not appear as part of the case record) related to Stabbert's counsels' notice to withdraw, Stabbert's response to Defendants' motion to strike untimely evidence, and Stabbert's motions for sanctions against Deepwater, declarations in support thereof, Deepwater's response to the motion for sanctions, including the declaration of Scott Zanzig in support of that response, and Stabbert's reply and the declarations in support of that reply .

CP 1554-1555.

Stabbert disagrees with Global Respondent's contention that the trial judge had discretion not to consider the evidence submitted by Stabbert prior to the Court's October 11, 2010 written ruling granting summary judgment. *See* Appellant's Opening Brief at 41 (citing, *Applied Indus. Materials Corp. v Melton*, 74 Wn. App. 73, 77, 872 P.2d 87 (1994); *Meridian Minerals Co. v. King County*, 61 Wn. App. 195, 203, 810 P.2d 31 (1991)); *see* GR Brief at 41. The rule is "a party may submit additional evidence after a decision on summary judgment has been rendered, but before a formal order has been entered." *Meridian Minerals*, 61 Wn. App. at 202. In this division, the rule only applies where the party moves for and is granted reconsideration. *O'Neill v. Farmers Ins. Co. of Washington*, 124 Wn. App. 516, 522, 125 P.3d 134 (2004). Such motion was

moved for and granted here. CP 1552, CP 1708. Global Respondents did not object to any evidence being untimely for purposes of reconsideration, and none was because all (except the four new declarations supporting reconsideration) had been submitted before October 11, 2010, which was the date the trial court issued written orders granting the summary judgments. CP 1545-1551 (orders dated October 11, 2010); CP 1563-1687

No objections were lodged to the declarations filed after October 11, 2010 in support of the motion for reconsideration. *See e.g.* (Stabbert declaration); CP 1688-1689 (Robinson declaration); CP 1690-01 (Stauffer declaration); CP 1692-1707 (Stafne declaration); CP 1710 (no objection to the Court amending the Order). Therefore, all the evidence submitted before the Court issued its summary judgment orders on October 11, 2010 and the four declarations submitted in support of the motion for reconsideration should be considered by this Court unless there is some reviewable articulation for the trial court not doing so. *Anderson v. Farmers Ins. Co. of Washington*, 83 Wn. App. 725, 735, 923 P.2d 713 (1996); *see also, Shellenbarger v. Brigman*, 101 Wn. App. 339, 345-346, 3 P.3d 211 (2000); *Applied Indus. Materials Corp. v Melton*, *supra.*; *Meridian Metals Co. v. King County*, *supra.*

In the absence of a motion to strike there would be no basis to strike Stafne's declaration unless the Court decided at that point to simply ferret out inadmissible evidence. *See generally*, CP 1737:16-1739:14 (and authorities set forth therein). If this is what occurred, then the lower court ignored the basic tenants of our adversary system; namely, that the parties present the issues and the judge rules on the parties' arguments in such a way that they can be reviewed by an appellate court. *See id. Sua sponte* striking any attorney's declaration because of unidentified hearsay to which there has been no objection is incompatible with the way courts are expected to handle the admission of evidence regarding summary judgments. *See Bonneville v. Pierce County*, 148 Wn. App. 500, 202 P.3d 309 (2008); *Walker v. Transamerica Title Ins. Co., Inc.*, 65 Wn. App. 399, 828 P.2d 621 (1992); *Smith v. Showalter*, 47 Wn. App. 245, 248, 734 P.2d 928 (1987).

The trial Court itself states it considered the pleadings referenced by the parties. *Id.* Therefore, the previous pleadings identified in support of and in opposition to the motion for reconsideration were properly before the lower court when it reconsidered its summary judgment ruling. *See Applied Indus. Materials Corp. v Melton*, 74 Wn. App. 73, 77, 872 P.2d 87 (1994); *Meridian Minerals Co. v. King County*, 61 Wn. App. 195, 203, 810 P.2d 31 (1991).

In summary, the Court's findings that there are unidentified hearsay and inadmissible materials in the pleadings submitted by Stabbert are not supported by Global Respondents' assertion that the Court has broad discretion to exclude untimely evidence.

**REPLY to facts and arguments related to Global Respondents'
"procuring cause" theory.
(G R Brief, pp. 3-14; 21-33.)**

Global Respondents purport to state undisputed facts² in Section A.2. of their Statement of the Case about Stabbert's "oral marketing agreement with the GLOBAL EXPLORER". G R Brief at 3. In this regard, respondents' state:

In approximately 2003, Global Explorer and Stabbert entered into an oral agreement for Stabbert to market the GLOBAL EXPLORER to the offshore oil and gas industry in Mexico (the "Oral Contract"). Under the Oral Contract, Global Explorer agreed to pay Stabbert a five percent commission on any charters of the GLOBAL EXPLORER procured as a direct result of Stabbert's efforts. Stabbert only would be paid if his efforts resulted in a charter. If no charter was signed, no commissions were owing to Stabbert regardless of how much work he put into marketing the GLOBAL EXPLORER. The arrangement was terminable at will by either party. Stabbert worked in this capacity individually through GML until February 1, 2007, when Global Explorer terminated the Oral Contract and ended the relationship. [CP 183].

² Stabbert moved the Commissioner strike each factual statement in Global Respondents "statement of the case" section of its brief which was not supported by the record as is required by RAP 10.3 (a)(5). The Commissioner denied this ruling. Stabbert intends to object to this and other rulings by the commissioner pursuant to RAP 17.7 because they likely intrude on merits decisions which should be made by a panel of judges.

G R Brief, at 3-4. The citation to the record (CP 183) for these factual statements about the oral agreement was a paragraph of a declaration Steuart submitted in support of Global Respondents motion for summary judgment. See CP 182-87. The language of Steuart's declaration was identical to the language in Global Respondents' motion. *Compare Id. with*, G R Brief, at 3-4.

These facts about the oral agreement were directly disputed by Stabbert. See CP 743-759. Stabbert stated in his response declaration:

2. In late 2002, I entered into an oral agreement with Global Explorer LLC to market the vessel, exclusively, in the United States and Mexico for commission of 5% on all charter revenues. The vessel was marketed initially to U.S. companies, even prior to the completion of her certificates. The first signed contract for the ship was Thales Geo Solutions, a company engaged in remote operated vehicle operations for submarine pipeline repairs in the Gulf of Mexico, specifically the US oil patch. My oral agreement with Global Explorer L.L.C was to find customers that could utilize the vessel and to educate the customer with regards to the operational capabilities of the Vessel. I would then provide Frank Steuart with the customer name and the general outline of customer requirements. If a charter was eventually entered into with the customer, I would receive a 5% commission on the charter and all extensions for use of the vessel, regardless of what project it performed for the customer. My obligation was to find the customer and to create successful dialogue between the customer and the vessel owners. I would then make the customer available to Frank Steuart to arrange the terms and conditions of the actual charter and to complete the preparation of a master time charter. See attached letter from Frank Steuart to Thales Geo Solutions. A copy is attached as Exhibit #3.

CP:744:21-45:18, ¶ 2. It is obvious that the testimony of Steuart and Stabbert regarding the terms of the oral agreement is at odds. Thus, just based on this disparate declaration testimony the trial court should have found Global Respondents had not met their burden of showing there was no issue of material fact regarding the terms of the oral agreement. *See* Appellants' Opening Brief, at 24-26 (authorities cited therein).

In addition to pointing out the disparity in Steuart's declaration testimony and his own, Stabbert also proved Steuart's testimony on other occasions was at odds with the carefully worded declaration testimony. *See* CP 446:1-448:18; 473:14-479:18; 482-485; 1327-1356; 1741:7-1745:7-1746:13. These discrepancies in Steuart's testimony also prevented Global Respondent's from meeting their burden as to showing there were no material fact issues as to the credibility of Steuart's testimony relating to the terms of the oral agreement. *See* CP 1745:3-17 (Authorities therein).

Deepwater Respondents seek to evade the obvious factual disputes by implicitly arguing that the "procuring cause" doctrine trumps the parties' intentions. *See* G R Brief at 21-24. But Washington law does not restrict the parties to an oral contract, or a written contract, from agreeing

to terms different than the normal standards established by the procuring cause doctrine; as this Court stated in *Syputa v. Druck Inc.*:

Even if other factors contribute to a sale, that does not necessary preclude a finding of procuring cause [FN 13]. "Application of the 'procuring cause' doctrine depends on a determination of the intentions of the parties to the agency relation."

Syputa v. Druck Inc., 90 Wn. App. 638, 647-8, 954 P.2d 279 (1998).

Footnote 13 explains:

For example, the independent factor of finding favorable financing that allows a deal to be consummated is not held to defeat the broker's claim that he or she procured the sale. E.g., *Professionals 100 v. Prestige Realty, Inc.*, 80 Wn. App 833, 842, 911 P.2d 1358 (1996). The scope of the broker's agency is to introduce the seller to the ready and willing buyer. This is why the presence of the broker is not required at the ultimate negotiations of the contract, e.g., *Feeley v. Mullikin*, 44 Wn.2d 680, 269 P.2d 828 (1954); *Sevener v. Northwest Tractor & Equip. Corp.*, 41 Wn.2d 1, 18-19, 247 P.2d 237 (1952); *Bonanza Real Estate, Inc. v. Crouch*, 10 Wn. App. 380, 385, 517 P.2d 1371 (1974), and by extension is not responsible for the ultimate terms of the deal.

Syputa, 90 Wn. App. at Note 13.

The parties to an oral or written contract can agree to forego the application of the procuring cause doctrine entirely.

The trial court determined that the language of the agreement--"provide a buyer"--was consistent with the concept of "procuring cause of sale." We agree. Although a contract could provide for payment of commissions to being something less than the procuring cause of a sale, the language in this contract does not so provide.

Professionals 100 v. Prestige Realty, Inc., 80 Wn. App. 833, 838, 911 P.2d 1358 (1996).

Just as Global Respondents have not met their burden of showing the absence of a material question of fact regarding the terms of the oral agreement between Stabbert and Steuart, Global Respondents have not met their burden of showing Stabbert has not earned commissions pursuant to the oral for Diavas' continuing long term charters of the GLOBAL EXPLORER. Stabbert testified (and Steuart has agreed, on occasion and under oath) that all Stabbert had to do was bring a potential client to the table. CP:744:21-45:18, ¶2 (Stabbert's testimony); *see e.g.*, 473:17-477:3 (Steuart's testimony). Stabbert testified that he brought Diavas to Steuart for purposes of entering into a charter of the GLOBAL EXPLORER prior to November, 2006.³ Shortly after a draft Master Time

³ CP 743- 758. Stabbert states in his original Response declaration, to which no specific objection was sustained:

My name is Richard Stabbert. I am over the age of majority and am competent to make this declaration. This declaration is based on personal knowledge as well as my review of business records kept in the regular course of my business. ... I have been chartering vessels to Pemex contractors since 2003 and am familiar with Pemex bidding, purchasing, contracting, and other procedures as a result of this work. I am also familiar with public Pemex documents.

* * *

8. I knew the EVYA contract was unraveling and in order to prepare for its possible termination , approached Diavaz, to negotiate a new contract to replace Evya on the Global Explorer, if required. I also arranged for a potential time charter for the Global Explorer to Sea Quest Diving of Houston Texas. Exhibit 16. We would use the Diavaz diving equipment and divers in addition we address the issue of the vessel remaining with Diavaz, if the vessel were returned to Mexico.

Charter was prepared Stuart sent Stabbert a new written brokerage agreement to sign which Stabbert believed would allow Stuart to deny him the commission for the long term Diavaz charters, which he believed he had already earned. CP 751-52.

9. On October 11, 2006 Diavaz was publicly notified of a contact award for Pemex contract #438236884. See Exhibit 24 [Public Bid Awards] On November 15, 2006 I received a new marketing agreement signed by Frank Steurt which changed the terms of our existing oral contract relating to marketing the vessel. See Exhibit #25 [Proposed written agreement]. I refused to sign the new written marketing agreement signed by Frank Steurt because, among other things, I was concerned I could limit my right to commissions for the Diavaz long term charter, which I knew I had already been earned.

CP 751:3-10.

See attached Exhibit 17 [Exhibit 17 is set forth at CP 850-856. It is the Diavaz' dive proposal dated August 22, 2006] ... The diving equipment [stolen from Evya] was returned to around August 11, 2006. This release then paved the way for the Global Explorer to resume working in Mexico on pending contracts for Pemex. The vessel returned to Mexico in December 2006 to a charter I arranged with Swecomex and Diavaz. The charter was in the name of Swecomex. Diavaz mobilized their equipment on board the Global Explorer. I thought this was important to provide Diavaz the opportunity to utilize the vessel and understand the capabilities of the vessel during the Swecomex charter. ... I was working directly with Diavaz to include the Global Explorer in its new contract proposals. In addition I help Nancy Terril [Stuart's assistant] and Mike Budelman [an attorney for Global respondents] prepare a draft MTC [Master Time Charter] for Diavaz which allowed for IMR or non IMR work depending on the final selection of intended use by Diavaz. ... See Exhibit 22. [Email from Stabbert to Stuart dated Dec. 11, 2006] Again in January of 2006 a draft charter party option was drafted for possible use of Global Explorer with Diavaz. Paragraph 6 expressly states that Diavaz may change the services for which the charter party is executed. See Exhibit 23 [Nov. 3, 2006 Emails between Stabbert, Stuart, Global Respondent's attorney and Nancy Terril re attached draft Master Time Charter between Global Explorer, LLC and Diavaz.

CP 743- 758.

The first time Steuart submitted a declaration about the oral agreement in the Evya litigation on April 22, 2009, he stated the new written agreement was presented "the parties had operated under only a verbal agreement that had the potential to lead to uncertainty regarding the parties rights and duties." CP 483 at ¶ 11. A factual inference from this statement is that Steuart was aware Stabbert likely expected commissions from future Diavaz's charters.

The claims by Steuart and Castro that they worked together to come up with the long term charters they are currently operating does not fulfill Global Respondents burden of demonstrating an absence of genuine issues of material fact regarding whether Stabbert was entitled to commissions under the previous oral agreement; and because Stabbert provided conflicting testimony and personally worked with Castro. *See* Appellant's opening brief, at 9-11 (and citations therein); *see also*, CP 871-887 (draft MTC prepared by Global Respondents' attorney in November and January 2006); CP 9 (Castro's dubious assertion that he never dealt with Stabbert regarding Global Explorer); CP 987 (Castro's July 18, 2007 email to Stabbert to "confirm our interest in the Global Explorer...").

**REPLY to facts and arguments related to Global Respondents'
breach of the April 3, 2006 Services Agreement.
(G R Brief, pp. 4-5; 33-35)**

Global Respondent's factual argument presumes Stabbert's claims for breach of the April 6, 2006 Services Agreement was only for commissions Deepwater owed Stabbert. Global respondents contend "Global Enterprises' decision to terminate its Oral Contract had had absolutely no connection whatsoever to do with the Services Agreement". G R Brief at 4-5. This factual statement is not supported by any citation to the record in violation of RAP 10.3 (a)(5).⁴ Stabbert respectfully requests the panel inquire into what portions of the record at CP 183-4 or CP 113-121 support the factual claim, which the Commissioner deemed to be adequate factual support for the briefing.

Global Respondents refuse to recognize Stabbert's complaint alleged both Deepwater and Global Respondents breached the contract. *See Generally*, G R Brief at 4-5; 33-35. Stabbert's complaint alleged, among other things, a joint repudiation (breach) by Deepwater and Global Respondents of the Services Agreement to avoid paying him for obtaining "protected status" for Deepwater's technology and *commissions pursuant to his oral agreement with Global Respondents*. *See* CP 1821 at ¶ 47;⁵

⁴ Although the Commissioner allowed Global Respondents complete immunity from providing citations to the record in their brief pursuant to RAP 10.3 (a)(5).

⁵ Stabbert's amended complaint alleges:

see also, CP 1814:4 - 1821:7; 1824:19 - 1826:5; 1827:8-1827:3.⁶

Stabbert's complaint also alleged his company, GML, had also lost the right to install Deepwater technology because of Global Respondents' and Deepwater's breach of the agreement and sought injunctive relief to regain licensing rights under Section 3 of the Services Agreement. CP 1821-25.⁷

Since the original Services Agreement was executed on July 10, 2005,⁸ Stabbert worked with Deepwater to obtain "protected status". CP 755 - 756. Stabbert outlined to Steuart how Global Explorer, LLC and the

As a direct result of conduct by defendant DEEPWATER ... and/or GLOBAL EXPLORER the plaintiff GLOBAL MAINE LOGISTICS has not been paid those monies to which it is entitle pursuant to the Technology Agreement...

CP 1821 at ¶ 47.

⁶ Stabbert's amended complaint alleged:

GLOBAL MARINE LOGISTICS asserts the GLOBAL EXPLORER defendants breached the Technology Agreement by attempting to compromise GLOBAL MARINE LOGISTICS rights to payment under the contract for its own benefits.

CP 1825 at ¶ 61

⁷ Stabbert's complaint alleged Deepwater breached the agreement by:

allowing its technology to be used, sold, distributed, and marketed in Mexico's territorial waters, EEZ, and the waters above the outer continental shelf by others without the payment of commissions owed to GLOBAL MARINE LOGISTICS. DEEPWATER ... also has breached the agreement by failing to honor the exclusive right of GLOBAL MARINE LOGISTICS to install the technology.

CP 1826 at ¶ 64; *See also* 1828:7-8.

⁸ *See* Stabbert's Reply to Deepwater Brief, at 5 and note 6.

vessel GLOBAL EXPLORER could benefit from participating in the Services Agreement with Deepwater. Id.; *see also* CP 1141-1146 (January 2006 letter from Stabbert to Steuart regarding cathodic protection). Stabbert invited Steuart to become involved in the Services Agreement and the two entered into a pre-joint venture agreement on behalf of their companies to explore this opportunity. *See* letter agreement signed by Stabbert and Steuart at CP 489-490. Stabbert performed every task identified on CP 489 except hiring consultants. CP 755-756; 1151-2.

The primary change to the second services agreement was the addition of Global Respondents as a party to the agreement. The Respondents go out of their way to ignore the basic premise of both Services Agreements, which was that Stabbert would obtain "protected status" for Deepwater technology in Mexico. Indeed, this is the *only fact* about Stabbert's obligations under the contract that Britton mentions in his declaration. There he testifies: "Several years ago, Richard Stabbert approached me and told me that he could use his knowledge of and connections with Pemex to generate large sales of Deepwater's products in Mexico." CP 45 at ¶ 3. The "Basic Agreement" set forth at CP 49, ¶ 1 states:

Basic Agreement. The parties agree that they shall undertake the obligations set forth in the Agreement for the purpose of licensing (or such other method of obtaining

protected status for Deepwater's anti-corrosion procedures as the parties may deem appropriate) pipeline corrosion technology through the appropriate Mexican Authority, marketing that technology, and soliciting and performing pipeline corrosion work utilizing that technology in the territorial waters and the waters over the outer shelf of Mexico.

CP 49 at ¶ 1. Britton's testimony, and the language of the contract, supports the inference that Stabbert's primary role under the contract was to obtain "protected status" for Deepwater's "Cathodic Protection Technology" because Stabbert had no control over Global Respondent's vessels and Deepwater's technology. As compensation for obtaining "protected status" and increasing Deepwater's sales through a bid and non-bid process, Stabbert and Global Respondents were given an "exclusive license" to "use, produce, sell, distribute, market and install its Cathodic Protection Technology..." in Mexico's territorial waters and EEZ. CP 49 at ¶ 3. The Agreement defines "Cathodic Protection Technology" to include all products, procedures, and processes, including those developed in the future. CP 49 at ¶ 3; 29:6-7; 41-44.⁹

⁹ The breadth of the term "technology" as used in the agreement is significant because in its responses to Stabbert's discovery Deepwater re-defined technology to mean only "products that were sold pursuant to the Services Agreement" so as to avoid answering questions regarding "technology". CP 1377:11-23. On other occasions Deepwater claimed Deepwater claimed not to know what the term Deepwater Cathodic Protection included. CP 1386:9-16.

Global Respondent's description of the Services Agreement ignores the "Basic Agreement" to obtain "protected status". G R Brief at 4-5. Ignoring this is significant because after Stabbert obtained "protected status" for Deepwater technology, Global Services and Deepwater obtained the primary benefit of the bargain contemplated to be performed by Stabbert. CP 49-53. CP 639-641. Since Stabbert had already performed his promise there was an economic motive for both Global Respondents¹⁰ and Deepwater to repudiate the agreement. CP 49, ¶ 3. d.; CP 600:4-602:2 (Deepwater had to pay two 10% commissions for all technology [i.e., products, processes, and procedures] sold or used pursuant to "protected status" outside of the bid process.)

The facts in the record substantiate that in October and November 2006 Stabbert was solidifying a long-term charter arrangement with Diavaz that Stabbert had started to put in place in August. CP 743- 758. In October after Diavaz was awarded a Pemex contract to use the Global Explorer to do IMR work and after Stabbert had negotiated a Master Time Charter which had been put into a draft format on November 2006, Steuart sends Stabbert a letter on November 15, 2006 to clarify that Stabbert

¹⁰ Global Respondent's economic motives for terminating the Services Agreement will be discussed in Stabbert's reply brief against those Defendants/Respondents.

should not get any commissions from the long term charters he had arranged with Diavaz. CP 751-2 at ¶ 9.

By agreeing with Britton to not perform the Services Agreement and firing Stabbert Global Respondents breached both the Services Agreement and the Oral Commission Agreement. *See* Appellant's opening brief at 29-32 (and cases cited therein). Significantly, Global Respondents do not cite a single case in support of their position that Global Respondents did not breach the Services Agreement. G R Brief at 33-35. Global Respondents failure to factually articulate a response to Stabbert's claim that Global Respondents breached the Services Agreement and failure to cite any authority adverse to Stabbert indicates Global Respondents have waived their right to deny this claim. *See Keever & Associates v Randall*, 129 Wn. App. 733, 741, 119 P.2d 926 (2005).

**REPLY to "C. Judge Canova Properly Rules on the Conflict of Interest Declarations, and his rulings are immaterial to the Dismissal of Appellants' claims on Summary Judgment"
(Global Respondents Brief, pp. 35-38)**

Global Respondents' argued:

Appellants cite authorities relating to the free access to the courts, including Washington State Constitution's broad requirement of open administration of justice, and focuses on the attorney-client relationship between Stabbert and his former attorneys. [Appellants' Brief at 34-36]. This discussion has no materiality to the summary judgment

motions in the underlying case. Notably, the discussion regarding attorney-client privilege totally ignores the privilege that Appellants' former counsel was attempting to preserve. Specifically, the attorney-client privilege being protected by the Orders to Seal was not any privilege between Stabbert and his former counsel (which of course, Stabbert could waive), but rather was the attorney-client privilege between said counsel and the plaintiffs in a companion case [FN 24] to which Stabbert's attorneys owed a separate duty of confidentiality. Appellants ignore and disregard the rights of the other represented parties, whose rights to confidential representation was being preserved by way of the request that defendant filed under seal.

G R Brief at 36.

Based on Deepwater's representation the trial court's records indicated the documents had been sealed to protect Evya's attorney-client privilege, Stabbert filed a motion with the Commissioner to unseal the documents for purposes of this appeal, and Stabbert incorporates that motion herein.

The Commissioner denied Stabbert's motion to unseal based on his belief that "it is hard to imagine how the declarations are of any significance in a de novo review of the motion for summary judgment." *See* copy of Commissioner's July 25, 2011 ruling, which by this reference is incorporated.¹¹ Stabbert would disagree in light of his assertion that

¹¹ Stabbert also provides notice here that he and GML will timely object to the Commissioner's ruling denying Stabbert's motion to unseal these documents for purposes of this appeal.

there had been such a significant deterioration of the attorney-client relationship between Stabbert and his attorneys that it had affected his ability to timely respond to the summary judgment proceedings. *See* CP 1556:17-1560:14. Moran's submission of a declaration to the Court (when he had not been asked to provide one) after Moran had been terminated (and told not to communicate with the Court) speaks volumes about his relationship with Stabbert when considered with the declarations of Robinson, (CP 1688-9); Stauffer, (CP 1690-91); and Stafne, (CP 1692-1707.) These declarations assert Moran kept evidence provided him so that he could use it to try Evya's case.

Once Global Respondents' admission that they do not know whether the sealing of the Windes and Moran declarations had anything to do with the Evya case is considered, it is clear they have put forth no argument the trial court did not err by refusing to allow Stabbert to see declarations filed against him by his former attorneys after the attorney-client relationship had been terminated. As a matter of policy this Court should not support any diminishment in the sanctity of the attorney-client privilege by allowing Courts to improperly invade that privilege.

CONCLUSION

The Superior Court's order granting summary judgment to Global Respondents should be reversed. The Superior Court's order denying

Stabbert's motion for reconsideration should also be reversed. This Court should order the declarations of Moran and Windes be unsealed.

Respectfully Submitted this 27th day of July, 2011.

Handwritten signature of Scott E. Stafne, consisting of the letters 'S', 'E', and 'S' followed by a horizontal line.

Scott E. Stafne
WSBA #6964

No. 66619-3-I

COURT OF APPEALS DIVISION ONE
OF THE STATE OF WASHINGTON

RICHARD STABBERT, et al.,
Appellants

vs.

GLOBAL EXPLORER, LLC, et al.,
Respondents/Appellees

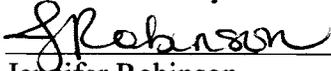
FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 JUL 28 AM 10:27

APPEAL FROM SUPERIOR COURT
FOR KING COUNTY

DECLARATION OF SERVICE

I, Jennifer Robinson, declare under the penalty of perjury that I served a copy of Appellants' Reply Brief To Global Explorer's Response on Appellees' attorneys, by depositing a copy of this document with the U.S. Postal Service addressed to W. Scott Zanzig, 1200 Fifth Ave., Suite 1414, Seattle, WA 98101; and to Michael Gossler, 5500 Columbia Center, 701 Fifth Ave., Seattle, WA. 98104.

Dated: July 27, 2011, at Arlington, Washington.


Jennifer Robinson

 ORIGINAL