

NO. 66619-3-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

RICHARD STABBERT and GLOBAL MARINE LOGISTICS LLC,
Appellants,
v.
GLOBAL EXPLORER, L.L.C., et al.,
Respondents.

2011 JUN 27 PM 3:46

COURT OF APPEALS
DIVISION I
CLERK

GLOBAL RESPONDENTS' RESPONSE BRIEF

Michael E. Gossler
WA State Bar No. 11044
Benjamin I. VandenBerghe
WA State Bar No. 35477
MONTGOMERY PURDUE
BLANKINSHIP & AUSTIN PLLC
Attorneys for Global Respondents

5500 Columbia Center
701 Fifth Avenue
Seattle, WA 98104-7096
(206) 682-7090

TABLE OF CONTENTS

Page

Contents

I. INTRODUCTION	1
II. STATEMENT OF THE CASE.....	3
A. RELEVANT AND UNDISPUTED FACTS	3
1. The GLOBAL EXPLORER and the Global Respondents	3
2. Appellants’ oral marketing contract with Global Explorer.....	3
3. The Deepwater Services Agreement	4
4. Termination of the Oral Contract	5
5. Nature of vessel time charters in Gulf of Mexico oil industry.....	6
6. The process for obtaining charter contracts is standard throughout the industry	7
7. Appellants’ claim for commissions.....	8
8. Stabbert’s claim to a commissions for the Diavaz/GE MTC	9
9. The PEMEX contract underlying the Diavaz/GE MTC	11
10. Stabbert had no role in securing the August 2007 Diavaz/GE MTC	11
11. The Unsigned Option and the Unsigned November 2006 MTC	12
12. The Unsigned Option and Unsigned MTC relate to a different PEMEX contract from the PEMEX contract for the Diavaz/GE MTC.....	13
B. PROCEDURAL HISTORY	14
1. Global Respondents’ Motion for Summary Judgment..	14
2. The orders to seal Appellants’ former counsels’ declarations	18
3. Appellants’ Motion for Reconsideration.....	19

III. ARGUMENT	20
A. JUDGE CANOVA CORRECTLY DISMISSED APPELLANTS’ CLAIM FOR COMMISSIONS AS A MATTER OF LAW	20
1. Standard of review and summary judgment generally ..	20
2. To prevail on a claim for commissions for the Diavaz/GE MTC, Appellants must be the procuring cause of that charter contract.....	21
3. Appellants failed to submit any evidence showing that Stabbert was the procuring cause of the Diavaz/ GE MTC.....	30
B. JUDGE CANOVA PROPERLY DISMISSED APPELLANTS’ CLAIM THAT GLOBAL RESPONDENTS BREACHED THE SERVICES AGREEMENT	33
C. JUDGE CANOVA PROPERLY RULED ON THE CONFLICT OF INTEREST DECLARATIONS, AND HIS RULINGS ARE IMMATERIAL TO THE DISMISSAL OF APPELLANTS’ CLAIMS ON SUMMARY JUDGMENT	35
D. JUDGE CANOVA’S DECISION TO NOT CONSIDER UNTIMELY DECLARATIONS WAS WITHIN HIS BROAD DISCRETION	38
E. JUDGE CANOVA’S DENIAL OF THE MOTION FOR RECONSIDERATION WAS WITHIN HIS BROAD DISCRETION	44
IV. CONCLUSION	46

TABLE OF AUTHORITIES

	<i>Page</i>
Cases	
<i>Bauman v. Worley</i> , 166 Ohio St. 471, 143 N.E.2d 820 (1957)	24
<i>Brown v. Peoples Mortg. Co.</i> , 48 Wn. App. 554, 739 P.2d 1188 (1987)	39
<i>Cantell v. Hill Holliday Connors Cosmopolos, Inc.</i> , 55 Mass. App. Ct. 550, 772 N.E.2d 1078 (2002)	24
<i>Clarkson v. Wirth</i> , 4 Wn. App. 401, 481 P.2d 920 (1971)	22
<i>Crosetto v. Crosetto</i> , 65 Wn.2d 366, 397 P.2d 418 (1964)	38
<i>Crowe v. Trickey</i> , 204 U.S. 228, 27 S.Ct. 275, 51 L.Ed. 454 (1907)	23
<i>Dreiling v. Jain</i> , 151 Wn.2d 900, P.3d 861 (2004)	35
<i>Cox v. Ohio Nat. Life Ins. Co.</i> , 250 Or. 7, 11, 438 P.2d 998 (1968)	24
<i>Ruffer v. St. Cabrini Hosp.</i> , 56 Wn. App. 625, 784 P.2d 1288 (1990)	20, 21, 33
<i>Erwin v. Cotter Health Centers</i> , 161 Wn.2d 676, 167 P.3d 1112 (2007)	27
<i>Fidelity and Deposit Co. of Maryland v. Dally</i> , 148 Wn.App. 739, 201 P.3d 1040 (2009)	21
<i>Garza v. McCain Foods, Inc.</i> , 124 Wn. App. 908, 103 P.3d 848 (2004)	39
<i>Graves v. P.J. Taggares Co.</i> , 25 Wn. App. 118, 605 P.2d 348, <i>modified on other grounds</i> , 94 Wn.2d 298, 616 P.2d 1223 (1980)	21
<i>Guenther v. Equitable Life Assur. Soc. of U.S.</i> , 23 Wn.2d 65, 159 P.2d 389 (1945)	22
<i>Gulf Coast Marine, Inc. v. Cheramie</i> , 317 F.Supp. 867 (E.D. La 1969)	25, 26
<i>Gulf Marine Equipment, Inc. v. C & G Boat Works, Inc.</i> , 471 F.Supp.2d 679, (E.D. La 2007)	26, 27

<i>Harding v. Rock</i> , 60 Wn.2d 292, 373 P.2d 784 (1962)	27
<i>Harris v. Hornbakerm</i> , 98 Wn.2d 650, 658 P.2d 1219 (1983)	37
<i>Kay Corp. v. Anderson</i> , 72 Wn.2d 879, 436 P.2d 459 (1967)	37
<i>Lilly v. Lynch</i> , 88 Wn. App. 306, 945 P.2d 727 (1997)	44
<i>Locher v. New York Life Ins. Co.</i> , 200 Mo. App. 659, 208 S.W. 862, (1919)	24
<i>Meyer v. University</i> , 105 Wn.2d 847, 719 P.2d 98 (1986)	21
<i>Nelson v. Mayer</i> , 122 Cal. App. 2d 438, 265 P.2d 52 (1954)	22
<i>Plumbing Industry Program, Inc. v. Good</i> , 120 So.2d 639, (Fla. App. 1960)	25
<i>Roger Crane & Assocs., Inc. v. Felice</i> , 74 Wn. App. 769, 875 P.2d 705 (1994)	24
<i>Shalimar Development, Inc. v. F.D.I.C.</i> 257 Va. 565, 515 S.E.2d 120 (1999)	22
<i>Shuler v. Kraft</i> , 75 Nev. 196, 337 P.2d 277 (Nev. 1959)	24
<i>Sibbald v. Bethlehem Iron Co.</i> , 83 N.Y. 378 (1881)	23
<i>State v. Turner</i> , 143 Wn.2d 715, 23 P.3d 499, 506 (2001)	37
<i>Syputa v. Druck Inc.</i> , 90 Wn App. 638, 954 P.2d 279 (1998)	28
<i>Tahir Erk v. Glenn L. Martin Co.</i> , 143 F.2d 232, (4th Cir. 1944)	24
<i>Thayer v. Damiano</i> , 9 Wn. App. 207, 511 P.2d 84 (1973)	24
<i>Town and Country Real Estate, Inc. v. Wales</i> , 24 Wn. App. 586, 602 P.2d 727 (1979)	24
<i>Way v. Turner</i> , 127 Md. 327, 96 A. 676, (1915)	23
<i>West v. Thurston County</i> , 144 Wn. App. 573, 183 P.3d 346 (2008)	44
<i>Weyerhaeuser Co. v. Commercial Union Ins. Co.</i> , 142 Wn.2d 654, 15 P.3d 115 (2000)	35, 39

<i>Willis v. Champlain Cable Corp.</i> , 109 Wn.2d 747, 748 P.2d 621 (1988)	27, 28
<i>Wood v. Hutchinson Coal Co.</i> , 85 F.Supp. 1010, (D.C.W.Va. 1949)	23
Statutes	
<u>CJC 3(C)(1)</u>	36
Rules	
CR 26(i)	47
CR 56	20, 44
CR 59	18, 44, 46
ER 1002	31
GR 15	18, 35

I. INTRODUCTION

The core claims in this appeal as it pertains to the Global Respondents¹ best can be characterized by the phrase “I touched it, and it is mine forever.” In substance, plaintiffs/appellants Richard Stabbert (“Stabbert”) and his solely owned limited liability company, Global Marine Logistics, LLC (“GML”) (collectively “Appellants”), claim that because they once held the right to market the 242 foot long vessel DSV GLOBAL EXPLORER to the limited number of companies engaged in the business of maintaining and repairing oil rigs and underwater oil and natural gas pipelines in the Gulf of Mexico, that anyone to whom Stabbert ever introduced the vessel is a customer for life, entitling him to commissions forever. As Judge Canova correctly determined, that is not the law in Washington, and because Stabbert presented no evidence that he procured the charter contract with Diavaz on which his claim in the underlying case was based, Appellants’ claim for commissions with respect to that charter contract properly was dismissed on summary judgment.

¹ The defendants/respondents consisting of Global Explorer, L.L.C., Global Enterprises, L.L.C., Frank Steuart (“Steuart”) and Jane Doe Steuart, and Steuart Investment Company (“SIC”) collectively are referred to in this brief as the “Global Respondents.”

Appellants also appeal the trial court's dismissal of their claims that the Global Respondents owe Stabbert commissions under a Services Agreement with defendant/respondent Deepwater Corrosion Services, Inc. ("Deepwater") for the prospective sale of cathodic protection technology to the oil and gas industry in the Gulf of Mexico, even though it is undisputed that (1) neither Stabbert nor the Global Respondents ever made a single sale of the products that are the subject of the Services Agreement and (2) as a result, the Global Respondents never received a penny of commissions from Deepwater (of which Appellants claim a right to a percentage).

Appellants also allege error based upon (1) Judge Canova's refusal to publish declarations of Stabbert's former counsel filed under seal, (2) Judge Canova's decision not to consider untimely declarations, filed after oral argument was heard on the summary judgment motions, in deciding the summary judgment motions, and (3) Judge Canova's denial of Appellants' Motion for Reconsideration. Judge Canova correctly denied Appellants' motions in each instance.

II. STATEMENT OF THE CASE

A. Relevant and Undisputed Facts

1. The GLOBAL EXPLORER and the Global Respondents

The DSV GLOBAL EXPLORER is a 242 foot long vessel, built in 2002, for use as a dive support vessel for oil and gas platform and underwater pipeline repair and maintenance work in the Gulf of Mexico. Respondent Global Explorer, LLC (“Global Explorer”) owned the GLOBAL EXPLORER until September 2006, when ownership was transferred to a successor company, respondent Global Enterprises, LLC (“Global Enterprises”). Respondent Steuart was the manager of Global Explorer and presently is the manager of Global Enterprises. Respondent SIC is the sole owner of Global Enterprises. [CP 182-83]

2. Appellants’ oral marketing contract with Global Explorer

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 and through GML until February 1, 2007, when Global Explorer terminated the Oral Contract and ended the relationship. [CP 183].

3. The Deepwater Services Agreement

On April 3, 2006, Global Explorer, GML, and Deepwater entered into a Services Agreement pursuant to which Global Explorer and GML agreed to market Deepwater's anti-corrosion pipeline technology ("Cathodic Protection Technology" as defined in the Services Agreement) to companies engaged in the oil and gas pipeline maintenance and repair business in the territorial waters over the outer continental shelf of Mexico (the "Services Agreement"). [CP 634-638]. The Services Agreement provides at Paragraph 5 that it does not create a partnership. Deepwater terminated the Services Agreement as of June 4, 2009. [CP 183-184].

Although nearly all the arguments in Appellants' Brief ("Appellants' Brief") regarding the Services Agreement are directed at Deepwater, Appellants allege that the Global Respondents somehow breached or repudiated the Services Agreement by firing Stabbert and not paying Stabbert any commissions. [Appellants' Brief at 31]. Global Enterprises' decision to terminate its Oral Contract with Stabbert to

market the GLOBAL EXPLORER had absolutely no connection whatsoever with the Services Agreement. Further, by its terms, Deepwater had the right to terminate the Services Agreement when and as it did. The undisputed record is that neither the Global Respondents nor GML sold any of Deepwater's Cathodic Protection Technology during the term of the Services Agreement. Indeed, Stabbert admitted at his deposition that he had no evidence of any such sales. Appellants have no evidence (as none exists since no sales occurred) to support their allegation that they are owed commissions based upon the sale of Cathodic Protection Technology under the Services Agreement. [CP 183-184, 113-121].

4. Termination of the Oral Contract

In November 2006, Steuart presented Stabbert with a draft of a proposed written marketing agreement to replace the Oral Contract. Stabbert refused to sign a written marketing agreement. Global Enterprises was not willing to continue its marketing relationship with Stabbert without a written agreement. On February 1, 2007, Global Enterprises terminated the Oral Contract with Stabbert.

Upon terminating the Oral Contract with Stabbert, Global Enterprises engaged Manuel Reyes Galindo ("Reyes"), general manager of Apoyos Técnicos Maritimos, S.A. de C.V., as a replacement

marketing agent for Stabbert, [CP 315] and entered into a written marketing agreement with Reyes. [CP 216-239]. At all times thereafter, Reyes (and not Stabbert) was the marketing agent for the GLOBAL EXPLORER in Mexico. [CP 315].

5. Nature of vessel time charters in Gulf of Mexico oil industry

The oil and gas industry in the Gulf of Mexico, and specifically the business of maintaining and repairing offshore oil platforms and underwater oil and gas pipelines, is a specialized and limited market. A relatively small number of companies bid for and perform these services, which services consist of submarine and platform construction, submarine pipe and equipment inspection, maintenance and repair, oil platform servicing and maintenance, and related services. One of the companies that performs this work is Diavaz S.A. de C.V. (“Diavaz”), a company which contracts primarily with PEMEX, the Mexican national petroleum company (Mexico nationalized its oil companies) responsible for bidding, contracting, and managing maintenance and construction contracts for the oil industry in the Gulf of Mexico. [CP 185, 315, 161, 259].

To perform contract work for PEMEX, companies like Diavaz charter specialized dive support vessels, of which the GLOBAL EXPLORER is one. There are a limited number of vessels suitable for

this type of work, and the contracting companies performing work for PEMEX know these vessels and keep track of which vessels are available for charter at any given point in time. [CP 185-186, 315-16, 161-162, 259-260].

6. The process for obtaining charter contracts is standard throughout the industry

There is a standard process by which PEMEX bids its work. The process begins with PEMEX publishing a bid, typically in a newspaper, seeking a provider to perform discreet types of services within a certain timeframe. The providers, Diavaz for example, then prepare proposals to submit to PEMEX to be awarded the contract. One component of a contractor's bid is to demonstrate that a vessel is available to the contractor to perform the work if the contract is awarded to that contractor. [CP 185-186, 315-16, 161-162, 259-260].

Vessel owners and their marketing agents and representatives regularly send letters, outlines, draft master time charters, and other types of term sheets to the companies who contract with PEMEX for this work when bids are published or when bid requests are anticipated. At this stage of the process, these documents are simply marketing materials, and do not bind the vessel owner or the contractor. If the contractor is awarded a contract by PEMEX, the contractor then engages in

negotiations with a vessel owner to procure a charter of a vessel, which may be the vessel contemplated at the time the contractor submitted its bid to PEMEX or some other vessel that is suitable and then available for charter. [CP 185-186, 315-16, 161-162, 259-260].

7. Appellants' claim for commissions

Appellants allege in the Amended Complaint that they are entitled to receive commissions on charter contracts for use of the GLOBAL EXPLORER that were negotiated and entered into **after** the Oral Contract was terminated.² At his deposition, Stabbert narrowed this claim to two charters of the GLOBAL EXPLORER: the Master Time Charter between Diavaz and Global Enterprises dated August 2, 2007 (“Diavaz/GE MTC”) and a Master Time Charter between Global Enterprises and another PEMEX provider company Oceanografía S.A. de C.V. (“Oceanografía”). However, in response to Global Respondents’ Motion for Summary Judgment (and again on appeal), Appellants made no claim for commissions based upon the Oceanografía charter, and only made a claim for commissions from the Diavaz/GE MTC. [Appellants’ Brief at 7-8; CP 106].

² See Amended Complaint, paragraphs 49-58. Global Respondents have filed along with this brief a Designation of Clerk’s Papers to include this pleading in the Clerk’s Papers.

8. Stabbert's claim to a commissions for the Diavaz/GE MTC

Appellants claim on appeal that Appellants are entitled to commissions for the Diavaz/GE MTC.³ The factual basis for this claim, as articulated in the Appellants' Brief, is (1) Stabbert's statement in his declaration that he "went ahead and negotiated the [Diavaz] Supplytime draft MTC, which is the November 3, 2006, with Julio Castro,"⁴ and (2) an email message from Mr. Castro to Stabbert dated July 18, 2007 in which Castro inquired of Stabbert about the then availability of the GLOBAL EXPLORER for a six month contract with two six month extensions.⁵ As is discussed in detail in the next sections,⁶ the prospective business between PEMEX and Diavaz which was the subject of the prior negotiations between the parties in November 2006 (and the type of vessel and specifications required to perform that prospective work) was

³ As noted in the preceding section, the only charter contract on which Stabbert sought a commission in response to the motion for summary judgment was the Diavaz/GE MTC. Likewise, that is the only charter contract addressed by Appellants on this appeal. [Appellants' Brief at 8-11, 26].

⁴ [Appellants' Brief at 9-10]. Julio E. Castro Lluria ("Mr. Castro") was the Managing Director for Diavaz in 2006 and 2007. [CP 258-59].

⁵ [Appellants' Brief at 10]. Since the negotiations during November 2006 between Stabbert and Mr. Castro regarding a previous potential charter of the GLOBAL EXPLORER resulted in no charter and ended those discussions, Mr. Castro was unaware when he emailed Stabbert in July of 2007 that Global Enterprises had terminated Stabbert as its marketing representative as of February 2007, five months earlier.

⁶ See subsections 10, 11 and 12, *infra*.

different from and unrelated to the contract between PEMEX and Diavaz which was the basis for the July 18, 2007 inquiry from Mr. Castro.

Although they do not make this argument in their Appellants' Brief, Appellants argued to the trial court that the Diavaz/GE MTC, executed in August 2007, was merely the culmination of a long contract negotiation process that began in November 2006, and that the Diavaz/GE MTC was entered into so that Diavaz could perform work for PEMEX under a PEMEX bid solicitation that was outstanding in November 2006 but was delayed and finally bid and awarded in August 2007. Stabbert testified repeatedly at his deposition (incompetently, without any foundation or personal knowledge)⁷ that the underlying PEMEX contract for which he was promoting the GLOBAL EXPLORER to Diavaz in November 2006 was the same PEMEX work for which Diavaz chartered the GLOBAL EXPLORER under the Diavaz/GE MTC. [CP 91-94]. As

⁷ Neither in August 2007, nor at any time thereafter, did Stabbert have any personal knowledge of the terms of the contract between PEMEX and Diavaz which formed the basis for the August 2007 Diavaz/GE MTC. He did not and could not present the trial court with any admissible evidence that the August 2007 Diavaz/GE MTC was for the PEMEX work under discussion in November 2006. On the other hand, Mr. Castro worked on both projects and has personal knowledge as to the work involved in those projects. As Mr. Castro explains in his Declaration, the two projects involved completely different work, with different vessel requirements and specifications (the GLOBAL EXPLORER needed modifications – the installation of moon pool – to perform the work under consideration in November 2006, but required no modifications to perform the work under the August 2007 charter). [CP 260-64].

is discussed hereafter, the only admissible evidence on this contention is to the contrary.

9. The PEMEX contract underlying the Diavaz/GE MTC

PEMEX is the primary source of work for Diavaz. Diavaz annually submits many bid proposals to PEMEX, amounting to 12-15 bids per year in 2006-2007. In 2004, PEMEX awarded a long term contract to Diavaz (the “2004 Diavaz/PEMEX Contract”) for what is known in the industry as “IRM” work (which stands for “Inspection, Repair, and Maintenance”) and specifically relates to maintaining submarine pipes used in the oil and gas industry. [CP 241, 266]. This scope of work could be performed by using the GLOBAL EXPLORER without any need to modify the vessel. It was for this work under the ongoing 2004 Diavaz/PEMEX Contract that the Diavaz/GE MTC was negotiated and signed in August 2007. [CP 260-261, 268-291, 337-360].

10. Stabbert had no role in securing the August 2007 Diavaz/GE MTC

Mr. Castro’s job duties include negotiating PEMEX bids and the vessel charters required to perform them. Mr. Castro negotiated the August 2007 Diavaz/GE MTC with Steuart, and all of Mr. Castro’s negotiations leading up to the execution of the Diavaz/GE MTC were with Steuart exclusively. [CP 260-262].

Diavaz had chartered multiple vessels from the inception of the 2004 Diavaz/PEMEX Contract until August 2007 in the performance of its work on the 2004 Diavaz/PEMEX Contract. As August 2007 approached, the vessel Diavaz most recently had been chartering was coming off charter, and Diavaz was in need of another vessel to continue its work under the 2004 Diavaz/PEMEX Contract. Mr. Castro advised Steuart that Diavaz was interested in chartering the GLOBAL EXPLORER, and from that point forward Mr. Castro worked exclusively with Steuart to negotiate the Diavaz/GE MTC. Diavaz negotiated the Diavaz/GE MTC exclusively through Steuart. Stabbert, having been terminated as Global Enterprises marketing agent five months earlier, had no involvement whatsoever in these negotiations. Mr. Castro had no negotiations with Stabbert related to the Diavaz/GE MTC. [CP 261-262, 316, 186].

11. The Unsigned Option and the Unsigned November 2006 MTC

Stabbert argued to the trial court that even though the Diavaz/GE MTC was not signed until August 2007, he procured that charter contract for Global Enterprises because it was merely the final version of an unsigned draft agreement dating back to November 2006 (the “Unsigned Option”) on which Stabbert had worked. In addition to the Unsigned Option, in November 2007, Stabbert also prepared a draft master time

charter, which contains the same terms as appear in the Unsigned Option and which bears Diavaz's name (the "Unsigned MTC"). Mr. Castro compared the Unsigned Option, the Unsigned MTC, and the Diavaz/GE MTC. They are completely unrelated and involve proposals on two totally separate and distinct PEMEX bids. [CP 108-111, 263, 293-294, 296-313].

12. The Unsigned Option and Unsigned MTC relate to a different PEMEX contract from the PEMEX contract for the Diavaz/GE MTC

Diavaz submits a dozen or more bids annually to PEMEX in response to PEMEX's requests for bid solicitations. During November 2006, Diavaz was submitting proposals to PEMEX on two separate bid solicitations, one for platform maintenance and the other for the installation of a pipe between two undersea oil wells. Both of these bids required a vessel that was equipped with a moon pool, which is an access way from the hull of the ship that allows dive operations to occur directly from a ship's interior. The Unsigned Option and Unsigned MTC include the requirement that the GLOBAL EXPLORER be equipped with a moon pool. The GLOBAL EXPLORER had no moon pool, and installing one is expensive and requires dry docking the vessel. Mr. Castro explains that because of the date of the Unsigned Option and the requirement of a moon pool, the Unsigned Option and Unsigned MTC related to Diavaz's potential bids for one or both of these 2006 bid solicitations from PEMEX,

and had no relationship to the later August 2007 charter, as the 2004 Diavaz/PEMEX Contract for which Diavaz chartered the GLOBAL EXPLORER in August 2007 did not require a moon pool. The Unsigned Option and the contemporaneous Unsigned MTC are completely unrelated to the August 2007 Diavaz/GE MTC. [CP 262-264].

B. Procedural History

Appellants' Amended Complaint in the underlying proceeding asserted claims against the Global Respondents for (1) breach of the Oral Contract, including a damages claim for unpaid commissions, breach of an alleged joint venture, and a claim for quantum meruit; (2) tortious interference with a business expectancy and contractual indemnity; (3) breach of the Services Agreement; and (4) individual liability against Steuart and SIC arising from an alleged fraudulent transfer.

1. Global Respondents' Motion for Summary Judgment

On September 3, 2010, the Global Respondents filed "Global Defendants' Motion for Summary Judgment Dismissal of Plaintiffs' Claims" ("Global Respondents' MSJ"), seeking dismissal of all claims by Appellants against the Global Respondents. [CP 60-85]. In support of Global Respondents' MSJ, the Global Respondents filed five declarations containing deposition transcripts, discovery responses, documentary evidence, and sworn statements of four witnesses describing the facts

material to Appellants' claims. [CP 86 – 159, 160 – 181, 182 – 257, 258 – 313, 314 – 360]. This narrowly tailored evidence was provided to the trial court to satisfy the Global Respondents' initial burden as the party seeking summary judgment to show the absence of any disputed material facts. [CP 576].

In response to Global Respondents' MSJ (and to Deepwater's motion for summary judgment filed contemporaneously), Appellants filed their Consolidated Opposition to Global Defendants' Motions and Deepwater's Motion for Summary Judgment of Dismissal. [CP 444-472]. Appellants responded in an incoherent and disorganized manner by filing over 500 pages of declarations and exhibits, including many exhibits that are illegible, not supported or authenticated, and/or written in Spanish with no certified translations. [CP 743-1201, 473-481, 507-563].⁸

After reviewing this response by Appellants, the Global Respondents filed "Global Defendants' Reply in Support of Motion for Summary Judgment Dismissal of Plaintiffs' Claims." [CP 574-583]. The next day, September 28, 2010, after all deadlines for filing papers on the Global Respondents' MSJ had expired, Appellants filed a "supplemental declaration" by their attorney, Mr. Stafne, consisting of 158 pages of

⁸ Some of Appellants' supporting declarations are duplicated in the Clerk's Papers, so Global Respondents are citing to only one copy of duplicate documents in the record.

deposition transcripts and more un-translated (and therefore inadmissible) Spanish language document exhibits. [CP 584-743]. The next day, September 29, 2010, two days before the hearing on the two pending summary judgment motions by the Global Respondents and Deepwater, Appellants filed yet another untimely declaration, this one by Stabbert, containing even more unsubstantiated speculation and inadmissible documents. [CP 1202-1225].

Deepwater filed a written motion to strike Appellants' two untimely declarations (the Stafne Declaration filed on September 28, 2010 and the Stabbert Declaration filed on September 29, 2010). [CP 1232-33]. The Global Respondents orally joined in that motion at oral argument. [CP 1357].

The hearing on both motions for summary judgment took place on October 1, 2010. [CP 1357]. On the day of that hearing, Appellants filed yet another untimely declaration (the "Latest Stafne Declaration"), this time attaching 27 pages from the deposition transcript of Steuart.⁹ Deepwater and the Global Respondents objected at oral argument to all of the untimely declarations, including the Latest Stafne Declaration, and the Court reserved its ruling. [CP 1357].

⁹ Supplemental Declaration of Scott E. Stafne Regarding the September 28, 2010 Deposition of Frank Steuart. [CP 1327-1356].

Remarkably, the onslaught of untimely filings by Appellants did not stop with the three filings through the day of oral argument. On October 3, 2010, two days after oral argument, Appellants attempted to present the court with yet another Declaration by Richard Stabbert (the “Latest Stabbert Declaration”),¹⁰ although the Court docket does not show that this document was filed and the record contains no evidence that a copy was provided to Judge Canova.¹¹ On October 4, 2010, Deepwater filed a motion to strike the Latest Stabbert Declaration as well. [CP 1391].

On October 11, 2010, Judge Canova entered an order granting Global Respondents’ MSJ and dismissing Appellants’ claims against the Global Respondents (“Global MSJ Order”). [CP 1545-47].¹² The Global MSJ Order entered by Judge Canova includes a detailed list of all the motion papers filed by all parties up through the date of the hearing that the court considered in making its decision. Judge Canova did not add to the list any reference to either the Latest Stafne Declaration (filed on the

¹⁰ This Declaration, captioned “Declaration of Richard Stabbert in Support of 1.) Opposition to Motion for Summary Judgment Against Deepwater; and 2.) Stabbert’s Motion to Strike,” ultimately was filed as an exhibit to a latter declaration filed by Appellants in support of Appellants’ Motion for Reconsideration. [CP 1567-1687].

¹¹ Global Respondents did receive this document through the ECR system, but the service email did not clarify whether the document had been effectively filed or a judge’s copy provided.

¹² Judge Canova entered an order dismissing Appellants’ claims against Deepwater on the same day. [CP 1548-1551].

day of the hearing) or the Latest Stabbert Declaration (allegedly filed two days after the hearing), as he did not consider either. [CP 1757-58].

2. The orders to seal Appellants' former counsels' declarations

Appellants were represented before the trial court by three attorneys, Mr. Stafne, and two attorneys from a separate law firm, Dennis Moran and Robert Windes, of the law firm of Moran Windes & Wong, PLLC. On September 1, 2010, Appellants' counsel filed a motion to withdraw, alleging a potential conflict had arisen between Appellants and their counsel. [CP 7-8]. A variety of responses and declarations were submitted relating to this motion, including a motion for a continuance of the trial date, which was opposed by all respondents.¹³ [CP 361-366]. On September 17, 2010, Judge Canova denied the motion to withdraw and denied the motion to continue the trial, and he requested that Appellants' former counsel submit an explanation of the potential conflict for *in camera* review under seal pursuant to GR 15. [CP 386].

On September 30, 2010, after reviewing the requested declarations *in camera*, Judge Canova entered a second order confirming that the declarations of both of Appellants former counsel, with exhibits, were to be filed under seal. [CP 1325-26]. This Order specifically states: “[t]o

¹³ These filings are not described in detail as they are largely irrelevant to this appeal.

protect attorney-client privilege, the Declarations and attached documents should be filed under seal.” [CP 1325]. On October 1, 2010, Judge Canova ordered an additional declaration and attachment be filed under seal. [CP 1358]. These two Orders to seal are collectively referred to herein as “Orders to Seal.”

Although the Orders to Seal contain standard form language regarding an application and hearing to open a sealed document, pursuant to GR 15(e)(3), Appellants did not file a motion to open the sealed declarations. Appellants only raised the issue of perceived prejudice from these sealed declarations in their Motion for Reconsideration (discussed below), although they do not cite to the standard in GR 15(e)(3) for opening sealed documents even at that late stage. [CP 1558-59].

3. Appellants’ Motion for Reconsideration

On October 20, 2010, Appellants filed a Motion for Reconsideration of This Court’s Grant of Summary Judgment to Global Defendant’s [sic] and Deepwater Corrosion Services (“Motion for Reconsideration”). [CP 1552-1562]. Appellants submitted (among other things) yet another declaration from Stabbert, attached to which was a full copy of the 120-page Latest Stabbert Declaration. [CP 1563-1687]. All respondents were directed to file responses, and did so. [CP 1709-1716,

1717-25]. Appellants then filed replies and an additional declaration. [CP 1726-1752].

On January 4, 2011, Judge Canova, by an order written by his own hand, (1) denied the Motion for Reconsideration; (2) clarified that he “did not consider the sealed Declarations of Mr. Windes or Mr. Moran **or any material not listed in the Orders Granting Summary Judgment in ruling on the subject Motions for Summary Judgment;**”¹⁴ and (3) clarified that he did not consider the Stafne Declaration filed on October 3, 2010 in support of Stabbert’s Motion for Sanctions when ruling on the motions for summary judgment. [CP 1757-58] (“Final Order”).

III. ARGUMENT

A. Judge Canova Correctly Dismissed Appellants’ Claim for Commissions as a Matter of Law

1. Standard of review and summary judgment generally

This Court reviews summary judgment dismissal of claims *de novo*, applying the same inquiry as the trial court. *E.g., Ruffer v. St. Cabrini Hosp.*, 56 Wn. App. 625, 627-28, 784 P.2d 1288 (1990). Summary judgment is appropriate when the pleadings, depositions, and admissions in the record, together with any affidavits, show that there is

¹⁴ Underline and bold added because this language was grossly misrepresented to the Court in Appellants’ Brief at 24.

no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c); *Id.*

Once there has been an initial showing of the absence of any genuine issue of material fact, the non-moving party must respond with more than conclusory allegations, speculative statements, or argumentative assertions of the existence of unresolved factual issues. *Ruffer*, 56 Wn. App. at 628. To avoid entry of summary judgment, the non-moving party “may not rest on its pleadings,” but must “set forth specific facts sufficient to rebut the moving party's contention and disclose that there is a genuine issue for trial.” *Graves v. P.J. Taggares Co.*, 25 Wn. App. 118, 122, 605 P.2d 348, *modified on other grounds*, 94 Wn.2d 298, 616 P.2d 1223 (1980). Issues of material fact cannot be raised by merely claiming contrary facts. *Meyer v. University*, 105 Wn.2d 847, 852, 719 P.2d 98 (1986).

2. To prevail on a claim for commissions for the Diavaz/GE MTC, Appellants must be the procuring cause of that charter contract

To prevail on a contract claim, the Appellants bear the burden of proof to show an agreement between the parties, a party's duty under the agreement, a breach of that duty, and resulting damages. *Fidelity and Deposit Co. of Maryland v. Dally*, 148 Wn. App. 739, 745, 201 P.3d 1040 (2009). In a suit for commissions, a broker must prove by a

preponderance of the evidence that he was acting under a contract, that he performed all conditions of the contract, **and** that he was the procuring cause of the transaction ultimately consummated. *Guenther v. Equitable Life Assur. Soc. of U.S.*, 23 Wn.2d 65, 73, 159 P.2d 389 (1945).

[A] broker is not entitled to recover commission unless he has a contract providing for the doing of certain acts; further, that those acts are performed in accordance with the terms of the contract and that the broker's efforts are the procuring cause of the transaction ultimately consummated between the principals.

Id. at 72.

To be the procuring cause (and thereby be entitled to a commission), a broker must locate a purchaser during his agency who is willing and able to purchase according to the terms of the seller. *See Clarkson v. Wirth*, 4 Wn. App. 401, 405, 481 P.2d 920 (1971). A corollary of this rule is that a broker is not entitled to a commission if his efforts fail, even if the broker introduced the eventual buyer to the seller. *Nelson v. Mayer*, 122 Cal. App. 2d 438, 446, 265 P.2d 52 (1954) (“Merely putting a prospective purchaser on the track of property which is on the market will not suffice to entitle the broker to the commission contracted for . . .”); *accord Shalimar Development, Inc. v. F.D.I.C.* 257 Va. 565, 572, 515 S.E.2d 120 (1999). (“The broker is not entitled to commission

upon the sale merely because the purchaser is one whom he introduced to the property.”). Put another way:

It is not enough that the broker has devoted his time, labor, or money to the interest of his principal, as unsuccessful efforts, however meritorious, afford no ground of action. And it matters not that after his failure and the termination of his agency what he has done proves of use and benefit to the principal. . . . He may have introduced to each other parties who otherwise would never have met; he may have created impressions which under later and more favorable circumstances naturally lead to and materially assist in the consummation of a sale; he may have planted the very seed from which others reaped the harvest; but all that gives him no claim. It was part of his risk that failing himself, not successful in fulfilling his obligation, others might be left to some extent to avail themselves of the fruit of his labor. To entitle a broker to commissions upon a sale or transaction which is actually consummated, he must show that his efforts and services were the primary, proximate, and procuring cause thereof.

Way v. Turner, 127 Md. 327, 96 A. 676, 676 (1915) (citation omitted); accord *Crowe v. Trickey*, 204 U.S. 228, 239-240, 27 S.Ct. 275, 51 L.Ed. 454 (1907); *Wood v. Hutchinson Coal Co.*, 85 F.Supp. 1010, 1015 (D.C.W.Va. 1949). Courts have long held that a contrary rule “would prolong a contract with a broker indefinitely. No man could know when he was freed from its obligations, and a liability would be imposed not contained in the terms of the contract, and essentially perverting its legitimate construction.” *Sibbald v. Bethlehem Iron Co.*, 83 N.Y. 378 (1881).

A broker is not entitled to commissions for merely locating a prospective purchaser; even when the prospective purchaser located by the broker eventually purchases the property, the broker's efforts must have led to *the* consummated sale contract on which the broker claims commissions. *Roger Crane & Assocs., Inc. v. Felice*, 74 Wn. App. 769, 776-77, 875 P.2d 705 (1994); *see also Cantell v. Hill Holliday Connors Cosmopolos, Inc.*, 55 Mass. App. Ct. 550, 555, 772 N.E.2d 1078 (2002); *Bauman v. Worley*, 166 Ohio St. 471, 475, 143 N.E.2d 820 (1957); *Tahir Erk v. Glenn L. Martin Co.*, 143 F.2d 232, 232-34 (4th Cir. 1944); *Shuler v. Kraft*, 75 Nev. 196, 197-200, 337 P.2d 277 (Nev. 1959); *Town and Country Real Estate, Inc. v. Wales*, 24 Wn. App. 586, 590, 602 P.2d 727 (1979). In addition, the eventual contract must be entered, within a "reasonable time period" following the efforts of the broker. *Thayer v. Damiano*, 9 Wn. App. 207, 210-11, 511 P.2d 84 (1973).

This same rule applies even when the broker has secured prior contracts with the eventual purchaser; absent a contract provision to the contrary, a broker is not entitled to renewals following the termination of his agency/employment. *E.g. Cox v. Ohio Nat. Life Ins. Co.*, 250 Or. 7, 11, 438 P.2d 998 (1968); *Locher v. New York Life Ins. Co.*, 200 Mo. App. 659, 208 S.W. 862, 866 (1919). Even when the contract provides for commissions on renewals, no commissions will be due when the

“renewal” has different terms than that previously entered, sufficient to constitute a new contract. See *Plumbing Industry Program, Inc. v. Good*, 120 So.2d 639, 640-41 (Fla. App. 1960).

Two cases from the Eastern District of Louisiana illustrate why the application of the above principles compel summary judgment in this case. In the first, *Gulf Coast Marine, Inc. v. Cheramie*, 317 F.Supp. 867 (E.D. La 1969), the defendant hired the plaintiff broker to market two ships, each 129 feet in length. From January to May 1967, the plaintiff attempted to negotiate a sale of the ships to Collins Submarine Pipeline, Ltd. (“Collins”). 317 F.Supp. at 867-68. However, Collins lost interest in the two ships, because as later became apparent, the two ships were not of sufficient length to meet Collins’ needs. *Id.* at 869. After May 1967, the defendant lengthened the two ships, and Collins subsequently purchased the two ships. The Court noted that the “plaintiff was not responsible for Collins’ renewal of interest in the purchase of the vessels and had nothing to do with bringing the buyer and seller together on common terms” and therefore dismissed Plaintiff’s complaint, applying the rule that “[a] broker is not entitled to a fee when he has failed in an attempt to effect a sale made afterwards by the principal or another broker to the person or company to whom the broker tried and failed to sell the property.” *Id.* at 868-69.

Similarly, in *Gulf Marine Equipment, Inc. v. C & G Boat Works, Inc.*, 471 F.Supp.2d 679, (E.D. La 2007) the court, applying Louisiana's "procuring cause" doctrine,¹⁵ granted the defendant summary judgment on plaintiff's claim for commissions. The plaintiff alleged that he was entitled to commissions because he "brought the contracting parties by getting [the defendant] on [the eventual purchaser's] bid list." *Id.* at 683. Applying the rule of *Gulf Coast Marine, Inc.*, the court noted that the defendant was not chosen for the bids submitted prior to the termination of the plaintiff's agency with defendant, and that the defendant had no involvement with the eventual purchaser for over a year and a half before the eventual contract was entered. *Gulf Marine Equipment, 471 F.Supp. 2d at 683.* There was a "salient break in continuity in the relationship between the Plaintiff and the prospective contracting parties." *Gulf Coast Marine*, 317 F.Supp. at 863-84. The court continued:

The mere fact that [the plaintiff] initially may have facilitated the relationship between [the defendant] and [the eventual purchaser] is not tantamount to being the procuring cause of any contracts awarded by [the eventual purchaser] to [the defendant]. . . . His actions were both temporally attenuated and causally unrelated to the [executed] contracts such that there is no genuine issue of material fact as to whether he was the procuring cause.

¹⁵ Louisiana's procuring cause doctrine is no different from that applied in Washington, as is evident from the court's discussion of Louisiana law. *Gulf Marine Equipment*, 471 F.Supp.2d at 682-83.

Gulf Marine Equipment, 471 F.Supp. 2d at 684.

Notably, the case law cited by Appellants is not to the contrary. *Erwin v. Cotter Health Centers*, 161 Wn.2d 676, 167 P.3d 1112 (2007), concerned whether the actions taken involved real estate brokerage services and a choice of law dispute, and did not address the procuring cause doctrine (the issues decided are outlined at page 686). *Harding v. Rock*, 60 Wn.2d 292, 373 P.2d 784 (1962), is not a procuring cause case, and stands only for the proposition that once a purchase agreement is executed, it cannot be repudiated, and the broker denied a commission, if the conditions to closing could have been met.

Appellants' citation to *Willis v. Champlain Cable Corp.*, 109 Wn.2d 747, 748 P.2d 621 (1988) provides no legal support for Appellants' claims, and to the contrary, supports the trial court's grant of summary judgment dismissal in this case. *Willis* not only agrees with the cases citing the black letter "procuring cause" rule, but also militates strongly against Appellants' claims for unearned commissions here. Factually, *Willis* is inapposite because it deals with whether the procuring cause doctrine can trump the express terms of a written employment agreement if an employee had been terminated in bad faith. *Id.* at 754. However, in ruling that the terminated broker in that case was not entitled to unearned commissions, the court stated: "We would not modify [the written] terms

to require the manufacturer to show that it terminated plaintiff in good faith, nor would we rule that the plaintiff is owed commissions on orders submitted by a buyer long after his effective termination date.” *Id.* at 759 (underline added). Thus, insofar as the procuring cause issue is concerned, *Willis* supports Judge Canova’s summary judgment dismissal here in that it plainly restates the rule that a broker is not entitled to commissions on sales occurring long after his termination.

Appellants cite *Syputa v. Druck Inc.*, 90 Wn App. 638, 646-50, 954 P.2d 279 (1998) in support of the broad assertion that whether a broker was the procuring cause for commissions occurring after a broker’s termination is *usually* a question of fact. [Appellants’ Brief at 27-28]. However, whether a material issue of fact exists ultimately is based upon the admissible evidence presented to the court. In this case, Appellants provided the court with no evidence establishing any issue of material fact demonstrating that Appellants were the procuring cause of the Diavaz/GE MTC. In cases like this one, where no evidence of procuring cause is submitted, dismissal of Appellants’ claims for commissions on summary judgment is completely appropriate.

Appellants then make the same argument with respect to oral contracts: that interpreting and enforcing oral contracts typically is not appropriate on summary judgment because intent and credibility must be

considered in determining the material terms of a contract.¹⁶ Appellants allege that Steuart and Stabbert have a different recollection as to the terms of the Oral Contract,¹⁷ and that Steuart explained the terms differently in deposition testimony and in declarations on file with the court.¹⁸ These arguments establish no issue of fact, as nowhere do Appellants articulate the material term of the Oral Contract they contend is in dispute, or explain how that dispute is material to any issue before the court on the Global Respondents' motion for summary judgment. The missing "fact" which Appellants had to prove to avoid summary judgment, and which Appellants did not and could not establish, was that Appellants were the procuring cause of the Diavaz/GE MTC.

Appellants further argue that whether the Global Respondents terminated Stabbert in order to avoid paying him a commission is an issue of fact precluding summary judgment.¹⁹ To the contrary, the Global Respondents' motive in terminating Stabbert in February 2007 is immaterial to the issue of whether Appellants are entitled to a commission. If Stabbert was the procuring cause of the August 2007 Diavaz/GE MTC,

¹⁶ See Appellants' Brief at 25-26.

¹⁷ Appellants' Brief at 26.

¹⁸ Appellants' Brief at 5-7.

¹⁹ Appellants' Brief at 27.

Appellants are entitled to a commission, regardless of when the Diavaz/GE MTC was executed. If Stabbert was not the procuring cause, Appellants are entitled to no commission. Whether Stabbert remained the marketing agent at the time the parties executed the August 2007 Diavaz/GE MTC, or whether he was terminated earlier, and for whatever reasons, are wholly immaterial.

3. Appellants failed to submit any evidence showing that Stabbert was the procuring cause of the Diavaz/GE MTC

The sole material issue on which this case turns is whether Stabbert was the procuring cause of the August 2007 Diavaz/GE MTC. Appellants acknowledge this, as Appellants specifically frame the question as to whether Stabbert was or was not the procuring cause of that charter.²⁰

On this issue, no material facts are in dispute. Appellants' claim for commissions, which is based solely upon the Diavaz/GE MTC, fails because Appellants did not meet their burden of submitting admissible evidence showing that they were the procuring cause of this charter. Appellants' Discovery Responses, Stabbert's deposition testimony, and the voluminous declarations filed by Appellants are devoid of any specific

²⁰ Appellants' Brief at 26-27. This question is asked in the last two paragraphs of page 26, and the *Willis* standard is quoted at length at page 27.

facts or admissible documentary evidence to support this claim. The only evidence in the record directly on point consists of the declarations submitted by the Global Respondents in support of Global Respondents' MSJ.

The uncontested facts are that the oil and gas industry in the Gulf of Mexico is serviced by a relatively limited number of companies, who obtain a limited number of PEMEX contracts, and who charter from a limited pool of available vessels. Due to the limited number of companies seeking charters, and the limited pool of qualified vessels, if Appellants' truly are claiming that introducing a customer to a vessel and vessel owner is all that is required to be eligible to be paid a commission, Appellants would be entitled to a commission for essentially every charter the GLOBAL EXPLORER enters into for as long as it stays in the Gulf of Mexico petroleum industry. This contention is absurd, and as set forth above, the law is directly to the contrary.

Stabbert was not the procuring cause of the Diavaz/GE MTC. Appellants' Oral Contract was terminated long before the negotiation and signing of the Diavaz/GE MTC. The Castro, Reyes, and Steuart declarations establish that Stabbert had no role in procuring this charter, and that the Diavaz/GE MTC was completely unrelated to the PEMEX

work for which Diavaz was considering the GLOBAL EXPLORER ten months earlier when Stabbert last was involved.

For Appellants to have avoided summary judgment dismissal of their claim for unearned commissions, Appellants had to submit evidence proving Stabbert was the procuring cause of the Diavaz/GE MTC. Despite the impressive volume of inadmissible and in some cases incomprehensible documents submitted by Appellants, the record is undisputed that the charter arrangement under discussion in the fall of 2006 never resulted in a charter contract, and the GLOBAL EXPLORER was chartered to others instead.

Appellants argue that Steuart's testimony as to what Stabbert had to perform to be eligible for a commission is inconsistent.²¹ It is not. Steuart consistently testified that to be entitled to a commission, a charter contract must be the "direct" result of Stabbert's efforts.²²

Appellants also argue that Stabbert need not be the procuring cause because Steuart testified that under the Oral Contract, Stabbert could engage other persons to assist Stabbert, and that Stabbert could pay these persons a portion of Stabbert's commission. This argument is a total *non*

²¹ Appellants Brief at 5-7.

²² Appellants' Brief at 5, fn. 4, and page 6.

sequiter. Whether Stabbert procured a customer for a charter of the GLOBAL EXPLORER through Stabbert's own efforts or through the efforts of Stabbert's agents is immaterial. If Stabbert brings a prospective charterer to Global Enterprises with a proposal which results in a charter contract, Stabbert is entitled to a commission whether he or an agent acting on his behalf negotiated directly with the prospective charterer. Likewise, the fact that Steuart was the person responsible for concluding and executing the charter contracts is equally immaterial: if Stabbert presented the customer and the business deal on terms acceptable to Global Enterprises, it matters not that Steuart prepared and executed the written charter contract with the customer.

None of the documents or declarations submitted by Appellants met their burden of demonstrating the existence of any admissible evidence that Appellants were the procuring cause of the Diavaz/GE MTC. As such, Judge Canova properly dismissed Appellants' claims as a matter of law.

B. Judge Canova Properly Dismissed Appellants' Claim that Global Respondents Breached the Services Agreement

Like the unearned commissions claim, this Court reviews *de novo* the summary judgment dismissal of Appellants' claims against the Global

Respondents based upon the Services Agreement. *See Ruffer*, 56 Wn. App. at 627-28.

Appellants allege a variety of claims against Deepwater related to the Services Agreement, but it remains unclear exactly how Appellants believe the Global Respondents breached the Services Agreement. Appellants argued below that the Global Respondents breached the Services Agreement because the Global Respondents failed to pay Appellants their share of commissions allegedly paid by Deepwater to the Global Respondents. However, since the Global Respondents never sold any Deepwater technology products, and therefore never received any commissions to share with Appellants, Appellants appear to have shifted to a new theory involving the law on repudiation of contracts. [Appellants' Brief at 31-32].

Regardless of which theory of breach Appellants put forth, Appellants have no claim against the Global Respondents for failure to pay Appellants commissions received from Deepwater if no sales were made of Deepwater technology and if Deepwater therefore paid no commissions to the Global Respondents. The undisputed facts are that Deepwater terminated the Services Agreement, Deepwater never paid any commissions to the Global Respondents, and Appellants have suffered no damages because they have no evidence of any sales occurring.

Judge Canova properly dismissed Appellants' claims against the Global Respondents related to the Services Agreement²³ as a matter of law.

C. Judge Canova Properly Ruled on the Conflict of Interest Declarations, and His Rulings Are Immaterial to the Dismissal of Appellants' Claims on Summary Judgment

This Court reviews a trial court's order to seal records pursuant to GR 15 under the abuse of discretion standard. *Dreiling v. Jain*, 151 Wn.2d 900, 907-08, 93 P.3d 861 (2004). Abuse of discretion occurs when the trial court's decision is manifestly unreasonable or based on untenable grounds. *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 683, 15 P.3d 115 (2000).

The declarations of Appellants' former counsel, filed under seal by order of the trial court to preserve the attorney-client privilege, are unrelated to the Global Respondents' Motion for Summary Judgment. Appellants' former counsel are not fact witnesses in the case. The declarations of counsel filed under seal were not filed in support of or in opposition to the motions for summary judgment.

²³ Appellants alleged before the trial court that the Services Agreement constituted a Joint Venture. Because Appellants cite no authority and make no argument in Appellants' Brief (aside from merely alleging on page 28 that a joint venture was offered), Global Respondents will not unnecessarily repeat (but incorporate by reference) their arguments below refuting Appellants' Joint Venture claims.

Appellants cite authorities relating to free access to the courts, including the 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 the 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 case²⁴ to which Stabbert's attorneys owed a separate duty of confidentiality. Appellants ignore and disregard the rights of the other represented parties, whose right to confidential representation was being preserved by way of the request that the declarations be filed under seal.

Appellants' argument is also flawed because this case does not present the issue of whether a document may be filed under seal, but instead merely asks whether a Superior Court Judge is capable of not considering evidence he or she has heard in ruling on motions for

²⁴ EVYA and ISCESA, the plaintiffs in King County Superior Court Case No. 09-2-4833-9, *EVYA and ISCESA v. Global Explorer et. al.*

summary judgment. This implication is an affront to the court and to the judiciary. Indeed, judges make decisions in every bench trial which involve hearing and disregarding immaterial evidence or evidence introduced for the purpose of creating prejudice.

As a threshold inquiry, a judge should disqualify him or herself when his or her “impartiality might reasonably be questioned”, CJC 3(C)(1), or where he or she “has a personal bias or prejudice concerning a party.” CJC 3(C)(1)(a). A judge is presumed to perform his functions “regularly and properly and without bias or prejudice.” *Kay Corp. v. Anderson*, 72 Wn.2d 879, 885, 436 P.2d 459 (1967). Thus, Washington courts:

[M]ust presume that judges are capable of finding adjudicative facts fairly while ignoring incidental influences. If such a presumption cannot be made, the administration of justice is not possible.

Harris v. Hornbakerm, 98 Wn.2d 650, 666, 658 P.2d 1219 (1983) (internal quotations omitted); *Accord State v. Turner*, 143 Wn.2d 715, 728, 23 P.3d 499, 506 (2001) (A judge is not biased merely because he witnesses defendant's disruptive conduct-including assaulting his attorney and threatening the judge-during pretrial hearings.); *Crosetto v. Crosetto*, 65 Wn.2d 366, 368, 397 P.2d 418 (1964) (In reviewing a bench trial, appellate court presumes that trial court disregarded irrelevant evidence.).

It is beyond dispute that the court has the discretion to consider evidence *in camera* and under seal to prevent disclosure of privileged information, and doing so does not thereby preclude the Court from performing its primary role as an impartial adjudicator. Judge Canova acted within his broad discretion in refusing to open the sealed declarations in response to Appellants' untimely request in their Motion for Reconsideration, and the implication that reviewing those declarations affected his impartiality is without support and must be rejected.

D. Judge Canova's Decision to not Consider Untimely Declarations was within His Broad Discretion

Appellants' frame as an "evidentiary question" the issue of whether Judge Canova did or should have considered the untimely Latest Stafne Declaration and the untimely Latest Stabbert Declaration (collectively "the Untimely Declarations") when he granted Global Respondents' MSJ [Appellants' Brief at 38-43]. Contrary to what Appellants argue here, there is no question that Judge Canova **did not consider** the Untimely Declarations when he entered the Global MSJ Order. The question on appeal is not what was considered, but rather whether Judge Canova's decision not to consider the materials filed by Appellants after oral argument on the summary judgment motions was an abuse of discretion.

Whether to accept or reject untimely affidavits filed prior to the entry of a final order on summary judgment is within the trial court's sound discretion. *Garza v. McCain Foods, Inc.*, 124 Wn. App. 908, 917, 103 P.3d 848 (2004). The trial court's decision is reviewed for an abuse of discretion. *Id.* (affirming trial court's decision to accept plaintiff's untimely brief but reject the attached affidavits); *Brown v. Peoples Mortg. Co.*, 48 Wn. App. 554, 560, 739 P.2d 1188 (1987) (finding no abuse of discretion where trial court rejected the plaintiff's untimely affidavit raising issues that could have been brought in a timely manner). Abuse of discretion occurs when the trial court's decision is manifestly unreasonable or based on untenable grounds. *Weyerhaeuser*, 142 Wn.2d at 683. Here, the Appellants had 16 months from the filing of their lawsuit to engage in discovery and prepare their case. It was not an abuse of discretion to decline to consider material submitted after oral argument on the motions for summary judgment.

Appellants' requested, in their Motion for Reconsideration, that the trial court clarify whether it considered the Untimely Declarations in ruling on the motions for summary judgment. [CP 1554]. Appellants' Brief reproduces this argument at length, [Appellants' Brief at 39-41], and argues that even after the Final Order (denying reconsideration) it remains

unclear whether Judge Canova did or did not consider the Untimely Declarations [Appellants' Brief at 39, 42].

These arguments are without merit. Indeed, Appellants' argument is based upon an outright misrepresentation of the language of the Final Order. Appellants' Brief quotes the Final Order as follows:

The Court clarifies that it did not consider the sealed Declarations of Mr. Windes or Mr. Moran or any materials not submitted in ruling on the subject motions for summary judgment.”

[Appellants' Brief at 24]. However, the Final Order actually reads as follows:

The Court clarifies that it did not consider the sealed Declarations of Mr. Windes or Mr. Moran or any material not listed in the Orders Granting Summary Judgment in ruling on the subject Motions for Summary Judgment.

[CP 1753].

The Global MSJ Order lists each specific filing that the court considered in ruling on the summary judgment motions, and the Final Order confirms that this list is complete and without exception.

Appellants have raised several other procedurally confusing points which the Global Respondents will address. First, contrary to Appellants' assertions, it is not evident from the record whether Appellants actually filed or provided Judge Canova with a judge's copy of the Latest Stabbert Declaration prior to entry of the Global MSJ Order. Appellants alleged

that “ECR Documents make clear this pleading was filed . . .” [CP 1554, ll. 21]; however, the document is not listed in the Court Docket and there does not appear to be anything in the record beyond Mr. Stafne’s statement in the Motion for Reconsideration to show this declaration was actually filed or delivered to Judge Canova prior to entry of the Global MSJ Order on October 11, 2010.²⁵ The first time this declaration appears in the record is as an exhibit to Stabbert’s October 18, 2010 Declaration filed in support of Appellants’ Motion for Reconsideration. [CP 1564, ¶ 2; 1567-1674]. Thus, it is not evident from the record whether Appellants erred and failed to file the Latest Stabbert Declaration.

Additionally, Appellants appear to be confused about the Final Order’s reference to the October 3, 2010 Declaration of Scott Stafne, as Appellants state no such document exists in the record. [Appellants’ Brief at 42]. The Final Order clarifies that Judge Canova did not consider the Declaration Appellants filed on October 4, 2010 (signed and dated by Mr. Stafne on October 3, 2010), to which Mr. Stafne had attached what he believed to be discovery responses, although he could not authenticate his own exhibit. [CP 1372-1390]. It is clear the Final Order was referring to

²⁵ Even if Judge Canova had the document in hand, its caption identifies it as being filed in support only of Appellants’ objection to Deepwater’s Motion for Summary Judgment and Stabbert’s Motion to Strike, not Global Respondents’ MSJ. [CP 1567].

CP 1372-1390 when the Court clarified it did not consider Mr. Stafne's October 3, 2010 Declaration.

A careful review of the record, and the Final Order, when quoted accurately, leaves no doubt that Judge Canova did not consider the Untimely Declarations when he granted the Global Respondents' MSJ. The trial court had broad discretion whether to consider the Untimely Declarations. Appellants have failed to cite any authority for or argue with any specificity why this decision was an abuse of discretion. This Court should affirm Judge Canova's decision to not consider the Untimely Declarations.

While it was within Judge Canova's discretion to not consider the Untimely Declarations, the question of whether the Untimely Declarations should have been considered ultimately is moot because the Untimely Declarations could not save Appellants from dismissal of their claims as a matter of law.

Appellants filed hundreds and hundreds of pages of documents and declarations in response to the Global Respondents' MSJ (and Deepwater's motion), yet nowhere in Appellants' briefing did they actually explain how any of this "evidence," even those select documents that could eventually be authenticated, actually refuted the Global Respondents' defenses to Appellants' claims. The Court heard oral

argument from all parties on October 1, 2010, and Appellants were given an opportunity to argue how any of the evidence submitted in any of their supporting declarations could establish the necessary elements of Appellants' claims against the Global Respondents. Appellants made no such showing.

On appeal, as in support of their Motion for Reconsideration, Appellants focus on the Untimely Declarations as if they somehow differ from the hundreds of pages of documents and declarations filed by Appellants previously. The first of these, the Latest Stafne Declaration, contained nothing but additional excerpts from the deposition transcript of Steuart. The Latest Stafne Declaration does not explain how this testimony gives rise to a material issue of fact preventing entry of summary judgment against Appellants.

The Latest Stabbert Declaration contained translations for some of the multitude of hearsay documents previously and improperly submitted by Appellants in Spanish, but otherwise simply repeated the unsupported allegations made in the Amended Complaint and in previous declarations. The Latest Stabbert Declaration establishes no issue of material fact with respect to the Global Respondents' MSJ.

By failing to articulate which documents allegedly support their claims and how they do so, Appellants essentially asked the trial court to

sift through hundreds of pages of documents and try to find, *sua sponte*, some document showing that Stabbert has a right to receive commissions he did not earn. Appellants have done the same thing to this Court by arguing the Untimely Declarations are relevant without explaining how they would prevent summary judgment dismissal of Appellants' claims even if the trial court were forced to consider them.

E. Judge Canova's Denial of the Motion for Reconsideration was within his Broad Discretion

CR 59 does not permit reconsideration of a judgment based on newly-discovered evidence in the absence of a showing that the "new" evidence could not have been obtained earlier. *West v. Thurston County*, 144 Wn. App. 573, 579-580, 183 P.3d 346 (2008). Appellate courts review a denial of a motion for reconsideration for abuse of discretion. *Lilly v. Lynch*, 88 Wn. App. 306, 321, 945 P.2d 727 (1997). Abuse of discretion occurs when the trial court's decision is manifestly unreasonable or based on untenable grounds.

Appellants appear to be claiming that the Untimely Declarations were before the court when it entered the Final Order [Appellants' Brief at 38-43]; however, the question on appeal, again, is whether Judge Canova abused his discretion by denying the Motion for Reconsideration, not what he considered in doing so.

In addition to the Untimely Declarations, Appellants filed yet another declaration from Richard Stabbert in conjunction with the Motion for Reconsideration. [CP 1563-1687]. This declaration was essentially a vehicle to make sure the Latest Stabbert Declaration was effectively filed and considered, as it was attached thereto along with other exhibits.

Neither the Untimely Declarations nor Stabbert's final declaration filed in support of the Motion for Reconsideration raise any new issues, identify any new material facts, or otherwise establish a legal basis for reconsideration. Without such a showing, a party cannot prevail on a Motion for Reconsideration.

Judge Canova drafted the Final Order himself, and his language is clear. The Final Order states that the Court "considered the pleadings submitted in support of and in opposition to said motion, and the records and file herein." [CP 1757]. The Final Order goes on to state: "[t]he admissible evidence submitted by plaintiff in support of the Motion for Reconsideration fails to supply, factually or legally, a valid basis for reconsideration pursuant to CR 59." This ruling was well within the discretion held by a trial court, and in no respect is there any argument offered as to how this constitutes an abuse of discretion.

Despite filing no fewer than nine declarations in opposition to Global Respondents' MSJ, many of which were untimely and most of

which were repetitive, Appellants dedicated only a single paragraph in their Motion for Reconsideration to explaining why they believed the Court erred in entering the Order. This single paragraph failed to identify any disputed material facts or explain how any of the facts in the Untimely Declarations or other declarations filed in support of the Motion for Reconsideration were newly developed or even newly filed (much less that Appellants had not been dilatory in waiting until that late date to file such documents).

Appellants have similarly failed to show on appeal that their evidence was newly acquired, as required by CR 59, and further have failed to articulate or demonstrate how Judge Canova's denial of the Motion for Reconsideration constituted an abuse of his broad discretion. This ruling should be affirmed.

IV. CONCLUSION

Appellants filed this lawsuit based upon the flawed notion that Stabbert should be forever entitled to commissions from relationships that at one time or another gave rise to a charter contract. The Global Respondents briefed the law and tested Appellants' lack of evidence, and reduced Appellants' claim to one charter contract, for which Appellants provided no evidence that Appellants were the procuring cause. Judge Canova correctly dismissed Appellants' claims as a matter of law.

Appellants likewise have made no showing how they could prevail on claim against the Global Respondents related to the Services Agreement, given the absence of any sales of Deepwater's technology. Appellants' procedural claims regarding clarification of the documents considered by the trial court have no merit. Judge Canova did not consider the Untimely Declarations when he entered the Global MSJ Order, but he did so when considering the Motion for Reconsideration. Both the decision to not consider the Untimely Declarations and the decision to deny the Motion for Reconsideration after considering them were within Judge Canova's sound discretion.

The Global Respondents respectfully request this Court affirm Judge Canova's dismissal of Appellants' claims against the Global Respondents along with his other rulings on appeal.

RESPECTFULLY SUBMITTED this 27 day of June, 2011.

MONTGOMERY PURDUE
BLANKINSHIP & AUSTIN PLLC

By 
Michael E. Gessler
WA State Bar No. 11044
Benjamin I. VandenBerghe
WA State Bar No. 35477
5500 Columbia Center
701 Fifth Avenue
Seattle, WA 98104-7096
(206) 682-7090
Attorneys for Global Respondents

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on June 27, 2011, I deposited in the mails of the United States of America, postage prepaid, an envelope containing a true and correct copy of Global Respondents' Response Brief (with advance copies by email) addressed to:

Scott Stafne
Attorney at Law
17207 155th Ave. NE
Arlington, WA 98223-6726
Email: scott.stafne@stafnelawfirm.com

W. Scott Zanzig
Hall Zanzig Claflin McEachern
1200 Fifth Avenue, Suite 1414
Seattle, WA 98101
Email: szanzig@hallzan.com

DATED this 27th day of June, 2011, at Seattle, Washington.



Karen L. Baril