

62713-9

88D

62713-9

No. 62713-9-I

DIVISION ONE, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

---

SEATTLE IRON & METALS CORPORATION,

Plaintiff/Respondent

v.

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

Defendants/Appellants

---

ON APPEAL FROM KING COUNTY SUPERIOR COURT  
(Honorable Chris Washington)

---

BRIEF OF RESPONDENT

---

Todd W. Wyatt  
WSBA No. 31608  
Salter Joyce Ziker, PLLC  
1601 Fifth Avenue, Suite 2040  
Seattle, WA 98101  
Phone: 206-957-5960  
Fax: 206-957-5961  
Attorneys for Respondent  
Seattle Iron & Metals Corporation

ORIGINAL

FILED  
DIVISION ONE  
COURT OF APPEALS  
STATE OF WASHINGTON  
2009 NOV 9 AM 11:07

## TABLE OF CONTENTS

I. INTRODUCTION .....	1
II. STATEMENT OF ISSUES.....	2
III. STATEMENT OF THE CASE.....	2
A. Letters of Credit Basics. ....	3
B. Substantive Facts. ....	4
1. The initial contract and Xie’s failure to secure a letter of credit. ....	4
2. The parties continue to try to work together. ....	5
3. Trouble with the bill of lading.....	8
4. Xie and SIMC receive partial payment. ....	11
C. Procedural History.....	11
IV. ARGUMENT.....	17
A. Standard of Review. ....	17
B. This Court Should Not Consider Issues Raised for the First Time on Appeal.....	18
C. The Trial Court Properly Granted Summary Judgment. ....	22
1. Xie breached his contract with SIMC. ....	22
2. Xie is liable regardless of whether the August 2 agreement was a new contract or a modification of an existing contract. ....	22
3. Xie is not excused from his obligations because he failed to obtain payment from his buyer.....	24
4. Even if Xie were only required to transfer the letter of credit, he is now estopped from claiming no further payment is due. ....	29
D. Xie’s Affirmative Defenses Are Without Merit.....	30
E. Xie’s Seasonable Notification Argument Was Waived and Is Without Merit. ....	34
1. This defense was waived by Xie. ....	34
2. Even if it is considered, Xie’s seasonable notification defense is without merit. ....	36
a. Xie’s “duly presented” argument ignores the UCC.....	36
b. There was seasonable notification. ....	39
c. Even if Xie did not receive notice within one year, Xie was still seasonably notified. ....	42
G. Even if the Court Does Review New Issues Raised by Xie, None of Them Have Merit.....	45

1. SIMC’s claim for breach of contract against Xie  
is governed by Article 2, not Article 5. .... 47

2. Xie was not acting as anyone’s agent..... 48

3. The Sidell deposition was admissible. .... 49

V. CONCLUSION ..... 50

## I. INTRODUCTION

Plaintiff/Respondent Seattle Iron & Metals Corporation (“SIMC”) is a metal recycling business. In 2005, SIMC entered into a contract with Defendant/Appellant Lin Xie, who was operating as a sole proprietor under the trade name “Giant International Metal Resources.”<sup>1</sup> The contract required SIMC to ship approximately 1,000 metric tons of scrap steel in exchange for Xie’s payment of \$175 per metric ton.

It is undisputed that SIMC delivered the steel. It is also undisputed that Xie has not paid SIMC in full. Distilled, Xie’s argument is that, despite performance, SIMC is not entitled to payment because Xie, who sold the steel to a third-party buyer, never received payment from his buyer. The trial court rejected this reasoning—which would lead to an illogical and unjust result whereby SIMC delivered steel and would have no avenue for payment—and granted summary judgment in favor of SIMC on SIMC’s breach of contract claim against Xie. CP 318-320. Final judgment was entered against Xie in the amount of \$139,269.10. CP 605-06.

After judgment was entered, Xie’s counsel withdrew, and Xie proceeded *pro se*. In his Brief of Appellant (“AB”), Xie raises a number of issues that were not raised below. He also cites evidence not in the record, improperly attempts to introduce a declaration in his brief (see AB

---

<sup>1</sup> Because they are legally one and the same, in most instances Giant International Metal Resources and Xie will be collectively referred to as “Xie” in this brief.

at 20-21),<sup>2</sup>and frequently makes factual claims without any citation. This Court should decline Xie’s invitation to re-litigate this matter under his new theories and evidence. But even if the invitation is accepted, Xie’s contentions are without merit. The trial court correctly held that Xie breached his contract with SIMC by failing to fully pay for the steel. For the reasons set forth below, the decision of the trial court should be affirmed.

## **II. STATEMENT OF ISSUES**

Xie raises a number of assignments of error. They can be summarized and recast into the following questions:

1. Did the trial court err by granting summary judgment to SIMC?
2. Did the trial court err by entering final judgment in favor of SIMC?
3. Should this Court examine issues not raised below?

This Court should answer “no” to all of these questions.

## **III. STATEMENT OF THE CASE**

Because Xie’s brief touches on many issues, it is necessary to provide the Court with a comprehensive summary of the substantive facts. And because Xie raises issues not addressed below, it is also necessary to provide a complete explanation of the procedural history of this matter to show what issues were, and were not, brought to the trial court’s attention.

---

<sup>2</sup> Because Xie’s “declaration” clearly violates RAP 9.11, SIMC assumes the Court will not consider it.

**A. Letters of Credit Basics.**

Letters of credit are vehicles for payment. They insure a seller of goods or services—such as SIMC—that funds will be paid by a third party—usually a bank—when the seller performs. Article 5 of the UCC governs letters of credit. *See* RCW 62A.5-101 *et seq.*

Letters of credit are typically required by the seller because the seller does not want to take the risk that the buyer cannot pay. The buyer of goods or services—the “applicant”—applies to a bank for a letter of credit. That bank—the “issuer”—holds funds of the applicant until certain conditions are met showing that the seller of goods or services—the “beneficiary”—performed under the contract. Once the conditions are met, the beneficiary receives the funds from the issuer, and if not received, has a *separate* cause of action against the issuer. As explained below, this claim against the issuer *is independent* of any cause of action against the applicant. Any dispute between the applicant/buyer and beneficiary/seller is governed by the contract law that applies between the two parties; in the case of goods, Article 2 of the UCC. On the other hand, a dispute between the beneficiary and the issuer—usually related to the issuer’s failure to honor the letter of credit—is governed by Article 5 of the UCC. Xie’s failure to appreciate the distinction and independence of these two types of claims permeates, and undermines, his arguments on appeal.

**B. Substantive Facts.**

**1. The initial contract and Xie's failure to secure a letter of credit.**

In 2005, Xie approached SIMC and negotiations ensued for Xie's purchase of scrap steel. CP 127 (Xie Deposition ("XD") at 95:23-96:25). Xie planned to sell and ship the steel to his buyers in China. CP 189 (Xie's complaint in a separate case against his freight forwarder, ¶ 2). On Wednesday, July 13, 2005, Xie signed and delivered a proposed contract to SIMC for his purchase of the metal. CP 128 (XD at 110:10-112:11), 174-76.

That contract required Xie to purchase 2,000 metric tons of scrap steel from SIMC at \$175 per metric ton. CP 174 (¶ 1). Xie would make payment "by Irrevocable Letter of Credit payable 100% at sight in favor of [SIMC] within three days after signing the contract." *Id.* (¶ 4). In other words, if SIMC signed the contract on Wednesday, July 13, the letter of credit would have been due on Saturday, July 16.

SIMC signed the contract on Wednesday, July 13, the day it was received. One important change was made, however. Before faxing the contract back to Xie, SIMC's employee handwrote the following additional condition next to the payment paragraph: "NO L/C ON Friday, NO Deal!!!!" CP 174 (¶ 4 (emphasis in original)); *see also* CP 128 (XD at 111:24-112:13). In other words, instead of a Saturday deadline, SIMC demanded a finalized letter of credit from Xie by Friday, July 15, 2005, or

there would be no agreement. Upon receiving the facsimile from SIMC, Xie did not object to the new condition in the contract but instead proceeded to try to obtain the letter of credit as soon as he could. CP 128-29 (XD at 112:14-114:22). The letter of credit, however, was not finalized and issued by Friday, July 15. CP at 129 (XD at 115:5-10).

**2. The parties continue to try to work together.**

Despite Xie's failure to obtain a letter of credit by the required deadline, the parties continued to try to put together a deal. A number of draft letters of credit were exchanged, none of which were satisfactory to SIMC. CP 235-37.

The parties also continued to negotiate the sales quantity. On July 28, 2005,<sup>3</sup> SIMC sent Xie a facsimile stating that "[t]he sales order quantity is hereby changed to 1,000 Metric Tons." CP 10. Later in the day, Xie sent a facsimile back, changing the terms of SIMC's proposal. In this facsimile, Xie stated: "Buyer [Xie] is willing to take 1000MT as partial shipment immediately. Buyer [Xie] is also willing to give seller [SIMC] extension of two-three weeks to carry out the contract." CP 262. SIMC did not agree to Xie's proposal, and instead sent another facsimile back to Xie, making clear that 1,000 metric tons was the total quantity that

---

<sup>3</sup> Xie asserts that at a meeting on this same day, he expressed concerns regarding "SIM's delay in performance, CP284." AB at 11. Page 284 of the Clerk's Papers is merely a page of one of Xie's briefs below, and contains no reference to any communication by Xie stating SIMC was late in performance.

SIMC would ship: “The sales order *total quantity* is hereby changed to 1,000 Metric Tons.” CP 178 (emphasis added). Xie signed and accepted this last version, and therefore agreed that the total quantity due from SIMC was 1,000 metric tons. Xie also signed a sales order confirming the sale of only 1,000 metric tons of scrap steel. CP 180.<sup>4</sup>

Xie structured the transaction with his buyer via a “transferable” letter of credit. That is, Xie’s buyer provided Xie with a letter of credit in an amount sufficient to purchase the 2,000 metric tons that Xie apparently promised to ship to this buyer. CP 236 (¶ 8), 255-60. For this letter of credit (which allowed Xie to receive up to \$406,000), Xie was the beneficiary, Xie’s buyer was the applicant, and the Bank of Shanghai was the issuer. CP 255. SIMC was not a party to this letter of credit.

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

---

<sup>4</sup> In his brief, and for the first time on appeal, Xie contends that he believed the August 2 agreement and sales order were not contracts, but “internal work orders.” AB at 11. First, there is no evidence in the record to support Xie’s statement. Second, even if there were, the objective meaning of the documents is undisputable. The facsimile that was signed by Xie reads, above his signature line, “I have read the above and am in agreement with the terms contained herein.” CP 178. Similarly, the sales order reads “Accepted for [Giant]” above Xie’s signature. CP 180. These were not merely internal accounting documents as Xie now claims.

metal. CP 271-75. For this letter of credit made for the benefit of SIMC, Xie was the applicant, Wells Fargo was the issuer, and SIMC was the beneficiary. CP 271.<sup>5</sup>

SIMC shipped the metal as required by the August 2, 2005 agreement with Xie. After the freight was weighed and shipped, SIMC sent invoices to Xie demanding \$158,100.90 for the metal that was sold to Xie. CP 106, 108.<sup>6</sup>

Xie, in turn, sold the metal to his buyer in China, was not immediately paid in full by the buyer, and accordingly refused to pay SIMC. At his deposition, *Xie admitted that if he eventually received full payment, SIMC also is entitled to full payment of the amount due.* CP 139, 141 (XD at 197:19-21; 205:7-9).

---

<sup>5</sup> Xie contends that for the transferred letter of credit (CP 271-275), Xie's buyer was the actual "applicant," and Xie and SIMC were first and second beneficiaries, respectively. AB at 12-13. But for this letter of credit, Xie is the applicant. CP 271. Wells Fargo issued that letter of credit, and it was Xie who requested that Wells Fargo do so. *See* RCW 62A.5-102(1)(b) (defining an "applicant" as a person at whose request an letter of credit is issued). *Regardless* of labels, however, and as discussed below, Xie and SIMC had a contract independent of the letter of credit that SIMC is entitled to enforce whether Xie was the "applicant" or a "first beneficiary."

<sup>6</sup> In a confusing footnote, Xie appears to make some sort of argument regarding whether the shipment was actually made. *See* AB at 12 n.4. This issue was not raised below. Even if it is now considered, the record is clear that SIMC delivered the metal per Xie's instructions. *See, e.g.,* CP 104, 106, 108, 113, 158 (line 24), 190 (lines 5-6), 285 (lines 22-24); AB at 13.

### 3. Trouble with the bill of lading.

To complete a letter of credit, the applicant's bank typically requires the delivery of a package containing originals of a number of relevant documents (such as a bill of lading and a packing list). This operates to confirm that the goods at issue have been shipped and that payment is due. In this case, Wells Fargo—Xie's bank—required bills of lading be sent to it (along with other documents) by U.S. Bank—SIMC's bank—in one package by September 14, 2005, or the letter of credit would expire. CP 183 (at line "31D"), 185 (second line up from the bottom).

A bill of lading is typically created by the shipping company. CP 130 (XD at 117:1-118:1). For this transaction, the shipping company hired by Xie was CU Transport, Inc.<sup>7</sup> Xie worked with CU Transport to obtain a bill of lading before Wells Fargo's September 14 deadline, but CU Transport made a number of errors in drafting the bill of lading that caused Xie to ask CU Transport to redraft the document. CP 142 (XD at 211:14-213:16), 189-90 (¶¶ 2.8-2.14).

Xie did not receive the final bill of lading from CU Transport until September 15, one day *after* the package of documents was due to Wells

---

<sup>7</sup> For the first time on appeal, Xie asserts that he did not have a contract with CU Transport. *See* AB at 13 n.7. His implication seems to be that trouble with CU Transport's performance should be a risk shouldered by SIMC, not Xie. The record belies Xie's new theory. *See* CP 189-92, 237 (line 22).

Fargo. CP 238. But this final bill of lading still contained errors. CP 190 (at paragraph 2.13).

Despite these errors and the late date, Xie attempted to deliver the bill of lading directly to Wells Fargo on September 15. CP 210 (a letter from Xie's attorney to Xie's buyer's attorney). Wells Fargo refused to accept the bill of lading from Xie because, as noted above, the letter of credit required all the documents to be delivered by U.S. Bank (SIMC's bank) in one parcel. CP 138 (XD at 195:8-25), 183, 185. Xie then drove to SIMC and gave SIMC the original bill of lading. CP 138-39 (XD at 196:1-197:2). SIMC, *that same day*, delivered the bill of lading and other documents to U.S. Bank, to which the funds would be transferred from Wells Fargo. CP 113.

Critically, Xie admitted in his deposition that SIMC did the correct thing, for Wells Fargo *required* delivery of the original documents directly *from U.S. Bank*. CP 20 (a letter from Xie's attorney stating: "Wells Fargo refused multiple times to accept a presentation of documents by Lin Xie of Giant during the period September 2 to 15, 2005, *apparently insisting that the transferee's bank must present the documents.*" (emphasis added)), 146 (XD at 249:6-250:1), 182-83 (the advising cover letter and stamp on the second page from U.S. Bank explaining that U.S. Bank would keep the

original letter of credit that would be needed for presentation).<sup>8</sup> Indeed, delivery of the documents from U.S. Bank to Wells Fargo was not only required by Wells Fargo, it is also typical in the industry for the payee/advising bank to deliver the documents to the payor/issuing bank. CP 27.

U.S. Bank delivered the documents to Wells Fargo on September 21, 2005. Based upon the delay in securing the necessary documents, among other reasons, Xie's buyer in China demanded that Xie pay certain demurrage charges that were incurred while the buyer allegedly waited for the documents and the metal shipment was held at port in China. CP 197-198 (a letter from the buyer written in Mandarin, with Xie's translation on the second page and Xie's notes in parenthesis).

Because his buyer refused to pay, Xie brought suit against CU Transport.<sup>9</sup> CP 188-93. Xie's suit was eventually dismissed for insufficiency of service.

---

<sup>8</sup> Xie complains that SIMC distorts his deposition because Wells Fargo never stated the documents had to come from U.S. Bank. *See* AB at 15 n.8. That is not what Xie said under oath: "Q. Right. The presentation of the documents, that had -- the actual group of documents, as your attorney, on your behalf says here, Wells Fargo was insisting that they come from U.S. Bank, isn't that true. A. I believe so." CP 146. Nor is it what Xie's attorney said. CP 20. The letter of credit itself is also clear that U.S. Bank would deliver the documents since it retained the original letter of credit. CP 182-85. Furthermore, if Xie wished to contradict the point, he could have submitted a declaration below expressly rebutting these assertions. He did not do so.

<sup>9</sup> It is unclear why Xie did not sue his buyer.

#### **4. Xie and SIMC receive partial payment.**

Xie initially was not paid anything by his buyer for the metal Xie purchased from SIMC. Xie made demands on his buyer, and the buyer eventually sent Xie \$99,980.00, which was much less than the total owed to Xie. CP 190 (¶ 2.19). Xie then wrote SIMC a \$60,000 check; he spent the rest of the money on his attorneys and various other costs. CP 110-11, 195, 202 (XD at 202:15-206:17). Xie admitted that SIMC was entitled to the remainder of the amount due—he labeled his \$60,000 payment to SIMC as only a “*partial* payment.” CP 111 (emphasis added).

Indeed, in the months that followed shipment, both parties discussed the unpaid letter of credit, the amount owing from Xie, and Xie’s attempts to obtain payment directly from his buyer. *See, e.g.*, CP 6-7 (XD at 232:17-235:1), 29 (at 146:10-147:12; 148:2-6), 31-35 (internal SIMC notes regarding Xie’s collection efforts from Xie’s buyer), 41 (at 68:15-18), 43 (a letter from SIMC to Xie regarding the partial payment and the amount still due from Xie), 111 (a facsimile from Xie in November 2005 stating: “We are working hard to get the full payment from Bank of Shanghai as soon as possible.”), 239.

#### **C. Procedural History.**

Based upon Xie’s failure to pay SIMC for the metal, SIMC filed a complaint against Xie on August 23, 2007, alleging breach of contract, unjust enrichment, negligent misrepresentation, and fraud. CP 54-62.

Xie, through counsel, filed an answer, denying the thrust of the allegations and alleging six affirmative defenses. CP 63-66.<sup>10</sup> Xie did not allege the statute of limitations as an affirmative defense. CP 66. Nor did Xie allege as an affirmative defense that SIMC failed to “duly present” the documents needed for the letter of credit. *Id.* Nor did Xie allege as an affirmative defense that he was not “seasonably notified” of the letter of credit’s dishonor under RCW 62A.2-325. *Id.* Nor did Xie allege that SIMC was not the correct party-in-interest, or that SIMC failed to join a necessary party. *Id.* Nor did Xie allege laches as an affirmative defense. *Id.* Nor did Xie allege any counterclaims against SIMC. *Id.*

On November 15, 2007, SIMC served Xie with discovery requests (CP 161-69) which Xie answered on January 15, 2008 (CP 154-60). In his answers, Xie denied that SIMC fully performed under the contract because SIMC only delivered 1,000 metric tons of scrap metal, as opposed to 2,000 metric tons. CP 156 (Answer to Interrogatory No. 5); *see also* CP 165 (Interrogatory No. 5). No other basis was given by Xie to explain why SIMC allegedly did not perform its obligations. Additionally, Xie was asked to list each and every fact that supported his affirmative defenses. CP 166 (Interrogatory No. 7). Xie listed the following

---

<sup>10</sup> These affirmative defenses were: (1) failure to state a claim upon which relief can be granted; (2) failure to plead fraud with particularity; (3) waiver and estoppel; (4) unclean hands; (5) an allegation that damages were caused by SIMC and/or third parties; and (6) failure to mitigate. CP 66.

substantive allegations: (1) SIMC failed to deliver 2,000 metric tons scrap metal, causing Xie damages; (2) SIMC delayed the delivery of the bill of lading; (3) SIMC delayed the delivery of an AQSIQ<sup>11</sup> certificate; and (4) the acts of third parties, such as Xie's buyer and CU Transport, caused the lack of performance. CP 157 (answer to Interrogatory No. 7). No other facts were listed.

SIMC then filed an amended complaint adding another defendant to the case—SIMC's four claims remained the same.<sup>12</sup> CP 67-70. Xie again filed an answer, and again alleged the same six affirmative defenses. CP 71-74. No other affirmative defenses were added by Xie. CP 74. Despite Xie's allusion in his discovery answers to damages he suffered as a result of SIMC's alleged breach by failing to ship 2,000 metric tons, no affirmative defense of setoff or counterclaim was made. CP 74.

Over the next few months, the parties took four depositions: Xie and three (former and current) SIMC employees. During Xie's deposition, he confirmed that, other than what was listed in his discovery answers, there were no other errors made by SIMC in this case. CP 146 (XD at 250:2-251:2).

---

<sup>11</sup> An AQSIQ certificate is issued by the Chinese government and essentially allows a supplier of product to import those products into China. Xie has not raised the AQSIQ issue on appeal.

<sup>12</sup> The trial court denied summary judgment against this other party. That aspect of the trial court's ruling is not the subject of Xie's appeal.

On August 29, 2008, SIMC moved for partial summary judgment. CP 79-100. Among other issues, SIMC sought an order holding that: (1) Xie was liable for breach of contract and the contract only required shipment of 1,000 metric tons of steel, CP 89-92; (2) Xie's affirmative defenses based upon irregularities with the bill of lading should be dismissed, CP 93-95; and (3) Xie's affirmative defenses based upon the AQSIQ certificate should be dismissed, CP 95-96.

Relevant to this appeal, Xie's summary judgment response brief, CP 282-303, asserted that: (1) Xie did not breach the contract because his only obligation was to transfer a letter of credit, CP 291-293; (2) SIMC breached by failing to present documents properly, CP 293-94; (3) SIMC cannot recover because there was no "seasonable notification" of "dishonor" under RCW 62A.2-325, CP 295-98; and (4) the affirmative defenses should not be dismissed, CP 300-302. This brief was the first time Xie had ever raised RCW 62A.2-325 as an issue. Furthermore, in his response brief, Xie did not challenge SIMC's arguments concerning the AQSIQ certificate.

In order to fully respond to Xie's new arguments and theories in his summary judgment response brief—and explain why the right to rely on these theories was waived—SIMC filed a motion to file an over-length reply brief. CP 648-651. Simultaneously, SIMC filed a 10-page summary

judgment reply brief.<sup>13</sup> CP 44-53. Xie filed a “response” to this motion, but never actually opposed the filing of the over-length reply brief. CP 656-65. Xie’s brief was essentially a sur-reply on the underlying merits, as SIMC pointed out to the trial court. CP 666-67. Nor did Xie move to strike SIMC’s reply brief.

In its summary judgment reply brief, among other arguments, SIMC explained that Xie’s new “seasonable notification” defense had been waived by Xie. CP 48-49. SIMC also asserted that even if it was considered, the new issue was without merit. CP 49-51.

Judge Chris Washington heard oral argument on the motion for summary judgment on September 26, 2008. RP 1-48. After a lengthy hearing, Judge Washington ruled that SIMC was entitled to summary judgment against Xie for breach of contract. RP 35. The parties and the Court never discussed the over-length reply brief, and no order was issued on the matter.

At the end of the hearing, after a colloquy with Xie’s counsel, Judge Washington allowed Xie to submit a supplemental brief concerning the application of RCW 62A.2-325. RP 36-48; CP 318-320.

Before submitting his supplemental brief, however, Xie moved for reconsideration of the trial court’s order granting summary judgment.

---

<sup>13</sup> King County Local Rules normally limit summary judgment reply briefs to five pages. *See* King County Local Rule 56(c)(3).

CP 324-36. The bulk of the motion for reconsideration merely re-argued the points already raised in the summary judgment briefs. For the first time, however, Xie asked that his affirmative defenses be treated as counterclaims or as an affirmative defense based upon setoff. CP 333-34. He did not move to file an amended answer, however. Xie also raised the AQSIQ certificate issue in his motion for reconsideration, which he had not raised in his summary judgment response brief. CP 334-35. The Court never ordered SIMC to file a response to this motion for reconsideration under King County Local Rule 59.

A few weeks after submitting his motion for reconsideration, Xie submitted his briefing concerning seasonable notification. He labeled it a “Supplemental Motion and Briefing Regarding Seasonable Notification.” CP 370-77. SIMC filed a response brief, arguing that the issue had been waived and, even if it had not, SIMC was still entitled to judgment. CP 394-404. Xie filed a reply brief, CP 451-64, and on November 7, 2008, the trial court denied Xie’s motion regarding seasonable notification. CP 465-66.

On December 1, 2008, SIMC moved to voluntarily dismiss its remaining claims, and enter judgment against Xie for breach of contract. CP 469-45. The next day, SIMC received notice that Xie’s counsel was withdrawing, effective December 12. Xie accordingly submitted a *pro se* response to SIMC’s motion. CP 504-15. In addition to re-arguing the

merits, that response also alleged that: (1) final judgment was not appropriate since the motion to reconsider was never technically ruled upon, CP 504-05; (2) SIMC's motion to enter judgment was not served and noted properly, CP 506-07; (3) the claims being voluntarily dismissed by SIMC were frivolous, CP 509-10; and (4) counsel for SIMC engaged in improper witness tampering, CP 510.

SIMC filed a reply brief rebutting Xie's accusations. CP 595-98. The court granted SIMC's motion for entry of judgment, and entered judgment against Xie in the amount of \$139,269.10. CP 605-08.

*After* judgment was entered, Xie moved to file an amended answer to the complaint which included counterclaims. The trial court denied Xie's motion. CP 641-42.

#### **IV. ARGUMENT**

##### **A. Standard of Review.**

The trial court's decision on summary judgment is reviewed *de novo*. *Cambridge Townhomes, LLC v. Pacific Star Roofing, Inc.*, 166 Wn.2d 475, 481, 209 P.3d 863 (2009). The trial court's decision on evidentiary matters; failure to strike a brief; denying a motion to amend; denying a motion to reconsider; and denying a continuance, are all reviewed for an abuse of discretion. *Hensrude v. Sloss*, 150 Wn. App. 853, 860, 209 P.3d 543 (2009) (evidentiary issues); *O'Neill v. Farmers Ins. Co.*, 124 Wn. App. 516, 521, 125 P.3d 134 (2004) (motion to strike);

*Wilson v. Horsley*, 137 Wn.2d 500, 505, 974 P.2d 316 (1999) (motion to amend); *Pacific Industries, Inc. v. Singh*, 120 Wn. App. 1, 11, 86 P.3d 778 (2003) (motion to reconsider); *Willapa Trading Co., Inc. v. Muscanto, Inc.*, 45 Wn. App. 779, 785, 727 P.2d 687 (1986) (motion for a continuance).

A trial court does not abuse its discretion unless the exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons. *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 107, 864 P.2d 937 (1994).

**B. This Court Should Not Consider Issues Raised for the First Time on Appeal.**

In his brief, Xie raises a host of issues. Many of these were not raised below. Rule of Appellate Procedure 2.5 codifies the long-standing rule that in most circumstances an issue not raised at the trial court will not be considered on appeal. Although there are some limited exceptions to this rule, none of them apply here.

The following arguments raised or alluded to by Xie were never made to the trial court: (1) SIMC's claim is barred by the one-year statute of limitations<sup>14</sup> under RCW 62A.5-115, see AB at 6, 22-30; (2) Xie was an

---

<sup>14</sup> The statute of limitations under Article 5 was discussed at oral argument before the trial court, but in reference to whether *Xie* could meet the statute of limitations for any claim against the bank that issued the letter of credit. RP 33. At no time did Xie ever allege that *SIMC*'s claim against Xie was barred by the one-year statute of limitations.

agent of SIMC and/or his end-buyer, and the contract was really between SIMC and the end-buyer, see AB at 3, 8-9, 10-11, 13, 22 n.13, 26-30; (3) SIMC was represented by Xie's attorney for purposes of collection, see AB at 15-17; (4) SIMC is not the correct party-in-interest and/or failed to join a necessary party, see AB at 5-8, 18, 45; (5) evidence supplied by SIMC was not based upon personal knowledge, see AB at 4 n.3, 44; (6) Xie did not have a contract with CU Transport, see AB at 13 n.7; (7) by not responding to a letter from Xie's lawyer, SIMC consented to the lawyer's position, see AB at 16-17; (8) SIMC breached its obligations of good faith and fair dealing, see AB at 23; (9) Xie never accepted the metal, see AB at 7-8, 28-30; 46; (10) the unsigned deposition transcript of Alan Sidell—the President of SIMC—was improperly used, see AB at 18 n10, 44; (11) SIMC improperly refused to provide Xie documents, see AB at 14-15; (12) SIMC is estopped from claiming Xie breached his contract with SIMC, see AB at 15; and (13) SIMC's claim is barred by laches, see AB at 33, 40-41.

Because Xie did not raise these arguments below, they should not be considered. *See, e.g., Am. Universal Ins. Co. v. Ranson*, 59 Wn.2d 811, 816, 370 P.2d 867 (1962) (“[I]t would be unfair to consider, on appellate review, matters not presented to the trial court for its consideration. We

must have before us the precise record—no more and no less—considered by the trial court.”).<sup>15</sup>

Of the new issues listed above, the only one that arguably fits into an exception to the general rule regarding new issues on appeal is the one-year statute of limitations under RCW 62A.5-115. AB at 33. Xie cites *New Meadows Holding Co. v. Wash. Water Power Co.*, 102 Wn.2d 495, 687 P.2d 212 (1984), and *State v. Fagalde*, 85 Wn.2d 730, 539 P.2d 86 (1975), as support for his contention that the statute of limitations issue can be considered for the first time on appeal. AB at 33.

*Fagalde* was a criminal case, and there the court held that because the defendant had raised an evidentiary issue to the trial court, it was properly reserved for appeal. 85 Wn.2d at 731-32. Xie’s situation is the exact opposite: he never raised the statute of limitations below.

In *New Meadows*, the plaintiff brought tort claims against three defendants. 102 Wn.2d at 497. One defendant moved for summary judgment on the plaintiff’s claim—as well as on another defendant’s cross-claim—based upon the statute of limitations. *Id.* The defendant who had filed the cross-claim resisted the motion for summary judgment; the plaintiff, however, did not file a response to the motion. *Id.* The trial

---

<sup>15</sup> As explained in Section G of this brief, even if they are considered, the few new issues that Xie does raise with some comprehensible analysis are without merit.

court granted the motion for summary judgment, and on appeal the defendant who had obtained summary judgment argued that the plaintiff waived its right to appeal the decision on summary judgment because the plaintiff did not resist the motion below. *Id.* at 498.

The Supreme Court rejected this reasoning, holding the issue was properly before the court. Two reasons were given. First, a deemed waiver of the issue would affect the plaintiff's "right to maintain the action," and the case accordingly fell within the exception to the general rule that issues not raised below cannot be considered on appeal. Second, the court held the issue was properly preserved because the cross-claiming defendant opposed the summary judgment motion, the issue was adequately briefed to the trial court, and the interests of the plaintiff and the cross-claiming defendant were identical with respect to the motion. *Id.* at 498-99.

This Court has subsequently ruled that the exception in *New Meadows* will *only* apply if the trial court was apprised of the issue by some party—conversely, if no one raised the statute of limitations as a defense below, it will not be considered on appeal. *See Bogle and Gates, PLLC v. Holly Mountain Resources*, 108 Wn. App. 557, 562-63, 32 P.3d 1002 (2001) ("The narrow exception [explained in *New Meadows*] does not apply here, where the trial court was never able to consider the applicability of [the statute of limitations] because neither *Bogle and Gates*

nor another party raised the issue below.”); *see also Muma v. Muma*, 115 Wn. App. 1, 7, 60 P.3d 592 (2003) (holding that the statute of limitations argument had been waived when it was not raised before the trial court).

Xie never raised to the trial court the issue of whether RCW 62A.5-115 acts to bar SIMC’s claims. The issue should accordingly not be considered.

**C. The Trial Court Properly Granted Summary Judgment.**

**1. Xie breached his contract with SIMC.**

Xie agreed to pay SIMC \$175 per metric ton and SIMC agreed to sell approximately 1,000 metric tons to Xie. CP 178-80. SIMC delivered the metal and was only paid \$60,000, leaving an outstanding principal balance owed by Xie of at least \$98,100.90. Because Xie did not pay in full, he breached his contract with SIMC.

**2. Xie is liable regardless of whether the August 2 agreement was a new contract or a modification of an existing contract.**

Xie complains that SIMC did not ship 2,000 metric tons of metal as required by the parties’ original contract. But Xie ignores the fact that less than one month after signing the contract, *Xie agreed in writing* that SIMC was only required to deliver 1,000 metric tons. CP 178-80.

The parties’ original contract contained a condition precedent: if a letter of credit was not delivered by Friday, July 15, there would be no deal. CP 174. Xie did not object to this condition. It is undisputed that

Xie did not finalize a letter of credit by the new deadline. CP 129 (XD at 115:5-10). Because this condition precedent was not met, SIMC had no obligation to ship 2,000 metric tons of metal. *Ross v. Harding*, 64 Wn.2d 231, 236, 391 P.2d 526 (1964). The August 2 agreement, CP 178-80, accordingly, was a new contract, and SIMC's only obligation was to ship 1,000 metric tons, which it did.

The same result is reached even if this Court concludes that the contract's condition regarding the deadline for the letter of credit was somehow waived because SIMC continued to work with Xie to finalize a letter of credit. But if that is the case, the August 2 agreement was simply a modification of the original contract. In exchange for a modification of the amount shipped, SIMC extended the deadline to August 5 for Xie to produce a satisfactory letter of credit. *Xie agreed in writing to this modification*, and is accordingly bound by its terms.<sup>16</sup>

---

<sup>16</sup> Relying on evidence never submitted to the trial court, Xie complains that SIMC insufficiently pled its breach of contract claim because, apparently, SIMC argued below that whether or not the August 2 agreement was a new contract or a modification of the existing contract, Xie was still liable. *See* AB at 43. Xie's position is without merit. SIMC was entitled to explain why, under either interpretation of the facts, Xie remained liable for the same claim: breach of contract. Moreover, the implication that Xie was not on notice of SIMC's claim is simply without merit. Specifically, Xie appears to argue he never received notice that SIMC was asserting that it only had to ship 1,000 tons, and when he did receive notice he did not have time to file an amended answer addressing the issue. Both contentions are false. SIMC's original and amended complaints state that Xie breached "the contract *and the amendments thereto*." CP 57, 68 (emphasis added). After SIMC filed its summary judgment motion Xie did *not* attempt to file an amended answer because SIMC alleged some sort of "new" theory of the case.

Finally, Xie's argument that SIMC was obligated to ship 2,000 metric tons is belied by his own pleadings. If SIMC breached by shipping only 1,000 metric tons, Xie should have brought a counterclaim against SIMC seeking damages for breach of contract. He did not attempt to do so until after final judgment was entered, which of course is too late. CP 205 (Xie's answer which does not allege a counterclaim). He could also have alleged setoff as an affirmative defense. He did not do so. CP 205.

**3. Xie is not excused from his obligations because he failed to obtain payment from his buyer.**

SIMC never had a contract with Xie's buyer or with Xie's buyer's bank. SIMC never had a contract with CU Transport. CP 104. Those relationships, and the risks associated with them, were instead the sole province of Xie. That Xie was unable to obtain payment from his buyer is not a legally cognizable reason for refusing to enforce Xie's clear obligation to pay what he owes SIMC for the metal SIMC delivered. There is nothing in the contract, in its original form or as amended, that makes payment by Xie to SIMC contingent upon payment from Xie's buyer in China. CP 174-80.

Xie's argument is basically that SIMC is only entitled to payment via letter of credit, and since that method failed, no payment is due. The trial court properly rejected this reasoning.

First, as the trial court recognized, the letter of credit is simply a method of payment from Xie to SIMC for the protection of SIMC. RP 28. Indeed, Xie appears to recognize as much. *See* AB at 9 (“no cash was to be used because SIM would not trust a new customer”). SIMC’s agreement that it could be paid via letter of credit does not mean that if errors concerning the letter of credit rendered it inoperative, SIMC would not be entitled to payment *at all*. Under such reasoning, despite the undisputed fact of SIMC’s performance, SIMC would be left uncompensated for the goods it delivered. This cannot be.<sup>17</sup>

Second, and similarly, the statutes and cases concerning letters of credit recognize the distinction between disputes regarding a letter of credit and disputes regarding an underlying transaction. Simply put, the letter of credit (and the performance or nonperformance thereof) is *distinct* from the underlying obligations of Xie to pay under the contract. This is known as the “independence principle” that governs letters of credit. *See generally* HAWKLAND, UCC Series § 5-103:13 (attached at Appendix 1-4).

Whether or not SIMC has a claim against the issuing bank does not affect SIMC’s claim against Xie. In other words, SIMC’s claim against

---

<sup>17</sup> Citing to page 265 of the Clerk’s Papers, Xie asserts that he made clear to SIMC that the letter of credit would be the only method of payment. AB at 12. Page 265 of the Clerk’s Papers says nothing of the sort. That evidence is an email string that references that *Xie’s buyer* will not make a cash payment *to Xie*. Xie never makes any statement that the letter of credit will be SIMC’s only path of recovery. Nor does the sales contract.

Xie for breach of contract is “independent” of whatever rights SIMC has against the issuer (Wells Fargo) concerning the letter of credit. *See, e.g., Alhadeff v. Meridian on Bainbridge Island, LLC*, 114 Wn. App. 928, 185 P.3d 1197, 1202-04 (2008) (explaining that a plaintiff’s underlying breach of contract and negligent misrepresentation claims were not barred by the statutes governing letters of credit—Article 5 of the UCC found at RCW 62A.5-101 *et seq.*—because “the underlying contract is a separate and distinct relationship” from letter of credit rights and duties and that “a party to an underlying contract has a separate cause of action for breach of that contract” independent of the letter of credit.); *Kenney v. Read*, 100 Wn. App. 467, 472-74, 997 P.2d 455 (2000) (“The letter of credit itself is independent of the underlying transaction and any other related obligations.”); RCW 62A.5-102 (UCC cmt. 3) (“The contract between the applicant [Xie, *see* CP 182] and beneficiary [the seller, SIMC] *is not governed* by Article 5, but by applicable contract law, such as Article 2 or the general law of contracts.”) (emphasis added); RCW 62A.5-103(4) (“Rights and obligations of an issuer to a beneficiary . . . under a letter of credit are independent of the existence, performance, or non performance of a contract . . . out of which the letter of credit arises . . . including contracts . . . between the applicant and the beneficiary.”).<sup>18</sup>

---

<sup>18</sup> Xie misleads the Court on page 39 of his brief. There, he quotes from the HAWKLAND UCC SERIES to suggest that the current case between SIMC and (footnote continued)

The authorities are also clear that a buyer's transfer of a letter of credit does not replace and extinguish the buyer's underlying obligation to pay under the contract with the seller. See RCW 62A.2-325(2) cmt. 1 ("Thus the furnishing of a letter of credit *does not* substitute the financing agency's obligation for the buyer's . . . ." (emphasis added)); RCW 62A.2-607(1) ("The buyer must pay at the contract rate for any goods accepted."); *In re AOV Industries, Inc.*, 64 B.R. 933, 941 n.8 (Bankr. D.C. 1986) (attached as Appendix 5-19 and explaining that the transfer of a letter of credit does not amount to "payment" under the underlying contract); *CT Chem. Inc. v. Vinmay Impex, Inc.*, 81 N.Y.2d 174, 181 (N.Y. 1993) (attached as Appendix 20-25 and explaining that the seller had a

---

Xie is governed by Article 5. But that section from HAWKLAND makes perfectly clear that the statute of limitations in Section 115 of Article 5 "would not apply to a contract between the applicant and the beneficiary that provides for a payment by means of a letter of credit." See Appendix at 29. In short, HAWKLAND does address Xie's argument, and directly refutes it.

Xie makes a similar attempt at misdirection on page 22 of his brief. There, Xie quotes a passage from ANDERSON ON THE UNIFORM COMMERCIAL CODE which cited a case where a court held that a letter of credit can inform the terms of the underlying contract. This proposition is not controversial. What it does not mean, however, is that a letter of credit *replaces* the underlying contractual obligation to pay. Indeed, Xie did not provide this Court with the complete passage from ANDERSON. The preceding sentence in ANDERSON, which cites the same underlying case, reads: "Foreign clothing manufacturers' failure to submit to the court 'approval sample certificates,' documents that, pursuant to the manufacturers' contracts with retailers, were required to be presented to retailers' representative in order to draw on the letter of credit posted by retailers, did not vitiate the validity of the underlying contracts." Appendix at 31. In short, the case cited by ANDERSON directly rebuts Xie's position: *the failure to abide by the presentment obligations unique to the letter of credit does not negate the parties' underlying contractual obligations.*

right to proceed against the buyer when the letter of credit was not paid by the issuing bank).<sup>19</sup>

Xie claims that SIMC is to blame for the non-payment of the letter of credit. This argument is addressed in Section D below. But even if SIMC were completely at fault for the mishaps with the letter of credit, which it was not, such actions still do not affect Xie's obligation to pay SIMC directly:

First, we find that plaintiff was entitled to summary judgment on its first cause of action, seeking payment for the costs of goods sold. There is no issue that the goods specifically at issue in this cause of action were received by defendants and were not paid for. We reject defendants' argument that summary judgment was properly denied because questions of fact remain as to whether the letters of credit opened by defendants in relation to the subject shipment were not paid solely because of plaintiff's own failure to present the necessary documentation. *As long as*

---

<sup>19</sup> Xie cites *Banca Del Sempione v. Provident Bank of Maryland*, 160 F.3d 992 (4th Cir. 1998) and *Amwest Surety Ins. Co. v. Republic Nat'l Bank*, 977 F.2d 122 (4th Cir. 1992) for the proposition that “[i]n essence,” and “effectively,” the transfer of a letter of credit substitutes SIMC for Xie with respect to the rights under the letter of credit issued to Xie by his buyer. AB at 10-11. Even if that were true—which is doubtful, because of instead of transferring the letter of credit, Xie applied for and had Wells Fargo issue a *new* letter of credit in favor of SIMC—that merely establishes rights in favor of SIMC with respect to the letter of credit, it does *not* compromise SIMC's *independent* right to seek compensation from Xie on the underlying contract between SIMC and Xie, as both cases cited by Xie recognize. *See Banca Del Sempione*, 160 F.3d at 995-96 (explaining that letters of credit “are separate transactions from the sales or other contract(s) on which they may be based,” and crediting evidence that a transfer of a letter of credit was “a separate independent undertaking”); *Amwest Surety*, 977 F.2d at 126 (emphasizing the “cardinal principle” that the relationship between the buyer and seller is distinct from the relationship between the issuer and beneficiary).

*the bank dishonored the letters, the reason for dishonor is irrelevant to defendant's obligation to pay for the goods[.]*

*Samsung Am., Inc. v. Yugoslav-Korean Consulting & Trading Co., Inc.*, 670 N.Y.S.2d 466, 467 (N.Y. App. Div. 1998) (attached as Appendix 26-28, emphasis added). This reasoning is consistent with the independence principle.

Accordingly, *regardless* of what occurred with respect to the letter of credit, Xie has an obligation to pay SIMC for the metal it delivered. That obligation has been breached.

Much of Xie's analysis is focused on whether SIMC had a cause of action against the issuer bank—but that does not affect SIMC's *independent* right to seek recovery from Xie under the contract. Indeed, Xie has previously admitted that the contract between SIMC and Xie is "independent" of the rights and obligations under the letter of credit. CP 291.

**4. Even if Xie were only required to transfer the letter of credit, he is now estopped from claiming no further payment is due.**

Even if the Court adopts Xie's novel reasoning that his sole obligation under the agreement with SIMC was to transfer a letter of credit, Xie's subsequent actions modified his obligations. Under the UCC, a party's course of dealing and course of performance can supplement the party's obligations. *See* RCW 62A.1-205(1) & (3); 2-208(1)-(3). Here, after no payment was received via the letter of credit, Xie directly paid

SIMC \$60,000 via check. CP 110-11, 195. Xie labeled this payment as a “partial payment” and promised that Xie was “working hard” to obtain the “full payment.” CP 110-11. These actions are inconsistent with Xie’s current theory that the only thing he was obligated to do was transfer the letter of credit, for if that were the case, he would have already performed and thus would have had no obligation to make any payment—let alone “work hard” to gather the remainder of the amount due. In these circumstances, the actions of Xie show that he assumed the obligation to pay, not merely to transfer a letter of credit. By making payment directly, and by acknowledging that the payment was only a “partial” payment, Xie is estopped from relying on the defense that Xie had no obligation to make further payments. *See, e.g., King v. Snohomish County*, 146 Wn.2d 420, 424, 47 P.3d 563 (2002) (“We have held that a defendant may waive an affirmative defense if . . . assertion of the defense is inconsistent with defendant’s prior behavior[.]”). SIMC reasonably relied upon Xie’s agreement to make “full payment” for the obligations owed.<sup>20</sup>

**D. Xie’s Affirmative Defenses Are Without Merit.**

Below, Xie’s non-waived affirmative defenses were all based upon the same three arguments: that SIMC should have shipped 2,000 metric

---

<sup>20</sup> The evidence is undisputed that SIMC continually relied on Xie’s representations, after the letter of credit was dishonored, that Xie was pursuing payment from his buyer and his buyer’s bank. CP 29 (Sidell Deposition at 146:10-147:12, 148:2-6), 31-35, 41 (at 68:15-18), 43, 110-11.

tons of metal, that SIMC delayed sending the bill of lading, and that SIMC delayed sending the AQSIQ certificate. As explained above, the argument regarding the amount of metal shipped is belied by the parties' contract. Xie does not present any argument on appeal regarding the AQSIQ certificate. The only remaining issue is the delivery of the bill of lading to Wells Fargo.

Xie asserted to the trial court that SIMC "delayed delivery of the Bill of Lading" and that, accordingly, this delay operated as either estoppel, waiver, unclean hands, breach of contract, or a failure to mitigate by SIMC. CP 157 (at Answer to Interrogatory No. 7), 207.

The undisputed facts simply do not support Xie's contention. SIMC delivered the original bill of lading to U.S. Bank *on the same day* that SIMC received it from Xie. CP 113, 209-10. Xie claims that SIMC should have sent the document directly to Wells Fargo instead of sending it to U.S. Bank. But Xie admitted in his deposition that SIMC *could not have* delivered the bill of lading; Wells Fargo instead insisted that the document come from U.S. Bank. CP 146 (XD at 249:6-250:1); CP 20-22 (a letter from Xie's attorney stating "Wells Fargo refused multiple times to accept a presentation of documents by Lin Xie of Giant during the period September 2 to 15, 2005, *apparently insisting that the transferee's bank must present the documents.*" (emphasis added)). Xie did not submit any contrary evidence.

Xie also asserts that SIMC presented documents late. But it is *undisputed* that the reason the documents were late was because Xie failed to produce the original bill of lading to SIMC until September 15. CP 190 (¶ 2.14 (“By the time [Xie] received the B/L [from CU Transport], it is already late . . . .”)), 238 (¶ 16).

Accordingly, SIMC did exactly what should have been done. Even if SIMC had unreasonably delayed sending the bill of lading, it is a moot point, as defendants failed to provide the bill of lading to SIMC until September 15, one day *after* the letter of credit expired.

These undisputed facts cannot form the basis for an affirmative defense of estoppel. Estoppel requires a showing by a defendant of “(1) an admission, statement or act inconsistent with a claim afterward asserted; (2) action by another in reasonable reliance on that act, statement, or admission; and (3) injury to the party who relied if the court allows the first party to contradict or repudiate such admission, statement or act.” *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist.*, 124 Wn.2d 816, 831, 881 P.2d 986 (1994). Each element must be proven by clear, cogent, and convincing evidence. *Id.* Here, there is no “act” or “statement” by SIMC concerning the bill of lading that is inconsistent with SIMC’s current position. Nor is there any evidence—let alone clear, cogent, and convincing evidence—that Xie relied on any alleged act by SIMC that caused the delay with the bill of lading. Instead, as Xie already

alleged in previous litigation, the delay was the result of CU Transport's errors, which were not the responsibility of SIMC. There was no genuine issue of material fact concerning Xie's affirmative defense of estoppel.

Nor do the facts support a triable issue on the affirmative defense of waiver. A waiver is an agreement to relinquish a known right under the terms of a contract that excuses the other party's obligation to perform. *Sherman v. Lunsford*, 44 Wn. App. 858, 862, 723 P.2d 1176 (1986). Here, SIMC never "waived" Xie's obligation to pay for the metal. Nor do the facts regarding the bill of lading even fit within a "waiver" analysis.

The defense of "unclean hands" is similarly unavailable to Xie. This defense lies in equity, and could not prevent summary judgment on SIMC's breach of contract claim. There was no delay by SIMC, and no basis for an unclean hands defense.

Finally, there is simply no evidence or theory to support the assertion that had SIMC acted any differently, SIMC's damages could have been avoided. The bill of lading was already late, and Xie admitted that it had to be delivered by U.S. Bank, not SIMC. Accordingly, the only thing SIMC could do was what it did do: deliver it to U.S. Bank. There is no factual basis for a jury issue on the failure to mitigate damages.

In sum, because SIMC proved that Xie failed to fully pay—an undisputed fact—and because Xie’s non-waived affirmative defenses are without merit, the trial court properly granted summary judgment.<sup>21</sup>

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

**1. This defense was waived by Xie.**

The first time Xie raised his “seasonable notification” defense under RCW 62A.2-325 was in his response to SIMC’s summary judgment motion. By that time, substantial discovery had occurred in the case.<sup>22</sup> Specifically, in his response brief, Xie claimed that the letter of credit was not “dishonored” and that even if it was, SIMC did not make “seasonable notification” of its demand for payment under RCW 62A.2-325. This affirmative defense was not raised in Xie’s answer to the complaint. CP 205-07. Nor was it raised in Xie’s answers to discovery requests regarding Xie’s defenses to SIMC’s claim. CP 156-57 (at Answers to Interrogatory Nos. 4, 5, and 7).<sup>23</sup> Nor was it raised when Xie was asked at

---

<sup>21</sup> For the same reasons, the trial court did not abuse its discretion when it failed to grant Xie’s motion for reconsideration.

<sup>22</sup> Four depositions occurred before summary judgment briefing. SIMC issued two sets of written discovery requests to Xie, and Xie issued one set of written discovery requests to SIMC. CP 2 (¶ 3). Because the defenses under RCW 62A.2-325 were not raised in Xie’s answer or discovery responses, the discovery did not focus on or explore these issues.

<sup>23</sup> Specifically, Interrogatory No. 4 sought a description of each and every fact that supported Xie’s basis for denying paragraph 2.3 of SIMC’s original complaint. Paragraph 2.3 of the original complaint alleged that Xie was obligated to pay SIMC the \$158,100.90 that SIMC invoiced to Xie. CP 13. In (footnote continued)

his deposition to list all the acts of SIMC that were the basis of his defenses. CP 146 (XD at 250:2-251:2). Xie's defenses based upon an alleged lack of "dishonor" and lack of "seasonable notification" under the UCC were accordingly waived and should not be considered. *See* CR 8(c); *King*, 146 Wn.2d at 424-26 (holding that a defendant waived its defense when, although it was alleged in the complaint, it was not explained in response to interrogatories); *Dep't of Labor and Industries v. Kaiser Aluminum and Chem. Corp.*, 111 Wn. App. 771, 778, 48 P.3d 324 (2002) (explaining that a party cannot contradict its answers to interrogatories to create an issue of fact on summary judgment); *Rainier Nat'l Bank v. Lewis*, 30 Wn. App. 419, 422-23, 635 P.2d 153 (1981) (holding that a defense raised for the first time at summary judgment was waived when it was not pled and there had been no attempt to amend the answer to include the defense).<sup>24</sup>

---

response, Xie made no mention of a lack of "dishonor" of the letter of credit or a lack of "seasonable notification" to Xie. CP 156 (at Answer to Interrogatory No. 4). Interrogatory No. 5 asked Xie to list each and every fact that supported Xie's denial of the allegation that SIMC fully performed under the contract. CP 165. In response, Xie made no mention of a lack of "dishonor" of the letter of credit or a lack of "seasonable notification" to Xie. CP 156 (at Answer to Interrogatory No. 5). Finally, Interrogatory No. 7 asked Xie to describe each and every fact that formed the basis of any affirmative defenses. CP 166. In response, Xie made no mention of a lack of "dishonor" of the letter of credit or a lack of "seasonable notification" to Defendants. CP 157 (at Answer to Interrogatory No. 7).

<sup>24</sup> Xie repeatedly complains that in its original moving papers, SIMC did not mention Xie's "seasonable notification" defense. The reason for that, of (footnote continued)

**2. Even if it is considered, Xie's reasonable notification defense is without merit.**

RCW 62A.2-325(2) states:

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

The UCC comments to this statute explain that "the furnishing of the letter of credit does not substitute the financing agency's obligation for the buyer's, but the seller must first give the buyer reasonable notice of his intention to demand direct payment from him." *Id.*, cmt. 1.

Xie makes two arguments regarding this statute. First, he claims that there was no "dishonor" because the letter of credit was never "duly presented." AB at 25-26. Second, Xie contends that even if there was due presentment, there was no reasonable notification that SIMC wished to be paid. AB at 32. Neither argument has merit.

**a. Xie's "duly presented" argument ignores the UCC.**

Based upon errors in the documents eventually delivered to Wells Fargo, Xie claims that the letter of credit was never duly presented. Xie

---

course, is that Xie had never raised it as a defense in any of his pleadings or papers. Nor, when questioned at his deposition regarding what acts of SIMC supported his defenses, did Xie allege he did not have "notice" that SIMC was seeking payment. But even if it was somehow error for the trial court to consider this issue on summary judgment, it was obviously cured when the trial court allowed Xie to file a supplemental brief, and then a supplemental reply brief, on this exact issue. CP 370-77, 451-64.

argues that there can only be dishonor after documents are duly presented. But Xie ignores the fact that the errors were not the fault of SIMC. Based on the undisputed evidence, SIMC did everything it could to properly present the documents. The UCC provides that in a situation like this, presentment has been made because SIMC employed reasonable diligence. *See* RCW 62A.3-504(a)(i) & (v); *see also* RCW 62A.3-502, cmt. 1 (“frequently presentment and notice of dishonor are excused (Section 3-504)”).

Perhaps more importantly, Xie’s reasoning rests on the applicability of Section 3-502 within Article 3, which governs negotiable instruments. Xie ignores the fact that Article 5, which governs letters of credit,<sup>25</sup> has its own definitions of “dishonor” and “presentment” that do *not* incorporate the concept of a “duly presented” instrument as Article 3 does. *See* RCW 62A.5-102(e), (h), & (l); *see also* RCW 62A.5-102, cmt. 11 (“‘Draft’ in Article 5 does not have the same meaning it has in Article 3.”); RCW 62A.5-116 cmt. 4 (“In several ways Article 5 conflicts

---

<sup>25</sup> Xie argues that SIMC’s reliance on Article 5 for its analysis on this point shows that this entire controversy is governed by Article 5. This is false. If considered, Xie has raised the issue of whether the “seasonable notification” condition in UCC 2-325(2) acts as a bar to SIMC’s breach of contract claim. That statute uses the dishonor of a letter of credit as a possible barrier to direct payment. Whether and when a letter of credit has been “dishonored” falls within the purview of Article 5. But if 2-325(2) is not raised—and/or if its conditions have been met—the underlying claim for payment between the seller/beneficiary and the buyer/applicant is governed by the applicable contract law, not Article 5. RCW 62A.5-105 (UCC cmt. 3).

with and overrides similar matters governed by Articles 3 and 4.”). The standards under Article 5 are straightforward: when no payment occurred, the letter of credit was dishonored. *See* RCW 62A.5-102(e) (“‘Dishonor’ of a letter of credit means failure to timely honor . . . .”) & (h) (“‘[H]onor’ occurs . . . [u]pon payment[.]”).

RCW 62A.5-108 also negates Xie’s argument. There, the UCC explains that, with exceptions, “an issuer shall dishonor a presentation” of documents that does not comply with the terms of the letter of credit. RCW 62A.5-108(1). In other words, a “dishonor” occurs when presentment of documents is faulty. If Xie were correct, Section 5-108 would not use the term dishonor because, according to Xie, there can be no “dishonor” unless there is proper presentation.<sup>26</sup>

An absurd result would be reached if Xie’s theory were adopted. According to Xie, any technical failure by a seller/beneficiary to properly present documents leads to a letter of credit being properly rejected, but because the documents were not duly presented, the rejection of the letter of credit is not a dishonor. Because no dishonor occurred, the beneficiary has no right to seek payment from the buyer under Section 2-325(2). Furthermore, if the defective presentment could not be cured, the seller

---

<sup>26</sup> *See also* comment 7 to Section 5-108, which speaks in terms of an issuer’s “dishonor” of a letter of credit when the presentment does not comply with the letter of credit’s terms.

would also have no claim against the issuer. But in these types of transactions, the buyer may supply some of the documents needed by the beneficiary to obtain payment. The buyer could—and in fact would have an incentive to—submit improper documents or submit late documents to the beneficiary to insure that the letter of credit did not fund. In short, despite delivering the goods, the seller/beneficiary would have no recourse to seek payment against anyone. This cannot be the case.

**b. There was reasonable notification.**

Xie's argument regarding "reasonable notification" is also without merit. Under the UCC, "reasonable" merely means "reasonable." RCW 62A.1-204(3). Here, Xie offers no evidence to support his defense that SIMC failed to reasonably notify Xie that no payment had been received. The undisputed facts are that in the months that followed shipment, both parties talked about the unpaid amount due and Xie hired a lawyer to collect the funds that were unpaid. *See supra* note 23; *see also* CP 6 (XD at 232:17-235:1), 20-22 (a December 5, 2005 letter from Xie's attorney stating that the letter of credit had been dishonored), 111, 188-92 (a January 2006 lawsuit filed by Xie against the freight forwarder for the unpaid amount), 195 (a check from Xie to SIMC for \$60,000—such a payment would have been illogical and unnecessary if Xie believed he had no obligation to pay SIMC), 200-01 (a letter from Xie's attorney dated November 2, 2005, noting that the buyer had failed to pay for the metal

delivered in September 2005), 239 (Xie Decl. ¶ 20 (“I learned sometime in or about October 2005 that the Bank of Shanghai refused to pay under the letter of credit . . . ”)).

Xie’s brief appears to draw a distinction between Xie’s knowledge that SIMC wanted to be paid, in general, for the goods it shipped and Xie’s knowledge that SIMC wanted to be paid specifically *by* Xie. This distinction is as fictional as it is illogical. There is *nothing in the record*—no declaration or any other evidence—that supports Xie’s contention that he was unaware SIMC wanted to be paid by Xie.

In fact, the UCC does not draw the fine line that Xie pretends exists. Under the UCC, “[a] person has ‘notice’ of a fact when . . . (c) from all the facts and circumstances known to him or her at the time in question he or she has reason to know that it exists.” RCW 62A.1-201(25). The facts and circumstances undisputedly demonstrate that Xie had, at a minimum, reason to know that SIMC wished to be paid by Xie. This is true for at least three reasons.

First, SIMC issued invoices *to Xie* for the amount due. CP 106, 108. Those invoices are all that is needed in a commercial transaction to express a desire to receive payment.

Second, *Xie made a direct payment to SIMC*. CP 110-11. Why would Xie have made such a payment if he did not believe that SIMC was looking to Xie for payment? Xie’s actions established a course of

performance and course of dealing that SIMC would be paid by Xie directly.

Third, SIMC's December 2005 letter to Xie confirms that the amount owed to SIMC was due *from Xie*:

We [SIMC] confirm that we are due \$158,100.90 relating to this transaction and if [SIMC] inadvertently receives *from* Giant International Metal Resources, any amount over this figure, we will refund the excess *to* Giant International Metal Resources.

CP 43 (emphasis added). Regardless of where Xie received the money, it was clear that SIMC expected the payment to come "from" Xie and any excess would be refunded "to" Xie.

Indeed, if Xie's theory is correct and if Xie never was put on notice that SIMC wanted payment, why would SIMC have been in contact with Xie at all? If Xie did not think he had any obligation to pay SIMC, why did he think SIMC made consistent inquiries regarding Xie's efforts to obtain funds? The record shows that SIMC kept in contact with Xie *because* SIMC wanted to be paid by Xie, as Xie was the only party who owed SIMC money.

Xie knew SIMC wanted payment from him. He made a payment in partial satisfaction of the obligation. There can be no dispute that Xie

was seasonably notified that SIMC looked to him to pay for the goods SIMC sold to Xie.<sup>27</sup>

**c. Even if Xie did not receive notice within one year, Xie was still seasonably notified.**

Xie's brief contends that he did not have notice that SIMC wanted to be paid until June 2007.<sup>28</sup> AB at 32. Even if the Court were to accept Xie's unsupported contention and adopt this allegation as true, contrary to the provisions of RCW 62A.1-201(25), summary judgment was still appropriate.

"Seasonable" under the UCC simply means a "reasonable time." RCW 62A.1-204. If the facts are undisputed, the courts determine what is a "reasonable time" under the UCC as a matter of law. *Graaff v. Bakker Bros. of Idaho, Inc.*, 85 Wn. App. 814, 820-21, 934 P.2d 1228 (1997). What is reasonable depends, in part, on the past practices of the parties and other circumstances of the case. *Id.* at 820. Washington courts weigh

---

<sup>27</sup> After the summary judgment and seasonable notification briefings were completed before the trial court, and in response to SIMC's motion to enter judgment, Xie presented for the first time a letter from Xie's attorney to SIMC regarding the unpaid amount. CP 591-92. On appeal, Xie for the first time claims that SIMC's lack of response to this letter somehow means SIMC consented to its contents. Placing that erroneous and unsupported argument aside, the letter aids SIMC's position, not Xie's. In the letter, Xie's attorney complains that it is "unreasonable for [SIMC] to demand *payment from Giant* when Giant has not been paid by its customer[.]" CP 592 (emphasis added). Why did the attorney write this? Because it was clear that SIMC wished to be paid by Xie.

<sup>28</sup> Tellingly, Xie himself *never* stated in any declaration that he did not have notice prior to 2007 that SIMC wished to be paid by Xie.

what is a “reasonable time” by examining prejudice to the parties involved. *See, e.g., Continental Can Co., Inc. v. Comm. Waterway Dist. No. 1 of King County*, 56 Wn. 2d 456, 460, 347 P.2d 887 (1960).

Here, Xie has suffered no prejudice as a result of any alleged delay in notification. Xie had three possible parties from which to seek recovery: the freight forwarder, his buyer, and the issuing bank. He sued his freight forwarder, but that suit was dismissed. He has a written contract with his end buyer, so he has six years to bring a suit against that buyer. Indeed, he hired an attorney to write a number of demand letters to the buyer *just weeks* after the letter of credit was dishonored. Xie certainly did not need notice from SIMC that he had claims against the buyer.

Finally, with respect to the issuing bank, any suit against the bank would have been unsuccessful, for Xie has already asserted (and, in fact, has based his initial defense to summary judgment on the allegation) that the bank acted *properly* in dishonoring the letter of credit. *See* RP 21; *see also* CP 188-92 (Xie’s previous lawsuit stating that the bill of lading was not provided to him by CU Transport in the time required to satisfy the letter of credit), 293, 297 (Xie’s Response to SIMC’s Motion for Partial Summary Judgment at 12 (“It was incumbent upon Plaintiff to satisfy the terms of the letter of credit in order to ensure payment, which Plaintiff failed to do.”) and at 16 (“In this case, Plaintiff did not ‘duly present’ the documents required by the letter of credit, as its presentation failed to

comply with [sic] letter of credit's terms. . . . The issuing bank could refuse payment or acceptance without dishonor for any one of those mistakes, and in fact did so.'')).

It short, Xie's theory in this case is that the bank acted *properly* in refusing payment under the letter of credit. Accordingly, any delay by SIMC in providing notice that SIMC wanted to be paid is immaterial with respect to Xie's claims against the issuing bank, for, according to Xie, such claims have no merit.<sup>29</sup>

**F. The Other Issues Raised By Xie Do Not Warrant Reversal.**

**1. The trial court did not abuse its discretion when it failed to grant Xie a continuance.**

After summary judgment had been granted, and after Xie's motion regarding reasonable notification had been denied, SIMC moved for entry of final judgment. There was some confusion regarding the noting date of this motion, and out of an abundance of caution, SIMC provided Xie with an extra day to respond. The full story can be reviewed at CP 596-97, 601-04. Suffice it to say, there was no abuse of discretion, and even if

---

<sup>29</sup> Although he does not provide any analysis of the issue, Xie appears to argue that it was error for the trial court to award prejudgment interest during the time period before reasonable notification occurred. This issue was not raised until after the trial court entered summary judgment and expressly held that prejudgment interest would apply. CP 319. It was accordingly waived. Even if it is considered, however, Xie's argument is without force. The amount due to SIMC was undisputedly liquidated. Regardless of the application or non-application of 2-325(2), those amounts were properly subject to the accrual of interest.

there was, any error was harmless because it was appropriate to enter judgment based on the trial court's previous rulings.

**2. There was no witness interference.**

In a rather bizarre series of accusations, Xie alleged below, and continues to allege on appeal, that SIMC's counsel engaged in witness interference. *See* AB at 22-23, 49. These allegations are frivolous: Xie's own counsel gave the witness in question the same advice that SIMC's counsel did—to answer “I don't know” if the witness did not know the answer to a question. *See* CP 597-98.

**3. The trial court properly denied Xie's motion to amend.**

Xie did not file his motion to amend his answer until after final judgment was entered. This is obviously too late. There was no abuse of discretion. CP 605-06, 641-42.

**G. Even if the Court Does Review New Issues Raised by Xie, None of Them Have Merit.**

It would be fundamentally unfair for this Court to engage Xie on the new issues presented. SIMC conducted discovery, argued its motions, and made its record based on the arguments raised before the trial court. Xie's disregard of the rules regarding issues on appeal has placed SIMC in the unenviable position of rebutting contentions on which SIMC never had an opportunity to seek discovery or present a record to the trial court.

Furthermore, of the plethora of issues raised by Xie for the first time on appeal, many are only briefly referenced or referred to by Xie with

little or no comprehensible analysis. SIMC will not bother trying to guess what Xie's analysis would be were these issues properly reasoned and presented, and accordingly SIMC will provide only summary responses.<sup>30</sup> The new issues for which Xie does provide some discernable explanation, if considered by the Court, are without merit.

---

<sup>30</sup> The following issues are raised or alluded to by Xie for the first time on appeal:

(1) Xie's argument that Sidell's declaration—which Xie did not move to strike—was not based upon personal knowledge, see AB at 44. But SIMC did not use Sidell's declaration for the point Xie raises; Sidell merely authenticated evidence on the topic. *See* CP 104, 113;

(2) Xie's protestations regarding what Judge Washington *said* at oral argument, see AB at 7-8, 10-13, 15-16. These are not the written rulings of the case, and any error concerning semantics at oral argument is unrelated to any possible claim for relief on appeal;

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

(4) Xie's contention that SIMC's failure to deliver documents was a breach of SIMC's contract with Xie, see AB at 15. But there is nothing in the parties' agreement which conditions SIMC's right to payment on due presentment of documents for the letter of credit. CP 174-76, 178, 180. Nor would such a provision even make sense considering that the letter of credit was for the benefit of SIMC; and

(5) Xie's new affirmative defense of laches, see AB at 3, 17-18, 22, 40-41. For the reasons explained in Section E.2 of this brief, there was no unreasonable delay by SIMC in bringing this action, and no prejudice to Xie has been shown.

**1. SIMC's claim for breach of contract against Xie is governed by Article 2, not Article 5.**

SIMC claims that Xie breached his contract to pay SIMC for goods. SIMC is not alleging Xie breached the letter of credit provisions, or some warranty under Article 5. SIMC's claim against Xie for breach of contract is independent of whatever rights SIMC may or may not have against the issuing bank for breach/dishonor of the letter of credit. The statute of limitations found in RCW 62A.5-115 does not apply to claims for breach of the underlying contract. *See Alhadeff*, 144 Wn. App. at 940-41 (“[A] party to an underlying contract has a separate cause of action for breach of that contract, governed by general principles of contract law, including the longer statute of limitations.”); RCW 62A.5-102 (UCC cmt. 3) (“The contract between the applicant and beneficiary *is not governed* by Article 5, but by applicable contract law, such as Article 2 or the general law of contracts.”); HAWKLAND, UCC Series § 5-115:2 (“[Section 115) would not apply to a contract between the applicant and the beneficiary that provides for a payment by letter of credit.”). Appendix at 29-30.

Indeed, the plain language of the statute makes this conclusion clear, as none of the rights and remedies within Article 5 would cover SIMC's breach of contract claim against Xie based on Xie's failure to pay. *Compare* RCW 62A.5-115, cmt. 2 (explaining that the statute governs all claims under Section 5-111 and other claims within Article 5), *with* RCW

62A.5-108 (listing an issuer's rights and obligations); RCW 62A.5-108 (listing warranties by the beneficiary); and RCW 62A.5-111 (listing remedies available against an issuer or advisor).

**2. Xie was not acting as anyone's agent.**

In various incarnations, Xie argues for the first time on appeal that he was only acting as an agent (it is not clear for whom), that there was a quasi-contractual relationship between SIMC and Xie's buyer, and that in fact the underlying contract was between SIMC and Xie's buyer. AB at 8-9, 10, 13, 21, 26-29. The record below is clear that the underlying contract was between SIMC and Xie. *See, e.g.*, CP 106, 108, 111 (where Xie refers to his buyer as the "end customer," not any kind of principal), 174-176, 178, 180, 189 (Xie's complaint in a different case at paragraph 2.1 explaining that he signed a contract with his end-buyer), 200 (discussing that same contract), 283 (Xie's summary judgment brief, stating "Plaintiff and [Xie] entered into a contract for the sale of scrap metal."); *see also* RP 25 (lines 20-23) (Xie's attorney admitting that SIMC's contract was with Xie); RP 29 (lines 7-10).<sup>31</sup>

---

<sup>31</sup> In a different twist on the same theme, Xie claims—again, for the first time on appeal—there was an assignment from Xie to SIMC because of the transfer of the letter of credit. AB at 30. This does not fly for a few reasons. First, such a claim is inconsistent with his assertion below in his doomed amended answer that he was entitled to damages. CP 617-27. Second, there is no evidence that such an assignment ever occurred. Third, Xie did not transfer the entire letter of credit amount to SIMC. *Compare* CP 255 *with* CP 271. Fourth, the UCC makes clear that a transfer of some or all of the rights under a letter of credit is not analogous to an assignment. *See* RCW 62A.5-112, cmt 2.

To help prove his new agency theory, Xie raises another novel and unsupported allegation never raised before the trial court: that Xie never received or accepted the metal. *See* AB at 7-8, 28-30, 46. There is simply *no evidence* to buttress Xie’s contention. He never submitted any evidence or argument below that the shipment itself was sent to the wrong location. The only evidence in the record is that SIMC delivered the metal just as Xie required. *See, e.g.*, CP 184, 237 (Xie Declaration at lines 11-13) (“Giant hired the freight forwarders that loaded the metal in Seattle and shipped it to Shanghai, China.”), 200 (a letter from Xie’s attorney to Xie’s buyer complaining that Xie has not been paid for the metal Xie properly shipped). Xie’s new claim is also inconsistent with his act of making partial payment. *See* CP 111.

**3. The Sidell deposition was admissible.**

Xie maintains that the Sidell deposition transcript was never signed and was accordingly inadmissible although Xie never moved to strike it below and he never asked for any other relief because of it—such as an extension to respond to SIMC’s summary judgment motion. Even if one assumes that was true—which it is not—Sidell’s deposition transcript was only used by SIMC in its reply brief on summary judgment to show that SIMC relied on Xie’s representations regarding Xie’s pursuit of payment and to show that it was typical within the industry for the documents for a letter of credit to be delivered by the beneficiary’s bank. CP at 52-53,

n.8&10. This evidence was never disputed. Thereafter, Xie submitted portions of the Sidell deposition in support of his motion for reconsideration and briefing regarding reasonable notification. CP 341, 357-64. There was no abuse of discretion.

**V. CONCLUSION**

SIMC and Xie entered into a contract for the sale of scrap steel. SIMC shipped the steel per Xie's instructions, and Xie made partial payment. Xie did not pay in full, however. SIMC was entitled to judgment against Xie for the remaining amount due. A contrary result would leave SIMC uncompensated for metal that it undisputedly provided. The decision below should be affirmed.

RESPECTFULLY SUBMITTED this 6<sup>th</sup> day of November, 2009.

SALTER JOYCE ZIKER, PLLC



---

Todd W. Wyatt  
WSBA #31608

Attorneys for Plaintiff/Respondent

**CERTIFICATE OF SERVICE**

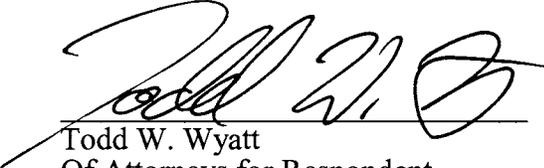
I, Todd W. Wyatt, hereby certify and declare as follows:

I am over the age of 18 years and am not a party to the within cause. On November 6, 2009, I caused a true and correct copy of the foregoing BRIEF OF RESPONDENT to be served on Appellant in the manner described below:

Dr. Lin Xie  
Suite 3, 19280 - 11th Place South  
Seattle, WA 98148  
Appellant, *pro se*

**By First-Class Mail**

DATED this 6<sup>th</sup> day of November, 2009.

  
\_\_\_\_\_  
Todd W. Wyatt  
Of Attorneys for Respondent

Westlaw

HAWKLAND § 5-103:13 [Rev]  
6B Hawkland UCC Series § 5-103:13 [Rev]

Page 1

Uniform Commercial Code Series

Database updated June 2009

Article  
5 [Rev] Letters of Credit

5-103 [Rev] Scope

**§ 5-103:13 [Rev] Independence**

U.C.C. § 5-103(d) [Rev] is U.C.C. Article 5 [Rev]'s clearest formulation of the independence principle, a principle that is central to the notion of what constitutes a letter of credit. As noted, the effects of the independence of the issuer's obligations under an LC to a beneficiary or nominated bank cannot be varied.[1]

It provides that “[r]ights and obligations of an issuer to a beneficiary or a nominated person under a letter of credit are independent of the existence, performance, or nonperformance of a contract or arrangement out of which the letter of credit arises or which underlies it, including contracts or arrangements between the issuer and the applicant and between the applicant and the beneficiary.”

While the limitation on variability does not expressly apply to a transferee beneficiary, its application may be inferred since “Beneficiary” “includes a person to whom drawing rights have been transferred under a transferable letter of credit” under U.C.C. § 5-102(a)(3) [Rev].

Although the formulation of the independence doctrine does not expressly refer to the documentary character of the letter of credit undertaking, this aspect of independence is also encompassed because it is so central. It should be noted that the provision of U.C.C. § 5-108(g) [Rev] that provides that non-documentary conditions are to be disregarded is not listed in the non-variable provisions of U.C.C. § 5-103(c) [Rev] which means that it can be varied up to a point.[2] However, the core concept of the documentary character cannot be varied without also varying the independence doctrine. To provide that the obligation of the issuer turns on whether or not there is performance of a non-documentary condition makes the issuer dependent on an underlying obligation.

There are other aspects of the reach of the non-variability of the independence doctrine that are less apparent. They include the extent to which the fraud exception to the independence doctrine which is codified in U.C.C. § 5-109 [Rev] (Fraud and Forgery) can be varied. These questions are considered in connection with the non-variability of the term “Letter of Credit” in connection with U.C.C. § 5-102 [Rev] (Definitions) and under the treatment of U.C.C. § 5-109 [Rev].

It should be noted that, in the same sense as with other non-variable provisions, the formulation of the obligations can itself affect how it is categorized, whether as a letter of credit or not. Thus, an undertaking whose core obligations are dependent would not be classified as a letter of credit.

Under U.C.C. § 5-107(a) [Rev] (Confirmor, Nominated Person, and Adviser), the reference to “issuer” in

U.C.C. § 5-103(d) [Rev] would include a confirmer. However, there is no mention of the independence of the undertaking of a nominated person, merely an indication that the undertaking of the issuer to it is independent. The UCC's treatment of nominated persons (other than the confirmer) is much more modest than that of the issuer. By the definition of the term "nominated person" in U.C.C. § 5-102(a)(11) [Rev], a nominated person has a right to reimbursement and by virtue of U.C.C. § 5-109(a)(1)(i) [Rev], the nominated person who gives value without notice is protected from beneficiary letter of credit fraud. The result of the combination of these provisions is effective independence for the nominated person.

Because letters of credit are not well understood by lawyers or judges, it is common for judicial opinions to provide a brief introduction to the transaction and the law, often as a preface to explaining the doctrine of independence. It is typical for these explanations to use a virtual or sometimes real diagram of a tripartite relationship between the applicant and beneficiary (often buyer and seller, respectively) agreeing that a letter of credit will provide payment or assurance, between the applicant and issuer contracting for issuance of the credit, and between the issuer and the beneficiary, which is the letter of credit itself.<sup>[3]</sup> These cases properly point out that the letter of credit undertaking is independent from the reimbursement agreement between issuer and applicant and the underlying contractual arrangement between applicant and beneficiary. In so doing, they sometimes state or give the impression that this tripartite relationship is essential, making two party letter of credit arrangements appear to be an anomaly.

While contemporary letters of credit typically result from such a series of relationships, it is not necessary that there be three separate parties. When letters of credit emerged in the post Napoleonic world, they were commonly undertakings of mercantile houses on their own behalf. Thus, Brown Bros., Morgan, or Baring Bros., to name a few, would issue letters of credit on their own behalf with respect to goods that they were purchasing or trading. Gradually, as other traders approached the more successful houses, it became apparent to them that selling or renting their name was more profitable than dealing with goods. The major houses sold their fleets and warehouses and became mercantile and commercial banks, issuing letters of credit for others than themselves. Nonetheless, banks occasionally issue letters of credit on their own behalf. A classic example is a bank that issues a standby on its own behalf to assure a landlord of payment of premises leased by the bank. Whether or not to act on such a letter of credit is a business decision for the beneficiary but the combination of the issuer and applicant does not render the credit invalid. Occasionally, a bank will be the beneficiary of a letter of credit that it issues. While rarer, a bank can also issue a letter of credit to itself as beneficiary. U.C.C. § 5-102 (Definitions) (a)(10) [Rev] ("Letter of Credit") recognizes this practice by providing that a financial institution can issue a credit for its own account or to itself. The critical question for letter of credit law and practice is the professionalism of the issuer of such a credit. By restricting two party credits to financial institutions, professionalism is assured to a considerable degree.

---

[FN1] Among the cases reciting the importance of the independence principle are *Banco Nacional De Mexico, S.A. v. Societe Generale*, 34 A.D.3d 124, 129, 820 N.Y.S.2d 588, 60 U.C.C. Rep. Serv. 2d 1248 (1st Dep't 2006) (New York U.C.C. Article 5 [Rev]) (the court, citing U.C.C. § 5-103(d) for the independence principle, stated "[t]he 'letter of credit' prong of any commercial transaction concerns the documents themselves and is not dependent on the resolution of disputes or questions of fact concerning the underlying transaction."); *Grunwald v. Wells Fargo Bank, N.A.*, 725 N.W.2d 324 328 (Iowa Ct. App. 2005) (Iowa Rev. U.C.C. Article 5) ("Central to the unique purpose of letters of credit is the

'independence principle,' which requires the issuer to pay a beneficiary on proper demand regardless of a breach or default on the underlying contract."); *DBJJI, Inc. v. National City Bank*, 123 Cal. App. 4th 530, 544, 19 Cal. Rptr. 3d 904, 55 U.C.C. Rep. Serv. 2d 126 (2d Dist. 2004) (California Rev. U.C.C. Article 5) (the court stated "independence safeguards the nature of the letter of credit as a distinct transaction from the underlying contract"); *Amwest Sur. Ins. Co. v. Concord Bank*, 248 F. Supp. 2d 867, 875, 50 U.C.C. Rep. Serv. 2d 249 (E.D. Mo. 2003) (Missouri Rev. U.C.C. Article 5) ("The most fundamental principle of modern letter of credit law is that the three contractual relationships giving rise to the letter of credit are completely independent of each other, and the rights and obligations of the parties to one are not affected by the breach or nonperformance of any of the others."); *New Orleans Brass, L.L.C. v. Whitney Nat. Bank*, 818 So. 2d 1057, 1060, 48 U.C.C. Rep. Serv. 2d 294 (La. Ct. App. 4th Cir. 2002) (Louisiana Rev. U.C.C. Article 5) ("The independence principle states that the underlying contract ... between the applicant and the beneficiary, will be viewed as distinct from an overarching contract, i.e. the letter of credit, which is between the applicant's bank and the beneficiary.").

[FN2] For example, the issuer could obligate itself to pay against a document that fulfilled that condition. This option was an alternative proposed by the Joint USCIB/ABA Task Force Report, *An Examination of U.C.C. Article 5 (Letters of Credit)*, 45 Bus. Law. 1521, 1546 (1990). Likewise, an issuer could obligate itself to go to a website and view data or even ascertain a fact. Such a step is possible under the eUCP, eUCP Supplement to UCP500 for Electronic Presentation, ICC Publication No.500/3 (International Chamber of Commerce 2002) printed in *LC Rules and Laws*, 4th ed. at 25, rules formulated by the ICC to supplement the UCP to accommodate electronic presentations. The implications for independence of reference to an external source on the internet explained in *Byrne and Taylor, ICC Guide to the eUCP at 102* (2002).

[FN3] Cases taking this approach include *Voest-Alpine Intern. Corp. v. Chase Manhattan Bank, N.A.*, 707 F.2d 680, 41 U.C.C. Rep. Serv. 912 (2d Cir. 1983) (New York Prior Article 5); *BM Electronics Corporations v. LaSalle Bank, N.A.*, 59 U.C.C. Rep. Serv. 2d 280 (N.D. Ill. 2006) (Illinois Rev. U.C.C. Article 5); *U.S. Material Supply, Inc. v. Korea Exchange Bank*, 417 F. Supp. 2d 652, 58 U.C.C. Rep. Serv. 2d 1064 (D.N.J. 2006) (New Jersey Rev. U.C.C. Article 5); *Inter Impex S.A.E. v. Comtrade Corp.*, 2004 WL 2793213 (S.D. N.Y. 2004) (New York Rev. U.C.C. Article 5); *Voest-Alpine Trading Co. v. Bank of China*, 167 F. Supp. 2d 940, 46 U.C.C. Rep. Serv. 2d 808 (S.D. Tex. 2000), judgment aff'd, 288 F.3d 262, 47 U.C.C. Rep. Serv. 2d 693 (5th Cir. 2002) (Texas Rev. U.C.C. Article 5 and UCP500); *Integrated Measurement Systems, Inc. v. International Commercial Bank of China*, 757 F. Supp. 938, 14 U.C.C. Rep. Serv. 2d 1167 (N.D. Ill. 1991) (Illinois Prior U.C.C. Article 5); *Banco Nacional De Mexico, S.A. v. Societe Generale*, 34 A.D.3d 124, 820 N.Y.S.2d 588, 60 U.C.C. Rep. Serv. 2d 1248 (1st Dep't 2006); *Cobb Restaurants, L.L.C. v. Texas Capital Bank, N.A.*, 201 S.W.3d 175, 60 U.C.C. Rep. Serv. 2d 469 (Tex. App. Dallas 2006), reh'g overruled, (Oct. 3, 2006) (Texas Prior U.C.C. Article 5 and mentioning Texas Rev. U.C.C. Article 5); *DBJJI, Inc. v. National City Bank*, 123 Cal. App. 4th 530, 19 Cal. Rptr. 3d 904, 55 U.C.C. Rep. Serv. 2d 126 (2d Dist. 2004) (California Rev. U.C.C. Article 5); *Levin v. Meagher*, 54 U.C.C. Rep. Serv. 2d 224 (Cal. App. 1st Dist. 2004), unpublished/noncitable (California Rev. U.C.C. Article 5); *Fleet Nat. Bank v. Omni Indus.*, 2000 WL 1683396 (Conn. Super. Ct. 2000) (Connecticut Prior U.C.C. Article 5); *New Orleans Brass, L.L.C. v. Whitney Nat. Bank*, 818 So. 2d 1057, 48 U.C.C. Rep. Serv. 2d 294 (La. Ct. App. 4th Cir. 2002) (LA Prior U.C.C. Article 5 and mentioning LA Rev. U.C.C. Article 5) (the details of any dispute must be settled between the applicant and beneficiary and not by interfering with payment of the LC); RZS

Holdings, *AVV v. Commerzbank, Ag*, 279 F. Supp. 2d 716, 51 U.C.C. Rep. Serv. 2d 797 (E.D. Va. 2003) (Virginia Rev. U.C.C. Article 5) (confirmation alone by bank with no other contact with jurisdiction does not give rise to personal jurisdiction over confirmer in part because the confirmation is independent of contract between issuer and applicant as opposed to contract between applicant and beneficiary); *Fisher v. Dakota Community Bank*, 405 F. Supp. 2d 1089, 58 U.C.C. Rep. Serv. 2d 256 (D.N.D. 2005) (North Dakota Rev. U.C.C. Article 5) (fraud by the beneficiary is an exception to the independence principle, therefore the applicant may obtain an injunction prohibiting the issuing bank from making payment).

Westlaw. © 2009 Thomson Reuters. No Claim to Orig. U.S. Govt. Works.

HAWKLAND § 5-103:13 [Rev]

END OF DOCUMENT

© 2009 Thomson Reuters. No Claim to Orig. US Gov. Works.

APPENDIX 4

Westlaw

Page 1

64 B.R. 933  
(Cite as: 64 B.R. 933)

**H**

United States Bankruptcy Court,  
District of Columbia.

In re AOV INDUSTRIES, INC. Alla-Ohio Valley  
Coals, Inc. Morehead City Coal Terminals, Inc.  
Camden Coal Terminal, Inc. A & T Associates, Inc.  
Fairmont Energy, Inc. Noralla Corporation Birnen  
Coal Co., Inc. Diggem Coal Co., Inc., Debtors.  
William J. PERLSTEIN, as Disbursing Agent for  
the AOV Industries Fund, Plaintiff,

v.

LAMBERT COAL CO., INC., Defendant.  
William J. PERLSTEIN, as Disbursing Agent for  
the AOV Industries Fund, Plaintiff,

v.

LOGAN & KANAWHA COAL CO., INC., De-  
fendant.

William J. PERLSTEIN, as Disbursing Agent for  
the AOV Industries Fund, Plaintiff,

v.

PILGRIM COAL SALES CORP. and Pilgrim Coal  
Corp., Defendants.

William J. PERLSTEIN, as Disbursing Agent for  
the AOV Industries Fund, Plaintiff,

v.

RAINTREE COAL CO., Defendant.  
William J. PERLSTEIN, as Disbursing Agent for  
the AOV Industries Fund, Plaintiff,

v.

SUMMERS FUEL, INC., Defendant.  
William J. PERLSTEIN, as Disbursing Agent for  
the AOV Industries Fund, Plaintiff,

v.

TYCOAL, INC., Defendant.  
William J. PERLSTEIN, as Disbursing Agent for  
the AOV Industries Fund, Plaintiff,

v.

ZAPATA COAL SALES, INC., Defendant.  
William J. PERLSTEIN, as Disbursing Agent for  
the AOV Industries Fund, Plaintiff,

v.

CAMELOT COAL CO., Defendant.

Bankruptcy No. 81-00617.

Adv. Nos. 84-0090, 84-0092, 84-0097, 84-0100,  
84-0101, 84-0104, 84-0105 and 84-0194.

Sept. 10, 1986.

Matter came before court on cross motions for sum-  
mary judgment in connection with the disbursing  
agent's motion to recover alleged preferential trans-  
fers under letters of credit. The Bankruptcy Court,  
Martin V.B. Bostetter, Jr., Chief Judge, sitting by  
designation, held that: (1) debtor had no interest,  
legal or otherwise, in proceeds received by coal  
suppliers under transferred letters of credit; (2) rel-  
evant transfers for purposes of preference section of  
Bankruptcy Code were transfers of letters of credit,  
not proceeds under letters of credit; (3) transfers of  
letters of credit which occurred outside 90-day  
preference period were not subject to avoidance;  
and (4) letters of credit transfers that satisfied ele-  
ments of preference were nevertheless insulated  
from avoidance by ordinary course of business ex-  
ception to avoiding powers.

Order accordingly.

See also 798 F.2d 491.

West Headnotes

[1] Bankruptcy 51 ↪ 2610

51 Bankruptcy  
51V The Estate  
51V(E) Preferences  
51k2606 Elements and Exceptions  
51k2610 k. Ownership of Interest  
Transferred. Most Cited Cases  
(Formerly 51k165(2))  
Transfer by agent of property belonging to its prin-  
cipal cannot be avoided as preference.

[2] Federal Civil Procedure 170A ↪ 2486

170A Federal Civil Procedure

64 B.R. 933  
(Cite as: 64 B.R. 933)

170AXVII Judgment

170AXVII(C) Summary Judgment

170AXVII(C)2 Particular Cases

170Ak2486 k. Bankruptcy Trustees,  
Cases Involving. Most Cited Cases

In action brought by disbursing agent to recover alleged preferential transfers by debtor to coal suppliers, substantial issue of material fact existed as to whether debtor was merely agent of foreign company purchasing American coal, precluding summary judgment.

[3] Federal Civil Procedure 170A ↪2486

170A Federal Civil Procedure

170AXVII Judgment

170AXVII(C) Summary Judgment

170AXVII(C)2 Particular Cases

170Ak2486 k. Bankruptcy Trustees,  
Cases Involving. Most Cited Cases

In action brought by disbursing agent to recover transfers under letters of credit to coal suppliers, substantial issues of material fact existed as to whether debtor was joint venturer with coal purchaser, so that letters of credit would be considered property belonging to coal purchaser or joint venture, not debtor, precluding summary judgment.

[4] Bankruptcy 51 ↪2610

51 Bankruptcy

51V The Estate

51V(E) Preferences

51k2606 Elements and Exceptions

51k2610 k. Ownership of Interest

Transferred. Most Cited Cases

(Formerly 51k165(2))

If debtor has such control over third party's funds that they are available for payment to debtor's creditors generally, funds become property of estate and can be preferentially transferred.

[5] Bankruptcy 51 ↪2610

51 Bankruptcy

51V The Estate

51V(E) Preferences

51k2606 Elements and Exceptions

51k2610 k. Ownership of Interest

Transferred. Most Cited Cases

(Formerly 51k165(2))

If third party's funds are available only to pay specific debt and funds are in fact so applied, there is no diminution of estate and no preference.

[6] Federal Civil Procedure 170A ↪2486

170A Federal Civil Procedure

170AXVII Judgment

170AXVII(C) Summary Judgment

170AXVII(C)2 Particular Cases

170Ak2486 k. Bankruptcy Trustees,  
Cases Involving. Most Cited Cases

In action brought by disbursing agent to recover transfers to coal suppliers under letters of credit, substantial issue of material fact existed as to whether debtor had interest in letters of credit allegedly "earmarked" for suppliers, precluding summary judgment.

[7] Banks and Banking 52 ↪191.10

52 Banks and Banking

52III Functions and Dealings

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

52k191 Letters of Credit

52k191.10 k. In General. Most Cited  
Cases

Beneficiary of letter of credit has both right to perform and right to receive cash following performance.

[8] Banks and Banking 52 ↪191.10

52 Banks and Banking

52III Functions and Dealings

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

52k191 Letters of Credit

52k191.10 k. In General. Most Cited  
Cases

64 B.R. 933  
(Cite as: 64 B.R. 933)

Transfer of letter of credit shifts beneficiary's burdens as well as his benefits.

[9] Banks and Banking 52 ↪ 191.10

52 Banks and Banking  
52III Functions and Dealings  
52III(F) Exchange, Money, Securities, and Investments

52k191 Letters of Credit  
52k191.10 k. In General. Most Cited

Cases

Debtor had no interest, legal or otherwise, in proceeds received by coal suppliers under transferred letters of credit obtained by coal purchaser, where debtor irrevocably had transferred its rights and duties as beneficiary of letters of credit.

[10] Bankruptcy 51 ↪ 2619.1

51 Bankruptcy  
51V The Estate  
51V(E) Preferences  
51k2619 When Transfer Occurs  
51k2619.1 k. In General. Most Cited

Cases

(Formerly 51k2619, 51k161(1))

Delivery of letter of credit constitutes completed "transfer" within meaning of provision of Bankruptcy Code governing preferences. Bankr.Code, 11 U.S.C.A. § 547(b).

[11] Bankruptcy 51 ↪ 2619.1

51 Bankruptcy  
51V The Estate  
51V(E) Preferences  
51k2619 When Transfer Occurs  
51k2619.1 k. In General. Most Cited

Cases

(Formerly 51k2619, 51k161(1))

Relevant transfers for preferential transfer purposes were transfers of letters of credit, not transfers of funds under letters of credit, where original beneficiary of letter of credit irrevocably transferred letters of credit themselves. Bankr.Code, 11 U.S.C.A.

§ 547(b).

[12] Bankruptcy 51 ↪ 2619.1

51 Bankruptcy  
51V The Estate  
51V(E) Preferences  
51k2619 When Transfer Occurs  
51k2619.1 k. In General. Most Cited

Cases

(Formerly 51k2619, 51k161(1))

No preferential transfer occurred in connection with transfers of letters of credit, notwithstanding transfer of funds under letters of credit within preference period, where relevant transfers were transfers of letters of credit themselves, not right to be paid under letters, and all transfers of letters of credit occurred prior to 90-day preference period. Bankr.Code, 11 U.S.C.A. § 547(b).

[13] Bankruptcy 51 ↪ 2616(1)

51 Bankruptcy  
51V The Estate  
51V(E) Preferences  
51k2606 Elements and Exceptions  
51k2616 Transfers in Ordinary Course of Business

51k2616(1) k. In General. Most Cited Cases

(Formerly 51k2616, 51k165(3.1))

Letter-of-credit transfers that satisfied all elements of preference were still insulated from avoidance by ordinary course of business exception to avoiding powers, where debtor's ordinary course of business was purchase of coal, transferees' ordinary business was to supply coal, each letter of credit transfer occurred within 45 days of when relevant debts were incurred, letters of credit were within ordinary course of debtor's financial affairs, and transferees were only few of many coal suppliers who receive letters of credit. Bankr.Code, 11 U.S.C.A. § 547(c)(2).

\*934 Frank M. Northam, Washington, D.C., for Pilgrim Coal Sales Corp. and Pilgrim Coal Corp.

64 B.R. 933  
(Cite as: 64 B.R. 933)

\*935 J. Peter Byrne, Michael Coursey, Covington & Burling, Washington, D.C., for Raintree Coal Co.

Thomas L. Hudson, H. Barritt Peterson, Jr., Cook, Howard, Downes & Tracy, Towson, Md., for Summers Fuel, Inc.

Peter N. Georgiades, Washington, D.C., for Tycoal, Inc.

David T. Ralston, Jr., Crowell & Moring, Washington, D.C., for Zapata Coal Sales, Inc.

Larry E. Christensen, Buchanan Ingersoll, P.C., Washington, D.C., for Camelot Coal Co.

Max O. Truitt, Jr., Duane D. Morse, Wilmer, Cutler & Pickering, Washington, D.C., for Disbursing Agent.

John J. Sabourin, Jr., Hazel, Beckhorn & Hanes, Fairfax, Va., for Lambert Coal Co., Inc.

Phillip H. Barrett, Joanne M. Schreiner, Porter, Wright, Morris & Arthur, Washington, D.C., for Logan & Kanawha Coal Co., Inc.

#### MEMORANDUM OPINION

MARTIN V.B. BOSTETTER, Jr., Chief Judge, sitting by designation.

In this case we are confronted with cross-motions for summary judgment.<sup>FN1</sup> For the reasons set forth below we find that the Disbursing Agent is not entitled to summary judgment because the defendants have raised a material issue of fact concerning Alla-Ohio's possible lack of an "interest" in the letters of credit that Alla-Ohio transferred to the defendants. We find further that the defendants are entitled to summary judgment as a matter of law because the various transfers sought to be avoided were either made before the preference period or were made in the ordinary course of business within 45 days of the dates the debts were incurred.

FN1. Raintree Coal Co. opposed the Disbursing Agent's summary judgment motion but, unlike the other defendants, chose not to file one of its own.

The underlying complaints in these cases, filed by the Disbursing Agent<sup>FN2</sup> for the AOV Industries Fund, William J. Perlstein, seek to avoid and recover certain transfers as preferences under section 547 of the Bankruptcy Reform Act of 1978, 11 U.S.C. §§ 101-151326 ("the Code"). Named as defendants in these actions are coal suppliers from whom one of the debtors, Alla-Ohio Valley Coals, Inc. ("Alla"), purchased coal during the months preceding the filing of its bankruptcy petition.

FN2. The Plan of Reorganization, confirmed on June 30, 1983, established the position of Disbursing Agent and appointed William J. Perlstein to fill that position. After a hearing on the 23rd day of November, 1984, this Court by order dated April 3, 1985 sustained such appointment by denying Burnell-Butler Corporation's motion to vacate.

The Court heard oral argument on the summary judgment motions in the Camelot Coal Co. and Logan and Kanawha Coal Co., Inc. proceedings on July 19, 1985. The remaining summary judgment motions under consideration were heard on September 18, 1985. Since the issues in all of the adversary proceedings are substantively identical, all the motions will be considered together in a single opinion. An appropriate order will issue in each case.

All the transfers alleged to be preferential follow substantially the same pattern. Pursuant to an ongoing business relationship with Steag-Handel GmbH of West Germany ("Steag"), Alla bought coal in America that Steag needed for delivery to its European customers. Steag would place an order with Alla and, after Alla cabled Steag that it had found an American supplier willing and able to provide coal meeting Steag's requirements, Steag would open a letter of credit in Alla's favor in an

64 B.R. 933  
(Cite as: 64 B.R. 933)

amount approximately equal to the supplier's price. Each letter was issued by Steag's German bank, Commerzbank, A.G. ("Commerzbank"). In order to draw on the letters of credit as the beneficiary, Alla was required to present documents to Commerzbank's American branch as evidence that coal meeting the required specifications\*936 had been shipped on rail-cars and/or dumped on board a ship chartered by Steag. The necessary documents included a signed commercial invoice, railroad bills of lading, and a certificate of mine analysis.

In each of the transactions at issue, Alla transferred the letter of credit along with all rights and duties thereunder to the supplier on or shortly after the date on which the supplier shipped the coal by rail-car. The supplier itself then presented the required documents to Commerzbank and drew the proceeds provided for by the letter of credit. Thus, although Alla conceivably could have retained the letters of credit, obtained the requisite documents, and made drafts on the letters itself, in each case it used the letter as a means to finance its purchase of coal.

The preference actions of the Disbursing Agent focus on the funds drawn by the defendants under the transferred letters of credit. He argues that these proceeds represented cash belonging to Alla that Alla allowed Commerzbank to turn over directly to the defendants. The defendants do not dispute that the funds were paid by Commerzbank within ninety days of the filing of Alla's bankruptcy petition on November 6, 1981. However, the defendants deny that the bank funds constituted property of the debtor within the meaning of section 547(b) of the Code. The defendants argue *inter alia* that the relevant transfers for the purpose of preference analysis were the transfers of the letters of credit themselves, assuming that Alla had an interest in the letters. These transfers would be protected from the Disbursing Agent's avoiding powers either because they were made outside the ninety-day preference period or because they fall within one of the statutory exceptions to avoidance. See 11 U.S.C. § 547(c).

With the Disbursing Agent's consent, the Court has considered each of the defendants' arguments for the benefit of all defendants. The Court's ultimate conclusions of law will apply uniformly in all cases. Accordingly, if only one of the defendants has identified a principle which benefits all the defendants, then all will benefit.

Under section 547(b) of the Code, a pre-petition transfer by the debtor of an interest in property is an avoidable preference if that transfer is

- (1) to or for the benefit of a creditor;
- (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
- (3) made while the debtor was insolvent;
- (4) made-
  - (A) on or within 90 days before the date of the filing of the petition ... [and] ...
- (5) [one] that enables such creditor to receive more than such creditor would receive if-
  - (A) the case were a case under chapter 7 of this title;
  - (B) the transfer had not been made; and
  - (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b). The Code's preference and avoidance provisions "facilitate the prime bankruptcy policy of equality of distribution among creditors of the debtor." H.R.Rep. No. 595, 95th Cong., 1st Sess. 177-78 (1977), U.S. Code Cong. & Admin. News 1978, pp. 5787, 6137-6139. To prevent or account for unequal treatment of creditors by a debtor pre-petition, preference law sets aside transfers made during defined periods prior to bankruptcy that have the result of "favoring the transferee over other similar creditors who may share in the distribution [of the bankruptcy estate]."

64 B.R. 933  
(Cite as: 64 B.R. 933)

4 *Collier on Bankruptcy* ¶ 547.21, at 547-85 through 547-88 (15th ed. 1986).

#### I. The Disbursing Agent's Motions for Summary Judgment.

To prevail in his preference actions, the Disbursing Agent must establish each of six elements: he must show that the debtor transferred an "interest of the debtor in property" and that such transfer satisfies each of the five conditions enumerated in section 547(b). In addition, to prevail as a \*937 matter of law on the instant summary judgment motions, the Disbursing Agent must demonstrate that no issue of material fact exists as to any of the above-mentioned six elements. *Bloomgarden v. Coyer*, 479 F.2d 201, 206-07 (D.C.Cir.1973).

Several of the defendants have argued vigorously that Alla did not have an "interest" in the letters of credit it transferred to them. Accordingly, if Alla had no interest in the letters themselves, then *a fortiori* the Disbursing Agent cannot claim through Alla an interest in their proceeds and the Disbursing Agent's position cannot be sustained.

[1] The defendants offer several theories in support of their argument. According to one scenario, Alla was merely an agent or broker buying coal for Steag on the basis of Steag's credit and with Steag's funds. A transfer by an agent of property belonging to its principal cannot be avoided as a preference. *See In re Crouthamel Potato Chip Co., Inc.*, 6 B.R. 501, 507 (Bankr.E.D.Pa.1980).

[2] The evidence reveals that Alla and Steag admittedly had an agent/principal relationship some time prior to the period in question here. *See* Deposition of Thomas Martin Rudolf Mulert, Managing Director of Steag (taken November 29, 1983) (offered as Exhibit 2 to "Plaintiff's Reply to [Summers Fuels'] Opposition Brief"). At least one defendant, Camelot Coal Co., insists that it believed Alla to be Steag's agent and dealt with Alla accordingly. The facts tend to show that Steag bought American coal

exclusively through Alla and orchestrated the movement of the coal from the mines in America to Steag's customers in Europe.

The evidence to establish a true agency relationship between Steag and Alla during the relevant period is not entirely convincing. However, the written agreements between the said parties which describe a non-agency relationship <sup>FN3</sup> do not dispose of the issue. Furthermore, the Disbursing Agent failed to offer the requisite proof that the agreements were scrupulously honored. Without such proof, the assertions of Camelot Coal Co. that an agency relationship existed are not adequately refuted. Consequently, a genuine issue of material fact remains making summary judgment in favor of the Disbursing Agent inappropriate.

FN3. The Disbursing Agent has offered copies of the "Master Sales Agreement" and the "Master Purchase Agreement" into evidence as exhibits to his memoranda of law in these cases.

[3] Other defendants allege that Alla was a joint venturer with Steag. The letters of credit thus would have been property belonging to Steag or the venture, not Alla. The Disbursing Agent concedes that Alla and Steag were planning to engage in a joint venture to sell coal overseas but claims that Alla's bankruptcy occurred before the plans could be realized. To counter the Disbursing Agent, the defendants point to a letter dated May 4, 1981—more than five months prior to Alla's bankruptcy—by J. Richard Knop, one of Alla's principals, in which Knop states the following concerning Alla's relationship with Steag:

For the past six months we [Alla] have been operating our trading activities as a joint venture with them [Steag]. They have provided considerable financing for our coal export activities and have not and will not charge any interest for Steag financing. They have also arranged for performance bonds, letters of credit and other financial instruments that have been essential in developing new

64 B.R. 933  
(Cite as: 64 B.R. 933)

markets.

Memorandum from J. Richard Knop, Esquire, to H.C. Sleigh, Ltd. (May 4, 1981). Despite the Disbursing Agent's caveat that Knop's Memorandum must be read in the light of its purpose-to attract H.C. Sleigh, Ltd. as an investor in Alla-the Memorandum at the very least raises a doubt as to whether Alla truly had an "interest" in the letters of credit opened by Steag.

Closely related to the joint venture argument is the contention that Alla had no interest in the letters of credit because it had no practical control over their application. The defendants claim that the letters \*938 were "earmarked" for Alla's suppliers: each letter corresponded to a particular supply contract between a defendant and Alla; each required documents that only the supplier could produce; each was in an amount approximately equal to the price agreed upon between Alla and the supplier, leaving no excess amount for Alla to draw on as profit; and each was in fact transferred by Alla to the supplier soon after Alla received it.

[4][5] If a debtor has such control over a third party's funds that they are available for payment to the debtor's creditors generally, the funds become property of the estate and can be preferentially transferred. *In re Jagers*, 48 B.R. 33, 36-37 (Bankr.W.D.Texas 1985). It follows that if a third party's funds are available only to pay a specific debt and the funds are in fact so applied, there is no diminution of the estate and no preference. *Hoffer v. Marine Midland Trust Co. of New York*, 294 F.Supp. 187, 189 (S.D.N.Y.1968). This is so because the debtor would not have received the funds but for the understanding that they would be turned over forthwith to a particular creditor. *Id.*; see also *In re Hearn*, 49 B.R. 143, 145 (Bankr.W.D.Ky.1985) (funds earmarked by agreement were not property of the estate subject to avoidance).

[6] The defendants' theories are plausible under well established principles of law and supported,

though admittedly far from proven, by the evidence. Because of the issues of material fact raised by the defendants regarding Alla's "interest" in the letters of credit under section 547, the Disbursing Agent cannot prevail in the instant summary judgment motions.

## II. The Defendants' Motions for Summary Judgment.

We then turn to consideration of the defendants' motions for summary judgment. The Court will view the evidence in the light most favorable to the Disbursing Agent and assume *arguendo* that Alla had an interest in the letters of credit opened by Steag. The transactions which the Disbursing Agent challenges as preferential transfers, however, are the payments of funds by Commerzbank to the defendants under authority of the letters of credit. To establish these payments as preferential, the Disbursing Agent must show that Alla held an interest in these funds in addition to holding an interest in the letters through which the funds were drawn.

If Alla had an interest in the funds, then Commerzbank's payment of funds pursuant to the terms of each letter could be a "transfer" under section 547 of the Code. This transfer would be on account of an antecedent debt incurred much earlier, when coal was loaded on to rail-cars by the supplier and identified to the contract.<sup>FN4</sup> If Alla held no interest in the funds, their payment to the defendants cannot be a "transfer" within the terms of section 547. The threshold issue thus may be cast in simple terms: when did a transfer addressed by section 547 take place?

FN4. Following oral argument on September 18, 1985, the Court ruled that the debts were incurred when the coal was loaded on coal cars for shipment by the defendants, which is when Alla obtained an identifiable property interest in the coal. See *In re General Office Wholesalers*, 37 B.R. 180, 182 (Bankr.E.D.Va.1984).

64 B.R. 933  
(Cite as: 64 B.R. 933)

The importance of the theory of the Disbursing Agent that the payments were transfers of property in which Alla held an interest cannot be overstated. If Alla held no interest in the funds, only the transfers to the defendants of the letters of credit would remain as possible preferential transfers. Many of these transfers did not take place during the preference period. Moreover, the defendants asserted both “contemporaneous exchange” and “ordinary course of business” defenses with respect to the transfers of the letters.

Because we find that under established law governing letter of credit transactions Alla held no interest in funds paid under the terms of the letters, we reject the Disbursing Agent’s characterization of these payments as transfers cognizable under section 547.

\*939 The Disbursing Agent claims that the cash received by the defendants was Alla’s property because it served to reduce Steag’s debt to Alla. He also claims that the transfers by Commerzbank depleted Alla’s estate because they reduced Alla’s claims against Steag *pro rata*, claims that could have been pressed for the benefit of all creditors. Consequently, Alla held an interest in the funds obtained by the defendants pursuant to the letters of credit.

The Disbursing Agent argues that the transfers of the letters themselves were not transfers “of an interest of the debtor in property” within section 547 of the Code under the mandate of section 547(e)(3): “For the purposes of this section [547], a transfer is not made until the debtor has acquired rights in the property transferred.” Section 547(e)(3) precludes a finding that the transfers of the letters are transfers within section 547, asserts the Disbursing Agent, because the original purpose for each of the letters of credit was to pay Alla for the coal it was to deliver for transport to shipboard. Accordingly, had Alla retained the letters instead of transferring them to the defendants, it would not have become entitled to draw cash under the letters—i.e., it would not have “acquired rights in the property”—until it had performed its contract with Steag and presented

the documents required by the letters of credit to evidence that performance. The transfers of the letters long antedate the presentation of documents that the Disbursing Agent argues marked the debtor’s acquisition of rights in the property. The Disbursing Agent concludes that because the transfers of the letters cannot satisfy the standard set forth in section 547(e)(3), the transfers of funds are the transfers cognizable under section 547.

[7][8] The Disbursing Agent’s argument ignores the unique nature of letters of credit. The beneficiary of a letter of credit has both the right to perform (here, to present documents) and the right to receive cash following performance. If Alla simply had assigned its rights in the proceeds of the letters of credit, then the Disbursing Agent’s argument could be well taken. Alla would not have acquired rights in the proceeds until after it had performed; a prior transfer of the proceeds would not have become effective until that time. 11 U.S.C. § 547(e)(3). In each of the instant cases, however, Alla transferred the letters themselves, not the proceeds.<sup>FN5</sup> Alla did not merely arrange by way of assignment to have funds of its own paid directly to the defendants.<sup>FN6</sup> The defendants’ rights to the funds they received were not derivative, not dependent on Alla’s performance. A transfer of a letter of credit shifts the beneficiary’s burdens as well as his benefits. *See* U.C.C. § 5-116 comment 1; 9 L. Weeramantry, et al., *Banking Law* § 237.07, at 237-16 (1986).

FN5. The transfers are evidenced by an “Irrevocable Letter of Transfer” issued by Commerzbank’s New York branch to each defendant stating the amount of the transfer and the conditions required to be met by the defendant before Commerzbank’s obligation to pay would arise.

FN6. The distinction between “transfer” and “assignment” has been described as follows: “[T]he term ‘transfer’ connotes a substitution of a third party for the beneficiary; the term ‘assignment’ connotes an alienation by the beneficiary of that to

64 B.R. 933  
(Cite as: 64 B.R. 933)

which he is entitled upon performance by him of the terms of the credit." H. Harfield, *Letters of Credit* 96 (1979).

Professors White and Summers provide an illustration of how a seller-beneficiary like Alla can employ section 5-116(1) of the Uniform Commercial Code to transfer his benefits and burdens under a letter of credit to his supplier as a means of financing the purchase:

The ... beneficiary's supplier might be willing to step into the beneficiary's shoes. That is, he might be willing to assume both the burdens and the benefits of the seller-beneficiary's status under the letters of credit (as distinguished from his contract for the sale of goods to the ... buyer). Thus the supplier would assume the seller-beneficiary's duty to procure and present the necessary documents called for by the terms of the letter of credit and would also acquire \*940 the beneficiary's right to draw drafts under the letter of credit and receive payment from the issuer.

J. White & R. Summers, *Uniform Commercial Code* § 18-9, at 748 (2d ed. 1980). The authors contrast a transfer of the letter of credit itself with an assignment of the proceeds: "Observe that the beneficiary's mere assignment of his right to proceeds is not a delegation by the beneficiary of his burdens, that is, of his duties to procure proper documents called for by the terms of the letter of credit." *Id.* at 750.

When Alla transferred each letter of credit, it transferred the valuable present right that it had as beneficiary to present documents to Commerzbank for payment. Thus, the requirements of section 547(e)(3) were satisfied. Furthermore, section 101 of the Code defines "transfer" as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property...." 11 U.S.C. § 101(41) (1983). The Comment to section 101 explains that subsection 41 "is intended to define transfer as broadly as possible." 11 U.S.C. § 101

comment (1983). See also *Pirie v. Chicago Title & Trust Co.*, 182 U.S. 438, 443, 21 S.Ct. 906, 908, 45 L.Ed. 1171 (1901) ("transfer of property includes the giving or conveying [of] anything of value,-anything which has debt-paying or debt-securing power"). The statutory language of sections 101(41) and 547(e)(3) militates in favor of the earliest possible date for transfer.

The Disbursing Agent concedes that after transferring the letters Alla retained no legal, enforceable rights to draw any of the funds that the defendants ultimately received.<sup>FN7</sup> Nevertheless, the Disbursing Agent claims that Alla retained certain rights or interests in the proceeds because of its underlying contract with Steag. Doubtless, Alla was interested in seeing that the defendant-suppliers received the proceeds that were due because, as will be shown, Alla was secondarily liable on Commerzbank's obligation. The fact remains that Alla retained no "interest" in the proceeds within the meaning of section 547.

FN7. The Disbursing Agent correctly points out that under Article 46(f) of the *Uniform Customs and Practice for Documentary Credits* (1974 Revision), Alla retained as transferor the right to present documents and draw down the difference between what the transferee was entitled to and what was left of the credit. However, this theoretical right would in no way have given Alla the right to substitute itself for the transferee.

[9] What the Disbursing Agent refuses to acknowledge is that the introduction of a letter of credit into a sale-of-goods transaction fundamentally alters the relationship between the parties. The defining characteristics of letters of credit compel the conclusion that Alla had no interest, legal or otherwise, in the proceeds received by the defendants under the transferred letters of credit. Once Alla irrevocably transferred its rights and duties as beneficiary, Commerzbank became primarily liable to pay the transferee according to the terms of the letter. See

64 B.R. 933  
(Cite as: 64 B.R. 933)

*Federal Deposit Insurance Corp. v. Philadelphia Gear Corp.*, 476 U.S. 426, 106 S.Ct. 1931, 90 L.Ed.2d 428 (1986) (“A conventional ‘commercial’ letter of credit, in contrast [to a ‘standby’ letter], is one in which the seller obtains payment from the issuing bank without looking to the buyer for payment even in the first instance.”). Those terms, of course, reflected the material terms of the coal supply contract—the required documents were to provide evidence that conforming coal in the amounts agreed upon had been shipped and delivered on time.

[10] The transfer of the letter did not only provide a convenient arrangement for payment, but by law it suspended Alla’s duty to pay the supplier. U.C.C. § 2-325(2). Commerzbank was not a guarantor of Alla’s obligation. See J. White & R. Summers, *Uniform Commercial Code* § 18-2, at 713-15 (2d ed. 1980). Alla’s duty to pay would revive only if (1) the letter of credit were dishonored by Commerzbank and (2) the seller gave Alla reasonable notice that it intended to demand direct payment from Alla. See U.C.C. § 2-325(2) comment 1. In all of the cases under advisement,\*941 Commerzbank honored the defendants’ drafts. Alla’s suspended obligation to pay never revived after delivery of the letters of credit. Delivery alone proved to be all that was required of Alla.<sup>FN8</sup>

FN8. It is not the holding of this Court that mere delivery of a letter of credit effects payment or satisfaction of the contract debt, but rather that delivery of a letter of credit constitutes a completed “transfer” under section 547(b). “Transfer” is not synonymous with “payment”; for example, although the granting of a perfected security interest does not pay a debt it nevertheless constitutes a transfer under the preference and avoidance sections of the Code.

[11] Once it is understood that Commerzbank was primarily liable on Alla’s debts to the defendants pursuant to the letters of credit, it becomes clear that the letter of credit proceeds received by the de-

fendants were Commerzbank’s property, not Alla’s. The Disbursing Agent cannot avoid a transfer of non-debtor property. See, e.g., *In re Illinois-California Express, Inc.*, 50 B.R. 232, 240 (Bankr.D.Colo.1985).

There is little case law on the subject of letter of credit fund transfers as preferences. The few courts that have addressed the subject, however, support the view that pre-petition transfers of proceeds to beneficiaries of letters of credit are not voidable preferences. The court in *In re Clothes, Inc.*, 35 B.R. 487 (Bankr.N.D.1983) was faced with a situation where the issuing bank honored a sight draft drawn under a letter of credit after an involuntary chapter 7 petition had been filed against the debtor but before an order for relief was entered. 35 B.R. at 488. The beneficiary was entitled to draw under the stand-by letter of credit because the debtor had failed to pay various debts owed to the beneficiary. *Id.* The trustee sought to avoid the payment to the beneficiary as a preferential payment. *Id.* The court granted the beneficiary-defendant’s motion for summary judgment:

The beneficiary of a letter of credit does not, in this Court’s opinion, receive a preference.

It is the opinion of this Court that by cashing the letter of credit, the Bank expended its own funds and not those of the Debtor’s estate. Accordingly, the transfer is not subject to either § 362 or § 547 of the Bankruptcy Code.

*Id.* at 489. Accord *In re Price Chopper Supermarkets, Inc.*, 40 B.R. 816, 818-19 (Bankr.S.D.Cal.1984).

Further support is found in the case of *In re Illinois-California Express, Inc.*, 50 B.R. 232 (Bankr.D.Colo.1985) in an opinion released the day before the first day of oral argument in the instant cases. The debtor had entered into an agreement with several banks to issue letters of credit in favor of the defendant insurance company, which was thereby empowered to draw on the letters in order

64 B.R. 933  
(Cite as: 64 B.R. 933)

to satisfy claims filed against the debtor by third parties. 50 B.R. at 233. The trustee sought to avoid pre-petition draws on the letters of credit as preferential transfers. *Id.*

The court granted the defendant's motion to dismiss, holding that the transfers made by the banks pursuant to the letters of credit were not made from property of the estate. *Id.* at 240. The proceeds came from the banks' assets, and "[t]he Bankruptcy Court's jurisdiction does not extend to control property in which the debtor has no property interest." *Id.*

There is no apparent reason why the reasoning in *Illinois-California Express, Inc.* should not control the instant cases. The defendants at bar drew on transferred letters of credit, but the beneficiary of a transferred letter stands in a position no different from that of the beneficiary under an original letter for the purposes of the present analysis.

*Perlstein v. Ore & Chemical Corp.*, (D.D.C. Mar. 30, 1984) does not compel a conclusion contrary to that indicated by *Illinois-California Express, Inc.*, *supra*. The Disbursing Agent infers that *Ore & Chemical* provides incontrovertible proof that the letter of credit proceeds were Alla's property. However, a close reading of Judge Gerhard A. Gesell's opinion shows that the holding of the case is not nearly so extensive.

\*942 In *Ore & Chemical*, the court denied the defendant's summary judgment motion in a preference action based on facts virtually identical to those in the cases at hand. *Ore & Chemical Corporation* ("Ore & Chemical") had moved for summary judgment in reliance on Judge Gesell's earlier opinion in *In re Page*. 18 B.R. 713 (D.D.C. 1982), asserting that *Page* was directly analogous and mandated the conclusion that the letter of credit proceeds were not Alla's property.

*Ore & Chemical's* motion was correctly denied. Although *Page* involved a letter of credit, it was otherwise distinguishable. *Page* arose from a creditor's

post-petition attempt to cash a letter of credit it held as partial security for a loan extended to the debtors. 18 B.R. at 714. The day after a draft was presented to the bank, the debtors sought an injunction to prohibit the bank from honoring the draft. *Id.* at 714-15. The Bankruptcy Court granted the injunction, reasoning that cashing the letter would violate section 362(a) of the Code; section 362(a) provides that the filing of a petition in bankruptcy stays "any act to obtain possession of property of the estate" and "any act to create, perfect, or enforce a lien against property of the estate." *Id.* at 715.

The District Court reversed, holding that "[a]lthough cashing the letter will immediately give rise to a claim by the Bank against the debtors pursuant to the latter's [sic] indemnification obligations, that claim will not divest the debtors of any property since any attempt to enforce that claim would be subject to an automatic stay pursuant to 11 U.S.C. § 362(a)(4)." 18 B.R. at 715-16 (footnote omitted). Cashing the letter of credit would constitute a transfer of the bank's property, not the debtors'. *Id.* at 715.

*Page* differed from *Ore & Chemical* because the documentary letter of credit in *Ore & Chemical* was intended as a medium of direct payment rather than as a stand-by letter of credit for security. The complaint in *Ore & Chemical* alleged a pre-petition preferential transfer, not a post-petition violation of the automatic stay. Furthermore, in *Ore & Chemical* the District Court did not even reach the issue the Disbursing Agent now claims that it ruled upon in his favor. After characterizing *Page* as a case concerning "the rights of one directly guaranteed by letter of credit to hold the bank to its obligation," the court pointed out that the *Ore & Chemical* case "on the other hand, does not even involve the bank's obligation to [Ore & Chemical]." Slip op. at 4 (emphasis in original). Rather, the Disbursing Agent's action against *Ore & Chemical* "apparently involves only return of cash belonging to Alla which Alla allowed the bank to turn over directly to

64 B.R. 933  
(Cite as: 64 B.R. 933)

[Ore & Chemical].” *Id.* (emphasis added).

The importance of the qualifier “apparently” cannot be over-emphasized. In *Ore & Chemical*, the court did not rule that the letter-of-credit proceeds paid to Ore & Chemical by Commerzbank constituted Alla's property. It used the above-quoted *dictum* only to contrast the case before it more sharply with *Page*. It based its ultimate ruling on the fact that *Page* was not factually on point. To so rule, it was not necessary to find that the cash paid out by Commerzbank was Alla's property for purposes of section 547(b) of the Code. In fact, the court explicitly did not so find: “Resolution of the issues raised [by the motion for summary judgment] should proceed in the Bankruptcy Court in normal course and in light of further facts which may be developed under [the preference claim].” *Ore & Chemical*, slip op. at 4. See *Gould v. Mossinghoff*, 711 F.2d 396, 398 (D.C.Cir.1983) (“the doctrine of collateral estoppel bars relitigation only of issues actually determined in prior litigation”).

*Ore & Chemical* should be read in the context of the jurisdictional uncertainties created by *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982). The reason the District Court had the *Ore & Chemical* case before it was because the Disbursing Agent had sought to preserve his rights in the event the Bankruptcy Court, where he had filed his \*943 preference action against Ore & Chemical, was stripped of its power to adjudicate the action. The District Court's holding in *Ore & Chemical* served to maintain the status quo between the litigants so that the action could proceed in the Bankruptcy Court in normal course. The unpublished opinion in *Ore & Chemical* should be limited to its substantive holding, which, as is clear from the order accompanying the opinion, was intended only to determine the non-applicability of *Page*. The text of the order reads in full:

For the reasons stated in the Court's Memorandum filed herewith, defendant's motion for summary judgment as to Count II of the com-

plaint based on *In re Page*, 18 B.R. 713 (D.D.C.1982), is denied, and further matters relating to Count II are to be resolved by the Bankruptcy Court subject to the conditions of the dismissal Order [without prejudice to the right of the parties to reopen the matter in the District Court in the event that the Bankruptcy Court were to lose its jurisdiction] entered this day.

SO ORDERED.

Order filed March 30, 1984. Again, the court did nothing more than deny Ore & Chemical's motion, which had in the court's view raised a single issue. The court's succinct opinion does not attempt to identify and state abstract principles of law applicable to cases beyond the one before it.

The instant cases are well suited for summary judgment. No disputes of fact surround the transfer issue. The letters of credit and the transfers are in evidence and speak for themselves. Similarly, the dates that these letters were issued and transferred are uncontested.

[12][13] Because the relevant transfers under section 547(b) of the Code were the transfers of the letters of credit, the defendants' motions for summary judgment must be granted. In the case of Pilgrim Coal Sales Corp. and Raintree Coal Co., the sole transfers occurred prior to the 90-day preference period. Similarly, of the transfers received by Tycoal, Inc., two were effected prior to the preference period. Any transfers received by any of the defendants during the preference period but prior to shipment of the coal would not be preferential because the transfers would not have been on account of antecedent debts. See 11 U.S.C. § 547(b)(2). Finally, the letter-of-credit transfers at issue here that satisfy otherwise all six elements of a preference are nevertheless insulated from avoidance because they fall within the “ordinary course of business” exception to the Disbursing Agent's avoiding powers.

The ordinary course exception protects transfers

64 B.R. 933  
(Cite as: 64 B.R. 933)

that were

(A) in payment of a debt incurred in the ordinary course of business or financial affairs of the debtor and the transferee;

(B) made not later than 45 days after such debt was incurred;<sup>FN9</sup>

FN9. The 45-day requirement was deleted by the Bankruptcy Amendments and Federal Judgeship Act of 1984.

(C) made in the ordinary course of business or financial affairs of the debtor and the transferee; and

(D) made according to ordinary business terms[.]

11 U.S.C. § 547(c)(2) (1983). Each of the elements of the ordinary course exception must be satisfied for the exception to apply. *In re General Office Furniture Wholesalers, Inc.*, 37 B.R. 180, 183 (Bankr.E.D.Va.1984). Each element is in fact satisfied with respect to each of the relevant transfers. There can be no question that the first element was present: the debtor's ordinary business was the purchase of coal, and the defendants' ordinary business was to supply coal. The second element was satisfied because each of the letter-of-credit transfers occurred within 45 days of the date the relevant debts were incurred-in fact, in several cases the transfers were made roughly contemporaneously with the \*944 shipments of coal themselves.<sup>FN10</sup> The third and fourth elements have been met as well. The use of letters of credit was certainly within the ordinary course of Alla's financial affairs; the defendants now before the court are only a few of the many coal suppliers who received letters of credit from Alla. The use of letters of credit can also be deemed within the ordinary course of each defendant's financial affairs. It is immaterial that a particular defendant's first experience with letters of credit might have been with Alla. Letters of credit are not unusual for payment when the parties are dealing

with each other for the first time, especially when the sales transaction is international. *See, e.g.,* McLaughlin, *Letters of Credit as Preferential Transfers in Bankruptcy*, 50 Fordham L.Rev. 1033, 1036 (1983). The Disbursing Agent argues that the instant sales transactions between Alla and the defendants were domestic though the coal's ultimate destination was Europe. Even so, the use of letters of credit is not necessarily unusual in a domestic sale-of-goods transaction. *See, e.g.,* J. White & R. Summers, *Uniform Commercial Code* § 18-10, at 752 (2d ed. 1980) ("the utility of letters of credit as financing devices is not confined to the international sphere"); 9 L. Weeramantry, et al., *Banking Law* § 230.01, at 230-1 (1986) ("Letters of Credit were increasingly used in domestic and non-sales transactions [after the 1974 revision of the *Uniform Customs and Practices for Documentary Credits*].").

FN10. Section 547(c)(1) provides an exception for a "contemporaneous exchange," but establishing the application of the exception requires proof of intent on the part of both the debtor and the creditor. Intent is an issue of fact more suitable for resolution at trial than on a motion for summary judgment. *See, e.g., In re T.I. Swartz Clothiers, Inc.*, 15 B.R. 590, 593-94 (Bankr.E.D.Va.1981).

Each defendant need not have been in the habit of accepting letters of credit in order for the ordinary course exception to apply to the instant transfers. The third and fourth elements of section 547(c)(2) are intended to further the legislative purpose of section 547 itself "to discourage unusual action by either the debtor or his creditors during the debtor's slide into bankruptcy." H.R. No. 595, 95th Cong., 1st Sess. 373 (1977), U.S. Code Cong & Admin. News 1978, p. 6329. The defendants need not show that letters of credit are routine for domestic coal sales in order to show compliance with section 547(c)(2). The District Court for the District of South Carolina explains that the requirements of the

64 B.R. 933  
(Cite as: 64 B.R. 933)

ordinary course exception "should usually be easy to meet":

Since [showing that the transaction was conducted in the ordinary course of business] is required merely to assure that neither the debtor nor the creditor do anything abnormal to gain an advantage over other creditors, an extensive showing that such transactions occurred often, or even regularly, is not necessary. *The transaction need not have been common; it need only be ordinary. A transaction can be ordinary and still occur only occasionally.*

*In re Economy Milling Co., Inc.*, 37 B.R. 914, 922 (D.S.C.1983) (emphasis added). The court further stated that a creditor can meet his burden under section 547(c)(2) by showing that he or other creditors like him previously entered into similar transactions with the debtor. *Id.* By this test, any one of the defendants in the cases at bar need only point to its co-defendants. For example, although a particular defendant might not be able to show that it accepted letters of credit for coal before agreeing to do business with Alla, it certainly could show that other suppliers like it in the industry had entered into similar transactions with the debtor. Under *Economy Milling, supra*, the latter showing is sufficient.<sup>FN11</sup>

FN11. Because section 547(c)(2) excepts all of the letter-of-credit transfers at issue from avoidance, there is no need to consider the other statutory and equitable defenses raised by various defendants.

Granting summary judgment in favor of the defendants comports with the legislative\*945 purpose informing the preference and avoidance sections of the Code. Neither the transfers of the letters of credit nor the disbursements of cash pursuant to the transferred letters constituted unusual acts to favor the defendants impermissibly over other unsecured creditors. <sup>FN12</sup> Furthermore, ruling in favor of the defendants is in accord with general policies in favor of facilitating commerce and maintaining the

strength of the letter of credit as a national and international financing device. If the payment made by the issuing bank pursuant to a letter of credit were to be avoidable as a preferential transfer, it would have a chilling effect upon letters of credit and in effect place an undesirable restraint on trade. To support this position, Professor Gerald T. McLaughlin offers a compelling argument in his well-reasoned law review article on letters of credit and preference law:

FN12. For reasons unknown, Lambert Coal Co. received a wire transfer instead of a letter of credit in payment for its final shipment of coal to Alla. Although this \$37,380.35 transfer was received within forty-five days of the date the debt was incurred, it was not made in conformance with the established course of dealing between the parties. *See In re Craig Oil Co.*, 785 F.2d 1563, 14 Bankr.Ct.Dec. (CRR) 553, 555-57 (11th Cir.1986) (payment by cashier's check following a history of payment by corporate check was not in the ordinary course of business or according to ordinary business terms). Additionally, the Court notes that the transfer was received on October 19, 1981, just eighteen days before Alla's bankruptcy. Because the circumstances surrounding this payment have not been adequately explored, judgment as to the wire transfer is not appropriate at this time.

Similarly, the Court is unable to rule at this time on payments received by Raintree Coal Co. pursuant to letters of credit, because Raintree Coal failed to file a motion for summary judgment against the Disbursing Agent.

To accommodate both letter of credit and preference policy, the bank's payment to the beneficiary ... should be immunized from preference attack. The very hallmark of the letter of credit has been the irrevocable nature of this payment oblig-

64 B.R. 933  
 (Cite as: 64 B.R. 933)

ation. Because the bank's obligation is irrevocable, the letter of credit places the risk of customer insolvency on the bank, not on the beneficiary. To permit the trustee to avoid the bank's payment as a preference essentially destroys the usefulness of the letter of credit. By avoiding the bank's payment, the risk of customer insolvency is placed back on the beneficiary.

McLaughlin, *Letters of Credit as Preferential Transfers in Bankruptcy*, 50 Fordham L.Rev. 1033, 1084 (1982) (footnotes omitted).

Letters of credit necessarily have become commercial fixtures because they substitute a bank's financial strength for a purchaser's less-certain ability to pay. The Court's holding in the cases at bar is in accord with long-established business practices involving letters of credit. It is also in accord with widely held concepts concerning these financial instruments. The New York Court of Appeals has stated that "a provision for a letter of credit in a contract of sale is intended to provide complete assurance to the seller that he will be paid whenever he complies with the terms of the contract." *Shirai v. Blum*, 239 N.Y. 172, 146 N.E. 194, 196 (1924). To accept the Disbursing Agent's position "would inject an element of uncertainty in a long-standing commercial practice designed to eliminate uncertainty." *Price Chopper Supermarkets, supra*, 40 B.R. at 819.

An appropriate order denying the Disbursing Agent's motion for summary judgment and, where applicable, granting the defendant's motion will be entered in each of the above-captioned cases.

Bkrcty.D.Dist.Col.,1986.  
 In re AOV Industries, Inc.  
 64 B.R. 933

END OF DOCUMENT

Westlaw

81 N.Y.2d 174

Page 1

81 N.Y.2d 174

(Cite as: 81 N.Y.2d 174, 613 N.E.2d 159)

▷

CT Chemicals (U.S.A.), Inc. v. Vinmar Impex, Inc.  
81 N.Y.2d 174, 597 N.Y.S.2d 284  
N.Y. 1993.

81 N.Y.2d 174613 N.E.2d 159, 597 N.Y.S.2d 284,  
1993 WL 134802, 20 UCC Rep.Serv.2d 853

CT Chemicals (U.S.A.) Inc., Respondent,  
v.  
Vinmar Impex, Inc., Appellant.  
Court of Appeals of New York

Argued March 23, 1993;  
Decided April 29, 1993

CITE TITLE AS: CT Chems. (U.S.A.) v Vinmar  
Impex

## SUMMARY

Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered June 25, 1992, which, upon reargument, modified, on the law, and, as modified, affirmed an order of the Supreme Court (William J. Davis, J.), entered in New York County, denying cross motions by plaintiff and defendant for summary judgment. The modification consisted of granting plaintiff summary judgment with respect to the goods delivered to defendant and with respect to defendant's counterclaims, in the amount of \$510,000, plus interest.

C.T. Chems. (U.S.A.) v Vinmar Impex, 184 AD2d 441, affirmed.

## HEADNOTES

Sales--Construction of Contract--Course of Performance

(1) Where a contract for the sale of high density polyethylene (HDPE), which initially provided for shipment in November by plaintiff to defendant of

1,000 metric tons with payment by irrevocable letter of credit, was later modified to double the quantity of HDPE and defer delivery to January/February, there was no modification of the payment term since defendant, faced with repeated occasions to object during January and February, chose instead to honor its obligation to furnish a letter of credit. Based on the course of performance, the modified contract required payment by letter of credit (UCC 2-208).

Sales--Delivery in Several Lots--"Circumstances" Confirming Right to Deliver in Several Lots

(2) Where a contract for the sale of high density polyethylene (HDPE), which initially provided for shipment in November by plaintiff to defendant of 1,000 metric tons with payment by irrevocable letter of credit, was later modified to double the quantity of HDPE and defer delivery to January/February but was silent as to whether delivery was severable, defendant was not entitled to delivery of the 2,000 metric tons in one lot with payment due when the full amount of HDPE was received, since the parties' correspondence demonstrates that the two amounts were always spoken of as severable, and the letter of credit defendant actually set up covered only the first 1,000 metric tons, indicating that the second 1,000 metric tons would be paid for separately. Pursuant to UCC 2-307, these actions constitute "circumstances" confirming plaintiff's right to make delivery in two lots and demand separate payment for each lot, and it had a right to payment for 1,000 metric tons as of the date that shipment was delivered.

Sales--Letter of Credit Term--Suspension of Payment

(3) In an action involving an alleged breach of a contract for the sale of 2,000\*175 metric tons of high density polyethylene (HDPE), pursuant to which plaintiff-seller had the right to make delivery in two lots and the right to payment by letter of credit for 1,000 metric tons as of the date that shipment was delivered, the letter of credit furnished by

81 N.Y.2d 174

Page 2

81 N.Y.2d 174

(Cite as: 81 N.Y.2d 174, 613 N.E.2d 159)

defendant-buyer for the first 1,000 metric tons did not suspend its obligation to pay where, upon presentment, the bank notified plaintiff of problems with the letter of credit and subsequently notified plaintiff that the letter of credit would be dishonored. Upon the initial notification of problems with the letter of credit, plaintiff rightfully demanded assurances that defendant would waive any discrepancies and suspended further performance until such assurances were forthcoming (*see*, UCC 2-609 [1]). Furthermore, upon the formal notification of dishonor, plaintiff rightfully demanded payment from defendant (UCC 2-325 [2]). Defendant's refusal to make payment constituted a breach of the contract, entitling plaintiff to withhold the second shipment (*see*, UCC 2-703).

#### Sales--Right to Adequate Assurance of Performance--Suspension of Payment

(4) In an action involving an alleged breach of a contract for the sale of 2,000 metric tons of high density polyethylene (HDPE), pursuant to which plaintiff-seller had the right to make delivery in two lots and the right to payment by letter of credit for the first 1,000 metric tons as of the date that shipment was delivered, defendant-buyer did not have the right to demand adequate assurances that the second shipment would be sent prior to paying for the first shipment of 1,000 metric tons delivered by plaintiff on the ground that it had reason to believe plaintiff would not be able to make the second shipment and, absent such assurances, it had no obligation to pay. While plaintiff did not receive the agreed return for the first shipment, defendant had the goods and therefore was not entitled to suspend payment.

#### TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Sales, §§ 265-267, 511, 512, 515, 516, 535, 536, 672-678, 986-988, 1004-1007.

UCC 2-208, 2-307, 2-325 (2); 2-609 (1); 2-703.

NY Jur 2d, Sales and Exchanges of Personal Property, §§33,82-83, 92, 148, 188, 193, 200.

#### ANNOTATION REFERENCES

Construction and effect of UCC art 2, dealing with sales. 17 ALR3d 1010.

#### POINTS OF COUNSEL

*DeGraff, Foy, Holt-Harris & Mealey*, Albany (*Kirk M. Lewis* and *Carroll J. Mealey* of counsel), and *Dunn & Zuckerman, P. C.*, New York City, for appellant.

I. Pursuant to UCC 2- 207, the January 13, 1987 "confirmation order" is not the contract. \*176(*Matter of Marlene Indus. Corp. [Carnac Textiles]*, 45 NY2d 327;*Roto-Lith, Ltd. v Bartlett & Co.*, 297 F2d 497;*St. Charles Cable TV v Eagle Comtronics*. 687 F Supp 820, 895 F2d 1410;*Lorbrook Corp. v G & T Indus.*, 162 AD2d 69;*Tuck Indus. v Reichhold Chems.*, 151 AD2d 566;*Rite Fabrics v Stafford-Higgins Co.*, 366 F Supp 1;*Diamond Fruit Growers v Krack Corp.*, 794 F2d 1440;*CBS, Inc. v Auburn Plastics*, 67 AD2d 811;*Matco Elec. Co. v American Dist. Tel. Co.*, 156 AD2d 840.)

II. Vinmar, as an insecure buyer, had the right to withhold payment for the partial shipment until it received assurances that the balance of the contract would be shipped. (*Cameras for Indus. v I. D. Precision Components Corp.*, 49 Misc 2d 1044, 30 AD2d 526;*National Farmers Org. v Coast Trading Co.*, 488 F Supp 944;*AMF, Inc. v McDonald's Corp.*, 536 F2d 1167;*Created Gemstones v Union Carbide Corp.*, 47 NY2d 250;*American Elec. Power Co. v Westinghouse Elec. Corp.*, 418 F Supp 435;*Cuba Cheese v Aurora Val. Meats*. 113 AD2d 1012.)

III. The Court below improperly resolved disputed questions of fact. (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395;*Weiss v Garfield*, 21 AD2d 156;*McBride v County of Schenectady*. 110 AD2d 1000;*GTF Mktg. v Colonial Aluminum Sales*, 66 NY2d 965.)

*Snitow & Pauley*, New York City (*Franklyn H. Snitow* and *Lyle D. Brooks* of counsel), for respondent.

I. The Court below correctly held that the terms of CT's January 13, 1987 sales confirmation were con-

81 N.Y.2d 174

Page 3

81 N.Y.2d 174

(Cite as: 81 N.Y.2d 174, 613 N.E.2d 159)

trolling. (*Tougher Heating & Plumbing v State of New York*, 73 AD2d 732; *Browning-Ferris Indus. v County of Monroe*, 103 AD2d 1040, 64 NY2d 1046; *Matter of Marlene Indus. Corp. [Carnac Textiles]*, 45 NY2d 327; *Davidson Extruded Prods. v Babcock Wire Equip.*, 138 Misc 2d 118; *Soffer v Elmendorf*, 108 AD2d 954; *Hammerstein v Woodlawn Cemetery*, 21 Misc 2d 42.)

II. The Court below correctly held that Vinmar's failure to timely open a letter of credit was a material breach entitling CT to refuse further deliveries and demand payment. (*Penn v Valiante*, 228 App Div 552; *Indovision Enters. v Cardinal Export Corp.*, 44 AD2d 228, 36 NY2d 811; *Arora v Arlee Home Fashions*, 98 AD2d 655.)

III. The Court below correctly held that plaintiff was entitled to payment upon delivery of each lot, because the contract required, and defendant demanded and accepted, separate deliveries. (*Kosinski v Woodside Constr. Corp.*, 77 AD2d 674.)

IV. The Court below properly granted summary judgment on the uncontested facts. (*Olan v Farrell Lines*, 64 NY2d 1092.)\*177

#### OPINION OF THE COURT

Chief Judge Kaye.

This appeal requires application of the Uniform Commercial Code to a dispute over the alleged breach of an agreement for the sale of high density polyethylene (HDPE) between two dealers in chemical compounds--plaintiff-seller, CT Chemicals (U.S.A.), and defendant-buyer, Vinmar Impex.

The events in issue--largely an exchange of telexes and other documents--took place during a six-month period beginning October 1986. On October 28, Vinmar by telex to CT memorialized its oral offer to buy 1,000 metric tons of HDPE, stating that payment was to be by letter of credit. The next day, CT sent Vinmar written confirmation that CT would ship 1,000 metric tons in November, with payment by irrevocable letter of credit. CT, that same day, also sent a telex confirming the terms as stated on its sales confirmation, and offering Vinmar an additional 1,000 metric tons on the same

terms and conditions. On October 31, Vinmar acknowledged receipt of CT's confirmation of the sale of 1,000 metric tons, but made no mention of the additional amount.

Vinmar alleges that some time in November, the parties orally agreed to change the payment method from irrevocable letter of credit to "net 30 days," or 30 days' credit. CT disputes that such an agreement was made.

On November 24, 1986, Vinmar sent CT a purchase order form for 1,000 metric tons, filled out to reflect delivery in November/December and payment "Net 30" days.

Vinmar two weeks later expressed concern about CT's plans to market HDPE as a competitor and purported to cancel its order. However, the parties soon thereafter agreed to continue with the contract, as evidenced by an exchange of telexes in mid-December, rescheduling shipment of 1,000 metric tons to January 1987. These communications also reflected that CT's offer to sell Vinmar an additional 1,000 metric tons of HDPE remained outstanding.

On January 9, Vinmar telexed CT instructions for shipping 1,000 metric tons and acceptance of the offer for the second quantity; which CT was to place on the purchase order sent for the first 1,000 metric tons. Four days later CT telexed confirmation that the initial contract was amended to state a purchase of 1,900/2,000 metric tons, with delivery in January/February 1987 and all other terms and conditions unchanged. CT then sent Vinmar an amended sales confirmation stating \*178 it would ship 1,900/2,000 metric tons with delivery in January/February and payment by irrevocable letter of credit.<sup>FN\*</sup>

FN\* Vinmar holds a copy of the January 13, 1987 sales confirmation with the words "confirmed irrevocable letter of credit" crossed out, and a handwritten "net 30" added. There was no evidence, however, that

81 N.Y.2d 174

Page 4

81 N.Y.2d 174

(Cite as: 81 N.Y.2d 174, 613 N.E.2d 159)

this was ever sent to CT.

In January and February 1987, the parties exchanged several communications addressing the mechanics of both the letter of credit and the first shipment. Notably, Vinmar's documents indicate no objection to the letter of credit. In fact, on January 28, Vinmar sent CT a copy of a proposed letter of credit in the amount of \$510,000--the agreed price for 1,000 metric tons--and on February 6, opened that letter of credit with Barclays Bank.

CT then shipped 1,000 metric tons of HDPE and later in the month Vinmar authorized shipment of the second amount. Due to the following events, however, the second shipment was never made.

On February 25, 1987 the first shipment arrived, and was accepted by Vinmar's customers. That same day, CT made presentment to Barclays Bank for payment under the terms of the letter of credit. However, the bank could not confirm that it would honor the letter of credit, and Vinmar refused to waive the discrepancies. In an exchange of telexes, CT declined to ship the second lot until the payment problem was resolved. On March 30, Barclays formally rejected CT's presentment, stating that on the advice of Vinmar, payment would be handled "outside of the L/C terms." CT demanded payment, Vinmar did not comply, the second shipment was never sent, and this lawsuit ensued.

The parties submitted a CPLR 3031 joint statement in lieu of pleadings containing claims by CT and counterclaims by Vinmar. Supreme Court denied cross motions for summary judgment, concluding there was a material factual issue with regard to when payment was due. The Appellate Division modified to grant plaintiff summary judgment in the amount of \$710,000 (reduced to \$510,000 upon reargument). We granted leave and now affirm.

At the outset, we note that this dispute between merchants implicates several provisions of article 2 of the Uniform Commercial Code, which propounds clear sensible rules grounded in the reality

of commercial transactions (*see*, UCC 2-101, comment).<sup>\*179</sup>

Contrary to defendant's contention, this case does not present a classic battle of forms--"the all too common business practice of blithely drafting, sending, receiving, and filing unread numerous purchase orders, acknowledgments, and other diverse forms containing a myriad of discrepant terms" (*Matter of Marlene Indus. Corp. [Carnac Textiles]*, 45 NY2d 327, 329-330). In such situations, UCC 2-207 governs whether a contract has been formed, and if so its terms (*see, Marlene Indus.*, 45 NY2d, at 332; 1 White and Summers, Uniform Commercial Code § 1-3, at 28-29 [3d ed]).

Here, the parties do not dispute the formation of a contract or the original terms: by virtue of the exchanges between Vinmar and CT in October 1986, a contract was formed for the sale of 1,000 metric tons of HDPE for delivery later that year, with payment by irrevocable letter of credit. Clearly also, this contract was later modified to double the quantity of HDPE and defer delivery to January/February 1987.

Disagreement centers on two alleged modifications--first, whether the payment method was changed from letter of credit to 30 days' credit and second, whether the new quantity was to be delivered as one shipment or two (which then determines when payment was due). We conclude that payment was to be by letter of credit, that two shipments were contemplated with payment due after the first, and that Vinmar--the buyer--therefore was correctly identified by the Appellate Division as the defaulting party.

Once a contract is formed, the parties may of course change their agreement by another agreement, by course of performance, or by conduct amounting to a waiver or estoppel. In order to determine the terms of such change, we look to UCC 2-208 and 2-209, not 2-207 (*see generally*, 1 White and Summers, Uniform Commercial Code § 1-3, at 36-37, n 22; § 1-6, at 57).

81 N.Y.2d 174

Page 5

81 N.Y.2d 174

(Cite as: 81 N.Y.2d 174, 613 N.E.2d 159)

(1) Vinmar claims there was an express oral modification of the original payment method--letter of credit--to provide for payment on 30 days' credit. However, that issue need not be reached, for the parties' course of conduct makes abundantly clear that there was no modification of the payment term.

Where a contract involves repeated occasions for performance and opportunity for objection "any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement" (UCC 2-208 [1]). "[S]uch course of performance shall be relevant to \*180 show a waiver or modification of any term inconsistent with such course of performance" (UCC 2-208 [3]). This section recognizes that the "parties themselves know best what they have meant by their words of agreement and their action under that agreement is the best indication of what that meaning was" (UCC 2-208, comment 1).

Faced with repeated occasions to object during January and February, Vinmar chose instead to honor its obligation to furnish a letter of credit. We therefore conclude, based on the course of performance, that the modified contract required payment by letter of credit (UCC 2-208).

We reach a similar conclusion as to the time payment was due, an issue that turns on whether delivery was severable. The contract itself does not address this issue, and we therefore look to the UCC to fill in the term (UCC 2-204 [3]; and comment). The UCC has a specific provision with regard to delivery in lots: "Unless otherwise agreed all goods called for by a contract for sale must be tendered in a single delivery and payment is due only on such tender but where the circumstances give either party the right to make or demand delivery in lots the price if it can be apportioned may be demanded for each lot" (UCC 2-307).

(2) Vinmar contends that it was entitled to delivery of the 2,000 metric tons in one lot and that payment was not due until the full amount was received, but again its actions belie that argument. The parties'

correspondence in January and February 1987 demonstrates that, while they discussed the possibility of collapsing delivery into one lot, the two amounts were always spoken of as severable. Indeed, the letter of credit Vinmar actually set up covered only the first 1,000 metric tons, indicating that the second 1,000 metric tons would be paid for separately. As the Appellate Division concluded, these actions constitute "circumstances" confirming CT's right to make delivery in two lots and demand separate payment for each lot (UCC 2-307), and it had a right to payment for 1,000 metric tons as of the date that shipment was delivered.

(3) Even if payment was due upon delivery of the first shipment, Vinmar contends that the letter of credit suspended its obligation to pay.

Again, the UCC provides the answer: "The delivery to seller of a proper letter of credit suspends the buyer's obligation to pay. If the letter of credit is dishonored, the seller may on reasonable notification to the buyer require payment directly \*181 from him" (UCC 2-325 [2]). Whether Vinmar set up a "proper" letter of credit is a factual question, but one we need not reach. Once the bank notified CT of problems with the letter of credit, CT had the right to demand assurances that Vinmar would waive any discrepancies and to suspend further performance until such assurances were forthcoming (*see*, UCC 2-609 [1] ["When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return"]). CT did just that.

Furthermore, when the bank formally notified CT that the letter of credit would be dishonored, under UCC 2-325 (2) CT had the right to demand payment from Vinmar, and in fact did so. Vinmar's refusal to make payment constituted a breach of the contract, entitling CT to withhold the second shipment (*see*, UCC 2-703 ["(w)here the buyer wrong-

81 N.Y.2d 174

Page 6

81 N.Y.2d 174  
 (Cite as: 81 N.Y.2d 174, 613 N.E.2d 159)

fully ... fails to make a payment due ... then also with respect to the whole undelivered balance, the aggrieved seller may (a) withhold delivery of such goods"]).

(4) Vinmar insists that, prior to paying for the first shipment, *it* had the right to demand adequate assurances that the second shipment would be sent because it had reason to believe CT would not be able to make the second shipment and that absent such assurances, it had no obligation to pay. We disagree. While CT did not receive the agreed return for the first shipment, Vinmar had the goods and therefore was not entitled to suspend payment. *Created Gemstones v Union Carbide Corp.* (47 NY2d 250, 255) is inapposite, as that case presented a factual issue that does not exist here--whether the seller had breached the contract.

Finally, since there was no dispute that the contract price for the 1,000 tons shipped was \$500 per metric ton, we see no basis for disturbing the award of \$500,000 plus incidental damages.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Judges Simons, Titone, Hancock, Jr., and Bellacosa concur; Judge Smith taking no part.  
 Order affirmed, with costs.\*182

Copr. (c) 2009, Secretary of State, State of New York  
 N.Y. 1993.  
 CT CHEMS. v VINMAR IMPEX

81 N.Y.2d 174

END OF DOCUMENT

Westlaw.

Page 1

248 A.D.2d 290, 670 N.Y.S.2d 466, 1998 N.Y. Slip Op. 02831  
(Cite as: 248 A.D.2d 290, 670 N.Y.S.2d 466)

**C**

Supreme Court, Appellate Division, First Department,  
New York.

SAMSUNG AMERICA, INC., Plaintiff-Appellant-Respondent,

v.

YUGOSLAV-KOREAN CONSULTING & TRADING CO., INC., etc., et al., Defendants-Respondents-Appellants.  
March 26, 1998.

Shipper of electronics equipment sued international trading corporation and its principal, seeking payment for goods shipped, and defendants asserted counterclaims. The Supreme Court, New York County, Saxe, J., granted in part and denied in part cross-motions for summary judgment. Appeals were taken, and the Supreme Court, Appellate Division, held that: (1) shipper was entitled to judgment on claim for costs of goods, regardless of reason for bank's failure to pay letters of credit; (2) fact issues precluded summary judgment on counterclaims arising from alleged failure of shipper to provide proper documentation for payment; (3) fact issue existed with respect to shipper's action for payment on checks corporation had given to shipper; and (4) fact issues precluded summary judgment with respect to shipper's attempt to pierce corporate veil and recover from principal.

So ordered.

West Headnotes

[1] Sales 343 ↪ 195

343 Sales

343IV Performance of Contract

343IV(D) Payment of Price

343k195 k. Excuses for Default or Delay.

Most Cited Cases

Seller who had not received payment for goods which had been delivered to purchaser was entitled to judgment on its claim for costs of goods, regard-

less of whether lack of payment on letters of credit opened by purchaser was due solely to seller's failure to present necessary documentation. McKinney's Uniform Commercial Code § 2-325(2).

[2] Judgment 228 ↪ 181(29)

228 Judgment

228V On Motion or Summary Proceeding

228k181 Grounds for Summary Judgment

228k181(15) Particular Cases

228k181(29) k. Sales Cases in General.

Most Cited Cases

Genuine issue of material fact as to whether letters of credit opened by defendants for goods shipped to them were dishonored solely due to shipper's failure to present necessary documentation to bank precluded summary judgment with respect to counterclaims asserted by defendants in connection with shipper's suit for costs of goods.

[3] Judgment 228 ↪ 181(29)

228 Judgment

228V On Motion or Summary Proceeding

228k181 Grounds for Summary Judgment

228k181(15) Particular Cases

228k181(29) k. Sales Cases in General.

Most Cited Cases

Genuine issue of material fact as to purpose for which purchasers of goods had given checks to shipper precluded summary judgment in shipper's action to recover payment on checks.

[4] Pleading 302 ↪ 53(2)

302 Pleading

302II Declaration, Complaint, Petition, or Statement

302k53 Separate Counts on Same Cause of Action

302k53(2) k. Particular Causes of Action.

Most Cited Cases

Plaintiff may seek judgment against corporation, and to pierce the corporate veil, all in one action.

Westlaw

HAWKLAND § 5-115:2 [Rev]  
6B Hawklnd UCC Series § 5-115:2 [Rev]

Page 1

Uniform Commercial Code Series

Database updated June 2009

Article  
5 [Rev] Letters of Credit

5-115 [Rev] Statute of Limitations

## § 5-115:2 [Rev] Scope

U.C.C. § 5-115 [Rev] applies to “[a]n action to enforce a right or obligation arising under this article”. As noted in Official Comment 2, the statute applies not only to all causes of action under U.C.C. § 5-111 [Rev] (Remedies) but also to any cause of action that arises under U.C.C. Article 5 [Rev]. It would appear to reach all matters that arise or are governed by U.C.C. Article 5 [Rev], which would include transfers, contracts to negotiate, and inter-bank reimbursement agreements. It would also apply to a contract to issue a letter of credit or a confirmation, as well as an action that gives rise to legal obligations such as the advice of a credit or confirmation. It would not apply to a contract between the applicant and the beneficiary that provide for a payment by means of a letter of credit.

However, the distinction between the two is not always clear. Nor is the manner in which the action is framed. In *Krause v. Stroh Brewery Co.*, the court applied the U.C.C. § 5-115 [Rev] limitations period to actions grounded in breach of contract or implied contract, unjust enrichment, and promissory estoppel.[1] The court concluded that the claims arose out of a “cause of action for wrongfully collecting on a letter of credit” under U.C.C. § 5-110 [Rev] (Warranties). The claim of “wrongful collection” arose from an alleged breach of a contractual promise in a contract between the beneficiary and the plaintiffs, who had pledged collateral and were principals of the applicant.

On the other hand, in *Alhadeff v. Meridian on Bainbridge Island, LLC*, the court distinguished between claims that were based on breach of the U.C.C. Article 5 [Rev] warranty and those grounded in breach of contract, noting that the actions were parallel and not subsumed in the U.C.C. § 5-110 [Rev] warranty.[2] The Alhadeff court criticized the result in *Krause* as having “failed to recognize the separate nature of a contract underlying a letter of credit transaction.” It stated that “[a]lthough these claims may rely on the same alleged conduct that would be subject to an Article 5 warranty claim, the claims are based on the alleged contract, not Article 5's warranty.” These claims “supplement Alhadeff's Article 5 warranty rights and the one-year statute of limitations does not bar them.”

What the Alhadeff court failed to take into account in its analysis was the intention of the drafters as manifested in U.C.C. § 5-115 [Rev] to push the reach of the statute beyond the letter of credit itself and to reach matters that would be collateral to it, clearly including the breach of warranty. It did so because it placed undue emphasis on the traditional verbiage about the tripartite distinction between the letter of credit, application, and underlying contract, even going so far as to question the situation where a surety applies for a letter of credit (an arrangement that it called a “four party letter of credit”). If the U.C.C. Article 5 [Rev] limitations period can in-

© 2009 Thomson Reuters. No Claim to Orig. US Gov. Works.

APPENDIX 29

trude into the application agreement with respect to a claim for wrongful honor, why can it not also intrude into the underlying contract with respect to a claim against the beneficiary for a breach of the contract by virtue of a wrongful drawing?[3]

Official Comment 2 notes not only a claim for breach of warranty but also to "claims between the issuer and applicant arising from the reimbursement agreement." The introduction of the agreement between the issuer and the applicant raises interesting questions about the scope of the limitations period.

It is less clear whether it would reach a suretyship undertaking between the issuer and a surety whereby the surety undertakes to act as surety for the applicant. Where the surety is also an applicant, it would apply. Otherwise, the court would have to determine whether the suretyship undertaking gave rise to a right or obligation arising under U.C.C. Article 5 [Rev].

---

[FN1] Krause v. Stroh Brewery Co., 240 F. Supp. 2d 632, 48 U.C.C. Rep. Serv. 2d 1094 (E.D. Mich. 2002) (Michigan Rev. U.C.C. Article 5). Interestingly, instead of looking to U.C.C. § 5-116 [Rev] (Choice of Law and Forum) for the applicable law, it looked to the law selected by the underlying contract.

[FN2] Alhadeff v. Meridian on Bainbridge Island, LLC, 144 Wash. App. 928, 185 P.3d 1197, 65 U.C.C. Rep. Serv. 2d 1054 (Wash. Ct. App. 2008) (applying Washington's Rev. U.C.C. § 5-115 to a breach of warranty claim).

[FN3] These comments would only apply to the contract claims and not to the ones sounding in tort or other theories that would not fall within the scope of U.C.C. § 5-115 [Rev].

Westlaw. © 2009 Thomson Reuters. No Claim to Orig. U.S. Govt. Works.

HAWKLAND § 5-115:2 [Rev]

END OF DOCUMENT

Westlaw

ANDR-UCC § 5-108:30 [Rev]  
 7A Anderson U.C.C. § 5-108:30 [Rev] (3d. ed.)

Page 1

Lawrence's Anderson on the Uniform Commercial Code

Database updated November 2009

Lary Lawrence

Article  
 5 [Rev] Letters of Credit

5-108 [Rev] Issuer's Rights and Obligations

Commentary

Commentary

Commentary

Commentary

Commentary

Commentary

Commentary

Commentary

E [Rev] Conditions of Letter of Credit

1 [Rev] In general

### § 5-108:30 [Rev] Generally—Particular applications

Foreign clothing manufacturers' failure to submit to the court "approval sample certificates," documents that, pursuant to manufacturers' contracts with retailers, were required to be presented to retailers' representative in order to draw on the letter of credit posted by retailers, did not vitiate the validity of the underlying contracts.[ 1]

Although the letter of credit may have been a contract separate from the parties' purchase orders, they are to be read together as a single agreement, provided that they are part of a single transaction and appear, in combination, to constitute the entire understanding of the parties.[2]

The use of the term "revolved" in a standby letter of credit did not implicitly impose a duty upon applicant to reimburse issuer for utilized credit before additional credit could be renewed and reused by beneficiary. To make issuer's payment obligation conditional, the parties would have had to set forth that requirement clearly

© 2009 Thomson Reuters. No Claim to Orig. US Gov. Works.

APPENDIX 31

and explicitly on the face of the letter of credit. The language of the instrument—this “letter of credit shall be revolving and reinstated every three months within the period of validity”—unequivocally established that applicant's credit line of \$11.5 million would automatically renew at the beginning of each of 15 fiscal quarters. Viewing the word “revolving” in the context in which it appeared in the letter of credit made it clear that renewal was based upon the passage of three months. The policy of strict construction applied in the case is consistent with the non-documentary conditions doctrine embodied in U.C.C. article 13 of the Uniform Customs and Practice for Documentary Credits.[3]

Since the letter of credit required a written demand for payment, the issuer was not to make payment under the letter of credit if no written demand was timely submitted, even if all other required documents were in order. Since the letter of credit's written demand requirement was not satisfied, issuer was not precluded from raising the absence of a timely written demand by reason of issuer's failure, upon receipt of beneficiary's letter, to notify beneficiary of the need for such a written demand. No preclusion could be deemed to arise from issuer's inaction since, in the absence of any demand for payment, the letter of credit could not be deemed to have constituted a presentation triggering an obligation on issuer's part to notify beneficiary of discrepancies within a reasonable time. Given that the letter of credit's requirement of a written demand for payment is obvious and nontechnical, beneficiary could not have justifiably relied on the issuer's silence as an indication that no written demand was required. Finally, beneficiary had nearly two months prior to the letter of credit's expiration in which to ask issuer why no payment or other response to its letter had yet been received. Instead, beneficiary made no such inquiry during this period, and did not contact issuer until more than two weeks had passed since the letter of credit expired.[4]

---

[FN1] *In re Bradlees Stores, Inc.*, 313 B.R. 565, 54 U.C.C. Rep. Serv. 2d 817 (S.D. N.Y. 2004).

[FN2] *In re Bradlees Stores, Inc.*, 313 B.R. 565, 54 U.C.C. Rep. Serv. 2d 817 (S.D. N.Y. 2004).

[FN3] *Nissho Iwai Europe PLC v. Korea First Bank*, 99 N.Y.2d 115, 752 N.Y.S.2d 259, 782 N.E.2d 55, 49 U.C.C. Rep. Serv. 2d 259 (2002)

[FN4] *J.P. Doumak, Inc. v. Westgate Financial Corp.*, 4 A.D.3d 62, 776 N.Y.S.2d 1, 52 U.C.C. Rep. Serv. 2d 991 (1st Dep't 2004).

Westlaw. © 2009 Thomson Reuters. No Claim to Orig. U.S. Govt. Works.

ANDR-UCC § 5-108:30 [Rev]

END OF DOCUMENT