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No. 66619-3-I

COURT OF APPEALS DIVISION ONE  
OF THE STATE OF WASHINGTON

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RICHARD STABBERT, et al.,  
Appellants

vs.

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

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APPEAL FROM SUPERIOR COURT  
FOR KING COUNTY

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APPELLANTS' REPLY BRIEF TO DEEPWATER'S RESPONSE

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 ORIGINAL

**TABLE OF CONTENTS**

Reply to: “I. INTRODUCTION.” Deepwater’s Response Brief .....1

Reply to: “II. COUNTERSTATEMENT OF ISSUES” .....3

Reply to: “III. STATEMENT OF THE CASE”, Reply to “A. Facial Background” .....4

Reply to: “1. The Services Agreement” .....4

Reply to: “2. GML Failed to Perform Its Obligations Under the Services Agreement” .....8

Reply to: “3. Deepwater Exercised Its Right to Terminate the Services Agreement” .....11

Reply to: “B.1 Deepwater’s Summary Judgment Motion” .....14

Reply to: “B.2 Motion for Sanctions” .....16

Reply to: “B.3 Motion for Reconsideration” .....17

Reply to: “IV. ARGUMENT ; A The Trial Court Properly Granted Deepwater’s Summary Judgment Motion; 1.The undisputed evidence established that Deepwater was entitled to and did terminate the Services Agreement in June 2009” .....18

Reply to: “IV. ARGUMENT”; “A. The Trial Court Properly Granted Deepwater’s Summary Judgment Motion” .....19

Reply to: “IV. ARGUMENT”; “B. The Trial Court Properly Denied Stabbert’s Motion for Reconsideration” .....22

Reply to: “IV. ARGUMENT”; “C. The Trial Court Property Denied Stabbert’s Motion for Sanctions” .....25

Conclusion .....25

## I. TABLE OF AUTHORITIES

### A. Table of Cases:

#### State Cases

<i>Amy v. Kmart of Wash., LLC</i> , 153 Wn. App. 846, 223 P.2d 1247 (2009) .....	25
<i>Bowcutt v. Delta N. Star Corp.</i> , 95 Wn. App. 311, 976 P.2d 643 (1999) .....	23, 25
<i>Erwin v. Cotter Health Centers</i> , 161 Wn.2d 676, 167 P.3d 1112 (2007) .....	20, 21
<i>Flower v. T.R.A. Industries, Inc.</i> , 127 Wn. App. 13, 111 P.3d 1192 (2005) .....	19
<i>Indoor Billboard/Washington Inc. v. Integra Telecom of Washington, Inc.</i> , 162 Wn.2d 59, 170 P.3d 10 (2007) .....	18
<i>Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC</i> , 139 Wn. App. 743, 162 P.3d 1153 (2010) .....	23
<i>Magana v Hyundai Motor America</i> , 167 Wn.2d 570, 220 P.3d 1291 (2009) .....	25
<i>Perdang v. State</i> , 38 Wn. App. 141, 684 P.2d 781 (1984) .....	23
<i>State v. Pettitt</i> , 93 Wn. 288, 609 P.2d 1354 (1980) .....	23
<i>Versuslaw, Inc. v. Stoel Rives, LLP</i> , 127 Wn. App. 309, 111 P.3d 866 (2005) .....	19, 20

**Reply to: "I. INTRODUCTION." Deepwater's Response Brief (hereafter "D R Brief"), pp. 1-4**

Deepwater's Introduction sets forth the conclusions of law it wants this Court to reach and argues the facts they assert are undisputed. For example, the Introduction argues:

Based on undisputed evidence, the court determined that (1) Deepwater was entitled to and did terminate the Services Agreement in June 2009; and (2) GML was entitled to no commissions prior to the termination of the agreement.

D R Brief at 1. This appeal by plaintiffs Richard Stabbert and Global Marine Logistics, LLC, (hereafter collectively referred to as "Stabbert") is based, among other things, on the contention there were disputes of material fact precluding summary judgment with regard to these issues.

Deepwater's Introduction asserts that Stabbert "never bid and performed a single project." D R Brief at 2. Of course, Stabbert disputed this.<sup>1</sup> But even if undisputed, this fact would not be determinative; as Stabbert asserts his 2006 efforts resulted in "protected status" for Deepwater's products. CP 625 - 628.<sup>2</sup>

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<sup>1</sup> See CP 752 at ¶9 & 10 ("...I had obtained protected status for Deepwater technology cathodic protection technology [in August, 2006]. It was already included in the 2006 Pemex contract ..."). See also log of Deepwater's sales activity in Mexico. CP 1411 ¶5, 1444-1445. See Robinson's discovery analysis, CP 1454-1456.

<sup>2</sup> See also, CP 1275:15 - 1282:9 (Deepwater understood having its products specified in bid process would constitute "protected status" under the Services Agreement); CP 1282:14 - 1289:13 (Deepwater was aware in early August, 2006 that Pemex was contemplating "protected status" for Deepwater technology as a result of Stabbert's

Deepwater argues that Stabbert only seeks lost commissions and did not allege Deepwater repudiated the contract shortly after Stabbert obtained "protected status" for Deepwater technology. D R Brief at 2. This statement is untrue and disputed; Stabbert's complaint alleged, among other things, a joint repudiation (breach) by Deepwater and Global Respondents to avoid paying him for obtaining "protected status" for Deepwater's technology. See CP 1821 at ¶ 47;<sup>3</sup> see also, CP 1814:4 - 1821:7; 1824:19 - 1826:5; 1827:8-1827:3.<sup>4</sup> Stabbert's complaint alleged his company, GML, had also lost the right to install Deepwater technology.<sup>5</sup>

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efforts); CP 1299:13-23 (in 2009 Pemex specified Deepwater products in public bids relating to oil pipeline work in the Services Agreement Territory.)

<sup>3</sup> Stabbert's amended complaint alleges:

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

CP 1821 at ¶ 47.

<sup>4</sup> Stabbert's amended complaint alleged:

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

CP 1825 at ¶ 61.

<sup>5</sup> Stabbert's complaint alleged Deepwater breached the agreement by:

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

CP 1826 at ¶ 64.

Deepwater alleges Stabbert filed "an unfounded motion for discovery sanctions". D R Brief at 3. Stabbert disagrees, in his response to Deepwater's motion for summary judgment Stabbert noted:

Not only should Deepwater **not** be granted a summary judgment, this Court should note that Deepwater has attempted to foist its litigation theory on Stabbert as a means of preventing disclosure of legitimate evidence relating to Stabbert's damages. For example, Deepwater systematically avoided responding to discovery requests seeking information regarding what Deepwater technology was being utilized in Mexico pursuant to the Protected Status Stabbert obtained. Deepwater refused to respond by objecting "this interrogatory is based on the false premise that products were sold under the Services Agreement". The objection is frivolous. Stabbert is entitled to all information showing what products and technology is being sold [or utilized] in Mexico as a result of the protected status he obtained.

CP 470:22 - 471:8.

Finally, Deepwater asserts on pages 3 and 4 of its Introduction that denial of Stabbert's motion to reconsider was proper because Stabbert "failed to establish any issues of material fact that could have affected the court's summary judgment determinations". D R Brief at 4. However, the Court's order did not make any such finding or discuss irregularities in the proceedings identified by Stabbert. *Compare* CP 1554:3 - 1560:14; *and* CP 1728:11 - 1732:7; *with* CP 1753-54.

**II. Reply to: "II. COUNTERSTATEMENT OF ISSUES" D R Brief, pp. 4 - 5.)**

Deepwater's issues 1 and 2 presume "undisputed" evidence. Stabbert raised genuine issues of material fact. D R Brief at 4. This is Stabbert's appeal and this Court should decide the issues he has raised.

Similarly, Deepwater attempts to re-frame the issues related to Stabbert's assignments of errors 3 - 5 so as to not address the issues in this Appeal. *Compare* Appellant's Opening Brief at 3-4 *with* D R Brief at 4-5. For example, Deepwater's brief does not address whether there was an irregularity in the proceedings as a result of the deterioration in Stabbert's relationship with attorneys Moran and Windes. *See* Appellant's Opening Brief at 3 (error 3). Further, Deepwater's issue number 4 assumes that Stabbert's attorney did not comply with CR 26 (i). D R Brief at 5. Stabbert's attorney stated otherwise in numerous pleadings. CP 471:7-11; 1365:9-13; 1459:1-1463:6; 1478-1483.

**Reply to: "III. STATEMENT OF THE CASE", D R Brief, pp. 5-15.**  
***Reply to "A. Factual Background. D R Brief, pp. 5-6.***

Deepwater states: "Stabbert approached Deepwater's president, Jim Britton, and told Britton that Stabbert could use his knowledge of and connections with Pemex to generate large sales of Deepwater's product in Mexico." See D R Brief at 5-6. ***Stabbert agrees with this material fact.***

***Reply to "1. The Services Agreement" D R Brief, pp. 6-8.***

This section of D R Brief cites only to the following clerk's papers: 45-51 (Jim Britton's three page declaration, CP 44-7, and three pages of attached April 3, 2006 Services Agreement. CP 49-51.) Stabbert does not agree with the conclusions of law, which purport to state as fact Stabbert's legal obligations under the alleged April 3, 2006, Services Agreement. See D R Brief at 7-8. Stabbert further disputes Britton's declaration attaches the full Services Agreement. Stabbert's Brief asserts: "The April 3, 2006 Services Agreement (CP 634-638) incorporates an earlier July 10, 2005 Services Agreement (CP 639-641.) See CP 636, at paragraph 5." Appellant's Opening Brief at 11; *see also* Deepwater CR 30(b)(6) designee's testimony at CP 585:1-590:9.<sup>6</sup> The history and differences between these two agreements were discussed in Stabbert's response to defendants' motion for summary judgment at CP 449:18-463:21. Under both contracts Stabbert's primary duty was to obtain "protected status" for Deepwater technology. *Id.*; *see also*, CP 585:1-590:9.

D R Brief goes out of its way to ignore the basic premise of both Services Agreements, which was that Stabbert would obtain "protected status" for Deepwater technology in Mexico. Indeed, this is the *only fact*

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<sup>6</sup> The two agreements which were executed by Stabbert and Britton recur throughout the clerk's paper. CP 51 ¶ 5 is the paragraph which incorporates the earlier July 10, 2005 agreement signed by Deepwater, Stabbert, Mario May, and James Gilmour into the April 3, 2006 Services Agreement. ¶ 5 is entitled "Prior Agreements; relationships of the Parties". *See also* Deepwater CR 30(b)(6) designee's testimony at CP 585:1-590:9.

about Stabbert's obligations under the contract that Britton mentions in his declaration. There he testifies: "Several years ago, Richard Stabbert approached me and told me that he could use his knowledge of and connections with Pemex to generate large sales of Deepwater's products in Mexico." CP 45 at ¶ 3. The "Basic Agreement" set forth at CP 49, ¶ 1 states:

Basic Agreement. The parties agree that they shall undertake the obligations set forth in the Agreement for the purpose of licensing (or such other method of obtaining protected status for Deepwater's anti-corrosion procedures as the parties may deem appropriate) pipeline corrosion technology through the appropriate Mexican Authority, marketing that technology, and soliciting and performing pipeline corrosion work utilizing that technology in the territorial waters and the waters over the outer shelf of Mexico.

CP 49 at ¶ 1.

Britton's testimony, and the language of the contract, supports the inference that Stabbert's primary role under the contract was to obtain "protected status" for Deepwater's "Cathodic Protection Technology" because Stabbert had no control over Global Respondent's vessels and Deepwater's technology. As compensation for obtaining "protected status" and increasing Deepwater's sales through a bid and non-bid process, Stabbert and Global Respondents were given an "exclusive license" to "use, produce, sell, distribute, market and install its Cathodic

Protection Technology..." in Mexico's territorial waters and EEZ. CP 49 at ¶ 3. The Agreement defines "Cathodic Protection Technology" to include all products, procedures, and processes, including those developed in the future. CP 49 at ¶ 3; 29:6-7; 41-44.<sup>7</sup>

Deepwater's description of the Services Agreement ignores the "Basic Agreement" to obtain "protected status". D R Brief at 6-8. Instead Deepwater concentrates only on those "bid" and "financing" provisions which only Global Respondents had the wherewithal to perform as they controlled the DSV GLOBAL EXPLORER and had the capability to finance "bid projects". Id. This is significant because after Stabbert obtained "protected status" for Deepwater technology, Deepwater and Global Services obtained the primary benefit of the bargain contemplated to be performed by Stabbert. CP 49-53. CP 639-641. Since Stabbert had already performed his promise there was an economic motive for both Global Respondents<sup>8</sup> and Deepwater to repudiate the agreement. CP 49, ¶

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<sup>7</sup> The breadth of the term "technology" as used in the agreement is significant because in its responses to Stabbert's discovery Deepwater re-defines technology to mean only "products that were sold pursuant to the Services Agreement" so as to avoid answering questions regarding "technology". CP 1377:11-23. On other occasions Deepwater claimed Deepwater claimed not to know what the term Deepwater Cathodic Protection included. 1386:9-16

<sup>8</sup> Global Respondent's economic motives for terminating the Services Agreement will be discussed in Stabbert's reply brief against those Defendants/Respondents.

3. d.; CP 600:4-602:2 (Deepwater had to pay two 10% commissions for all technology [i.e., products, processes, and procedures] sold or used pursuant to "protected status" outside of the bid process.)

***Reply to "2. GML Failed to Perform Its Obligations Under the Services Agreement" D R Brief, p. 8-9.***

Deepwater does not cite to any part of the record as support for the factual statement: "Deepwater's relationship with GML soured almost immediately after the Services Agreement was signed". D R Brief at 8. This statement is puzzling because the undisputed evidence indicates Stabbert obtained (or was well on his way to obtaining) "protected status" for Deepwater's technology in early *August, 2006* on a contract that was supposed to last until 2016. CP 49.<sup>9</sup>

In support of the contention Stabbert did not perform his duties under the Agreement, Deepwater cites CP 33, a page of Stabbert's deposition testimony indicating Stabbert had no contact with Deepwater after February, 2007, and CP 45-46, two pages of Britton's declaration where Britton states that in October 2006 he sent a notice of termination to Frank Steuart (not Stabbert or his company) that Deepwater wanted to terminate the Services Agreement.<sup>10</sup> Britton also claims that "[b]y early

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<sup>9</sup> See, e.g., CP 625-628 (August 9, 2006 E-mail from Jennifer Preston May to Jim Britton re: "PEMEX visit report"); see also CP 591:14-598:13.

<sup>10</sup> Mr. Britton's declaration testimony in this regard can be found at CP 45:17-21. The text of the notice is set forth at CP 462:11-19. See also CP 480 at ¶ 10. The letter itself

2007" he believed that all parties to the Services Agreement agreed that it should be terminated". CP 45:22-23. In any event, it is Stabbert's position the record establishes the Services Agreement was repudiated on or after October 2006. CP 607:15-608:8; CP 1732:8-1734:19.

Britton's self-serving testimony fails as proof that Stabbert "[GML] Failed to Perform Its Obligations Under the Services Agreement" because it is not credible in light of Jennifer Preston's August 9, 2005 email to Britton. D R Brief at 8; *see* CP 625-628. In that email (CP 626) Preston confirms to Britton:

On August 9, 2006 Mr. Sergio Dominguez Engineering Coordinator of Pemex, Joaquin Parrusquia, Rosa Maria Berlin <sic> and Mr. Richard Stabbert from Global Marine Logistics, visit our office with the purpose of defining new strategies to introduce our product into Pemex Technical Specifications.

\* \* \*

Mr. Dominguez wanted us to justify technically why our products were better than the ones you could find generally in the market. His idea is to write into the specification the characteristics that make our products unique or describe only our product so that the client will have to buy the products just from us to be in accordance with the spec.

Preston then goes on to describe the vast Pemex projects that Mr. Dominguez was there to discuss. CP 626-628. "Maintenance for old pipelines" CP 626. "New Pipelines". *Id.* A reasonable juror would

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is set forth at CP 712. As the Court can see there is no indication the termination letter was sent to Stabbert as is required by ¶ 6 of the Services Agreement. CP 51.

question why Deepwater argues that Stabbert had done nothing to fulfill his contractual obligations as of October, 2006 when less than three months before Stabbert brought the Engineering Coordinator of Pemex to Deepwater's offices to write specifications that included Deepwater's cathodic technology in pipeline and platform contracts. In fact, a reasonable juror might well conclude the attempts from October, 2006 through February, 2007 to "*informally*" terminate the Services Agreement by Global Respondents and Deepwater were done to convert to their own benefit the "protected status" Stabbert had obtained from Pemex.

At his deposition Britton testified that if had he known that Stabbert had obtained or was about to obtain "protected status" he would never have considered terminating the contract. CP 605:22 - 606:15. "If he could show us protected status at that time we would have no grounds to terminate." CP 606:12-15. So why did Deepwater decide to "recast" its relationship with Global Respondents shortly after it was clear Stabbert was performing his responsibilities under the contract? *See* CP 625-628.

In this regard, it is worth reminding the Court that:

There is no dispute that Deepwater has obtained "protected status" for Pemex technology related to work done on the Pemex pipeline and platform infrastructure work in Mexico. CP 594:13-597:12. Britton testified he does not know how this status came about. CP 605:19-606:19.

Appellant's Opening Brief at 12.

***Reply to "3. Deepwater Exercised Its Right to Terminate the Services Agreement" D R Brief, p. 9-11.***

As support for the facts set forth in this section Deepwater again cites Britton's declaration. DR Brief at 10-11 (citing to CP 46-47). These pages of Britton's declaration state at paragraph 3 that Stabbert told Britton several years ago that Stabbert "could use his knowledge and connections with Pemex to generate large sales of Deepwater's products in Mexico." CP 45. Then the declaration skips to testimony about how unhappy Britton was with Stabbert and his performance from April, 2006 to October, 2006. Id. at ¶ 5, 6, and 7. Britton's failure to address Stabbert's August 9, 2006 success with Pemex discounts the premise Stabbert had done nothing from April 3, 2006, through October, 2006. October was when Britton "sent a notice of default indicating that Deepwater was considering terminating the Services Agreement" to Stuart. CP 45. On October 19, 2006, (only two months and ten days) after Britton was notified that Stabbert was obtaining "protected status" from Pemex, Britton writes to Frank Stuart:

Dear Frank:

We have informally agreed that our business arrangement must be recast since the Mexican staff of GML and Global have been unable to communicate and coordinate effectively with the Deepwater representatives under the April 3, 2006, Services Agreement among GML, Global, and Deepwater. Coordination, without which we cannot

succeed, is the obligation of GML and Global under Section 4(d).

In the hope of moving things forward, this is Deepwater's notice of default given under Section 6 of the Agreement. Please contact me promptly to discuss the necessary adjustments in our business arrangement. If we can make some progress, it will not be necessary for Deepwater to exercise its right to terminate the Agreement after having given its ten day default notice.

CP 712; *see also* CP 462:11-19; CP 480 ¶ 10.

This notice was not sent to Stabbert as was required by ¶ 6 of the Services Agreement. *See* CP 51 ¶ 6 ("... [T]he non-defaulting party may terminate this Agreement **by providing written notice to all other parties** hereto.") Britton's letter indicates that during this short period occurring after Pemex's visit to Deepwater, Britton and Steuart (managing member of Global Explorer, LLC and Global Enterprises) "...**informally agreed that our business arrangement must be recast...**". CP 712 (emphasis supplied). Although, the above termination notice was not effective under the Agreement because it had not been provided to Stabbert, it was undisputed by the parties during the summary judgment proceedings that no "bid" or other work was done after this "informal termination". D R Brief, at 8-9; CP 46, ¶ 7; CP 607:15-608:8; 1298; CP 1732:8-1734:19.

On January 23, 2007, while Global Respondents and Stabbert were discussing a written brokerage contract for the DSV GLOBAL EXPLORER (which Stabbert ultimately refused to sign),<sup>11</sup> Stuart wrote to Britton:

I have come to the same conclusion that you have that things aren't progressing with respect to the cathodic protection program. I know you have an interest in terminating the agreement. I actually think that if we did so... and knowing the product now... that we can then bring a proposal to you... discuss a deal ... should one come up. Let's talk when you return...

CP 55 (ellipses in original). These two emails, coupled with evidentiary admissions<sup>12</sup> and admissions in Deepwater's briefs<sup>13</sup> that no bid work was performed after Britton and Stuart informally agreed the Services Agreement should be terminated, clearly present a fact question with regard to whether the informal termination of the Services Agreement by Stuart and Britton constituted a repudiation of the Services Agreement after Stabbert had performed his basic obligations.

Britton states that Deepwater properly terminated the agreement on June 4, 2009, after Stabbert sent him an email indicating he was willing to

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<sup>11</sup> CP 127:14-150:11 documents a time line submitted by Stabbert in discovery which documents events occurring from the first July 2005 Services Agreement through February 24, 2007. This timeline was submitted as evidence by Global Respondents. CP86:21-87:24. The timeline does not include reference to documents such as Engineer Preston's August 9, 2006 email to Britton (CP 625-628) because Stabbert did not obtain a copy of this email until it was disclosed by Global Respondents via discovery.

<sup>12</sup> See e.g. CP 45:3-46:10; 607:15-608:8.

<sup>13</sup> See e.g. CP 13:20-15:1; D R Brief, pp 8-9

begin selling Deepwater's products. CP 46 at ¶ 8-10. Deepwater then claimed it had a right to terminate the agreement a second time pursuant to the last sentence of ¶ 6 of the Services Agreement, which states:

Deepwater may, upon notice to Global and GML, unilaterally terminate this Agreement on or after March 1, 2009, if, by that date, Deepwater has not realized at least Five Hundred Thousand Dollars (U.S. \$500,000.00) in gross revenues as a result of its participation in the Bid process.

CP 51.

Stabbert contended the reason \$500,000 had not come in as a result of the bid process is because Deepwater and Global Defendants repudiated the Services Agreement by informally terminating the Services Agreement in October 2006 so that no bids pursuant to the Services Agreement were ever made thereafter<sup>14</sup>. *See supra*, pp 2, notes 2-4; CP 55; CP 712; *see also* CP 462:11-19; CP 480 at ¶ 10. Stabbert also contended Deepwater had withheld information relating to damages which should have been disclosed through discovery. *See supra*, p. 2-3.

***Reply to "B.1 Deepwater's Summary Judgment Motion." D R Brief 11-13***

Deepwater cites CP 1791 and 1806 for the proposition that Stabbert claimed only that "Deepwater breached the Services Agreement by failing to pay commissions." D R Brief at 11. This is not true, Stabbert

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<sup>14</sup> Stabbert also asserted that Deepwater was hiding revenues, *See supra*, note 1; *See also* Deepwater's acknowledgement that it had obtained protected status. CP 591:10-597:12

alleged Deepwater and Global Respondents jointly breached the Services Agreement. *See supra.*, pp. 2-3. These allegations were sufficient to provide Deepwater notice that Stabbert was claiming Deepwater and Global Respondents jointly breached, *i.e.* repudiated, the Services Agreement. Paragraph 3 of the Services Agreement states:

3. Legal Representative; Grant of Exclusive License. Deepwater hereby appoints Global and GML, as its exclusive representative and agent, and grants an exclusive license to Global and GML to use, produce, sell, distribute, market, and install its Cathodic Protection Technology (defined below) in Mexico and within the exclusive economic zone (EEZ) and continental shelf adjacent to that county (the "Territory").

CP 49.

There is nothing in the complaint which suggests Stabbert was not alleging a repudiation of the contract. This is important because, as was pointed out to the Superior Court, Deepwater chose to move for summary judgment by setting out its own version of the facts, as opposed to alleging Stabbert had failed to present evidence sufficient to support its case. CP 445:12-19. In order to prevent summary judgment, all Stabbert had to show, as he did, was a viable theory that would prevent Deepwater from obtaining a summary judgment simply because the economic benefit test imposed by the last sentence of paragraph ¶ 5 of the Services Agreement was not met. *Id.* Stabbert met this burden by presenting

evidence establishing there was a question of fact with regard to whether Deepwater and Global Respondents breached the contract for their own benefit. *Id.* Stabbert also argued, in the alternative, that Deepwater had prevented proof of damages by inappropriately failing to answer discovery. *See supra.*, p. 3; CP 1457:14-17; 1490-1497; 1573:16-1575:2.

***Reply to "B.2 Motion for Sanctions." D R Brief pp. 13-15.***

Deepwater states as fact, without any citation to the record as is required by RAP 10 (3) (a), that Stabbert's motion for sanctions was "based on a number of allegations that were demonstrably false..." D R Brief at 13. Stabbert moved for sanctions because Deepwater had objected to discovery requests without seeking a protective order. *See e.g.*, CP 1362:6-9; 1365:20-1366:14; 1367:13-20; 1377:5-1379:5. Stabbert maintained that Deepwater had improperly re-defined his discovery requests in a way to suggest the information and documents, which he requested, related only to Deepwater's sales of products in Mexico pursuant to the informally terminated Sales Agreement. CP 1362:6-1365:8; 1484:13-1488:17. Stabbert pointed out Deepwater's original answers to discovery requests stated Deepwater would provide non-privileged communications was inconsistent with its later claim that such documents had been destroyed pursuant to a company policy. CP 1484:16-1485:2; *compare*, CP 1420:22 - 1421:3 (2/22/2010 discovery

answer: "Deepwater will produce copies of responsive, non-privileged communications related to the Services Agreement" *with* CP 1301:16-1312:17 (Deepwater's CR 30(b)(6) designee's 9/23/2011 testimony regarding email and documents policies). Stabbert also showed Deepwater's discovery responses were belated and seemed to change whenever Deepwater's interests benefitted. *See, e.g.*, CP 1457-58; CP 1476. Stabbert also produced evidence indicating Deepwater's production responses about sales were not consistent with the proof Deepwater offered in support thereof. CP 1454-1456; *see also*, Exhibit 3 to Zanzig's declaration at CP 1411 at ¶ 5; CP 1444 - 1445.

Rather than resolve these discovery issues the Superior Court held because Stabbert's counsel had not met and conferred with Deepwater's attorney the Superior Court had no authority to grant sanctions. CP 1755. Stabbert's counsel disputed he had not met and conferred with Deepwater's counsel about the discovery requests. CP 1365; 1452-3; 1459:1-1463:6.

***Reply to "B.3 Motion for Reconsideration." D R Brief p. 15.***

The Superior Court's Order on Reconsideration invites this Court to speculate with regard to what evidence it found admissible. D R Brief at 15 (citing to CP 1753-1754). This is particularly difficult to do with regard to Mr. Stafne's October 3, 2010, declaration as there is none. Deepwater's reliance on the Court's legal conclusion that the admissible

evidence submitted in support of the motion for reconsideration does not provide a valid basis for reconsideration (D R Brief at 15) suffers from the same problem as Stafne's phantom declaration. There is no specific ruling by the Superior Court about any specific piece of evidence to review.

***Reply to "IV. ARGUMENT ; A The Trial Court Properly Granted Deepwater's Summary Judgment Motion; 1.The undisputed evidence established that Deepwater was entitled to and did terminate the Services Agreement in June 2009" D R Brief 15-18***

Deepwater's "Argument" section contends the Trial Court properly granted Deepwater's summary judgment motion. D R Brief at 15-16. Section A sets forth "some" black letter law relating to summary judgments, but fails to note that there are two types of summary judgment. "A party may move for summary judgment by setting forth its own statement of the facts or by alleging the non-moving party failed to present sufficient evidence to support its case." *Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, 162 Wn.2d 59, 70, 170 P.3d 10 (2007) Deepwater chose to move for summary judgment by setting forth its own version of the facts, i.e., non-payment of the \$500,000 financial threshold allowed Deepwater to unilaterally terminate the Services Agreement. CP 445:3-19; CP 470:6 – 471:6. In regards to Stabbert's duty to meet this deadline Deepwater relied on the last sentence of ¶ 6 of the Services Agreement, CP 15-16; CP 46 at ¶ 8-9; CP 51 at ¶ 6,

which states in pertinent part: "... Deepwater ... may unilaterally terminate this Agreement on or after March 1, 2009, if, by that date, Deepwater has not realized at least \$500,000 in gross revenues as a result of participation in the bid process." CP 51 at ¶ 6.

***Reply to "IV. ARGUMENT"; "A. The Trial Court Properly Granted Deepwater's Summary Judgment Motion"; D R Brief 15-18***

Deepwater baldly claims that it was entitled to terminate the contract after March 1, 2009, because Deepwater had not received at least \$500,000 in revenues from projects GML had bid in Mexico. D R Brief at 18. Stabbert contends this is a misstatement of the law because Deepwater and Global Respondents repudiated (*i.e.* breached) the Services Agreement in late 2006 or early 2007 thereby preventing performance of the bid provisions of the Service Agreement. *See* Appellant's Opening Brief at 32 (authorities cited therein); CP 463:19-465:4; CP 1561:1-16; *see also, Flower v T.R.A. Industries, Inc.*, 127 Wn. App. 13, 111 P.3d 1192 (2005) (In a bilateral contract one cannot renege on his/her promise to perform after another party has performed his promise.); *Versuslaw, Inc. v Stoel Rives, LLP*, 127 Wn. App. 309, 321, 111 P.3d 866 (2005) (Whether there is a repudiation (*i.e.* breach) of a contract is a question of fact.)

In this case everyone agrees that the ten-year bilateral contract was "informally" terminated less than a year after it began and Stabbert had

obtained "protected status" for Deepwater cathodic protection technology. Deepwater claims the Services Agreement was mutually abandoned by all parties. Stabbert claims Deepwater and Global Respondents breached (repudiated) the Services Agreement by Global Respondents firing him and then both foregoing the bid process contemplated by the Service Agreement shortly after he obtained "protected status" under the Agreement. *Compare*, CP 591:10-597:12 (Britton's testimony: "We got 'protected status' but I do not know how"); *with See* CP 752 at (Stabbert's testimony "I had obtained protected status for Deepwater technology cathodic protection technology. It was already included in the 2006 contract (#412603872)") *and* CP 1492, at ¶ 7 (Stabbert's testimony: I obtained "protected status" for Deepwater technology); *and* CP 625-628 (August 9, 2006 Preston letter to Britton describing meeting with Pemex chief of engineering arranged by Stabbert.)

The argument by Deepwater that any breach of contract was excused because Stabbert did not present Deepwater with bids totaling \$500,000 by April 1, 2009 is much like the argument rejected in *Versuslaw*. In that case Stoel Rives argued that no claim for royalties could accrue after a certain date set forth in the contract. *VersusLaw*, 127 Wn. App. at 322-323. But the Court held there was a question of fact whether Mathew Bender refused to accept performance. *See also, Erwin v*

*Cotter Health Centers*, 161 Wn.2d 676, 167 P.3d 1112 (2007) (A party cannot excuse his promise to perform by refusing to perform contingencies within his power before a certain deadline where the other side has timely performed his promise.)

Stabbert presented uncontradicted evidence of damages. Britton admitted Deepwater had obtained "protected status" for its cathodic protection in a Pemex contract executed in 2009 or before. CP 594:13-597:12. Stabbert testified the contents of the contract documents Deepwater's CR 30(b)(6) designee had testified showed Deepwater obtained "protected status" showed Deepwater products were being sold in Mexico. CP 1573:16 - 1575:2.

Stabbert also contended Deepwater had improperly avoided responding to discovery requests relating to damages by redefining the questions to include information relating only to the money generated from the performance of the Services Agreement, *which Deepwater and Global Respondents repudiated in late 2007 or early 2007*. CP 1484-9. The license agreement, which Stabbert claimed was violated, involved more than commissions for sales. It also would have provided Stabbert income for such things as licensing, installation, and distribution. *See* CP 49 at ¶ 3 (Global Respondents and Stabbert had an exclusive license to use, produce, sell, distribute, and install cathodic protection technology.)

***Reply to "IV. ARGUMENT"; "B. The Trial Court Properly Denied Stabbert's Motion for Reconsideration"; D R Brief 23- 27***

Deepwater argues that Stabbert presented no evidence that Deepwater repudiated its promise to grant an exclusive license. D R Brief 24-25. Stabbert contends the facts and inferences from Deepwater's briefs, Britton's declarations and testimony, Stabbert's testimony, the Services Agreement, and the Preston August 9, 2006 email describing Deepwater's meeting with the engineering director of Pemex as previously set forth herein create an issue of fact as to whether Deepwater and Global Explorer decided to breach (repudiate) the Services Agreement shortly after Stabbert began to obtain "protected status".

Deepwater does not respond to Stabbert's argument that he has been prejudiced by the irregularity of the Court not identifying in its Summary Judgment Order what evidence the Court chose not to consider and why. *See* CP 1554:3-6:16. Nor does Deepwater offer any authority supporting the propriety of the Court's ruling that: "the admissible evidence submitted by plaintiff <sic> in support of the Motion for Reconsideration fails to supply, factually or legally, a valid basis for

reconsideration pursuant to CR 59." CP 1754:7-9. What evidence did the Court find inadmissible and why? *See* CP 1553:13-1554:2.<sup>15</sup>

It is the trial court which should be deciding specific evidentiary objections to determine the admissibility of specific evidence; rather than leaving it up to this Court and counsel to guess as to what evidence was offered and admitted with regard to the summary judgment motions and Stabbert's motion for reconsideration. *See also* authority cited at CP 1725:21-1731:14; CP 1737:16-1739:14. By failing to exercise its discretion by ruling on specific objections raised by the parties the Superior Court abused its discretion by not making an adequate record for appellate review of its evidentiary rulings. *Jacobs Meadow Owners Assn. v. Plateau 44 II, LLC*, 139 Wn. App. 743, 754-755, 162 P.3d 1153 (2007). The failure to make specific evidentiary rulings in response to the parties' objections constitutes an abdication of discretion, which is itself an abuse of discretion. *See also, Bowcutt v. Delta N. Star Corp.*, 95 Wn. App. 311, 320-21, 976 P.2d 643 (1999); *State v. Pettitt*, 93 Wn.2d 288, 296, 609 P.2d 1354 (1980); *Perdang v. State*, 38 Wn. App. 141, 684 P.2d 781 (1984).

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<sup>15</sup> The lower Court's familiarity with the record is suspect when it strikes Stafne's October 3, 2010, declaration (which does not exist) apparently in response to Deepwater's motion to strike Stabbert's October 3, 2010, declaration. CP 1391-1392.

Deepwater asserts Stabbert's decision to fire some of his attorneys provided no basis to challenge the trial court's summary judgment orders. D R Brief at 25-27. But Deepwater's argument on this issue misses the point. The fact "[t]he Court clarifies it did not consider the sealed Declarations of Mr. Windes or Mr. Moran... in ruling on the subject Motions for Summary Judgment" (CP 1753:20-22) suggests the lower court did not consider these declarations in deciding whether Stabbert's troubles with his lawyers constituted an irregularity in the proceedings under CR 59. In addition to the sealed declarations, the other evidence before the Court on this issue included the notice of withdrawal by Moran and Windes (CP 78); Stafne declaration, (CP 372-82); Stabbert objection to withdrawal (CP 382-384); Order, (CP 385); Stabbert declaration and termination of Moran and Windes; (CP 1317-1320); Stafne declaration (CP 1692-1707); Robinson declaration (CP 1688-9); and Stauffer declaration (CP 1690-1). These declarations established that after Moran and Windes filed a notice to withdraw they refused to return much of Stabbert's evidence because they were using it to litigate the *EVYA* companion case.<sup>16</sup> See Appellant's motion Unseal Documents at 11. Under these circumstances the law clearly favors the exercise of discretion

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<sup>16</sup> The record also shows that some of the pleadings filed in this case were sent solely to Moran, who did not pass them on. See CP 1411 at ¶4 and CP 1442-3.

to allow additional evidence pursuant to a motion for reconsideration. *See* CP 1555:13-1560:16 and authorities cited therein.

***Reply to "IV. ARGUMENT"; "C. The Trial Court Properly Denied Stabbert's Motion for Sanctions"; D R Brief 23- 27***

The Court concluded it was precluded from granting sanctions because Stabbert's attorney had not met and conferred with Deepwater's attorney. CP 1755. This was an error of law because the Superior Court had discretion to grant sanctions. *Magana v. Hyundai v Motor America*, 167 Wn.2d 570, 583-584, 220 P.3d 191 (2009); *see also Amy v. Kmart of Wash., LLC*, 153 Wn. App. 846, 853, 223 P.2d 1247 (2009). This error of law constitutes an abuse of discretion. *Bowcutt v. Delta N. Star Corp.*, *supra*. As is set forth at pages 16-17 hereof, Deepwater should have been sanctioned because it used objections (without moving for a protection order) to trump its duty to make fair discovery. *Magana*, 167 Wn.2d 570.

CONCLUSION

This Court should reverse the Superior Court's order granting of summary judgment to Deepwater; reverse the order denying the motion for reconsideration; and reverse the order denying sanctions.

Respectfully Submitted, this 26<sup>th</sup> day of July, 2011,



Scott E. Stafne, WSBA No. 6969

No. 66619-3-I

COURT OF APPEALS DIVISION ONE  
OF THE STATE OF WASHINGTON

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RICHARD STABBERT, et al.,  
Appellants

vs.

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

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APPEAL FROM SUPERIOR COURT  
FOR KING COUNTY

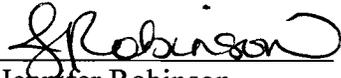
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DECLARATION OF SERVICE

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

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

  
Jennifer Robinson

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STATE OF WASHINGTON

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