Filed In The District Court
of Travis County, Texas
on 4-3-09
at 10:40A M.
Amalia Rodriguez-Mendoza, Clerk

345TH DISTRICT COURT
TRAVIS COUNTY COURTHOUSE
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AUSTIN, TEXAS 78767

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April 3, 2009

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Re: D-1-GN-07-000772; *International Metal Sales, Inc. vs. State Bank nka Prosperity Bank & Prosperity Bank vs. Kimberly A. Lerch vs. Prosperity Bank & Fritz, Byrne, Head & Harrison, LLP; in the 250th District Court of Travis County, Texas*

Dear Counsel:

I will deny State Bank's Motion to Strike the entire affidavit of Ms. Lerch. With respect to the objections to specific sections of the affidavit, I deny the "Outside IMS's response" objections and sustain the remainder of the objections.

I will grant State Bank's Motion for Summary Judgment.

Please prepare an order and submit it to me for approval within two weeks.

Sincerely,

Stephen Yelenosky
Judge, 345th District Court

CAUSE NO. D-1-GN-07-000772

INTERNATIONAL METAL SALES, INC., Plaintiff v. STATE BANK (NOW KNOWN AS PROSPERITY BANK), AND PROSPERITY BANK, Defendants and Third-Party Plaintiffs, v. KIMBERLY A. LERCH, Third-Party Defendant and Counter-Plaintiff, v. PROSPERITY BANK and FRITZ, BYRNE, HEAD & HARRISON, LLP, Counter-Defendants and Third-Party Defendants.	§ §	IN THE DISTRICT COURT 250TH JUDICIAL DISTRICT OF TRAVIS COUNTY, TEXAS

Filed in The District Court of Travis County, Texas
APR 27 2009 CLC
At ____ M.
Amalia Rodriguez-Mendoza, Clerk

ORDER GRANTING PARTIAL SUMMARY JUDGMENT

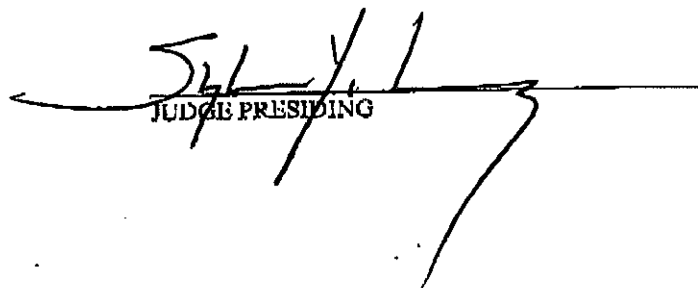
On March 31, 2009, Defendant State Bank's, now known as Prosperity Bank (1) Traditional Motion for Partial Summary Judgment as to the Claims of International Metal Sales, Inc., and (2) Objections to and Motion to Strike Affidavit of Kimberly Lerch Filed in Opposition to Prosperity Bank's Traditional Motion for Partial Summary Judgment were heard by the Court.

After review of the Motions and Responses and the arguments of counsel, the Court is of the opinion that said Motion for Partial Summary Judgment should be granted and the Motion to Strike Affidavit should be denied in part and granted in part. It is therefore,

ORDERED, that Defendant Prosperity Bank's Traditional Motion for Partial Summary Judgment as to the Claims of International Metal Sales, Inc., against Prosperity Bank be and hereby is GRANTED.

IT IS FURTHER ORDERED, that Prosperity Bank's Objections to and Motion to Strike Affidavit of Kimberly Lerch Filed in Opposition to Prosperity Bank's Traditional Motion for Partial Summary Judgment is DENIED as to the entire Affidavit. With respect to the objections to specific sections of the Affidavit, it is denied as to the "Outside IMS's response" and sustained as to the remainder of the objections.

Dated this 27 day of April, 2009.



JUDGE PRESIDING

CAUSE NO. D-1-GN-07-000772

Filed in The District Court
of Travis County, Texas
OCT 06 2008 MR
At 1:58 P M.
Amalia Rodriguez-Mendoza, Clerk

INTERNATIONAL METAL SALES, INC.,	§	IN THE DISTRICT COURT
	§	
Plaintiff	§	
	§	
v.	§	
	§	
STATE BANK (NOW KNOWN AS PROSPERITY BANK), AND PROSPERITY BANK,	§	
	§	
Defendants and Third-Party Plaintiffs,	§	
	§	
v.	§	250TH JUDICIAL DISTRICT
	§	
KIMBERLY A. LERCH,	§	
	§	
Third-Party Defendant and Counter-Plaintiff,	§	
	§	
v.	§	
	§	
PROSPERITY BANK and FRITZ, BYRNE, HEAD & HARRISON, LLP,	§	
	§	
Counter-Defendants and Third-Party Defendants.	§	OF TRAVIS COUNTY, TEXAS

Prosperity Bank's Traditional Motion for Partial Summary Judgment
As to the Claims of International Metal Sales, Inc.

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CAUSE NO. D-1-GN-07-000772

INTERNATIONAL METAL SALES, INC., Plaintiff v. STATE BANK (NOW KNOWN AS PROSPERITY BANK), AND PROSPERITY BANK, Defendants and Third-Party Plaintiffs, v. KIMBERLY A. LERCH, Third-Party Defendant and Counter-Plaintiff, v. PROSPERITY BANK and FRITZ, BYRNE, HEAD & HARRISON, LLP, Counter-Defendants and Third-Party Defendants.	§ §	IN THE DISTRICT COURT 250TH JUDICIAL DISTRICT OF TRAVIS COUNTY, TEXAS

Prosperity Bank's Traditional Motion for Partial Summary Judgment
As to the Claims of International Metal Sales, Inc.

State Bank (now known as Prosperity Bank) (hereafter "the Bank," except where otherwise indicated) files this Motion for Traditional Partial Summary Judgment as to all claims made by International Metal Sales, Inc. ("IMS") against the Bank.

I.
STATUS OF CASE

In an attempt to recover losses sustained in its steel business, IMS sued Global Steel Corporation in Williamson County. After Judge Karnes dismissed IMS's suit, IMS now sues the Bank, hoping to recover against the Bank. IMS's suit in this Court claims that the Bank wrongfully honored drafts drawn against a standby letter of credit that the Bank issued at the

request of IMS for the benefit of Global Steel Corporation. The suit alleges that some, but not all, of the invoices attached to the sight drafts from Global Steel Corporation were on the letterhead of "Global Steel Corp." (a related entity with common ownership), not "Global Steel Corporation" and that therefore the drafts did not comply with the terms of the standby letter of credit. The suit claims damages in the amount of $194,108.31, the total amount of the drafts honored by the Bank. IMS admits that it received all of the steel described in the invoices.

The Bank filed a counterclaim against IMS seeking reimbursement for the amount the Bank paid to Global Steel Corporation under the standby letter of credit and for collection of an amount due from IMS under a line of credit note. Shortly thereafter, IMS filed for bankruptcy. The Bank does not seek summary judgment on its counterclaim against IMS at this time. Instead, the Bank seeks partial summary judgment on all of IMS's claims against the Bank.

Thereafter, the Bank, after seeking leave of the Court, filed a third party action against Kimberly Lerch, as Guarantor of the obligations of IMS to the Bank. (IMS is wholly owned by third-party defendant, Kimberly Lerch, who was its sole employee.) Ms. Lerch – in her individual capacity – counterclaimed against the Bank and filed a third-party action against the Bank's former counsel in this case, Fritz, Byrne, Head & Harrison, L.L.P. alleging a variety of theories. Neither the Bank's claims against Lerch nor Lerch's counterclaims against the Bank are the subject of this motion.

II.
SUMMARY OF MOTION

This Court has already denied IMS's motion for summary judgment against the Bank. This Court should enter judgment as a matter of law against IMS for three general reasons. ***First***, the Texas Legislature instructs courts to resolve claims of wrongful honor of letters of credit as a matter of law when such claims may depend on expert testimony. *See* Tex. Bus. & Com. Code § 5.108 (UCC comment). ***Second***, as a matter of law, the Bank had no choice but to

honor the sight drafts that Global Steel Corporation presented; hence the Bank complied with the express terms of the letter of credit. Tex. Bus. & Com. Code § 5.108. ***Third***, IMS contends that Global Steel Corporation and Global Steel Corp. are separate legal entities and the Bank wrongfully honored drafts presented by Global Steel Corp. Yet in its suit against Global Steel Corporation in Williamson County, IMS pled and argued that the two entities constituted a "single business enterprise." This Court should judicially estop IMS from playing fast and loose with the facts and pleading inconsistent theories to suit its needs in different lawsuits.

III.
SUMMARY JUDGMENT PROOF

The Bank attaches as Exhibit A its summary judgment proof, described in detail in this motion, but summarized as follows:

Exhibit A - Affidavit of David K. Bissinger:

A-1: Kimberly Lerch's deposition, given on December 21, 2006.

A-2: August 31, 2006 transcript of hearing in *IMS v. Global Steel Corp.*, in Williamson County, TX.

A-3: Letter of credit between the Bank and IMS, as authenticated in the Affidavit of Kimberly Lerch, given on May 29, 2007.

A-4: Excerpts from James J. White and Robert S. Summers, Uniform Commercial Code Treatise, 4th Ed., vol. 3.

A-5: Affidavit of Kimberly Lerch, given on May 29, 2007, authenticating documents.

A-6: Deposition of Robert Lutzky, given on August 2, 2006.

A-7: "Agreement for Management Services" between Global Steel Corp. and Global Steel Corporation, as authenticated in the deposition of Robert Lutzky, given on August 2, 2006.

A-8: June 30, 2005 electronic mail message from IMS to Global Steel Corporation stating the Bank agreed to payoff the full standby letter of credit, as authenticated in the deposition of Kimberly Lerch, given on December 21, 2006, as authenticated in the Affidavit of Kimberly Lerch, given on given on May 29, 2007.

A-9: June 10, 2005 sight draft presented to the Bank, for $158,249.14, on Global Steel Corporation letterhead, including invoices from Global Steel Corp, as authenticated in the Affidavit of Kimberly Lerch, given on given on May 29, 2007.

A-10: June 20, 2005 sight draft presented to the Bank, for $20,767.39, on Global Steel Corporation letterhead, including invoices from Global Steel Corp., as authenticated in the Affidavit of Kimberly Lerch, given on given on May 29, 2007.

A-11: July 13, 2005 sight draft presented to the Bank, for $15,091.78, on Global Steel Corporation letterhead, including invoices from Global Steel Corp., as authenticated in the Affidavit of Kimberly Lerch, given on given on May 29, 2007.

A-12: Fourth Amended Petition in *IMS. v. Global Steel Corp.*, alleging that Global Steel Corporation and Global Steel Corp. act as a single enterprise.

A-13: Affidavit of John Robert Hudspeth, given on August 14, 2007, explaining the Bank's standard practices and opining that the Bank's honor was proper.

IV.
UNDISPUTED FACTS

A.
State Bank Issued a Standby Letter of Credit at the Request of IMS for the Benefit of Global Steel Corporation

Kimberly Lerch brokered steel under the corporate name, International Metal Sales. Ex. A-1 at 14, 32. (deposition of Kimberly Lerch of 12/21/06). Lerch was IMS's only employee and operated out of her house in Georgetown. Ex. A-2 at 33, ll. 22-24 (Williamson County hearing transcript) (no employees); Ex. A-1 at 32, ll. 13-17 (Lerch Depo., 12/21/06) (operated out of house). IMS brokered steel by matching steel suppliers with purchasers. IMS did not manufacture steel.

Aware of IMS's thin capital, Global Steel Corporation required IMS to post a letter of credit to ensure payment for IMS's large steel purchases. According to Lerch:

> [Global was] uncomfortable having . . . a $100,000 insurance and maintaining . . . $700,000 open line on [IMS, Lerch's company]. Bob [Lutzky, of Global] had indicated that there is no one else that they extend that kind of credit level to [and] that I either

contact the insurance company and increase the insurance that Global could get on International Metal Sales ***or I provide a standby letter of credit.***

Ex. A-1 at 87, ll.7-15 (Lerch Depo., 12/21/06) (emphasis added).

On March 23, 2005, the Bank issued its Standby Irrevocable Letter of Credit (hereinafter "the standby letter of credit") in Global Steel Corporation's favor, in the amount of $200,000.00. *Id.* at 88, ll. 9-15; Ex. A-3 (letter of credit and testimony authenticating same). Kimberly Lerch personally guaranteed repayment of IMS's debts owed to the Bank, including all amounts drawn under the standby letter of credit.

As discussed in further detail in this motion, when a beneficiary (like Global Steel Corporation) draws on a letter of credit, the issuer must pay – even if the beneficiary has breached the underlying contract. *See generally* 3 White & Summers, Uniform Commercial Code § 26-2, at 113 (1995) (observing that the "independence principle" underlying letters of credit means that "the bank's obligation to the beneficiary is independent of the beneficiary's performance on the underlying contract") (attached as Ex. A-4).

Here, the standby letter of credit contained two provisions relevant to IMS's claims. First, it stated that "[d]rafts are to be accompanied by invoice for the full commercial value of products and/or services and/or charges arising or accruing from ***orders placed by*** and ***accepted from*** International Metal Sales, Inc. . . ." Ex. A-5 (Lerch Aff., 5/29/07); Ex. A-3 (standby irrevocable letter of credit) (emphasis added). In other words, the standby letter of credit made the Bank's obligation dependent on IMS's orders and acceptance of goods from those orders – not whether the invoices supporting a sight draft contained particular names or language.

Second, the standby letter of credit also contained an "assignments" provision that specifically empowered Global Steel Corporation "the right to assign [its] interest in this letter of credit to the party of [Global Steel Corporation's] choice without [the Bank's] consent." Ex. A-5 (Lerch Aff., 5/28/07); Ex. A-3 (letter of credit) (emphasis added). This "assignments" provision

reflects the commercial reality that businesses can and do make and accept assignments of rights and claims in the ordinary course of their operations.

At the same time, Global Steel Corporation also took steps to enable it to act on behalf of a related entity. Global Steel Corporation and Global Steel Corp. had the same president, the same vice president, and the same 50-50 shareholders. Ex. A-6 at 6, ll. 14-25, 14, ll. 9-24 (deposition of Robert Lutzky). In its "Agreement for Management Services," Global Steel Corp. (a company with common ownership with Global Steel Corporation) authorized Global Steel Corporation to "***enter into contracts on behalf of [Global Steel Corp.]***," "mak[e] credit evaluations and decisions relating to [Global Steel Corp.] vendors and customers," and "negotiat[e] prices and other terms" for vendors and customers of [Global Steel Corp.]." Ex. A-7 (emphasis added); *see also* Ex. A-6 at 31 (authenticating agreement).

Again, as with the "assignments" provision of the Standby Letter of Credit, the Agreement for Management Services represents a typical business arrangement for one Global Steel entity to act on behalf of the other.

B.
After Requesting the Standby Letter of Credit, IMS Acknowledged that the Bank Would Honor Sight Drafts Containing "Global Steel Corp." Invoices

In March 2005, at the time IMS requested the Standby Letter of Credit, IMS had already ordered nearly $200,000 worth of steel from Global Steel Corporation. IMS did not pay for the steel but told Global Steel Corporation to draw against the Standby Letter of Credit.

In an email dated June 30, 2005, IMS (through its sole employee Kimberly Lerch) advised Global Steel Corporation that "Bob Lutzky [of Global Steel Corporation], I [Lerch of IMS] and State Bank agreed that the ***bank will payoff the full standby letter of credit total[ing] $200,000*** as the invoices go 90 days." Ex. A-8 (emphasis added); Ex. A-1 at 113-14 (Lerch

Depo., 12/21/06) (authenticating e-mail). Further, Lerch stated, "I know that [Global Steel] had submitted to draw." Ex. A-1 at 123, l. 14.

Global Steel Corporation did indeed submit three sight drafts to the Bank, and the Bank paid Global Steel as IMS/Lerch anticipated and directed. The first was dated June 10, 2005, in the amount of $158,249.14 (Ex. A-9); the second was dated June 20, 2005, in the amount of $20,767.39 (Ex. A-10); and the third was dated July 13, 2005, in the amount of $15,091.78 (Ex. A-11). All three sight drafts were identical except for the date and amount. *See* Exs. A-9 to A-11. Each sight draft directed the Bank to remit payment to Global Steel Corporation's bank account. *Id.*

The sight drafts totaled $194,108.31 – just within the Bank's obligation under the standby letter of credit to honor drafts up to $200,000.00. As per the terms of the standby letter of credit, invoices for the steel were attached to the sight drafts. Most of the invoices were on the letterhead of "Global Steel Corp." instead of "Global Steel Corporation." The "Global Steel Corp." invoices form the basis of Plaintiff's suit.

Importantly, sight drafts that Lerch told Global Steel Corporation that the Bank would honor contained invoices on "Global Steel Corp." letterhead. According to Lerch's June 30, 2005, e-mail, two invoices – nos. 13268 and 13334 (both with "Global Steel Corp." on the letterhead) "are going through the standby letter of credit." Ex. A-8; Ex. A-1 at 113-14 (Lerch Depo., 12/21/06) (authenticating e-mail).

C.
In Williamson County, IMS Alleges that the Global Entities Are a "Single Business Enterprise"

At the same time, in June 2006, IMS sued Global Steel Corporation in Williamson County, Texas, alleging that the steel purchased from Global Steel Corporation was defective.

Global Steel Corporation filed its own suit against IMS in its home state of Pennsylvania, under the name "Global Steel Corp." – not "Global Steel Corporation."

In Williamson County, IMS moved to temporarily enjoin "Global Steel Corp." from prosecuting the Pennsylvania suit. For proof of the Williamson County court's jurisdiction over "Global Steel Corp.," which had not appeared in Williamson County, IMS contended that no distinction existed between "Global Steel Corporation" (the defendant in Williamson County) and "Global Steel Corp." (the plaintiff that sued IMS in Pennsylvania).

IMS made these arguments in its pleadings, proof, and in open court:

- **Pleadings – "there is no real distinction between the two entities."** IMS contended that "despite the fiction of having to separate corporations, Global Steel Corporation and Global Steel Corp., are, and have at all relevant times, been acting as a single enterprise. Both entities are, therefore, jointly and severally liable to Plaintiff [IMS]. [T]here is no real distinction between the two entities." *See, e.g.*, Ex. A-12 ¶ 5, at 2 (Fourth Amended Petition in Williamson County).

- **Proof: that Global always held itself out as a single entity with common owners, managers, and operations.** Lerch swore in an affidavit that she had dealt with Global Steel's owners for almost 20 years and that no one at Global Steel ever advised her that she was dealing with anyone other than "Global Steel Corporation" until "Global Steel Corp." sued her in Pennsylvania. *See* Ex. A-5 (Lerch Aff.). Lerch pointed out that the two supposedly different companies had the same owners, same managers, operated out of the same office, had the same employees, and they operated the same kind of business – steel sales. *Id.*

- **Statements in open court: "it is important that the single business enterprise doctrine be applied."** In the August 2006 temporary injunction hearing, Lerch told Judge Karnes that she believed "corp." was a "standardly [sic] accepted abbreviation for corporation." Ex. A-2 at 36 (Williamson County hearing transcript). As IMS, through counsel, argued to the court at that time: "[W]hen you have someone who represents themselves as a single business enterprise and then tries to invent – not invent but pursue a claim under a hidden entity[,] it is important that the single business enterprise doctrine be applied." *Id.* at 66.

IMS obtained a significant victory with these arguments. In August 2006, Judge Karnes in Williamson County temporarily enjoined both "Global Steel Corporation" and "Global Steel Corp." from pursuing the Pennsylvania litigation. Ex. A-2 at 81 (Williamson County hearing transcript). (Judge Karnes later transferred the case to Pennsylvania on other grounds.)

D.
IMS Takes the Opposite Position in its Travis County Suit Against the Bank

In March 2007, IMS filed this suit against the Bank for wrongfully honoring the Standby Letter of Credit. IMS alleges that that ***"Global Steel Corp. is a completely separate legal entity from Global Steel Corporation."*** Pltf's Orig. Pet. ¶ 10, at 3 (emphasis added). This allegation omits the fact that IMS pleaded and proved in the Williamson County case. In September 2007, this Court recognized the flaws in IMS's case and declined to grant IMS's motion for summary judgment against the Bank.

V. ARGUMENT

A.
The Court Should Decide This Case on Summary Judgment

The Texas Legislature has directed the courts to decide matters relating to questions of proper honor or dishonor of letters of credit. *See* Texas UCC § 5.108(e) and comment. That guidance applies with particular force when, as here, no significant factual disputes exist. Under Texas UCC § 5.108(e), the question of so-called "standard practice" of banks issuing letters of credit "is a matter of interpretation for the Court," and thereby should be decided on summary judgment. As the commentary to the Texas UCC states:

> Granting the court authority to make these decisions [in article 5 disputes] will . . . ***encourage the salutary practice of courts' granting summary judgment in circumstances where there are no significant factual disputes.*** The statute encourages outcomes such as *American Coleman Co. v. Intrawest Bank,* 887 F.2d 1382 (10th Cir. 1989), where summary judgment was granted.

Tex. Bus. & Com. Code § 5.108 (UCC comment) (emphasis added).

The Bank's motion for summary judgment rests principally on undisputed evidence arising from the text of the standby letter of credit, the sight drafts, and other undisputed facts

without reference to "standard practices." That undisputed factual evidence presents a far stronger case for summary judgment than the garden-variety "standard practice" summary judgment that the Uniform Commercial Code contemplates.

As a supplement to this undisputed factual record, the Bank also presents undisputed evidence of UCC standard practices in the affidavit of banker Robert Hudspeth, presented to the Court in opposition to IMS's summary judgment motion in late 2007. IMS has never disputed Mr. Hudspeth's conclusions. The Hudspeth affidavit supplements the already compelling record before this Court.

Moreover, given this Court's denial of IMS's motion for summary judgment and the directive of the Texas Legislature to decide cases like this as a matter of law, this Court should grant the Bank's motion and dismiss IMS's groundless claim.

B.
The Bank Was Required to Honor Global Steel's Sight Drafts

1. Under the Text of the Standby Letter of Credit, the Bank Was Required to Honor the Sight Drafts

"A 'sight' draft is a draft which is payable on demand." *Temple-Eastex Inc. v. Addison Bank,* 672 S.W.2d 793, 777 (Tex. 1984) If the presentment by the beneficiary strictly complies with the terms of the letter of credit, then the issuer has no choice but to honor its obligations there under and pay according to those terms. *Westwind Exploration, Inc. v. Homestate Sav. Ass'n,* 696 S.W.2d 378, 381 (Tex. 1985).

Here, the Bank was required to honor Global Steel's sight drafts for three reasons: (a) IMS concedes that it ordered and accepted the steel made basis of the sight drafts; (b) Global Steel Corporation had written authority to act on Global Steel Corp.'s behalf; and (c) the standby letter of credit expressly permitted such sight drafts under its "assignments clause." Each of these reasons is discussed in detail below.

(a) The Bank's Obligation to Honor Arose from IMS's Ordering and Accepting the Steel, Not the Identity of the Invoiced Party.

First, Global Steel's rights under the standby letter of credit arose from invoices that reflected products that IMS ordered and accepted. Those rights did not depend on what the invoices said. The standby letter of credit itself states simply that "[d]rafts are to be accompanied by invoice for the full commercial value of products and/or services and/or charges arising or accruing from ***orders placed by*** and ***accepted from*** International Metal Sales, Inc. . . ." Ex. A-5 (Lerch Aff.); Ex. A-3 (letter of credit) (emphasis added).

Here, no dispute exists that IMS ordered and accepted the steel. Indeed, IMS admits that it knew the Bank would be liable for those orders before the Bank disbursed the funds to Global Steel. In an email dated June 30, 2005, IMS/Lerch advised Global in that email that "Bob Lutzky [for Global], I [Lerch for IMS] and State Bank agreed that the ***bank will payoff the full standby letter of credit totally [sic] $200,000*** as the invoices go 90 days." Ex. A-8; Ex. A-1 at 113-14 (Lerch Depo., 12/21/06) (authenticating e-mail). As Lerch admitted, "I know that [Global] had submitted to draw." Ex. A-1 at 123, l. 14.

Further, Lerch knew and raised no option to payment of the "Global Steel Corp." invoices. In the same June 30, 2005 email, Lerch advised Global in an e-mail that "Global Steel Corp" invoices (here, nos. 13268 and 13334) "are going through the standby letter of credit." Ex. A-8; A-1 at 114 (authenticating e-mail). Thus, IMS, Global, and State Bank all acknowledged that the invoices were pending, that IMS had ordered and accepted the steel, and that the Bank would pay those invoices. Under these undisputed facts, IMS's theory of the Bank's supposed wrongful honor of the Global Steel sight drafts fails as a matter of law.

(b) The "Agreement for Management Services" Between Global Steel Corporation and Global Steel Corp. Gave Global Steel Corporation the Right to Tender the Sight Drafts.

An "Agreement for Management Services" between Global Steel Corporation and Global Steel Corp. gave Global Steel Corporation authority to act on Global Steel Corp.'s behalf. Under the agreement, Global Steel Corporation agreed to "***enter into contracts on behalf of [Global Steel Corp.]***," "mak[e] credit evaluations and decisions relating to [Global Steel Corp.] vendors and customers," and "negotiat[e] prices and other terms" for vendors and customers of [Global Steel Corp.]." Ex. A-7 (emphasis added).

This agreement leaves no doubt that Global Steel Corporation's tender of sight drafts was proper. The Bank's duty to accept orders from the agents and assigns of Global Steel Corporation did not change simply because Global Steel Corporation ordered Global Steel Corp. to fill the order. How Global Steel Corporation allocated its orders among affiliates has no impact on whether the Bank properly honored the sight drafts.

(c) The Standby Letter of Credit Contemplated This Exact Case in its "Assignments" Provision.

Indeed, the standby letter of credit contemplated exactly this case when it stated that "[the Bank] understand[s] [Global Steel Corporation has] ***the right to assign*** [its] interest in this letter of credit ***to the Party of [Global Steel Corporation's] choice without [the Bank's] consent***." Ex. A-5 (Lerch Aff.); Ex. A-3 (letter of credit) (emphasis added). Just as the "Agreement for Management Services" contemplated that Global Steel Corporation might place orders for Global Steel Corp., the assignments provision of the standby letter of credit recognized the commercial realities between affiliated companies in cases just like this one. Therefore, even if somehow it was otherwise improper for Global Steel Corporation to rely on Global Steel Corp. invoices in presenting sight drafts to the Bank, this "assignment" clause –

with or without the Management Services Agreement – gave Global Steel Corporation the right to tender the "Global Steel Corp." sight drafts and required the Bank to honor them.

2. The Bank Had an Affirmative Duty to Pay Because Extrinsic Evidence Cured Any Theoretical Discrepancy <u>Between Global Steel Corporation and Global Steel Corp.</u>

Even if somehow the factual record here contained a discrepancy because of the names "Global Steel Corporation" and "Global Steel Corp." (a discrepancy that the Bank denies ever existed), nothing about it required the Bank to refuse to honor the Global Steel sight drafts. The extrinsic evidence available then and now made clear that whatever distinction existed made no difference.

The responsibility of the issuer under a letter of credit is to examine documents and to make a prompt decision to honor or dishonor based upon that examination. *See* Texas UCC § 5.108 (Comment 9). That prompt decision requires courts to forgive complaints about possible discrepancies that would be unreasonable to require issuing banks to investigate. A bank is not required or equipped to undertake an investigation into the law or facts.

The First Circuit emphasized the duty of a bank to honor sight drafts when extrinsic evidence cures any ambiguities in *Flagship Cruises, Ltd. v. New England Merchants Nat'l Bank*, 569 F.2d 699, 704 (1st Cir. 1978). In *Flagship Cruises*, a bank refused to honor a draft drawn by corporate agent Flagship, *Inc.* instead of principal beneficiary Flagship, *Ltd.* However, the court concluded that an accompanying document unmistakably cured the discrepancy. The court found that the issuing bank had a duty to honor the draft to the extent that "there is no possibility that the documents could mislead the paying bank to its detriment." *Id.* at 705.

Under the *Flagship Cruises* rule, not only was the Bank's honor of Global Steel Corporation's sight draft proper, the factual record before this Court would have made the Bank

liable to Global Steel Corporation if the Bank had failed to honor the sight drafts.

In fact, under cases like *Flagship Cruises,* holding a bank liable for wrongful honor flies in the face of core principles of the Texas UCC. A bank has a far greater incentive to dishonor a sight draft (and preserve capital) than it does to honor it. As White & Summers note,

> For several reasons we believe it should be an unusual case in which the applicant successfully recovers from the issuing bank for wrongful honor under 5-109 or 5-114(2)(b). ***In the usual case the bank's bias and its selfish interest run exclusively toward dishonor.*** In the normal case, the issuer's most obvious and intense interest will be in its applicant as against a diffuse and remote interest in the integrity of the letter of credit system. If we are to preserve the independence principle and bolster the utility of letters of credit, the law must encourage banks to act in a relatively disinterested way, namely to pay. ***Moreover, one should have sympathy for the bank in this position. The bank earns only a small fee, has a limited amount of time to make a decision and, at least when it acts in good faith, courts should be sympathetic to its judgment about beneficiary's compliance with the credit.***

3 White & Summers § 26-11, at 187 (emphasis added) (attached as Ex. A-4).

That incentive to dishonor grows even larger when a beneficiary draws against a standby letter of credit. A beneficiary can draw on a standby letter of credit only after the borrower has defaulted on an obligation to the beneficiary. 3 White & Summers, § 26-1, at 108 (attached as Ex. A-4). As White & Summers note, a draw on a standby letter of credit usually means that something has gone awry. *Id.*

Here, as in *Flagship Cruises,* no question exists that the Bank had a duty to honor Global Steel's sight drafts against IMS. IMS had ordered and accepted the steel made basis of the sight drafts. IMS knew that Global Steel would submit the sight drafts and that the Bank would honor them.

3. The Undisputed Evidence of UCC Standard Practices Required the Bank to Honor the Drafts

Beyond the Bank's duty to pay in the face of the text of the stand by letter of credit and the inconsequential discrepancy between Global Steel Corp. and Global Steel Corporation, the

undisputed evidence of UCC standard practices requires the Court to grant the Bank's motion for summary judgment.

Texas UCC § 5.108(a) states that an "issuer ***shall*** honor a presentation that, as determined by "standard practices," referred to in Subsection (c), appears on its face strictly to comply with the terms and conditions of the letter of credit." (Emphasis added.) Beyond the strict text of the standby letter of credit, the undisputed evidence of standard practices in this case required the Bank to honor the sight drafts.

Moreover, as explained in section IV(A) above, this Court must make that determination as a matter of law after giving the parties "a reasonable opportunity to present evidence of the standard practice." *See* Texas UCC § 5-108(e). The Texas UCC makes this point clear: "Determination of the issuer's observance of the standard practice ***is a matter of interpretation for the court.*** " *Id.* (emphasis added). And, as the commentary states, "[i]dentifying and determining compliance with standard practice are matters of interpretation for the court, ***not for the jury.***" Tex. Bus. & Com. Code § 5.108, comment 1 (emphasis added).

IMS has had ample opportunity to provide proof of "standard practices," and has failed to do so. When IMS moved for summary judgment more than a year ago, IMS failed to dispute – or even to object – to the affidavit regarding standard banking practices from John Robert Hudspeth, a Texas commercial banker with 40 years of experience.

Mr. Hudspeth's affidavit contains three opinions that dispose of IMS's claims as a matter of law. Ex. A-13. First, Mr. Hudspeth opines that "[t]he letter of credit does not contain any requirement that the invoices, bills of lading, or other proof of delivery to be presented with drafts must name Global Steel Corporation, or that Global Steel Corporation must be located at or name a particular address." *Id.* at 2.

Second, because the Standby Letter of Credit allowed Global Steel Corporation "to assign [its] interest in this letter of credit to the Party of your choice without [the Bank's] consent," Ex. A-3, the drafts did not have to come from Global Steel Corporation at all. Ex. A-13 at 2 (Hudspeth Aff.). Therefore, "the Drafts therefore strictly complied with the Letter of Credit." *Id.* Further, according to the affidavit testimony of Mr. Hudspeth, "State Bank's decision to honor the Drafts complied with Standard Practice." *Id.*

Third, Mr. Hudspeth noted that "Global Steel Corp. and Global Steel Corporation appeared to be one and the same entity based upon the documents presented to State Bank with the Drafts" and that "'Corp.' is a very well-known and widely used standard abbreviation for 'Corporation.'" *Id.* at 3. (Kimberly Lerch of IMS said the same thing in Williamson County when she testified that "corp." is a "standardly [sic] abbreviation for "corporation." Ex. A-2 at 36.)

Therefore, Mr. Hudspeth opined, "it is consistent with the Standard Practice for State Bank to regard Global Steel Corporation and Global Steel Corp. as one entity under these circumstances."

In short, whether reviewed from the plain text alone or in conjunction with the undisputed Hudspeth Affidavit, the undisputed evidence of standard practices proves that the Bank satisfied article 5 when it honored Global Steel Corporation's sight drafts.

C.
Judicial Estoppel Bars IMS's Claim Because of IMS's Prior Inconsistent Position That Global Steel Corporation and Global Steel Corp. Constituted a "Single Business Enterprise"

Courts judicially estop parties when, after obtaining an advantage with one position in one court, waffle on that position to obtain another advantage in a new court. As the Fifth Circuit has observed, "the purpose of the doctrine is to protect the integrity of the judicial

process by preventing the parties from playing fast and loose with the courts to suit the exigencies of self interest." *In re Coastal Plains, Inc.*, 179 F.3d 197, 205 (5th Cir. 1999) (citations and quotations omitted). The court reasoned:

> Courts have used a variety of metaphors to describe the doctrine, characterizing it as a rule against playing fast and loose with the courts, blowing hot and cold as the occasion demands, or having one's cake and eating it too. Emerson's dictum that a foolish consistency is the hobgoblin of little minds cut no ice in this context.

Id. at 205 n.1 (citations and quotations omitted).

As the *Coastal Plains* court observed, the need to estop a flip-flopping party becomes most pressing when four things happen. First, the party takes a position totally inconsistent with the position it took in an earlier proceeding . *Id.* at 205 ("The purpose of the doctrine is to protect the courts from the perversion of judicial machinery."). Second, the party obtained a favorable ruling when it took that earlier, now inconsistent, position. *See id.* at 206 n.5. Success on the old position is not a requirement for judicial estoppel, but it makes the case for estoppel all the more compelling. *Id.* Third, the waffling party's earlier position involved a factual, as opposed to legal, claim. *Id.* Fourth, the party acted intentionally, not inadvertently, when it took the earlier claim: "the rule looks toward cold manipulation and not an unthinking or confused blunder." *Id.* at 207 (citations and quotations omitted).

IMS's position against Global Steel Corporation involves all four factors that require this Court to estop it from trying to manipulate the judicial process to serve its current self-interest of a corporate distinction between "Global Steel Corporation" and "Global Steel Corp."

- **<u>First: IMS's Positions Are Precise Opposites</u>**. In Williamson County, IMS argued that the court should treat the Global Steel entities as a "single business enterprise" as a ploy to avoid Global Steel's effort to sue IMS in Pennsylvania. Ex. A-2 (Williamson County hearing transctipt). In this case, IMS alleges the opposite fact to avoid the debt it knowingly undertook to the Bank when, through Lerch, IMS instructed Global Steel Corporation to draw on the "full standby letter of credit totall[ing] $200,000 as [IMS's unpaid invoices to Global go 90 days]." Ex. A-8 (E-mail from IMS to Global Steel Corporation); Ex. A-1 at 113-14 (Lerch Depo.) (authenticating e-mail).

- **Second: IMS Exploited the Contrary Position to Its Benefit**. In Williamson County, IMS obtained an anti-suit injunction against Global Steel Corporation from proceeding with its "Global Steel Corp." claim in Pennsylvania. As Judge Carnes observed, "[t]hese [Global Steel] names have been – seem to have been used interchangeably to the point that I find it is probable that there will be a finding of a single business enterprise." Ex. A-2 at 80-81.

- **Third: IMS's Allegations Were Factual, Not Legal**. IMS was making a purely factual argument in Williamson County when it said that no distinction existed between "Global Steel Corporation" and "Global Steel Corp." IMS made this clear when it said that "[t]here has been ***enough evidence presented to show*** that Global Steel Corp., and Global Steel Corporation are acting as a single business enterprise. Ex. A-2 at 65 (emphasis added).

- **Fourth: IMS Made This Argument Intentionally, Not Inadvertently**. IMS made its "single enterprise" argument about "Global Steel Corporation" and "Global Steel Corp." the centerpiece of its August 31, 2006 argument; in no way could it ever be characterized as a position made inadvertently.

IMS's inconsistent pleadings and prior statements in Williamson County require this Court to apply the doctrine of judicial estoppel and deny IMS's claim, based on wholly contradictory legal position as a matter of law.

VI.
CONCLUSION AND PRAYER

In light of all the reasons why IMS's claims lack merit, the Bank respectfully requests that this Court grant its motion for traditional summary judgment.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing instrument was delivered to all counsel of record herein via first class mail and/or certified mail with a return receipt requested, and/or via facsimile, and/or via personal delivery on this the 1st day of October, 2008:

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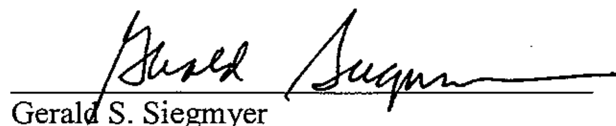

Gerald S. Siegmyer

CAUSE NO. D-1-GN-07-000772

INTERNATIONAL METAL SALES, INC.,	§	IN THE DISTRICT COURT
	§	
Plaintiff	§	
	§	
v.	§	
	§	
STATE BANK (NOW KNOWN AS PROSPERITY BANK), AND PROSPERITY BANK,	§ § §	
	§	
Defendants and Third-Party Plaintiffs,	§	
	§	
v.	§	250TH JUDICIAL DISTRICT
	§	
KIMBERLY A. LERCH,	§	
	§	
Third-Party Defendant and Counter-Plaintiff,	§	
	§	
v.	§	
	§	
PROSPERITY BANK and FRITZ, BYRNE, HEAD & HARRISON, LLP,	§ §	
	§	
Counter-Defendants and Third-Party Defendants.	§ §	OF TRAVIS COUNTY, TEXAS

Prosperity Bank's Reply in Support of its Traditional Motion for Partial Summary Judgment Relating Only to IMS (Subject to Prosperity Bank's Objections to and Motion to Strike Affidavit of Kimberly Lerch)[1]

I. SUMMARY OF REPLY

IMS makes four arguments in opposition to the Bank's summary judgment motion:

[1] Concurrently with this Reply, the Bank is filing its Objections to and Motion to Strike the Affidavit of Kimberly Lerch. The Lerch Affidavit consists of 34 single-spaced pages of incoherent ramblings and musings that go far beyond the points raised in IMS's Response. Moreover, the Lerch Affidavit should be stricken for its legal conclusions, its speculations about the Bank's state of mind, and its failure to attach pertinent documents. The Bank incorporates its Objection to and Motion to Strike for all purposes herein.

IMS's Argument #1: "State Bank paid out based on documentation from the wrong entity." This argument fails for three reasons. First, the standby letter of credit required the Bank to honor sight drafts submitted by Global Steel Corporation; the standby letter of credit did not require that the invoices come from any particular vendor. IMS's argument relies on a distinction without a difference. Second, the Bank's "notice" that certain invoices submitted with the sight drafts were on the letterhead of "Global Steel Corp.," instead of "Global Steel Corporation," did not affect the Bank's obligation to strictly comply with the instructions on the face of the standby letter of credit, particularly because IMS specifically instructed the Bank to honor the sight drafts and because Global Steel Corporation and Global Steel Corp. operated as one company. Third, because the Bank in fact paid (against its economic interest in light of IMS's inevitable collapse), Texas law requires the Court to give the benefit of the doubt to the Bank.

Argument #2: "Assignment is not a transfer." IMS is misguided in its arguments about UCC concepts of "transfer" of letters of credit (usually arising out of mergers) and "assignment" of proceeds. The plain language of the standby letter of credit required the Bank to honor Global Steel Corporation's sight drafts. The Bank paid Global Steel Corporation. The corporate arrangement between the commonly owned entities giving "Global Steel Corporation" the right to act for and on behalf of "Global Steel Corp." further undermines IMS's argument.

Argument #3: "The doctrine of judicial estoppel is inapplicable." IMS asks this Court to exempt it from the doctrine of judicial estoppel because (a) IMS "ultimately" failed in contending that the Global entities comprised a "single business enterprise; and (b) IMS meant for the "single business enterprise" doctrine to apply only "for purposes of liability," not for the

legal conclusion that the entities are one and the same. As to point (a), IMS is wrong on whether it had to be "ultimately" successful. As to point (b), IMS's position falls woefully short. IMS's attempt to distinguish its subjective purpose in making its "single business enterprise" argument in Williamson County and then abandoning the argument in this litigation reflects exactly the kind of "playing fast and loose" with the courts that the doctrine of judicial estoppel forbids.

Argument #4: "Notwithstanding any of the foregoing arguments," the Bank "fail[ed] to require and obtain supporting documentation." IMS has alleged a new theory to defeat summary judgment. IMS alleges that technical defects in the documentation of the sight drafts (never before alleged in the pleadings) override IMS's explicit instructions to the Bank to honor the drafts. IMS's complaints fail as a matter of law. Even worse, IMS ignores important facts in making those clams.

II.
ARGUMENT AND AUTHORITIES

IMS Argument #1: "State Bank Paid Out Based on Documentation from the Wrong Entity." (pp. 4-5)

IMS contends that the Bank "should have been on notice" that the invoices accompanying the sight draft were "from the wrong entity." The argument fails because (1) the plain language of the standby letter of credit obligated the Bank to honor the sight drafts; (2) IMS itself admits that the Bank could not have been on notice of the "Corporation" versus "Corp." distinction; and (3) the law requires the Court to give the Bank the benefit of the doubt because the Bank honored the sight drafts against its economic interests.

a. The Bank Was Obligated to Honor the Sight Drafts

No genuine issue of material fact exists that IMS ordered and received the steel and then failed to pay. This triggered Global Steel Corporation's draws on the standby letter of credit. The standby letter of credit has no requirement that the invoices submitted with the sight drafts come from Global Steel Corporation, or any other entity for that matter. The standby letter of credit only requires that the invoices accompany the sight drafts; the fact that some invoices submitted were on the letterhead of "Global Steel Corp." is of no consequence. Moreover, if IMS disputed the invoices, IMS could have sought an injunction preventing the Bank from honoring the sight drafts. IMS failed to do so. Instead, IMS specifically advised the Bank to pay the sight drafts.

The standby letter of credit states:

> "Drafts are to be accompanied by invoice for the full commercial value of products and/or services and/or charges ***arising or accruing from orders placed by and accepted from International Metal Sales, Inc.***"

Ex. A-3 (letter of credit) (emphasis added).

IMS argues that some invoices accompanying the sight draft from "Global Steel Corporation" were on letterhead of "Global Steel Corp." Nothing in the standby letter of credit barred the Bank from honoring sight drafts that contained invoices from vendors other than "Global Steel Corporation." The standby letter of credit only required that the attached invoices reflect "the full commercial value" of products, services, or charges "arising or accruing from orders placed by and accepted from International Metal Sales, Inc." Ex. A-3 (underlining in original).

IMS now suggests that somehow it never ordered or took delivery of the steel. *See, e.g.*, Response, ¶ 22, at 7 (alleging no proof of "an order placed by or accepted by Plaintiff"); ¶ 23, at

7-8 (same); ¶ 24, at 8 ("[T]here is nothing to suggest, much less prove, that Plaintiff took delivery of anything."). These insinuations are specious. IMS has not only suggested, but has admitted and proven conclusively that it ordered and took delivery of all the steel in this case.

First, in IMS's Williamson County lawsuit against Global Steel, IMS alleged that "upon delivery," Global Steel's products "were determined to be defective, deficient, or otherwise as not represented by [Global Steel]." Ex. A-12, ¶ 15, at 4. (Only after IMS lost its claims against Global Steel in Williamson County did IMS sue the Bank in Travis County.) For IMS to have represented that it took delivery of steel in the Williamson County case but deny that allegation in this case raises troubling questions about its good faith in this Court. Second, at the time Global Steel Corporation tendered the sight drafts in the summer of 2005, IMS told the Bank, again and again, that it had taken delivery of the steel.

In June 2005, just after Global Steel Corporation presented the first (and largest) sight draft, $158,249.14, IMS asked the Bank to consider whether the Bank could honor the Global Steel sight draft ***by returning the steel of which IMS had taken delivery***. *See* Ex. A-14 (email and accompanying memo discussing whether the Bank could "fulfill the letter of credit by returning [to] Global the $200,000 worth of steel [International] Metal Sales has purchased") (Lerch TPD-CP00011).

The Bank correctly concluded, after consulting legal counsel, that the standby letter of credit required the Bank to pay Global Steel Corporation in cash – not in returned steel. At that point, Kimberly Lerch instructed the Bank to pay: "***ok - pay the 158249.14*** [*i.e.*, the first and largest sight draft of $158,249.14] - I will get with Global on this matter -- then will let you know what we have or have not worked out . . . ." Lerch TPD-CP00016 (Ex. A-15) (emphasis added).

In short, the undisputed facts show that IMS ordered and took delivery of the steel described in the invoices submitted, IMS's artful pleading notwithstanding. IMS's statements and pleadings require the Court to grant summary judgment for the Bank.

b. *Notice to the Bank: As IMS Itself Admitted (Until Filing This Lawsuit), Neither the Bank Nor IMS "Could Have Expected" Multiple Global Steel Entities*

IMS argues that "[t]he real issue is whether the Bank should have been on notice that it was not receiving documentation from the entity named as the beneficiary in the letter of credit." (Response, ¶ 14, at 4.)

The Bank agrees that notice is "the real issue," but the Court must consider this "notice" argument from the perspective of the few days in June 2005 during which the Bank had to decide whether to honor or dishonor the sight drafts. The Court must reject IMS's invitation to view "notice" from the perspective of the nearly four years IMS has had to investigate, litigate, and speculate about all the different ways it might use legal gamesmanship to avoid its plain obligation under the standby letter of credit.

Nothing in the documents available at the time put the Bank on notice of any discrepancy. The Bank is not required to make an investigation into corporate separateness. Moreover, the Bank is not an arbiter of whether the steel conformed to the buyer's requirements. If that were the case, letters of credit would be rendered virtually useless.

IMS/Lerch herself assured the Bank in 2006 (long after the Bank's ten-day window in June 2005 to honor or dishonor the sight drafts had come and gone) that the discovery of multiple Global Steel entities opened ***"[a] can of worms that neither of us expected."*** Ex. A-16 (TPD-CP 00029) (emphasis added).

Indeed, IMS/Lerch said in its Williamson County case against Global Steel Corporation that "corp." is a "standardly [sic] abbreviation for corporation." Ex. A-2 at 36 (Lerch

testimony). By IMS's own reckoning, neither IMS nor the Bank had "notice" of the "Corp." versus "Corporation" distinction upon which IMS bases its claims against the Bank.

IMS points to the different addresses and phone numbers of the two Global Steel entities. But under the Uniform Customs and Practice for Documentary Credits ("UCP"), which are incorporated into the Texas UCC under § 5-108, addresses in sight drafts or "***stipulated document[s] . . . need not be the same*** as those stated in the [letter of] credit" so long as they are in the same country. *See* UCP 600 Art. 14j, (emphasis added) (Ex. A-17); *cf.* Texas UCC § 5-108 comment 8 (incorporating UCP).

Similarly, the UCP allows the Bank to accept data that is not identical to the documentary requirements, so long as the data does not conflict. UCP 600 Art. 14d; *see also* Tex. Bus. & Comm. Code § 5.108(a) ("an issuer shall honor a presentation that . . . ***appears on its face*** strictly to comply . . .") (emphasis added); *RTC v. Kimball*, 963 F.2d 820, 823 (5th Cir. 1992) (rejecting similar claim of wrongful honor where drafts facially complied with the letter of credit).

IMS's instruction to the Bank to honor the sight drafts was and is binding on IMS and conclusively resolves the case. IMS had the right to alter the terms of the standby letter of credit at any time as long as it did not affect the rights of the beneficiary.

Furthermore, instructing the Bank to honor the sight draft operated as a waiver of IMS's right to further challenge the transaction. IMS could have, but did not, choose to seek an injunction to enjoin the Bank under Texas UCC § 5.109(b)(2).

IMS made this decision with the benefit of counsel. Ex. A-18 (email of 6/7/05) ("Please have your attorney call my attorney...It seems we may have no choice but to pay in cash...on anything 90+ days."). Second, as noted above, on June 20, 2005, Lerch/IMS emailed the Bank:

"***ok - pay the 158249.14***. . . .- I will get with Global on this matter -- then will let you know what we have or have not worked out . . . ." Lerch, TPD-CP00016. (Ex. A-15) (emphasis added). Third, on June 30, 2005, Lerch/IMS confirmed in an email to Global that the two remaining invoices, totaling $50,859.17 "are going through the standby letter of credit . . . . The bank will payoff the full standby letter of credit total[ling] $200,000 as the invoices go 90 days." Ex. A-8.

In every possible way, IMS itself has precluded any question of the Bank's honor of Global Steel Corporation sight drafts.

c. *Even Without IMS's Attempted Distortions of the Evidence, the Law Favors the Bank.*

If the Bank had dishonored the Global Steel sight drafts, binding Texas precedent would have found the Bank liable to Global Steel Corporation. Texas courts are biased in favor of honoring sight drafts in letter-of-credit cases in which beneficiaries (*i.e.*, like Global Steel Corporation) allege "wrongful dishonor" in the face of similar trivial discrepancies.

For example, in *New Braunfels Nat. Bank v. Odiorne*, 780 S.W.2d 313, 316 (Tex. App. – Austin 1989, writ denied), the court held that that superficial discrepancies in a sight draft gave the Bank no grounds for dishonor. To the contrary, courts protect banks from having to know the commercial impact of discrepancies in sight drafts and supporting documents when the bank honors the sight draft. *Id.*

On the other hand, courts rule against banks that fail to honor sight drafts in the face of minor discrepancies relating to extrinsic facts outside of banks' limited knowledge. *Id.* at 317-18; *see also All American Semiconductor, Inc. v. Wells Fargo Minnesota*, 2002 U.S. Dist. LEXIS 27769 (D. Minn. March 7, 2002), *aff'd* 105 Fed. Appx. 886 (8th Cir. 2004) (minor

variance in applicant's name gave Bank no protection against beneficiary's claim of wrongful dishonor).

As the leading UCC treatise observes, "[a]t least when [the Bank] acts in good faith, courts should be sympathetic to its judgment about [Global Steel's] compliance with the credit." 3 White & Summers § 26-11, at 187 (Ex. A-4).

Nothing about the supposed "strict compliance" cases cited by IMS changes this Court's obligation to give the benefit of the doubt to the Bank. IMS relies on *Courtaulds, Inc. v. NCNB*, 528 F.2d 802 (4th Cir. 1975), for the proposition (in IMS's words) that "[s]trict compliance does not allow for approximation, and close does not count." (Response, ¶ 12, at 4.) Texas and the leading UCC authorities reject IMS's extreme view of strict compliance that IMS (incorrectly) attributes to *Courtaulds*.[2]

In fact, the Austin Court of Appeals has observed "that strict compliance [does not] demand[] an oppressive perfectionism," particularly with respect to extrinsic commercial facts that no bank examiner could possibly know. *See New Braunfels*, 780 S.W.2d at 316.

IMS's other case, *Cobb Restaurants, LLC v. Texas Capital Bank, N.A.*, 201 S.W.3d 175 (Tex. App. – Dallas 2006, no writ), is also distinguishable. Unlike the present case, in *Cobb*, the party tendering the sight drafts and demanding payment ("McKinney Office") acknowledged in the sight draft that it was not the beneficiary named in the letter of credit

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[2] *Courtaulds* involved an unusual instance of alleged wrongful dishonor in which the Bank refused to honor sight drafts with invoices marked "Imported Acrylic Yarn" when the letter of credit expressly required the invoices to state "100% Acrylic Yarn." *Id.* at 804. The Fourth Circuit concluded that the Bank properly dishonored in light of the discrepancy. *Id.* at 807-08. Here, unlike *Courtaulds*, the letter of credit contained no express requirements about the verbiage on the invoices, let alone specific identification of the vendor as "Global Steel Corporation."

("McKinney Land"), but instead that McKinney Office had succeeded to McKinney Land's rights as beneficiary.

In other words, the alleged beneficiary admitted expressly before the Bank paid the sight draft that it was not the same beneficiary. Moreover, the applicant in *Cobb* expressly objected to the presentment before the bank honored the sight draft. *Id.* at 177. As a result, the bank had unquestionable and undisputed actual notice of a discrepancy of corporate entities and an objection from the applicant to the sight draft before the Bank honored it. Not surprisingly, the Dallas Court of Appeals ruled that the Bank wrongfully honored the sight draft that McKinney Office presented. In short, the bank's actual notice of corporate discrepancies in *Cobb* supports Prosperity Bank, not IMS, given that the parties here agree that the Bank had no notice (actual or otherwise) of the discrepancy in the identity of the beneficiary.

IMS Argument #2: "Assignment is Not Transfer." (p. 5)

IMS argues that there is no summary judgment evidence that Global Steel Corporation assigned its interest in the standby letter of credit to Global Steel Corp. (Response, at 5.)

IMS misses the point. At all times, Global Steel Corporation retained its right "to draw or otherwise demand performance" under the standby letter of credit. Global Steel Corporation never transferred the right "to make demands" under § 5.112(a) to Global Steel Corp. However, under the "Agreement for Management Services," Global Steel Corporation had the right to act on behalf of Global Steel Corp.; in other words, when Global Steel Corp. gave power to Global Steel Corporation to "enter into contracts on behalf of [Global Steel Corp.], Global Steel Corporation retained the right "to draw or otherwise demand performance" under the standby letter of credit. *See* Texas UCC § 5.112(a). The Bank does not and need not allege a transfer of

any kind under § 5.112(a). Global Steel Corporation tendered the sight draft, exactly as the standby letter of credit required.

Moreover, Global Steel's sight drafts included, as the standby letter of credit required, "invoices for the full commercial value of products . . . or charges arising or accruing from orders placed by and accepted from International Metal Sales, Inc. . . ." Under the express terms of the standby letter of credit, Global Steel Corporation had the right to draw on behalf of any vendor of goods to IMS, so long as IMS had placed the order for the goods. The standby letter of credit did not require an assignment.

IMS Argument # 3: No Judicial Estoppel Occurred Because IMS "Ultimately" Lost on Its Single Business Enterprise Theory, or, In the Alternative, IMS Alleged that Theory Only "For Purposes of Liability" (pp. 5-6)

IMS makes two arguments to avoid judicial estoppel. First, IMS relies on *AAA Apartment Plumbers, Inc. v. DPMC-Briarcliff, LP*, 2006 WL 2827275, 2006 Tex. App. LEXIS 8576 (Tex. App. – Houston [14th Dist.] 2006, no writ), for the proposition that the party to be estopped must have been ultimately successful in maintaining a prior, inconsistent statement in a prior proceeding. (Response, ¶ 18, at 6.) But nothing in *AAA Apartment Plumbers* says this.

To the contrary, *AAA Apartment Plumbers* points out that the doctrine of judicial estoppel applies with respect to inconsistent statements, as here, that a party makes in an earlier case, but not with respect to an appeal of the same case. *Id.* at *16 (Ex. A-18).

Nothing about that holding imposes a heavier burden on the Bank; the law of judicial estoppel requires only success in some respect, not necessarily ultimate success in the earlier case. *See, e.g., In re Coastal Plains, Inc.*, 179 F.3d 197, 205 (5th Cir. 1999). Here, IMS successfully obtained a temporary injunction with Judge Carnes's finding that "it its probable that there will be a finding of single business enterprise." (Ex. A-2, at 80-81.)

Second, IMS contends that this Court should reject the Bank's judicial estoppel defense because IMS only argued the "single business enterprise" theory "*for purposes of liability.*" (Response, ¶ 19, at 6.) IMS contends that under *Paramount Petroleum Corp. v. Taylor Rental Center*, 713 S.W.2d 534 (Tex. App – Houston [14th Dist. 1986, no writ]), the doctrine "does not and cannot make two separate entities merge into a single unit." (Response, ¶ 19, at 6.) Yet that is exactly what *Paramount Petroleum* teaches: when the true facts reveal that two entities "integrate their resources to achieve a common purpose," the law treats them as one. 712 S.W.2d at 536. In fact, that is exactly what IMS told Judge Carnes when it said that "[t]here has been enough evidence presented to show that Global Steel Corp. and Global Steel Corporation as acting as a single business enterprise." Ex. A-2 at 65 (IMS closing argument, 12/21/06, Williamson County).

IMS's effort to minimize its arguments in the prior Williamson Counter case represents the "ineffectual hair-splitting" that courts reject in judicial estoppel cases. *See, e.g., Ahrens v. Perot Sys. Corp.*, 39 F. Supp. 2d 773, 778-79 (N.D. Tex. 1999). To the contrary, the doctrine of judicial estoppel exists precisely for the "purpose of preventing the parties from playing fast and loose with the Courts to suit the exigencies of self interest." *Coastal Plains, Inc.,*179 F.3d at 205 (citation and quotations omitted).

Without question, judicial estoppel bars IMS from arguing one doctrine in one action for one purpose, and then denying it in another for another purpose. *See, e.g., In re Cooper*, 147 B.R. 678, 683 (Bankr. N.J. 1992); *Goldstein v. Scott*, 439 N.E.2d 1039, 1043 (Ill. App. 1982).

IMS Argument #4: "The Bank Paid Without Requisite Documentation" (pp. 6-8)

IMS alleges that technical defects in the documentation of the sight drafts should override IMS's explicit instructions to the Bank to honor the drafts. (Response, ¶¶ 20-26;

Plaintiff's First Am. Orig. Pet., ¶¶ 10-12.) As to each alleged defect, however, IMS's claims lack any support in the record or the law.

Alleged Defect A: Global Presented Invoices Too Soon

IMS contends that the Bank should not have honored the first and second sight drafts because Global Steel presented the drafts to the Bank less than ninety days after the last invoice date. (Response at ¶¶ 22-23.) IMS's argument fails. It is of no consequence when the beneficiary places the draft in the mail to the Bank. The only requirement of the standby letter of credit is that the Bank not pay the draft prior to the expiration of the ninety-day period, as the following table shows:

Inv. Date	Inv. No.	Days Btw. Inv. & Sight Draft	Days Btw. Inv. & Pmt.
FIRST SIGHT DRAFT			
3/16/05	13169	86	97
3/16/05	40989	86	97
3/21/05	13184	81	92
SECOND SIGHT DRAFT			
3/31/05	13268	81	97

See also Summary of Invoices and Sight Drafts (attached as Ex. A-19) (detail and backup).

In short, the undisputed evidence shows that the Bank did not pay any draft prior to 90 days; IMS has no evidence to the contrary. By waiting for the full 90 days to expire, the Bank properly honored the drafts. *See also Flagship Cruises Ltd. v. New England Merchants Nat'l Bank*, 569 F.2d 699, 704 (1st Cir. 1978) (holding a bank must honor sight drafts if the alleged defect was cured); *Armac Indus. Ltd. v. Citytrust*, 525 A.2d 77, 83 n.4 (Conn. 1987) (same).

Alleged Defect B: The Bank Paid the Second Draft Too Soon

IMS contends that the Bank paid the second sight draft less than 90 days after the last invoice. (Response, ¶ 23, at 7.) IMS's assertion is factually incorrect. The only invoice in the second sight draft, No. 13268, was dated March 31, 2005. As the chart above shows, the Bank

paid Global Steel Corporation 97 days after the date of the invoice. (Again, Ex. A-19 contains a chart with additional details and supporting documentation.)

Alleged Defect C: Global Failed to Include Original Letter of Credit With Each and Every Sight Draft

IMS contends that the Bank should not have paid the sight drafts because the original standby letter of credit did not accompany each draft. (Response at ¶¶ 22-24.) The letter of credit itself contains no such requirement; it requires only "bills of lading/proof of delivery" and "commercial invoices." *See* Ex. A-3. The standby letter of credit contained no such obligation. As a general matter, courts reject a party's attempt to add an implied requirement to save its claim. *Travis Bank & Trust v. State,* 660 S.W.2d 851, (Tex. App. – Austin 1983, no writ).

Alleged Defect D: In Two Instances, Global Failed to Submit the Required Number of Copies of Invoices

IMS contends that the Bank should not have honored the second and third sight drafts because they included only one copy of the invoices, rather than three copies of the invoices. (Response, ¶¶ 23-24, at 7-8); Ex. A-19 at Column I (Summary of Invoices and Sight Drafts).

Courts require banks to pay even if the beneficiary fails to provide additional copies of documents. *See, e.g., Bank of Cochin, Ltd. v. Mfrs. Hanover Trust Co.*, 612 F. Supp. 1533, 1541 (S.D.N.Y. 1985) (holding that the issuer could not dishonor the sight draft due to the beneficiary providing five, rather than six, copies). IMS's argument is without merit.

Alleged Defect E: "Discrepancies Between Material Invoiced and Material Shipped"

IMS contends that the Bank should have dishonored the sight drafts because of "discrepancies between material invoiced and material shipped." (Response, ¶ 22 at 7.) As a threshold matter, this argument supports the Bank's position and the unambiguous evidence in the record that IMS took delivery of the steel, contrary to IMS's arguments discussed above. In

any event, the standby letter of credit does not impose any obligation to verify the description of the steel.

A bank has no ability to investigate claims of discrepancies in business transactions. *See New Braunfels*, 780 S.W.2d at 317 ("The [strict compliance] rule assumes that issuers [*i.e.*, banks] are not in a position to know whether discrepancies matter to the commercial parties") (citations omitted); 3 White & Summers § 26-2, at 113 (observing that independence principle means that "bank's obligation to the beneficiary is independent of the beneficiary's performance on the underlying contract")(Ex. A-4).

Moreover, if IMS believed that there were discrepancies that required action, it could have sought an injunction to prevent the Bank from honoring the standby letter of credit. It did not do so. Moreover, IMS expressly instructed the Bank to honor the drafts. IMS cannot complain about that now.

IMS cites no authority to make the Bank responsible for Global Steel Corporation's alleged discrepancies. Indeed, the Bank's duty to pay exists even if Global Steel Corporation submitted false documents. *Philipp Bros., Inc. v. Oil Country Specialists, Ltd.*, 787 S.W.2d 38, 40-41 (Tex. 1990) (holding an issuer must pay even if the beneficiary's documents contain untrue statements).

Alleged Defect F: "No Proof of Orders Placed by or Accepted from Plaintiff"

Finally, IMS seeks to avoid summary judgment on the theory that the documentation contained "no proof" of IMS ordering or accepting steel. *See, e.g.*, Response, ¶ 22, at 7 (alleging no proof of "an order placed by or accepted by Plaintiff"); ¶ 23, at 7-8 (same); ¶ 24, at 8 ("[T]here is nothing to suggest, much less prove, that Plaintiff took delivery of anything."). This argument is equally devoid of merit.

Each of the sight drafts contains proof that IMS placed each order: every single invoice identifies "International Metal Sales, Georgetown TX" making the order. *See* Ex. A-9. In fact, the standby letter of credit states the self-evident fact that "[sight] [d]rafts are to be accompanied by invoice . . . arising or accruing from order placed by and accepted from International Metals Sales, Inc." In other words, the invoices prove IMS's orders.

More to the point, and as established throughout this reply, IMS admits to have placed the orders and taken delivery of the steel, both in this case and in the prior Williamson County action. *See, e.g.*, Ex. A-12, ¶ 15, at 4; Ex. A-14. The record in this case overflows with undisputed evidence that IMS took delivery of the steel.

As to IMS's allegation that the sight drafts themselves lacked "proof" of delivery, that argument fails too. Each and every sight draft contained proof that IMS took delivery, whether by bill of lading (invoices 13046, 13126, 40989), "receiving report" (invoices 13105, 13125, 13156, 13169, 13184, and 13268), or internal notation (invoice 13334) ("per Kim [Lerch of IMS], all material has been moved as of 5/20").

IMS's creative arguments to avoid summary judgment lack merit. To the contrary, IMS's arguments underscore the absence of any genuine issue of material fact and the need for the Court to grant the Bank's motion.

III.
CONCLUSION AND PRAYER

The Bank respectfully requests that this Court grant its motion for traditional summary judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was delivered to all counsel of record herein via regular mail, *and/or* certified mail, with a return receipt requested, *and/or* via facsimile, *and/or* via personal delivery on this the 14th day of January, 2009:

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