

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 -----x

4 CVD EQUIPMENT CORPORATION,
5 Plaintiff,

6 v.

10 CV 573 (RJH)

7 TAIWAN GLASS INDUSTRIAL
8 CORPORATION, et al.,

9 Defendants.
10 -----x

11 New York, N.Y.
12 March 25, 2011
13 2:48 p.m.

14 Before:

15 HON. RICHARD J. HOLWELL,

16 District Judge

17 APPEARANCES

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1 (Case called; in open court)

2 THE COURT: Good afternoon. All right. We have four
3 motions, actually, I guess the two sets of motions. Maybe we
4 could address the Mizuho CVD motions first.

5 MR. MAHER: Your Honor.

6 THE COURT: Yes.

7 MR. MAHER: This lawsuit really relates to a dispute
8 between CVD, which is an equipment technological manufacturer
9 on Long Island, with Taiwan Glass, which is a glass
10 manufacturer in Taiwan. They have a \$11.8 million dispute,
11 roughly \$12 million dispute over whether they complied with the
12 contract between themselves. That dispute, your Honor, has
13 nothing to do with Mizuho Corporate Bank and that dispute will
14 go on in this case having nothing to do with Mizuho Corporate
15 Bank.

16 There's one claim against Mizuho Corporate Bank in
17 this lawsuit, your Honor, and that is Mizuho Corporate Bank
18 refused to honor a draw down request on a \$12 million letter of
19 credit, \$11.8 million letter of credit, related to this
20 transaction. That letter of credit was issued by Mizuho at
21 Taiwan Glass's request in order to facilitate this transaction.

22 Now, the letter of credit, your Honor, that we issued
23 has milestones attached to it. There's a 30 percent up-front
24 payment which is subject to CVD getting a standby letter of
25 credit for the same amount in case a refund is needed, and

1 that's what Capital One is here for. They provided the standby
2 letter of credit. That's the second set of motions your Honor
3 is going to hear.

4 There was a 30 percent initial payment under Mizuho's
5 letter of credit. That was paid. There's no dispute about
6 that.

7 There was another 30 percent payment that was supposed
8 to be made upon shipment and proof of shipment of CVD's goods
9 to Taiwan to TGI after testing at CVD's facility on Long Island
10 and acceptance for shipping by TGI. That's the subject of the
11 dispute currently before your Honor on the motion for summary
12 judgment.

13 Then the other 40 percent of the letter of credit is
14 based upon milestones that nobody claims was reached in this
15 case and has nothing to do with the dispute before the Court.

16 Now I'd like to focus on the 30 percent shipment part,
17 which is the part that's before the Court currently.

18 THE COURT: And that's 3 million and change?

19 MR. MAHER: Three and a half million, your Honor,
20 roughly, yes.

21 Now, the last day that Mizuho, the Mizuho letter of
22 credit could be drawn upon was August of 2010. But, of course,
23 that relates to the 40 percent milestones that people claim are
24 not at issue in this case. The relevant date for purposes of
25 this motion is when the last date that the goods were supposed

1 to be shipped, and that was November 30, 2009. And on that
2 day, we needed to have proof, written proof that the goods
3 actually were on board an ocean vessel, on board the vessel on
4 or before that date.

5 The November 30, 2009 date, therefore, your Honor, is
6 a critical date. And if the goods were not on board the ship
7 and they did not present proof that the goods were on board on
8 the ship on November 30, 2009, they're not entitled to be paid.

9 Now, the reality here, and this has been submitted
10 from Taiwan Glass in a submission on our motion, Mr. Chen
11 attaches a document which is a shipper's document, Exhibit 10
12 to his affirmation or declaration, dated September 30, 2010.
13 And that document, which is the shipper's own document, says
14 that the goods were not loaded on board the boat until
15 December 5. That's five days too late.

16 THE COURT: That's when they were loaded or the vessel
17 left?

18 MR. MAHER: That's when they were loaded on board the
19 ship, which was going to sail to Taiwan.

20 THE COURT: Of course, that's in a sense irrelevant to
21 you because you don't look to shipper's documents.

22 MR. MAHER: Exactly, your Honor. But I'm just saying
23 that there is something submitted in the record here that
24 indicates that in fact the goods were not loaded until five
25 days later. But you're right. I'm focused on the documents

1 here that were presented to us to determine whether or not they
2 complied with the letter of credit.

3 Now, as your Honor knows, the documents presented to
4 an issuing bank, and that issuing bank here is Mizuho, must
5 strictly comply with the precise terms of the letter of credit.
6 And because such matters are subject to documentary proof,
7 they're frequently determined on motions for summary judgment.

8 Now, our summary judgment papers list five different
9 ways in which the documents we were presented did not comply.
10 I'm only going to address two of them here today, your Honor,
11 because I think those are the two clearest. Then I'm going to
12 address briefly their defense, their principal defense that our
13 rejection of the documents was not timely. And then I want to
14 just touch on, just in passing, the claim of fraud that we've
15 alleged here with respect to the documentation.

16 Now, your Honor, there are two separate ways we claim
17 the document -- five, but two I'm arguing here today in which
18 the document was noncompliant. First, the bill of lading was
19 not in compliance and, second, the insurance certificate was
20 not for the full amount of the shipment of the contract,
21 meaning \$12 million plus 10 percent, which was required.

22 Turning first to the bill of lading issue, the Mizuho
23 letter of credit specifically required "onboard ocean bills of
24 lading." That means that Mizuho was entitled to receive
25 documentary proof that CVD's goods were loaded on an ocean

1 vessel by November 30, 2009, at the very latest. Now, we
2 believe, obviously, they couldn't do that because the goods in
3 fact were not loaded. But they pretend that they have a bill
4 of lading that says that they were loaded.

5 THE COURT: Well, the second bill of lading has "on
6 board" stamped on it.

7 MR. MAHER: It does, your Honor, but that bill of
8 lading was presented more than 20 days after, and this gets
9 ahead to the timing issue which is their principal defense.
10 The goods had to be shipped by November 30. We had -- there
11 was 20 days that they had under their letter of credit to
12 present conforming documents. The subsequent document which
13 they tried to present --

14 THE COURT: When was that 20th day?

15 MR. MAHER: December 20.

16 THE COURT: December 20.

17 MR. MAHER: The subsequent documents that they tried
18 to submit, your Honor, to correct the defect that you've noted,
19 which is it did note it was on board, was dated after, was
20 submitted after the 20-day period and, therefore, it's not
21 allowed to be accepted. We frankly think it's fraudulent.

22 The bill of lading they submitted, your Honor, merely
23 states that an intermediate shipper.

24 THE COURT: What document or documents creates the
25 20-day window?

1 MR. MAHER: There is, well, there are two things, your
2 Honor. There is the last day that the goods have to be shipped
3 is stated to be --

4 THE COURT: 30th of November.

5 MR. MAHER: 30th of November, 2009. That's in the
6 amendment. The original date was earlier. There was an
7 amendment to the letter of credit. The first letter of credit
8 is Exhibit A to the Wong affidavit -- declaration. The
9 amendment is Exhibit B to the Wong declaration. The amendment
10 says that they have until November 30, 2009 to ship the goods.

11 THE COURT: Right.

12 MR. MAHER: Then there's a separate provision in the
13 letter of credit that says the documents, the presentation
14 documents have to be submitted within 20 days, and that's on
15 page 2 of the Wong declaration, your Honor, which is --

16 THE COURT: It's in the letter of credit, you're
17 saying.

18 MR. MAHER: Yes, exactly. It's in the letter of
19 credit itself.

20 Your Honor, even if it were not in the letter of
21 credit, there is a specific provision in the UCP, which
22 everyone agrees is applicable here, that says it has to be
23 within 21 days. So whether it's 20 days under the contract,
24 which is what we say, or 21 days on the off-the-rack rule on
25 the UCP, what they submitted on the 24th or the 27th or

1 thereafter of December was too late either under the letter of
2 credit or under the UCP rules.

3 Going back for a minute, if I could, to the original
4 bill of lading they presented. All it states is that an
5 intermediate shipper picked up the goods from Suffolk County,
6 Long Island, at the very end of November 2009. It doesn't
7 state or purport to state that the goods were loaded on board
8 an ocean vessel on or before November 30, 2009, which is what
9 is required. Our briefs recite the clear legal distinction
10 between a received bill of lading and a shipped bill of lading,
11 and that's on pages 16 to 19 of our reply brief of
12 September 30, your Honor. I won't repeat it. But it's clear
13 that the first bill of lading did not comply. The second one
14 that they tried to submit, too late.

15 The second discrepancy, your Honor, with respect to
16 the documents is the full CIF value of the shipment was not
17 insured. Now, the letter of credit is very specific on this,
18 your Honor. It says it requires an insurance policy or
19 certificates for the full CIF value plus 10 percent. CIF means
20 cost, freight, and insurance -- cost, insurance, and freight.
21 So the Mizuho letter of credit required proof of insurance of
22 approximately 12 million, which is the amount of the contract,
23 plus 10 percent. The insurance certificate that was submitted
24 and presented, which is attached again to the Wong declaration
25 as Exhibit C, says it was insured for only 7.8 million. So

1 obviously the shipment was underinsured, and Mizuho properly
2 rejected the documents on the grounds that the shipment was
3 underinsured.

4 Now, at the time, CVD agent, Capital One, claimed that
5 it was appropriate to deduct the initial three and a half
6 million dollar payment from the total amount and that,
7 therefore, the 7.8 million was enough insurance. We've shown
8 in our briefs, your Honor, that that is not the correct legal
9 standard, that's not what the letter of credit says, and, in
10 fact, CVD has completely abandoned that argument now. They're
11 no longer arguing that the prepayment is a deduction against
12 the amount of the insurance that they're supposed to carry.

13 And so what do they say now instead of that? They say
14 that CVD is claiming without any support whatsoever that the
15 value of the shipment that they shipped was somehow magically
16 exactly equal to the 70 percent, which was a hundred percent
17 minus the 30 percent deduction for the prepayment, because the
18 materials were unassembled. This argument is not supported by
19 anything that appears in the letter of credit or on the face of
20 the presented documents which are controlling and, therefore,
21 it must be rejected.

22 Your Honor, in summary on the discrepancies, CVD did
23 not present an onboard ocean bill of lading and did not present
24 an insurance policy for the full CF value plus 10 percent and
25 either of those entitles us to prevail on the claim that the

1 documents were inadequate.

2 THE COURT: All right. I think I understand Mizuho's
3 position.

4 Mr. Good.

5 MR. MAHER: Your Honor, the argument, the principal
6 argument is that it was untimely. They're saying we gave the
7 rejection too late, and I'm prepared to address that.

8 THE COURT: OK.

9 MR. MAHER: Now, that's their principal defense and
10 that's wrong and here's why. The letter of credit requires the
11 documents to be presented within 20 days. The last day for
12 shipment was the 30th of November, so the documents had to be
13 presented in the window between November 30 and December 20.

14 THE COURT: This is the five-day issue?

15 MR. MAHER: It is, your Honor.

16 THE COURT: OK.

17 MR. MAHER: Now, we've already talked about the post
18 December 20 documents. They don't count; they're not within
19 that window.

20 Here's what happened during that 20-day window. On
21 December 4, CVD forwarded the documents to its agent, Capital
22 One. On December 7, Capital One received the documents and
23 sent them to Mizuho. Mizuho received the documents on
24 December 10. On December 17, Mizuho rejected the documents as
25 not complying with the letter of credit.

1 THE COURT: When did Mizuho receive them?

2 MR. MAHER: December 10.

3 THE COURT: And then seven days later?

4 MR. MAHER: Seven days later. Everyone agrees with
5 that chronology, your Honor.

6 Here's the relevance. Mizuho, the relevant provisions
7 of the UPC say that Mizuho has five banking days to determine
8 if a presentation is compliant. The 10th to the 17th is seven
9 calendar days but only five banking days because Saturday and
10 Sunday aren't banking days.

11 CVD now finally admits in their reply brief, your
12 Honor, which is 10/22/10 submitted, page 9, at note 5, that if
13 the relevant date is December 10, that Mizuho's rejection was
14 timely. They've conceded that. That's all we need to win on
15 summary judgment, your Honor.

16 THE COURT: Because you say the five-day period runs
17 from the 10th.

18 MR. MAHER: It runs from the 10th, but it's five
19 banking days.

20 THE COURT: Yes, I understand that. But the issue is
21 whether both Capital One and Mizuho get five days each or
22 whether it's five days for both.

23 MR. MAHER: Absolutely.

24 THE COURT: Banking days.

25 MR. MAHER: Yes. They now claim for the first time,

1 your Honor, on this summary judgment motion for the first time
2 that each entity doesn't get five days. There's only one
3 five-day period and it starts to run from when Capital One, the
4 agent of CVD, got the documents, and that's totally
5 counterintuitive. How can the five-day period begin to run
6 before Mizuho even receives the documents?

7 Now, under CVD's reading of the rules, that means that
8 Capital One could have sat on these documents for five days,
9 intentionally or otherwise, and then passed them along to
10 Mizuho and said, oh, Mizuho, your time is up. You have no
11 opportunity to object no matter whether the documents comply or
12 not. That was not CVD's position when they were discussing
13 this in December 2009, your Honor.

14 I want to call your attention to the Wine declaration,
15 Exhibit E at page 2. This is Capital One in a litany of
16 rejections saying why the submission was compliant. The last
17 one they said is this. Lastly, documents received by you on
18 12/10 and your refusal should have been received latest 12/16
19 instead of 12/17. CVD and Capital One were counting Mizuho's
20 days from the 10th of December. They miscounted. Maybe they
21 didn't count the first day right or they missed one of the
22 weekends days, but they were counting from the 10th. And they
23 said we were too late because we didn't do it on the 16th. We
24 did it on the 17th. They've now admitted their error.

25 THE COURT: So is this a waiver argument by you, an

1 estoppel argument?

2 MR. MAHER: In part, your Honor, absolutely. That's
3 an alternative basis. But the principal basis is the statute
4 doesn't support their interpretation of it. They've made a
5 textual argument. Under 14B of the UCP, it says clearly, the
6 plain reading is each of the nominated bank, the confirming
7 bank, if any, and the issuing bank, each gets five days when
8 the presentation is made to them.

9 We've rebutted that textual argument, your Honor,
10 quite well on pages 12 to 14 of our reply brief, which is dated
11 September 30, so I won't repeat them. But it says each, and
12 their interpretation reads out the word each. All they have to
13 say to that textually is that one of the three types of bank
14 listed on UCP 14B, namely, the confirming bank, is not entitled
15 to any presentation of the documents. That is wrong. Under
16 UCP 8A, it says that the documents are presented to the
17 confirming bank for review and compliance.

18 Now, this was an argument they made really principally
19 in their reply brief which is the last submission and we had no
20 chance to respond to, your Honor. But I'm pointing out for the
21 record they are making arguments that are not consistent with
22 the statute itself and certainly make no sense from a
23 commercial reasonableness point of view or from common sense.

24 There's no evidence that -- CVD has presented no proof
25 that Capital One as a nominated bank was acting on its

1 nomination, according to them. There's no evidence that
2 Capital One did anything other than forward the documents to
3 Mizuho. There's no evidence that Capital One agreed to advance
4 funds to CVD. In fact, there's no evidence that they paid or
5 agreed to pay anybody. They did nothing other than forward the
6 documents, your Honor. If you look at what they say in their
7 certification, their certification says, We hereby certify that
8 the documents were presented within the validity of the credit,
9 meaning it was before August of 2010 and within the
10 presentation period, meaning the 20-day period from November 30
11 to December 20. They say nothing about whether these documents
12 comply with the terms of the letter of credit.

13 Finally, your Honor, very briefly, the last point on
14 fraud.

15 THE COURT: Yes.

16 MR. MAHER: Even if the Court disagrees on the
17 timeliness issue with us, CVD cannot obtain summary judgment on
18 its cross motion due to the presence of the fraud issues. Now,
19 I understand based upon their last submission, which we haven't
20 had a chance to respond to, they come up with some kind of
21 explanation for why they're trying to back date these
22 documents. We haven't had a chance to test that, your Honor.
23 But latent fraud can be raised as a defense at any time to a
24 letter of credit. Under a letter of credit, falsified
25 documents are the same as not having presented any documents

1 at all, and that's argued in our reply brief at pages 7 and 11.

2 Now, in light of the explanations, Mizuho may not
3 obtain summary judgment on the fraud issue here today, your
4 Honor, and I accept that; but neither can CVD obtain summary
5 judgment on its cross motion even if you disagree with us on
6 the timeliness issue which, frankly, we think we're right on.

7 Your Honor, one last point. They claim in their
8 papers, what was the motive? What was the motive for trying to
9 make it December, November 27 instead of November 30? It was
10 still good in November 30, wasn't it? That's their argument.
11 So why were they frantically trying to back date these
12 documents? Here's why. Everybody knows -- and we'll be able
13 to get people to testify to this if need be -- you can't get
14 goods being picked up on the 30th from eastern Long Island,
15 ship them over here to the ports of Manhattan to a warehouse or
16 a dock and get them loaded on the ship in the same day. So
17 they're trying to back date these documents to give them a
18 patina of cover that there was enough time for somebody to pick
19 up the documents on -- equipment on eastern Long Island, ship
20 them over to Manhattan, have them sit on a dock and then get
21 loaded on the boat somehow within a couple of days. That was
22 the motive here, your Honor. That's the fraud.

23 And we believe that stamping later in December "on
24 board" on that designation when we know all it meant was we
25 picked up the documents on eastern Long Island, when they

1 stamped clean onboard on that, that's a fraud, Judge. They
2 weren't on the ship.

3 We respectfully rest on the remainder of our papers.

4 THE COURT: All right. Thank you.

5 Mr. Good.

6 MR. GOOD: Thank you, your Honor. We do agree with a
7 lot of what Mr. Maher has said about the governing law, about
8 the strict construction of the letter of credit. Let me tell
9 you some of the things we disagree about, and I'm going to
10 refer to some of the statements that Mr. Maher just made toward
11 the end of his argument.

12 You can't take the goods at Ronkonkoma, ship them over
13 to Manhattan -- that's what he said; he said it twice -- can't
14 ship them over to Manhattan and get them loaded on a boat in
15 one day. Judge, there's a real issue here about the use of the
16 word shipping or the words shipping and shipment. Neither of
17 those words is defined in the UCP.

18 Now, the only hint of a definition of what shipment is
19 is in the letter of credit. The word appears, shipment appears
20 once and shipped appears once, by my recollection. The first
21 time it appears is in item 44C, field 44C on the letter of
22 credit, and it says last date of shipment, and Mr. Maher told
23 your Honor that that means it's got to be on a vessel. There
24 was no vessel that was going to transport these goods from
25 Ronkonkoma to Manhattan, an act that Mr. Maher himself

1 described as shipping, used the word ship.

2 The other place that "ship" appears in the letter of
3 credit, which has to be construed against Mizuho, the issuer,
4 is in item, in field 45B and that -- here are the words that
5 appear there.

6 THE COURT: So CVD's position as to the last day of
7 shipment in the letter of credit means the day in which it goes
8 into the possession of the shipper?

9 MR. GOOD: The day in which the movement of those
10 goods --

11 THE COURT: -- begins.

12 MR. GOOD: -- begins.

13 THE COURT: So that's the pickup from the Ronkonkoma
14 plant.

15 MR. GOOD: Right, what Mr. Maher described as
16 shipping, what 45B calls shipping and testing at seller's
17 facility. That's the only clue that we have as to what these
18 parties meant by shipping, shipping and testing, shipping at
19 seller's facility. That clearly was done on November 27. And
20 if Mizuho doesn't think we proved it was done on November 27,
21 it was done on November 30, the last day for shipping.

22 So there is nothing in the letter of credit that
23 requires an onboard bill of lading dated on or before
24 November 30, nothing at all. It just says an onboard bill of
25 lading separately. It says last date for shipment, 11/30,

1 separately. It says shipping and testing at seller's facility.
2 We shipped it on time. There is no question about that.

3 Here's the other thing that we disagree about or the
4 primary thing that we disagree about is the rule about when the
5 documents were presented on this letter of credit. In our
6 opening memorandum we said --

7 THE COURT: Well, do you disagree on whether the bill
8 of lading in question is a received bill of lading as opposed
9 to an onboard bill of lading?

10 MR. GOOD: We don't see the word received bill of
11 lading in the UCP. So we believe that the bill of lading
12 satisfied the conditions set forth in the letter of credit.
13 But our primary argument is that the notice of discrepancies
14 was untimely.

15 THE COURT: Was what?

16 MR. GOOD: Untimely. We argued in our initial brief
17 that there was one presentation and it was made to Capital One.
18 Capital One is a nominated bank under the UCP.

19 THE COURT: Whose agent are they?

20 MR. GOOD: Both. They are a nominated bank. We
21 didn't prepare the letter of credit. Mizuho prepared a letter
22 of credit that said available at any bank. It's clear under
23 the UCP that that means that any bank is a nominated bank.
24 Capital One took the documents, examined them, verified them,
25 sent them on and asked for payment to its account, and that is

1 sufficient proof for the purposes of this motion that it acted
2 as a nominated bank.

3 We have cited in our briefs the purpose behind the
4 five-day rule, and we have shown, just as Mr. Maher says we
5 read words out of -- I'm going to call it the statute -- out of
6 the UCP, they read words into it. The 14B says that the
7 issuing bank, the confirming bank, the nominated bank acting on
8 its nomination shall each have a maximum of five banking days
9 following the day of presentation to determine if a
10 presentation is compliant.

11 THE COURT: So do you agree with Mr. Maher that under
12 CVD's reading of the five-day period that Capital One could
13 either intentionally or unintentionally keep the documents for
14 five business days and essentially have a pocket veto over
15 whether or not Mizuho can reject documents?

16 MR. GOOD: The answer in a word to that is yes, I do
17 believe that, but I don't believe that Mizuho was without a
18 remedy if that happens.

19 But the UCP actually contemplates a very similar
20 scenario. Article 35, the second paragraph, says that if a
21 nominated bank or a confirming bank accepts documents and
22 forwards them on to the issuing bank and they are lost in
23 transit, that the issuing bank must honor. So that's not even
24 a case of withholding. That's a case of the issuing bank not
25 getting it late, never getting the documents at all, the UCP

1 says the issuing bank must honor.

2 I don't know what better proof there could be other
3 than the plain language on this day of presentation. There's
4 only one day of presentation. We have cited the quote/unquote
5 legislative history of UCP 600 and the five-day rule. Used to
6 be a reasonable time, seven days, and the whole purpose was to
7 make it finite and quick and give the seller a right to reclaim
8 his goods and dispose of them by another means if he wasn't
9 going to receive payment.

10 The flip side of Mr. Maher's argument that the
11 nominated bank that holds the documents for more than the five
12 days and then send them on to the issuing bank is that the
13 nominated bank could hold the documents for two years and two
14 years later send them to the issuing bank and the issuing bank
15 would have five days, two years and five days from the
16 submission of documents to reject them.

17 THE COURT: That wouldn't be the case if each had five
18 days. Then that period couldn't be more than ten.

19 MR. GOOD: I'm saying if Mr. Maher's argument is
20 correct that notwithstanding the nominated bank accepting,
21 examining and negotiating and forwarding them on, that the
22 issuing bank still has five days once they receive them, if the
23 nominated bank holds on to them for two years, by Mr. Maher's
24 argument, the issuing bank would still have five days two years
25 later when they first received them. That can't be the rule,

1 the whole reason that the UCP went to this firm five-day limit.

2 Mr. Maher cited some language from Article 5. The
3 fact of the matter is that presentation is defined in
4 Article 2, and it does not include within that definition a
5 confirming bank. So I grant you, your Honor, that the language
6 Mr. Maher read from Article 8 is indeed in Article 8. But the
7 definition in Article 2, which by the terms of the UCP governs
8 all of the articles, is to the contrary.

9 THE COURT: So what import, if any, does CVD apply to
10 the word "each"?

11 MR. GOOD: The import of each is as follows, your
12 Honor. The nominated bank here, Capital One, got the documents
13 on December 7. They had five days. They sent the documents by
14 FedEx or whatever. They arrived in Taiwan on December 10 -- I
15 think I have this right; was that correct -- they arrived in
16 Taiwan on December 10. There was still five banking days.
17 There was still a remainder of the five banking days left. The
18 five banking days started on the 7th and ended on the 14th
19 because of the intervening two weekend days.

20 So they got it on the 10th and they had until the 14th
21 to reject, and that is consistent with the UCP speaking about
22 expedited communications, telecommunication whenever possible,
23 and the fact that Mizuho and Taiwan Glass had it within their
24 power not to designate a nominated bank or they could have
25 designated Mizuho's branch in New York as the only nominated

1 bank where a presentation could be made, but they didn't do
2 that. They designated any bank.

3 A word about the insurance, and then I want to address
4 this I must say what I find offensive argument about fraud.

5 THE COURT: I don't think we need to go very far on
6 the fraud issue. If it gets down to that level of analysis, I
7 think everybody would agree it's a question of fact.

8 MR. GOOD: OK. I just think it's clear from the
9 string of emails that this is a wholly concocted fiction about
10 back dating and whatnot, but I will leave that at that.

11 THE COURT: All right.

12 MR. GOOD: I want to talk about the insurance just for
13 a minute. And I think Mr. Maher acknowledged this in his
14 presentation and I think all parties would acknowledge, at
15 least all parties who know about it would acknowledge the fact
16 that CVD is a company that fashions unique solutions, very high
17 tech, unique solutions to very difficult technological
18 problems. And the evidence before the Court even on summary
19 judgment shows that the equipment that was shipped occupied
20 three containers and weighed more than we all collectively
21 could lift. I don't remember the exact numbers.

22 But that equipment was to be, as per the contract,
23 which is an exhibit to somebody's papers, maybe not in our
24 motion but I think in the Capital One motion, that equipment
25 was to be inserted into not exactly the middle but some place

1 within an existing assembly line at Taiwan Glass. In fact, the
2 payment schedule, as payment schedules would, contemplated that
3 the assembly was going to take months and was a major expense,
4 and it only makes sense that the payments be scheduled to
5 correspond to the expense item.

6 So the value of the goods, this being a contract for
7 goods and services, the value of the goods on the ship was
8 equal to the payments that would be required to be made at the
9 time those goods were received. Those were the two
10 \$3.5 million and change payments. You add them together, you
11 get 7.1 or something in that neighborhood. You add the
12 10 percent, and you get the amount of the insurance.

13 We covered the full CIF value of the goods, and that
14 is apparent from the payment schedule which is set forth within
15 the letter of credit. So no extrinsic documents were needed
16 for Mizuho to verify that the amount of the insurance was
17 adequate as required.

18 Just one last reference that I didn't touch on when I
19 was talking about the date of presentation. There is simply no
20 evidence that CVD made or contributed to the statement that
21 Capital One made that Mr. Maher quoted that the last day to
22 object was December 16 when it initially rejected Mizuho's
23 notice. So we don't see how that could possibly be a waiver on
24 behalf of CVD. We never said that. CVD never said that.

25 THE COURT: All right. Thank you.

1 Then let's go to the Capital One, Taiwan Glass
2 dispute.

3 MR. ALLEGAERT: Who do you care to hear from first,
4 your Honor?

5 THE COURT: Who moved first?

6 MR. STRAUS: It's our motion to dismiss the
7 counterclaim, your Honor.

8 THE COURT: All right. Mr. Straus, why don't you go
9 first.

10 MR. STRAUS: Thank you, your Honor. Capital One has
11 no business being in this case. This is a contract dispute
12 between CVD, the manufacturer, Taiwan Glass, the purchaser.
13 Capital One's only role was to issue a standby letter of
14 credit. And when CVD submitted a bill of lading in support of
15 the cancellation conditions of that standby letter of credit,
16 Capital One forwarded it on to Taiwan Glass's agent and Taiwan
17 Glass's bank and notified them of the cancellation. When
18 Taiwan Glass sought payment after that, Capital One told them
19 it's already been canceled, we're not going to pay you. That's
20 the extent of their involvement.

21 The entire claim that Taiwan Glass asserts against
22 Capital One is premised on one thing, which is that the bill of
23 lading that CVD submitted should have contained an onboard
24 stamp and that premise --

25 THE COURT: CVD submitted its bill of lading to

1 Capital One on December 2?

2 MR. STRAUS: Capital One forwarded it on on
3 December 8. I believe it was submitted to Capital One on --

4 THE COURT: CVD asked for cancellation, right?

5 MR. STRAUS: December 2, yes, your Honor. And the
6 idea that it required an onboard stamp and Taiwan Glass's claim
7 fell for two reasons. First of all, there is no such
8 requirement in a standby letter of credit. The standby letter
9 of credit has a very specific cancellation provision. It lists
10 six different events, the first of which to occur results in
11 the calculation of the letter of credit. One of the events is
12 the submission by CVD of a bill of lading.

13 THE COURT: So could any document which simply said
14 bill of lading --

15 MR. STRAUS: No, your Honor.

16 THE COURT: -- qualify?

17 MR. STRAUS: The cancellation provision, which is
18 Section 7A of the standby letter of credit, has an express,
19 very detailed list of exactly what that bill of lading was
20 required to include, and there are at least five different
21 elements, depending on how you count them, that it was required
22 to include. None of those elements is an onboard stamp. So,
23 in other words, the parties agreed on what the bill of lading
24 had to say. They didn't say it had to have an onboard stamp.

25 Now, that's in contrast to the Mizuho letter of credit

1 which said that for purposes of the presentation under that
2 letter of credit, that it required an onboard ocean bill of
3 lading. There's no such language in the standby letter of
4 credit. It just says a copy of an original bill of lading.

5 THE COURT: So that means that Taiwan Glass has to
6 make and does make the argument that that may be so but the
7 letter of credit incorporates the UCP as the governing rules
8 for the letter of credit, and Article 20 of the UCP says that a
9 bill of lading must be an onboard bill of lading. So that's
10 how they get it in.

11 MR. STRAUS: That's right, and there are two responses
12 to that, your Honor. One is that while the UCP in general
13 applies, Article 20 does not apply to this cancellation
14 condition. It's clear under the text, under the commentary
15 throughout the UCP that Article 20 applies when there needs to
16 be presentation made seeking payment under the letter of
17 credit, and there's a reason for that which is that the UCP is
18 intended to facilitate business transactions, to standardize
19 items, if you will, and there are -- it's always contemplated
20 that there will be a presentation seeking payment under a
21 letter of credit. The UCP governs that.

22 What it does not govern is cancellation, what results
23 in the cancellation of a standby letter of credit, if anything.
24 There's nothing in the UCP that speaks to that. It's left up
25 to the parties to agree on that and set it forth expressly, and

1 that's exactly what they did in this case, your Honor. The
2 standby letter of credit, that specific provision on
3 cancellation, it says expressly exactly what is required and
4 what the bill of lading is required to include, and it does not
5 say that it needs to be an onboard bill of lading. It doesn't
6 say that it needs to have that stamp.

7 In addition, your Honor, it also doesn't say that it
8 needs to show that the goods shipped by any particular date.
9 That's another difference between this letter of credit and the
10 Mizuho letter of credit. This letter of credit just says that
11 the bill of lading needs to be dated no later than November 30,
12 2009. It says nothing about the date of shipment or the date
13 something is located on board.

14 THE COURT: You don't get a bill of lading -- does the
15 bill of lading issue before shipment?

16 MR. STRAUS: It can, your Honor, where -- again, it
17 depends on what you mean by shipment. But to avoid using that
18 term, it can issue as soon as the goods are delivered to the
19 carrier for shipment. So it doesn't necessarily mean that the
20 goods are on the water on that day and there's no reason that
21 Taiwan Glass would have understood that.

22 And as we cited a Second Circuit case for the
23 proposition that it is their, Taiwan Glass's, responsibility as
24 the beneficiary to make sure that the language of the letter of
25 credit reflects exactly what their understanding of the deal

1 is. And so the onus was on them to make sure that the letter
2 of credit set out the requirements that they wanted met. And
3 it didn't say that there needed to be an onboard stamp, it
4 didn't say that it needed to be on board, it didn't say that
5 the goods needed to be shown to be shipped by a certain date;
6 none of that was in the standby letter of credit.

7 Now, in December of '09, CVD submitted its bill of
8 lading which met every one of the express requirements that
9 were set forth in that letter of credit, and there's no dispute
10 about that. There's no dispute that all the list of items were
11 met. Capital One gets that, sends it on to Mizuho December 8.
12 At that point there's nothing Capital One is going to do other
13 than treat the letter of credit as canceled. At that point,
14 its customer, its bank, the applicant, has submitted a bill of
15 lading that meets all the express requirements under the letter
16 of credit. And if Capital One at that point had turned around
17 and paid Taiwan Glass when Taiwan Glass made a demand, CVD
18 would have sued Capital One.

19 And on Article 20, we go through in our brief the
20 specifics of why this applies to -- why Article 20 applies to a
21 presentation and not to a cancellation. As I said, the
22 cancellation is not provided for in the UCP. It's something
23 the parties agreed to. It's clear from the language.

24 THE COURT: Both LCs, do they both bear the same date
25 or is one issued first?

1 MR. STRAUS: No, your Honor, I believe one was issued
2 first.

3 MR. HARBESON: The Mizuho LC is 9/15/2008, your Honor.

4 MR. ALLEGAERT: Capital One LC is October 8, 2008,
5 your Honor.

6 THE COURT: October what?

7 MR. ALLEGAERT: 8, 2008, so it's after the Mizuho LC.

8 MR. STRAUS: Now, so that's the cancellation. That's
9 why this was not required to comply with Article 20 and, in
10 fact, as we say in the brief, I won't go into the whole
11 argument, but there are provisions of the UCP that would make
12 absolutely no sense if a presentation referred to the
13 submission of documents for purposes of cancellation.

14 Article 15 says that when an issuing bank determines
15 that a presentation is complying, it must honor. Well, if CVD
16 submitting a bill of lading to Capital One was a presentation
17 and if Capital One determined that complied, it would be
18 required under Article 15 to honor the letter of credit. That
19 makes no sense. It means if the cancellation were complying,
20 it would have to honor the letter of credit.

21 THE COURT: And who prepared the Capital One letter of
22 credit, is that prepared by Capital One?

23 MR. STRAUS: I believe that's the case, your Honor.
24 But the important thing is that Taiwan would have had an
25 opportunity to reject it if Taiwan disagreed with the letter of

1 credit or if the letter of credit did not reflect what it
2 wanted to do, and I think that's the important thing and that's
3 why the case law puts the onus on the beneficiary because the
4 beneficiary, whether it prepares it or whether it simply
5 reviews it, has an opportunity to ensure that the language
6 reflects the terms of the deal.

7 THE COURT: All right.

8 MR. STRAUS: And, sorry, the second point, your Honor,
9 is that -- so there was no obligation to comply with
10 Article 20, but our second point is that even if there were,
11 they still lose because CVD submitted a bill of lading that did
12 comply with Article 20 according to even Taiwan Glass. There's
13 no dispute that the second bill of lading, which was forwarded
14 on to Taiwan Glass's bank on December 24, met whatever
15 requirements Taiwan Glass believes had to be met. And the only
16 arguments that Taiwan Glass makes in opposition to that second
17 bill of lading are that, first, Capital One should be precluded
18 from relying on it now because it did not argue about it at the
19 time.

20 Well, at the time Capital One sent the notice of
21 cancellation, which was on December 8 of 2009, the second bill
22 of lading -- it didn't have the second bill of lading. It had
23 the original bill of lading, and that was the original basis
24 for the cancellation.

25 THE COURT: Yes, that's true, although Taiwan Glass

1 then argues that when they presented for payment in early
2 January, Capital One simply referred back to the December 8
3 cancellation letter and didn't refer to a second bill of
4 lading.

5 MR. STRAUS: That's correct, your Honor, they did
6 refer back to the December 8 cancellation. But, it's also very
7 clear that Taiwan and Mizuho knew exactly that the second bill
8 of lading was being asserted as a basis for cancellation, and
9 that's clear from the fact that when Capital One refused to
10 honor the letter of credit in response to Taiwan Glass's
11 January 4 request, Mizuho argued about why the second bill of
12 lading did not meet the requirements.

13 And that's in Exhibit 11 to the Sigh January 27
14 declaration, Mizuho says that the applicant presented the
15 revised bill of lading on December 24 and the actual onboard
16 date and it goes on to make an argument about why the revised
17 bill of lading doesn't comply. So, in other words -- and this
18 was in January of 2010 -- so, in other words, they knew exactly
19 that this was being submitted in support of cancellation. It
20 was also being submitted in support of CVD's seeking payment
21 under the Mizuho letter of credit, but they understood as well
22 that this would have been a basis for cancellation and they
23 argued with it and we have a dispute about whether or not --
24 but they certainly knew at the time that it was being done, so
25 Capital One should in no way be precluded from arguing now

1 based on that second bill of lading.

2 THE COURT: All right.

3 MR. STRAUS: And our last point is a fraud one which,
4 as even your Honor said, we don't look to the shipping
5 documents. The bank is entitled to rely on the documents that
6 are presented to it. In this case it was the bill of lading.
7 The shipping document that they referred to is not a stipulated
8 document. That's not something that was required to be
9 submitted pursuant to the bill of lading, pursuant to the
10 cancellation provision.

11 It's black letter law that the bank does not have to
12 investigate allegations of fraud, and here it's incredibly
13 distant that there would be any suggestion of fraud, but that's
14 not something the bank has to worry about. And even if it
15 were, just shifting for a moment to Taiwan's summary judgment
16 motion, even if your Honor disagreed with everything that we
17 said on the motion to dismiss and why we're entitled to
18 dismissal from the case, at a minimum there would be an issue
19 of fact as to whether there was a fraud that the bank -- an
20 outright, intentional fraud that the bank somehow knew about,
21 and there's no evidence of that in the record, your Honor. So
22 we're entitled to win as a matter of law.

23 THE COURT: Thank you, Mr. Straus.

24 MR. ALLEGAERT: Thank you, your Honor, for Taiwan
25 Glass.

1 Taiwan Glass is entitled we argue at summary judgment
2 because there are no disputed issues of material fact and, as a
3 matter of law, we're entitled to judgment against Capital One.

4 As to the facts, Capital One and Taiwan Glass both
5 agree on the same version of the story. Capital One purported
6 to cancel the standby LC in early December of 2009 based on a
7 bill of lading lacking an onboard notation. We refer to this
8 as the first bill of lading. Taiwan Glass promptly objected to
9 that purported cancellation. In the bank's correspondence at
10 that time, Taiwan Glass and Capital One agreed that Article 20
11 of UCP 600 applied. They argued about whether the first bill
12 of lading complied with Article 20, but not about the
13 application of the UCP and Article 20. They agreed about that.
14 In January 2010, Taiwan Glass requested payment under the
15 standby LC. Capital One refused payment because of its
16 purported cancellation which was done under the first bill of
17 lading, not the second bill of lading.

18 Now, as for the law, Taiwan Glass is entitled to
19 judgment as a matter of law because the first bill of lading
20 does not comply with Article 20 of UCP 600. Article 20
21 requires that the first bill of lading contain an onboard
22 designation, and the first bill of lading indisputably doesn't.
23 No one disputes that.

24 Capital One doesn't dispute that the first bill of
25 lading fails to comply with Article 20. They make a different

1 argument. They just say Article 20 doesn't apply at all based
2 on a purported distinction which they say is encompassed within
3 Article 20 which is that it only deals with presentations for
4 payment and not presentations for cancellation, but Capital One
5 cites to no authority for that proposition and, indeed, the
6 facts and the authorities are in direct contradiction to that
7 position.

8 THE COURT: The commentary to that section discusses
9 presentation, not cancellation.

10 MR. ALLEGAERT: Excuse me, it's not the commentary to
11 that section that they cite to. It's the commentary to Article
12 2, which I'll get to in a minute. Thus, the standby letter of
13 credit incorporates the entirety of UCP 600. It doesn't
14 exclude Article 20. The parties agreed UCP 600 applied. They
15 didn't make any exclusions. Capital One makes much of the fact
16 that the standby letter of credit does not specifically require
17 onboard or ocean bill of lading.

18 THE COURT: And you'd agree with that, that the
19 letter, the Capital One letter of credit is obviously different
20 in its literal terms --

21 MR. ALLEGAERT: That is correct.

22 THE COURT: -- than the Mizuho letter of credit.

23 MR. ALLEGAERT: We don't dispute that. That is
24 correct. But that issue is a red herring because the standby
25 letter of credit already incorporates Article 20 and, in any

1 event, we've cited to cases, the Blonder case, and to ICC
2 opinion showing that Article 20 is applicable even when an LC
3 governed by the UCP does not specifically require an ocean or
4 onboard bill of lading. So we have authorities for that
5 proposition.

6 Article 20 of the UCP is entitled bill of lading. It
7 doesn't make any distinction between presentation for payment
8 and presentation for cancellation. That's something they've
9 grafted into it. The definitions of presentation and presenter
10 are contained in UCP Article 2, and they contradict Capital
11 One's position. Presentation is defined as "either the
12 delivery of documents under a credit to the issuing bank or
13 nominated bank or the documents so delivered." Presenter is
14 defined as "beneficiary, bank, or other party that makes a
15 presentation."

16 There can be no doubt given the breadth of those
17 definitions that a party in the position of the applicant here,
18 CVD, can make a presentation to cancel a letter of credit.
19 Capital One has no answer to that point.

20 The commentary to the definition of presenter in
21 Article 2 that they have is the sole basis for their argument,
22 but it doesn't support the distinction that they're trying to
23 make. The commentary says a presenter "may be" the
24 beneficiary, here, Taiwan Glass or its bank, here, Mizuho, or,
25 the beneficiary's agent. The commentary doesn't trump the

1 plain words of what Mr. Good called the statute, the UCP here,
2 what is incorporated in the party's contract. It doesn't say
3 that the presenter cannot be a party seeking to cancel the LC.

4 Now, one of the points that my adversary makes is
5 certain provisions of the UCP wouldn't make any sense if a
6 presentment or presenter could involve a cancellation of a
7 letter of credit rather than just, as they would argue, the
8 payment of a letter of credit. But actually in the
9 introduction to the UCP, it very specifically says, and we cite
10 this in our brief, that the provisions of the UCC apply to a
11 standby letter of credit to the extent applicable. So it is
12 acknowledged right in the UCP that not every provision is going
13 to be applicable to a standby letter of credit. And to the
14 provisions that they cite to that they say would result in a
15 nonsensical result, clearly those don't apply to a standby
16 letter of credit.

17 Now, in any event, and furthermore Capital One
18 otherwise doesn't tell us what rule applies, what international
19 banking practice should be looked to in examining the first
20 bill of lading. They just say you've just got to have a
21 document that says bill of lading. That's it. They don't tell
22 you what body of law, what authority defines what will satisfy
23 that condition that the parties put into the LC. We say what
24 the parties put into the LC was the UCP and that's what
25 applies, particularly the section of the UCP that has a heading

1 on it, bill of lading.

2 Now, in any event, even if Capital One's distinction
3 between presentation for payment and presentation for
4 cancellation has merit, the parties incorporated by their
5 course of dealing Article 20 into the LC agreement. This is
6 because in the course of its correspondence, Taiwan Glass,
7 through Mizuho, and Capital One acknowledge that Article 20
8 applied. Indeed, Capital One insisted that the first bill of
9 lading complied with Article 20. And I cite to you to the Sigh
10 declaration, Exhibit 6, which is the telex which Capital One
11 sent to Mizuho explaining why their cancellation was proper and
12 why Article 20 applied and why the bill of lading they received
13 was compliant under Article 20.

14 Now, perhaps understanding that they're on shaky
15 ground with respect to the first bill of lading, Capital One
16 now incredibly seeks to rely on the second bill of lading
17 which, of course, as we say conveniently has an onboard stamp
18 dated November 27, 2009. Now, first, it's got to be noted that
19 Capital One has repeatedly admitted it didn't rely on the
20 second bill of lading, it didn't need to rely on the second
21 bill of lading when it purportedly canceled the standby LC.
22 Under Article 16 of UCP 600, Capital One is precluded from now
23 relying on the second bill of lading. Thus, the sole legal
24 issue for the Court to decide is whether the first bill of
25 lading as we argued complied or not.

1 Moreover, Capital One cannot now rely on the second
2 bill of lading because the onboard date on that bill of lading
3 is in direct and obvious contradiction to the onboard date
4 shown in the shipping company's cargo tracking record. Capital
5 One was informed of the cargo tracking record back in early
6 December 2009. It had a copy of the cargo tracking record, and
7 it hasn't disputed in these proceedings the accuracy of that
8 record. Nobody has. CVD hasn't disputed it; Capital One
9 hasn't disputed it.

10 The point here is Capital One can't now say we're off
11 the hook because of the second bill of lading in good faith.
12 The two documents don't make sense together. One is right and
13 one is wrong, but they don't go together.

14 The cases we cite show that when false or fraudulent
15 shipping documents such as bills of lading are presented, the
16 issuing bank has a duty to exercise due diligence. Capital One
17 argues it has no duty to investigate fraud, but we're not
18 asking them to investigate fraud. What's being asked of
19 Capital One here is that it act in good faith and that means
20 Capital One cannot willfully ignore the obvious problems on the
21 faces of these bills of lading, which purport, by the way, to
22 be the same document.

23 And the Schroeder Merchant's Corporation, Crutcher,
24 and Old Colony cases that we cited all involve false or
25 fraudulent bills of lading, and the court in each of these

1 cases required the issuing bank to exercise some due diligence
2 before deciding to accept problematical bills of lading. Here,
3 Capital One by asking this Court to allow it to rely on the
4 second bill of lading is asking the Court to ignore these
5 precedents and to allow Capital One to ignore the glaring
6 inconsistency.

7 Now, the only portion of their briefing that we didn't
8 have a chance to respond to is their reply brief on their
9 motion to dismiss, and there are just a couple of points I'd
10 like to make there. They say that the cases that we cite
11 recognize the statutory rule that absent an injunction, an
12 issuing bank may choose to honor or dishonor a facially
13 compliant presentation even when there's fraud. That's the
14 general rule.

15 But the point that qualifies the general rule in the
16 UCC and in the cases that we cite is the issuing bank has to
17 act in good faith. If it's presented with glaringly
18 inconsistent shipping documents, it can't act. It's not
19 allowed to just ignore what it sees right in front of it. It's
20 not a question, as my adversary would frame it, of ferreting
21 out who is committing fraud and who isn't. It's a question of
22 you've got two documents that don't make sense when you look at
23 them and you're choosing to go with one and not the other and
24 just say, hey, it's not our problem. It's someone else's
25 problem.

1 Now, Capital One attempts to distinguish a very
2 important case that cite, which is the Blonder case, and we
3 cited that for various propositions. And the distinctions that
4 they draw don't undermine the two major points in Blonder.
5 Article 20's onboard requirement is satisfied by either
6 preprinted wording or by an onboard stamp. Thus, the Blonder
7 court held that the clean onboard stamp on the bill of lading
8 "clearly meets the UCC requirement" and stated that "loading on
9 board may be indicated by preprinted wording on the bill of
10 lading providing notation of the date on which the goods had
11 been loaded on board."

12 Now, critically, where the parties to a standby LC
13 incorporate UCP Article 20 applies regardless of whether the
14 standby LC specifically required an ocean or onboard bill of
15 lading. So the court in Blonder applied article 20 to the
16 shipped onboard requirement and held that the clean onboard
17 stamp was sufficient even though the LC in that case required
18 only as follows: "One copy of the bill of lading evidencing
19 freight prepaid and shipment from Corinto Port, Nicaragua, to
20 Rotterdam, Netherlands." So in that case, the LC similarly had
21 no onboard requirement for payment. It was not in the LC, and
22 the court construed that -- but the parties did agree that the
23 UCP applied, and the court applied Article 20 and said they
24 were going to read into it the requirement of onboard and
25 onboard stamp.

1 THE COURT: All right.

2 MR. ALLEGAERT: Thank you, your Honor.

3 MR. STRAUS: Your Honor, may I respond very briefly?

4 THE COURT: Yes.

5 MR. STRAUS: Just to a few points, your Honor.

6 One correction is that it's not the case that we only
7 rely on the commentary to Section 2. That's one of the things
8 we rely on because of the definition of presenter that's in
9 Article 2 of the UCP, but we also cite in our brief to the
10 commentary to Article 20 itself because that's where it
11 describes what Article 20 does apply to and it actually says
12 that Article 20 applies where a letter of credit requires
13 presentation of a bill of lading.

14 THE COURT: What are you citing?

15 MR. STRAUS: This is to the commentary to Article 20,
16 and it's at the Mazlo declaration, Exhibit 8, page 77. That's
17 the very first thing we rely on in that.

18 Next, on the Blonder point, I would just point out one
19 important distinction that the Blonder letter of credit
20 required the bill of lading to, quote, evidence shipment.
21 There's no such language in the standby letter of credit here.

22 One other thing that was said is that in the
23 definition of -- in the commentary regarding presenter, it says
24 that a presenter may be the beneficiary or a bank or another
25 party acting on behalf of the beneficiary, and it's clear

1 though that the point of the definition is to define who the
2 presenter is. It doesn't mean that it may be one of those
3 three people or anyone else under the sun. The purpose of the
4 definition was to define who a presenter was, and that's
5 clearly set forth as the beneficiary or someone acting on
6 behalf of the beneficiary. And, again, that's only one of the
7 textual pieces that we cite.

8 Just a point on Article 16, your Honor. Article 16
9 doesn't preclude Capital One from arguing based on the second
10 bill of lading in this case. Article 16 says that the bank has
11 to notify the beneficiary of the discrepancies, and we notified
12 Taiwan Glass of the discrepancies. The discrepancy was that
13 the letter of credit had expired or been canceled and that's
14 exactly what they said in their response to Taiwan Glass's
15 request. There's nothing in Article 16 that requires them to
16 go further down into the weeds and list every basis for that
17 discrepancy. That had already been -- there was correspondence
18 between the parties on that and Taiwan Glass knew full well
19 what the basis for the expiration or the cancellation was at
20 that point.

21 On the fraud cases, your Honor, generally the cases
22 that Taiwan Glass cites on fraud are preliminary injunction.

23 THE COURT: I don't think I need argument on the fraud
24 cases.

25 MR. STRAUS: OK.

1 THE COURT: All right. I initially thought I was
2 going to decide this from the bench and I'm close to deciding
3 it from the bench, but it's a very complicated fact pattern so
4 I think I'm going to convert my talking points into a very
5 short opinion and issue it next week. Thank you for coming
6 out.

7 MR. HARBESON: Your Honor, may we address -- I know
8 you received letters both from Mr. Chen --

9 THE COURT: On discovery issues.

10 MR. HARBESON: -- on the discovery cutoff. I don't
11 want to go into the details.

12 THE COURT: I'll grant your reasonable extension.

13 MR. HARBESON: OK. So we should confer and submit a
14 second revised scheduling order to you next week?

15 THE COURT: Yes.

16 MR. HARBESON: Thank you very much.

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