UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

SEUNG WOO LEE and GIL SOO RYU, as Co-receivers for Medison Co., Ltd., a Korean Corporation,

Plaintiffs and Appellees

vs.

IMAGING3, INC., a California Corporation; formerly known as IMAGING SERVICES, INC.;

Defendant and Appellant,

CASE NO. 06-55993
(District Court No. CV-05-02806-FMC)

Appeal from the Central District Court of the County of California, No. CV-05-02806-FMC (AJWx)

The Honorable Florence Marie Cooper, Judge

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page No.

Statutes:

Cases:

Treatises:

1. INTRODUCTION.

This case involves disputed contentions concerning the validity of an award made against Defendant/Appellant before the Korean Arbitration Board and of the counterclaims of Appellant before the United States District Court. The question before this Court is a simple one: did the Defendant/Appellant adequately present sufficient material facts to support its defenses and claims for relief to overcome Plaintiffs' Motion for Summary Judgment to allow the case to proceed to trial on its merits? The answer is an unqualified "yes". Yet, the court below improperly granted Plaintiff/Appellees' Motion for Summary Judgment as to the Plaintiffs' entire Complaint. [Excerpts of Record (hereafter "ER") Tab 3, pages 16-28.]

Purportedly relying on a finding that "Petitioners have met all of the prerequisites necessary to support their request for an order confirming the Korean arbitration award," the trial court took the extraordinary step of granting Summary Judgment against Appellant despite an overwhelming number of disputed material facts sufficient to defeat summary judgment and proceed to trial. As a matter of law, the lower court erred in granting Defendant Summary Judgment and dismissing all of Plaintiffs' claims. Appellant respectfully requests that this Court reverse the judgment below,

overrule the Plaintiffs' summary judgment motion, vacate costs, and remand for further proceedings.

2. STATEMENT OF THE CASE.

A. Nature of Action and Relief Sought.

Respondent/Defendant Imaging Services, Inc. (now Imaging3, Inc.) is an x-ray equipment manufacturer and remanufacturer. Imaging3 was formed in October, 1993 to acquire, remanufacture, service, sell, new, demonstration, and remanufactured medical equipment, including C-arms, C-arm tables, pain management tables, surgery tables, urology tables, vascular tables, and related equipment primarily used in the medical field. It provides service and service contracts and sells accessory & disposable items for x-ray equipment as well as replacement parts. [Dean Janes' Declaration ¶s 3, 11; Christopher Sohn Declaration ¶s 3, 11; ER tab 18, ps. 565, 566, ER tab 19, p. 587, 588.] Formerly known as Imaging Services, Inc., it is a California (United States) corporation against which a Statement of Claim was filed by the Plaintiffs herein, in the Korean Commercial Arbitration Board, which had been sent to Imaging3 at an incorrect address. [Dean Janes' Declaration ¶ 4; Christopher Sohn Declaration ¶ 4; ER tabs 18, 19.]

The Plaintiffs in this case are purportedly acting as receivers of Medison Co., Ltd. ("Medison"), a Korean equipment manufacturer which had commenced bankruptcy or reorganization proceedings in 2002. [Dean Janes' Declaration ¶ 6; ER tab 18, p. 565; Christopher Sohn Declaration ¶ 6, ER tab 19, p. 587; Plaintiffs' Motion, ER tab 8, p. 120, 124.] According to the Plaintiffs' Motion, it remains in the Korean reorganization. [Declaration of Young Chae Suh ("YCS Dec." in Plaintiffs' Motion ¶ 5; ER tab 10, p. 175.] At all times, Imaging3 disputed the claims and assertions of the Plaintiffs, the jurisdiction of the Korean tribunal, and the legal standing of the Plaintiffs to assert the claims which are the subject of this action. [Dean Janes' Declaration ¶ 6, ER tab 18, p. 565; Christopher Sohn Declaration ¶ 6, ER tab 19, p. 587.]

B. Nature of Disputes.[1]

[1] **Defendant/opposing party Imaging3 objected to the "Declarations" of Young Chae Suh and Gi Min in their entirety. Neither of these individuals have percipient knowledge of the facts of this case, of the circumstances of the contractual dealings between the parties, the disputes concerning the defective equipment, the agreement to litigate this matter in California courts, the invalidity of the Korean arbitration, or the disputed legal proceedings and procedures. As such, their affidavits are inadmissible and irrelevant, lacking percipient knowledge, lacking foundation, and based on inadmissible hearsay. No affidavits or declarations whatsoever have been presented by the Plaintiffs themselves; nor is any evidence presented by the actual contracting parties or individuals with any percipient knowledge of the material facts in this case.** [Dean Janes' Declaration ¶ 7; Christopher Sohn

Prior to Petitioner Medison's bankruptcy or organization, it had contracted with Imaging3 to provide Imaging3 with certain specialized medical products. [Dean Janes' Declaration ¶ 12, ER tab 18, p. 567; Christopher Sohn Declaration ¶12, ER tab 19, p. 588.] The products allegedly provided to Imaging3 by Medison proved to be of no value to Imaging3, and caused significant economic losses to it. [Dean Janes' Declaration ¶s 8, 12, 17-26, ER tab 18, p. 566-570; Christopher Sohn Declaration ¶s 8, 12, 17-26, ER tab 19, p. 588-592.] In large part because of the bankruptcy or reorganization of Medison, Imaging3, Inc. was effectively prevented from pursuing its claims against Medison. [Dean Janes' Declaration ¶ 8, ER tab 18, p. 566; Christopher Sohn Declaration ¶ 8, ER tab 19, p. 588.]

Imaging3, Inc. contests the Korean arbitration award in its entirety. The original contract between Imaging3 and Medison provided (in paragraph 8.6) that **"The validity, performance and interpretation of this Agreement shall be governed and construed under the laws of the State of California**, as applicable to contracts made and fully performed in

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Declaration ¶ 7.] The trial court overruled these objections, and held that "the objections are not stated with sufficient specificity to permit the Court to identify the substance of the evidence to which Imaging3 objects." [Judgment, page 2, lines 15-23, ER tab 2, p. 12.]

California between California residents…." The original contract was signed and agreed to by Medison in the presence of Imaging3's Chief Executive Officer, Dean Janes. [Dean Janes' Declaration ¶ 14, 15, ER tab 18, p. 567; Christopher Sohn Declaration ¶s 14, 15, ER tab 19, p. 589.] Although the signed original was destroyed in the fire referenced above, the attached form was re-printed from Mr. Janes' laptop computer, which was with him when he met with Medison in Korea. [Dean Janes' Declaration ¶ 15, ER tab 18, p. 567; Christopher Sohn Declaration ¶ 15, ER tab 19, p. 589; Counterclaim ¶ 16, Exhibit A thereto, ER tab 6, p. 98.] Plaintiffs presented no percipient witnesses to refute these facts, only submitting declarations of two individuals who were not present, and without even a declaration of the actual plaintiffs.

Contrary to the suggestion of the Plaintiffs, **the November 1, 2000 "Agreement" attached to their motion does not even provide for arbitration or for resolution of disputes in Korea**. Paragraph 8.6 of the "Agreement" presented by the Plaintiffs in their motion merely states that "this Agreement shall be governed and construed under international trade law, as applicable to contracts made and fully performed internationally." **No mention is made of Korea or arbitration**. Moreover, **the disputed "Sales Contract" upon which the plaintiffs rely with an arbitration**

clause was not with the plaintiffs or Medison Co., Ltd., but rather with Medison Econet Co., Ltd., a distinct entity not a party to this litigation at all. [See, Plaintiffs' Motion, Exhibit D, ER tab 8 and tab 10, p. 207; Defendant's Separate Statement ¶s 32-36, ER tab 9, p. 154-155.] Medison Econet, Co., Ltd. was not a party to the arbitration in Korea, and is not a party to this case. [Defendant's Separate Statement ¶s 35-36, ER tab 9, p. 155.] No contract between Imaging3, Inc. (or Imaging Services, Inc.) and the plaintiffs (or Medison) provides for Korean arbitration [Defendant's Separate Statement ¶s 37, ER tab 9, p. 156.] Based on the agreement of the parties, the Korea Commercial Arbitration Board was not a proper forum for this matter.[2]

B. Summary of Material Facts.

II. THE UNDERLYING EQUIPMENT WAS DEFECTIVE AND INADEQUATE.

[2] The award of the Korean Arbitration Board, essentially made by default and "rubber-stamped," completely disregarded the evidence before it. Despite the Declaration of Dean Janes and the extensive supporting documentation, for example, the Board simply made statements such as "we have found no evidence to believe so," and "Neither have we found any evidence to believe so." [Plaintiffs' Motion, Exhibit N, page 5, ER tab 11, p. 294.]

Imaging3, Inc. contends that the specific systems sent by Medison to Imaging3 proved to be defective and wholly inadequate. [Counterclaim ¶ 18, ER tab 6, p. 98.] Nearly all of the original systems were ultimately returned by the end-users, sometimes leading to litigation. [Dean Janes' Declaration ¶ 17, ER tab 18, p. 568; Christopher Sohn Declaration ¶ 17, ER tab 19, p. 589.] As Medison was advised, the equipment which is the subject of this proceeding was also defective and unusable. [Dean Janes' Declaration ¶ 17, ER tab 18, p. 568; Christopher Sohn Declaration ¶ 17, ER tab 19, p. 589.] In addition to being defective and of no value, the systems were improperly shipped, by Medison, to customs, not under Imaging3's FDA (Food and Drug Administration) brand name, so the FDA placed a hold on them. [Dean Janes' Declaration ¶ 12, 18, ER tab 18, p. 567, 568; Christopher Sohn Declaration ¶ 12, 18, ER tab 19, p. 588, 590.] The effect of this improper labeling was to prevent Imaging3 from selling them, as planned, because Imaging3 then had to demonstrate that the equipment was certified. [Dean Janes' Declaration ¶ 18, ER tab 18, p. 568; Christopher Sohn Declaration ¶ 18, ER tab 19, p. 590; Counterclaim ¶ 19, ER tab 6, p. 98.]

As indicated on the "Commercial Invoice" attached to Medison's original claim, the equipment to be provided was to be the "ISI2500" C-Arm

System (with the ISI representing "Imaging Services, Inc."), and were to be labeled as such; they were not. (The same designation appears on the November 27, 2001 "Marine Cargo Insurance Policy") [Dean Janes' Declaration ¶ 19, ER tab 18, p. 568; Christopher Sohn Declaration ¶ 19, ER tab 19, p. 590.] Rather, the equipment bore the Medison designation of MCA-901, which was not approved by the FDA for sale or clearance through Customs. [Dean Janes' Declaration ¶ 19, ER tab 18, p. 568; Christopher Sohn Declaration ¶ 19, ER tab 19, p. 590.] Accordingly, a freeze was imposed by the United States Food and Drug Administration ("FDA") which first prevented Imaging3 from receiving the equipment and, once received, prevented the sale of the equipment. [Dean Janes' Declaration ¶ 19, ER tab 18, p. 568; Christopher Sohn Declaration ¶ 19, ER tab 19, p. 590.] Documents concerning Counterclaimant's inability to utilize the systems because of Medison's improper labeling and "freeze" imposed by the FDA were also destroyed in Imaging3's fire, but are being sought from the Food and Drug Administration (FDA).[3] [Dean Janes' Declaration ¶ 20, ER tab 18, p. 568; Christopher Sohn Declaration ¶ 20, ER tab 19, p. 590.]

[3] The need for these documents, among other things, also related to Defendant's alternative request for a continuance pursuant to Rule 56(f), which request was denied.

On several occasions, Medison representatives were informed of these and many other problems with the Medison-shipped devices, support, quality, and FDA certification problems. [Dean Janes' Declaration ¶ 21, ER tab 18, p. 568; Christopher Sohn Declaration ¶ 21, ER tab 19, p. 590.] Indeed, at or about the time Medison filed its reorganization proceedings, Imaging3 contacted Medison concerning Counterclaimant's displeasure and concerns for the Medison products, noting that Imaging3, when dealing with Medison, had received "nothing but negative and accusatory comments, delays, improper documentation, harassing negotiation, double talk and no technical support whatsoever." [Dean Janes' Declaration ¶ 21, ER tab 18, p. 568; Christopher Sohn Declaration ¶ 21, ER tab 19, p. 590.] For months prior, Imaging3 had contacted Medison's employees concerning the problems and defects with the Medison equipment, which had rendered it unusable. [Dean Janes' Declaration ¶ 22, ER tab 18, p. 569; Christopher Sohn Declaration ¶ 22, ER tab 19, p. 590.] Some of the additional defects and problems with the equipment sent by Medison include:

a. Intermittent HFG Filament Interlock Error;

b. Intermittent CCD Camera Noise;

c. H.V. Cables Shorting at H.V. Tank;

d. Slow response from auto KV tracking;

e. KV & mA Calibration not within the legal specifications of 5% on every system;

f. No Dose adjustment;

g. No CCD Camera Imaging adjustments, black level, white clipping;

h. Collimation board revisions changed but not downward compatible;

i. Mechanical locks unsturdy and break;

j. "C" breaks when trying to adjust cradle bearing tension;

k. SID varies from system to system;

l. X-ray tube and Image Intensifier not perpendicular to each other;

m. No kV adjustment;

n. No calibration procedure provided;

o. Incomplete schematics;

p. Incomplete service manual;

q. Improper aluminum filtration provided.

[Dean Janes' Declaration ¶ 23, ER tab 18, p. 569; Christopher Sohn Declaration ¶ 23, ER tab 19, p. 591.]

The problems in the preceding paragraph were all reported to Medison, but never corrected. [Dean Janes' Declaration ¶ 24, ER tab 18, p.

570; Christopher Sohn Declaration ¶ 24, ER tab 19, p. 591.] These problems rendered the equipment unusable and impossible to sell, in addition to the labeling problems which also made it impossible for Imaging3 to re-sell the equipment because of the FDA restrictions described herein. [Dean Janes' Declaration ¶ 24, ER tab 18, p. 570; Christopher Sohn Declaration ¶ 24, ER tab 19, p. 591.]

In its counterclaim, Imaging3, Inc. alleges that Plaintiffs breached their contract with Counterclaimant IMAGING3, INC. by, among other things:

(a) Failing and refusing to resolve disputes between the parties in the California forum, as agreed;

(b) Failing to deliver equipment in a working and non-defective condition;

(c) Failing to properly use Imaging3's FDA (Food and Drug Administration) brand name, so the FDA placed a hold on the shipped goods. The effect of this improper labeling was to prevent Imaging3 from selling them, as planned, because Imaging3 then had to demonstrate that the equipment was certified;

(d) Failing to remedy the problems and defects described in this Claim for Relief.

[Counterclaim ¶ 29, ER tab 6, p. 100-101.]

Plaintiffs herein filed their Complaint/Petition to confirm the Korean arbitration board ruling on April 15, 2005. Defendant IMAGING3 filed an answer to the Plaintiffs' complaint on May 23, 2005, setting forth 37 Affirmative Defenses. [Answer to Complaint, May 23, 2005, ER tab 5, ps. 80-94; Plaintiffs' Separate Statement ¶19, ER tab 9, p. 149.] Defendant IMAGING3 also filed its Counterclaim, stating claims for relief for Breach of Contract and Violations of the California Business and Professions Code. [Counterclaim, May 23, 2005, ER tab 6, p. 95-104.]

C. Judgment/Ruling of District Court and Statement of Appealability.

Plaintiff/Respondents filed a motion for Summary Judgment on April 4, 2006 against Plaintiff/Appellant, asserting that "Medison Is Entitled To Judgment As A Matter Of Law." [ER tab 8, p. 115] Plaintiffs opposed the Motion. [ER tab 15.] The Plaintiffs' opposition consisted of an opposing Memorandum of Points and Authorities [ER tab 15], Responses to Defendant's Statements of Facts [ER tab 17], a Separate Statement of Material Facts in Dispute [ER tab 16], Evidentiary Objections [ER tab 15, p.

491], and extensive factual declarations of Plaintiff Dean Janes [ER tab 18], Christopher Sohn [ER tab 19], and accompanying exhibits.

The District Court held, without oral argument, that the Motion for Summary Judgment is granted (and confirmed the Korean arbitration award) on the ground that "Petitioners have met all of the prerequisites necessary to support their request for an Order confirming the Korean arbitration award," that "Imaging3 has failed to satisfy its burden of proof as to one of the New York Convention's enumerated defenses," and that "Imaging3 has failed to allege facts sufficient to warrant a look beyond the KCAB's decision." [Judgment, page 12, lines 20-25; ER tab 3, p. 27.] The court thus ordered Summary Judgment in favor of Respondent and against the Appellant.

The District Court of California, by the Honorable Florence-Marie Cooper, Judge, rendered its final Order Granting Summary Judgment to Respondents on June 1, 2006. [ER tab 3.] The Judgment was entered on June 21, 2006 [Id.], as indicated in the Judgment filed on that date. [ER tab 2, p. 11.] Notice of Appeal from the Judgment was timely filed on July 19, 2006. [ER tab 2, p. 9, 10.] The appeal is from a judgment that finally disposed of all affirmative claims of Plaintiffs against the Defendant.

D. Standard of Review.

SUMMARY JUDGMENT IS INAPPROPRIATE WHERE, AS

HERE, MATERIAL FACTUAL DISPUTES EXIST.

i. Summary Judgment Is Inappropriate Where There Are Disputed Material Facts; Applicable Legal Standards.

In a motion for summary judgment, the burden is on the moving party to establish both that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. *Quadra v. Superior Court of San Francisco*, 378 F.Supp. 605 (N.D. Cal. 1974). The requirement that there be no genuine dispute as to any material fact before summary judgment is granted is to be strictly construed so as to insure that factual issues will not be determined without the benefit of the truth seeking procedures of trial. *Corely v. Life & Casualty Ins. Co*., 296 F.2d 449 (D.C. Cir 1961). Summary judgment should not be granted where there is any doubt as to whether there is a material fact in dispute. *Griffeth v. Utah Power & Light*, 226 F.2d 661 (9th Cir. 1955). The issue of material fact required by Fed.R.Civ.P. 56(e) to be present to entitle a party to proceed to trial is not required to be resolved in the favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial. *First National Bank v. Cities Service Co*., 391 U.S. 253 (1968).

"It is a fundamental maxim that on a motion for summary judgment under Fed.R.Civ.P. 56 the court cannot try issues of fact; it can only determine whether there are issues to be tried. The court cannot assess the credibility of the evidence presented on the motion, weigh the movant's evidence against that of the responding party, resolve conflicts presented by the parties' affidavits and other supporting materials, or grant summary judgment because it does not find the responding party's evidence to be convincing." 28 Fed.Proc., L.Ed. 62:547, at pp. 41-42.

Summary judgment is seldom appropriate where a case presents issues involving state of mind or subjective feelings and reactions, such as motive, intent or good faith. *Poller v. Columbia Broadcasting System, Inc*., 368 U.S. 464 (1962); *Shuman v. Standard Oil Co*., 453 F.Supp. 1150 (N.D. Cal. 1978). "[C]ourts should be cautious in granting summary judgment in cases presenting complex issues of law or fact, or important or unsettled questions of law." 28 Fed.Proc., L.Ed. 62:565, at pp. 57-58, citing *Zweig v. Hearst Corp*., 521 F.2d 1129 (9th Cir. 1975), *cert. den*., 423 U.S. 1025. "Caution is especially appropriate in cases where the law is undeveloped, as in cases of first impression or test cases." 28 Fed.Proc., L.Ed. 62:565, at p. 58.

ii. Defendant Has Raised Several Statutory Grounds to Vacate or Disregard the Arbitration Award.

Review of an arbitration award is generally governed by the Federal Arbitration Act (the "FAA"). The FAA provides that an arbitration award may be vacated if: (1) the award was procured by corruption, fraud or undue means; (2) the arbitrators exhibited "evident partiality" or "corruption"; (3) the arbitrators were guilty of misconduct; or (4) the arbitrators exceeded their power. See 9 U.S.C. § 10. Specifically, the statute provides:

"Section 10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."

Moreover, courts have recognized that an arbitration award may be vacated if it is rendered in "manifest disregard of the law." *Halligan v. Piper Jaffray, Inc*., 148 F.3d 197, 201-202 (2d Cir. 1998); *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953).

In addition to the other grounds set forth herein, the facts presented by Imaging3, Inc., as supported by the affidavits of Dean Janes and Christopher Sohn, provide ample evidence of grounds to vacate the Korean arbitration award, certainly for purposes of defeating summary judgment or judgment on the pleadings.

iii. Review on Appeal; Standard of Review. The appellate court will review a summary judgment motion *de novo* to determine whether there is a triable issue as to any material fact and whether the moving party is entitled to judgment as a matter of law. [4] A district court's order granting

[4] California state law is in accord. (*Galanty v. Paul Revere Life Ins. Co.* (2000) 23 Cal.4th 368, 374; *Code Civ. Proc*., § 437c, subd. (c).) The Court is not bound by the trial court's stated reasons or rationales. (*Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 878.) "In practical effect, we assume the role of a trial court and apply the same rules and standards which govern a trial court's determination of a motion for summary judgment." (*Lenane v.Continental Maritime of San Diego, Inc.* (1998) 61 Cal.App.4th 1073,

summary judgment is reviewed *de novo*. Under the law of the United States Court of Appeals for the Ninth Circuit, this court reviews the grant or denial of summary judgment without deference. See *DeBoer v. Pennington*, 206 F.3d 857, 863 (9th Cir. 2000) (stating that the Ninth Circuit reviews both a denial and grant of summary judgment de *novo*).[5] See also, *Terry Barr Sales Agency, Inc. v. All-Lock Co*., 96 F.3d 174, 178 (6th Cir. 1996); *Smith v. Ameritech*, 129 F.3d 857, 863 (6th Cir. 1997); *Hale v. Tallapoosa County*, 50 F.3d 1579, 1581 (11th Cir. 1995); *Webb v. Cardiothoracic Surgery Associates*, 137 F.3d 264, 267 (5th Cir. 1998).

For summary judgment to be granted, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

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1079.) Thus, the Court will independently determine the construction and effect of the facts presented to the trial judge as a matter of law. (*Saldana v. Globe-Weis Systems Co.* (1991) 233 Cal.App.3d 1505, 1511-1515.) Summary judgment is a drastic remedy to be used sparingly, and any doubts about the propriety of summary judgment must be resolved in favor of the opposing party. (*Kulesa v. Castleberry* (1996) 47 Cal.App.4th 103, 112; *WYDA Associates v. Merner* (1996) 42 Cal.App.4th 1702, 1709.)

[5] See also, *Terry Barr Sales Agency, Inc. v. All-Lock Co*., 96 F.3d 174, 178 (6th Cir. 1996); *Smith v. Ameritech*, 129 F.3d 857, 863 (6th Cir. 1997); *Hale v. Tallapoosa County*, 50 F.3d 1579, 1581 (11th Cir. 1995); *Webb v. Cardiothoracic Surgery Associates*, 137 F.3d 264, 267 (5th Cir. 1998). The District Court's rulings on Appellant's evidentiary objections and request for continuance are reviewed for an abuse of discretion. See, *Domingo vs. T.K.*, 289 F.3d 600, 605, (9th Cir. 2002), *Chance v. Pac-Tel Teletrac, Inc*., 242 F.3d 1151, 1161 n. 6 (9th Cir. 2001).

affidavits, if any, [must] show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "If the facts in a case are undisputed, one of the parties is entitled to judgment as a matter of law." *Niecko v. Emro Marketing Co*., 973 F.2d 1296, 1304 (6th Cir. 1992). The Plaintiffs herein failed to make such a showing.

The Appellant herein maintain that the Plaintiffs, in providing insufficient evidence or documentation to refute Defendant's facts, failed even to meet their initial burden because they have made no showing of an absence of material facts. Plaintiffs' Motion should not have been granted under these standards.

3. ARGUMENT.

A. MATERIAL FACTUAL DISPUTES WERE PRESENTED TO THE TRIAL COURT, REQUIRING DENIAL OF PLAINTIFFS' SUMMARY JUDGMENT MOTION.

Imaging3, Inc. contests the Petitioner's standing, and it disputes the Korean arbitration award in its entirety. The original contract between Imaging3 and Medison provided (in paragraph 8.6) that **"The validity, performance and interpretation of this Agreement shall be governed**

and construed under the laws of the State of California, as applicable to contracts made and fully performed in California between California residents…." the disputed "Sales Contract" upon which the plaintiffs rely with an arbitration clause was not with the plaintiffs or Medison Co., Ltd., but rather with Medison Econet Co., Ltd., a distinct entity not a party to this litigation at all. [See, Plaintiffs' Motion, Exhibit D, ER tab 10, p. 207; Defendant's Separate Statement ¶s 32-36, ER tab 16, p. 513-514.] Medison Econet, Co., Ltd. was not a party to the arbitration in Korea, and is not a party to this case. [Defendant's Separate Statement ¶s 35-36, ER tab 16, p. 514.] No contract between Imaging3, Inc. (or Imaging Services, Inc.) and the plaintiffs (or Medison) provides for Korean arbitration [Defendant's Separate Statement ¶s 37.] Based on the agreement of the parties, the Korea Commercial Arbitration Board was not a proper forum for this matter. [Dean Janes' Declaration ¶s 14, 15, ER tab 18, p. 567; Christopher Sohn Declaration ¶s 14, 15, ER tab 19, p. 589.]

Imaging3, Inc., in addition to contesting the validity of the Korean arbitration award, further contends that Counter-defendants breached their contract with Imaging3, Inc., and further violated California's *Business and Professions Code*. Plaintiffs breached their contract with Counterclaimant IMAGING3, INC. by, among other things:

(a) Failing and refusing to resolve disputes between the parties in the California forum, as agreed;

(b) Failing to deliver equipment in a working and non-defective condition;

(c) Failing to properly use Imaging3's FDA (Food and Drug Administration) brand name, so the FDA placed a hold on the shipped goods. The effect of this improper labeling was to prevent Imaging3 from selling them, as planned, because Imaging3 then had to demonstrate that the equipment was certified;

(d) Failing to remedy the problems and defects described in this Claim for Relief.

[Counterclaim, ER tab 6, p. 100-101; Dean Janes' and Christopher Sohn Declarations, generally, ER tabs 18 and 19.]

Imaging3, Inc. disputes the damage claims of Medison in their entirety. [Answer ER tab 5, p. 80-94; Counterclaim ER tab 6, p. 95-104; Dean Janes' and Christopher Sohn Declarations ER tabs 18 and 19.] The equipment sent to Imaging3, Inc. proved to be of no value. Even if Medison had repaired and remedied every problem identified by Imaging3, Inc. [which it did not], Imaging3, Inc. suffered serious financial and reputable

losses due to Medison's lack of support, in amounts still being determined, but in excess of those amounts claimed by Petitioners. [Dean Janes' Declaration ¶ 8 ER tab 18, p. 566; Christopher Sohn Declaration ¶ 8 ER tab 19, p. 588.]

B. IMAGING3, INC. RAISED A NUMBER OF AFFIRMATIVE DEFENSES AND GROUNDS ENUMERATED UNDER THE NEW YORK CONVENTION TO JUSTIFY NON-RECOGNITION OF THE KOREAN AWARD.

Contrary to the assertion of the Plaintiffs that "Imaging3 has waived all defenses potentially available under the New York Convention," [Motion, page 12, lines 22-23, ER tab 8, p. 130], it has asserted a number of facts and defenses available to it, which require denial of Plaintiffs' motion.[6]

Critically, Defendant has always asserted that the original contract between Imaging3 and Medison provided (in paragraph 8.6) that **"The validity, performance and interpretation of this Agreement shall be governed and construed under the laws of the State of California**, as applicable to contracts made and fully performed in California between California residents…."

[6] Moving parties made the astonishing assertion that "Even if Imaging3 were allowed to amend its answer, Imaging3 cannot show any of the enumerated defenses…" [Motion, page 14, lines 7-8, ER tab 8, p. 132.]

Moreover, at the trial of this action, Imaging3, Inc. will be able to demonstrate other enumerated grounds to refuse to enforce the arbitration award. It has already raised the issue of its incapacity, not at the time of the signing of the underlying contract, but at the time of the arbitration hearing, based on its catastrophic fire loss. [Dean Janes Declaration ¶s 9, 29, ER tab 18, p. 566, 571; Christopher Sohn Declaration ¶s 9, 29, ER tab 19, p. 588, 592; Article V of the New York Convention, 9 U.S.C. 207 (a).] Based on the disputed issue of the forum and jurisdiction clause, there certainly is a disputed fact concerning whether the award falls "within the terms of the submission to arbitration" and whether the award, therefore was "beyond the scope of the submission to arbitration." [Article V of the New York Convention, 9 U.S.C. 207 (c).]

Imaging3 has set forth serious factual disputes concerning the documentation presented by the Plaintiffs, and the validity of the purported signatures. These disputed facts alone raise grounds for refusing to recognize the Korean award, as the "arbitral procedure was not in accordance with the agreement of the parties." Article V of the New York Convention, 9 U.S.C. 207 (d). For these reasons as well, it is respectfully submitted that this Court must deny Plaintiffs' Motions.

4. THE COURT ERRED IN GRANTING SUMMARY JUDGMENT.

As detailed throughout this brief, the District Court, it is submitted, erred in granting Plaintiffs Summary Judgment. Among other things, it was error to overrule Imaging3, Inc.'s objections to the declarations submitted by the Plaintiffs. The lower court overruled the evidentiary objections, stating that they were "stated in broad terms and are not adequately supported by citations to authority." [Judgment, page 2, lines 15-20, ER tab 3, p. 17.] The Court further said that "the objections are not stated with sufficient specificity to permit the Court to identify the substance of the evidence to which Imaging3 objects." [Judgment, page 2, lines 20-23, ER tab 3, p. 17.]

Appellant further maintains that it was error of the lower court to hold that "Because Imaging3's counterclaim seeks to relitigate the merits of the same questions that were before the KCAB arbitrator, it is improper under the New York Convention." [ER tab 3, p. 26.] Furthermore, Appellant maintains that it was complete error to grant summary judgment to Plaintiffs under the facts and law presented.

5. CONCLUSION.

In review a grant of summary judgment, the role of the appellate court is well established: A grant of summary judgment is reviewed *de*

novo. [See *Kruso v. International Telephone & Telegraph Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989).] The appellate court must determine, viewint the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant law. [See *Tzung v. State Farm Fire and Casualty Co.*, 873 F.2d 1338, 1339-40 (9th Cir. 1989). The appellate court's review is governed by the same standard used by the district court under FRCP 56(c). [*Darring v. Kincheloe*, 783 F.2d 874, 876 (9th Cir. 1986).] In this case, Plaintiffs presented more than enough evidence in their opposition to overcome Plaintiffs' summary judgment, such that this case should have proceeded to trial.

For the reasons stated herein, Defendant and Appellant respectfully requests that this Court should reverse the lower court's Summary Judgment decision, and allow the case to go forward on its own merits.

DATED: June 30, 2007 LAW OFFICES OF RICHARD D. FARKAS

By: _____
RICHARD D. FARKAS
Attorneys for Defendant and
Appellant IMAGING3, INC.

CERTIFICATE OF COMPLIANCE

Pursuant to *Federal Rule of Appellate Procedure* 32(a)(7)(C), Appellant certifies that its Opening Brief is prepared in proportionately spaced Times New Roman typeface in fourteen point.

The number of words in the body of this brief is approximately 5,706 according to the word processor program (Microsoft Word®) used for this brief.

DATED: July 3, 2007 LAW OFFICES OF RICHARD D. FARKAS

By: _____
RICHARD D. FARKAS
Attorneys for Defendant and
Appellant IMAGING3, INC.

CORPORATE DISCLOSURE STATEMENT

Pursuant to *Federal Rule of Appellate Procedure* 26.1 and 28(a)(1), Appellant Imaging3, Inc. certifies that it is a publicly-traded California corporation. There is no parent corporation, and no publicly-traded corporation holds 10% or more of its stock. The following persons and entities have an interest, financial or otherwise, in the outcome of this litigation: Defendant, defendant's attorneys and plaintiffs.

DATED: July 3, 2007 LAW OFFICES OF RICHARD D. FARKAS

By: _____
RICHARD D. FARKAS
Attorneys for Defendant and
Appellant IMAGING3, INC.

Lee and Ryu (Medison) vs. Imaging3, Inc.
Court of Appeals Case No. **06-55993** (District Court No. CV-05-02806-FMC)

PROOF OF SERVICE

I am a resident of the State of California, I am over the age of 18 years, and I am not a party to this lawsuit. My business address is Law Offices of Richard D. Farkas, 15300 Ventura Boulevard, Suite 504, Sherman Oaks, California 91403. On the date listed below, I served the following document(s):

APPELLANTS' OPENING BRIEF; EXCERPTS OF RECORD

XX by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as set forth below. I am readily familiar with the firm's practice of collecting and processing correspondence for mailing. According to that practice, items are deposited with the United States mail on that same day with postage thereon fully prepaid. I am aware that, on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing stated in the affidavit.

Mark S. Faulkner, Esq. Lee, Hong, Degerman, Kang, & Schmadeka 660 South Figueroa, Suite 2300 Los Angeles, California 90017	

XX by personally delivering the document(s) listed above to the person/court at the address set forth below.

U.S. Court of Appeals P.O. Box 193939 San Francisco, CA 94119-3939	Clerk, U.S. Court of Appeals 95 Seventh Street San Francisco, CA 94119-3939	

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: July ____, 2007

KERRI CONAWAY