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Jacobsen Construction v. Teton Builders : Brief of Appellant

Utah Supreme Court

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IN THE UTAH SUPREME COURT

JACOBSEN CONSTRUCTION
COMPANY, INC., a Utah corporation,

Plaintiff and Appellee,

vs.

TETON BUILDERS, a Wyoming
corporation, and THOMAS R. HUNTER,
an individual,

Defendants and Appellants.

BRIEF OF APPELLANT

Supreme Court No. 20030727-SC

**APPEAL FROM AN INTERLOCUTORY ORDER OF
THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY,
HONORABLE ROBERT K. HILDER, DISTRICT JUDGE**

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STATEMENT OF JURISDICTION

The Utah Supreme Court has appellate jurisdiction over this matter pursuant to Utah Code Ann. § 78-2-2(3)(j) (2002).

ISSUES PRESENTED FOR REVIEW

Issue No. 1. Did the trial court abuse its discretion when it enforced the forum selection clause in Jacobsen’s form contract and thereby contravened Utah public policy and generated duplicative litigation in two states?

Standard of Review. The trial court’s enforcement of a forum selection clause is reviewed for abuse of discretion. See Prows v. Pinpoint Retail Sys., Inc., 868 P.2d 809, 810 (Utah 1994); see also Durdahl v. National Safety Assocs., Inc., 988 P.2d 525, 528 (Wyo. 1999). While Wyoming law governs the interpretation of Jacobsen’s Contract, the Court looks to the public policies of the forum state—Utah—in determining whether to extend comity to Wyoming. See Durdahl, 988 P.2d at 528; see also Trillium, U.S.A., Inc. v. Board of County Comm’rs, 2001 UT 101, ¶ 19, 37 P.3d 1093. This issue was raised below. See Memorandum Supporting Motion to Dismiss at 5–7 [R.45–47]; Reply Memorandum Supporting Motion to Dismiss at 8–9 [R.128–29].

Issue No. 2. Did the trial court abuse its discretion when it found jurisdiction over subcontractor-defendants where Jacobsen’s form contract involves construction improvements to real property in Wyoming, was negotiated and performed in Wyoming, contains a bald forum selection clause for Utah—but no consent-to-jurisdiction clause—and the only connection to Utah is Jacobsen’s main office?

Standard of Review. Since the motion to dismiss was supported only by affidavits, an appeal from the trial court’s decision “presents only legal questions that are reviewed for correctness.” Arguello v. Indus. Woodworking Mach. Co., 838 P.2d 1120, 1121 (Utah 1992). This issue was raised below. See Memorandum Supporting Motion to Dismiss at 12–14 [R.52–54]; Reply Memorandum Supporting Motion to Dismiss at 1–8 [R.121–28].

DETERMINATIVE PROVISIONS

Interpretation of Utah Code Ann. § 13-8-3 is of central importance to the determination of Issue Number 1, above. This provision reads, in pertinent part:

(2) A provision in a construction agreement requiring a dispute arising under the agreement to be resolved in a forum outside of this state is void and unenforceable as against the public policy of this state if:

(a) one of the parties to the agreement is domiciled in this state; and

(b) work to be done and the equipment and materials to be supplied under the agreement involves a construction project in this state.

Utah Code Ann. § 13-8-3(2) (2001).

STATEMENT OF THE CASE

I. NATURE OF THE CASE

The general contractor, Jacobsen Construction Company, Inc., (“Jacobsen”), sued its carpentry subcontractor, Teton Builders, and Teton Builders’ president, Thomas R. Hunter (“Hunter”) (collectively “Subcontractors”) on Jacobsen’s form subcontract agreement (“Jacobsen’s Contract”) executed by the parties. Jacobsen’s Contract provides for the construction of improvements on real property located in Wyoming, Jacobsen maintains an office in Wyoming, and Jacobsen’s Contract was negotiated and performed solely in Wyoming. Subcontractors are both domiciled in Wyoming, and Subcontractors have no Utah contacts whatsoever. Thomas R. Hunter Affidavit (“Hunter Aff.”) at ¶¶ 2–20. [R.42–44.] The parties stated that Wyoming law governs Jacobsen’s Contract. Contract at ¶ 8(I) (Exhibit A, attached). [R.17.] The only connection to Utah in this case is Jacobsen’s head office located in Utah. The forum selection clause in Jacobsen’s Contract designates Utah as the venue for resolving disputes. *Id.* at ¶ 7(C). [R.16.] Jacobsen’s Contract does not include a consent-to-jurisdiction clause by Subcontractors.

II. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

Subcontractors moved to dismiss for lack of personal jurisdiction. The trial court determined that the forum selection clause in Jacobsen’s Contract is enforceable under Wyoming law. Transcript at 30 (Exhibit C, attached). The trial court ruled that Subcontractors agreed to the venue provision and impliedly consented to personal

jurisdiction in Utah. Id. Then, applying the “rational nexus” test set forth in Phone Directories Co. v. Henderson, 2000 UT 64, ¶ 14, 8 P.3d 256, the trial court determined that the lone fact of Jacobsen’s Utah domicile was a sufficient “rational nexus” with Utah on which to find personal jurisdiction over Subcontractors and denied the motion to dismiss. Order Denying Defendants’ Motion to Dismiss at 2 (Exhibit D, attached). [R.141.] This Court granted an interlocutory appeal.

III. STATEMENT OF FACTS

Subcontractors, both residents of Jackson, Wyoming, presented uncontroverted evidence below that they have no contacts whatsoever with Utah. They have never worked, advertised, contracted, or conducted business of any nature within Utah’s borders. Subcontractors executed Jacobsen’s Contract to perform framing work on a hotel construction project on real property located in Jackson, Wyoming (the “Property”).¹ Jacobsen was the general contractor. Jacobsen’s Wyoming-based employees finalized Jacobsen’s Contract with Subcontractors through Jacobsen’s Wyoming office, and the parties signed Jacobsen’s Contract in Wyoming. All work under Jacobsen’s Contract was performed in Wyoming, where the Property is located. Hunter Aff. at ¶¶ 2–10, 18–19. [R.37–38.]

Jacobsen’s Contract contains a forum selection provision that reads: “All arbitration proceedings and litigation shall take place within Salt Lake County, State of

¹ Subcontractors also executed Jacobsen’s form Subcontract Work Order, which is attached as Exhibit B.

Utah.” Contract at ¶ 7(C) (Exhibit A, attached). [R.16.] Jacobsen’s Contract also contains a choice of law provision electing Wyoming law: “This Agreement . . . shall be deemed to have been made in and shall be interpreted under the laws of the place where the project is located.” Id. at ¶ 8(I). [R.17.] There is no consent-to-jurisdiction clause in Jacobsen’s Contract.

Teton Builders recorded a mechanic’s lien notice against the Property in Wyoming. Statement of Claim for Mechanics and Materialmens Lien (the “Lien Notice”) (attached within Exhibit B to Memorandum Opposing Defendants’ Motion to Dismiss). [R.102–04.] Jacobsen filed a second action regarding this same dispute, currently pending in Wyoming state court, in which Jacobsen has sought to strike the lien against the Property. Richard Kirkham Affidavit at ¶¶ 8–10. [R.114.]

Jacobsen obtained a payment bond (the “Payment Bond”) from United States Fidelity and Guaranty Company (“US Fidelity”) as substitute security for Teton Builders’ mechanic’s lien in the event that the Wyoming court does not strike the lien. Id. at ¶ 10. [R.114–15, 118–20.] The Payment Bond is payable to the owner of the Property, FS Jackson Hole Development Company, LLC, (“FS Jackson Hole”), and not Subcontractors. Payment Bond (attached as Ex. 1 to Kirkham Affidavit). [R.118.] FS Jackson Hole is a Delaware limited liability company domiciled in Wyoming. Lien Notice [R.102.] US Fidelity is a Maryland corporation domiciled in Minnesota. Payment Bond. [R.118–19.]

SUMMARY OF ARGUMENTS

The forum selection clause is unreasonable and against Utah public policy. Utah public policy recognizes the importance of requiring construction litigation to be adjudicated in the state where the subject property is located, along with the need to bring disputes in one action. It is unreasonable and unfair to force Subcontractors to defend two competing lawsuits in Wyoming and Utah—an inevitable result if the trial court retains jurisdiction. On these bases, the Court should determine that the forum selection clause is unenforceable.

The trial court’s ruling further raises a question of first impression, namely, what standards should determine personal jurisdiction where an out-of-state subcontractor with no Utah contacts signs a Utah general contractor’s form construction contract containing a Utah forum selection clause—but no consent-to-jurisdiction clause. This dispute has no relation to Utah but is instead centered upon out-of-state real property. Based on the plurality of opinions in Henderson, the “rational nexus” test only governs contracts that include consent-to-jurisdiction clauses. Thus, traditional minimum contacts analysis applies here. Since Subcontractors have no minimum contacts, this action should be dismissed and the parties should resolve their dispute in Jacobsen’s second action in Wyoming.

Finally, even if the “rational nexus” test should apply here, the trial court misapplied it. Because Jacobsen’s Contract was for construction improvements to real property located outside Utah, Jacobsen acted as a Wyoming resident with respect to

Jacobsen's Contract, and the only connection to Utah is the fact of Jacobsen's head office, there is no "rational nexus."

This Court should reverse and dismiss for lack of jurisdiction.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT ENFORCED JACOBSEN'S FORUM SELECTION CLAUSE BECAUSE THE CLAUSE IS UNREASONABLE AND AGAINST UTAH PUBLIC POLICY.

Before even reaching the issue of personal jurisdiction, the trial court should have determined that the forum selection clause in Jacobsen's Contract is unenforceable. Under Jacobsen's Contract, Wyoming law governs. See Contract at ¶ 8(I) (Exhibit A, attached). [R.17.] In Wyoming—as in Utah and other jurisdictions—a forum selection clause is not enforceable if it is unreasonable, against a public policy of the forum state, or the chosen forum is seriously inconvenient. See Durdahl v. National Safety Assocs., Inc., 988 P.2d 525, 528, 530 (Wyo. 1999). Accord Prows v. Pinpoint Retail Sys., Inc., 868 P.2d 809, 812–13 (Utah 1994) (finding forum selection clause unenforceable based on a number of factors, including increased cost, policy considerations, unfairness, and inconvenience); The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972). Enforcement of the forum selection clause in Jacobsen's Contract is unreasonable, against public policy, and seriously inconvenient. Based on the totality of these circumstances, the forum selection clause should not be enforced, particularly where the improvements to the subject property are located in Wyoming and Jacobsen's second action regarding the lien is pending in Wyoming.

A. Enforcement of Jacobsen’s Forum Selection Clause Is Unreasonable and It Violates Utah Public Policy Regarding the Venue for Construction Disputes.

The Utah Legislature has recognized a public policy of voiding out-of-state forum selection clauses in construction litigation that involves Utah real property. See Utah Code Ann. § 13-8-3(2) (cited in full in Determinative Provision section, above). Importantly, it is the public policy of the forum state—Utah—that controls the Court’s analysis of whether to enforce the forum selection clause. See Durdahl, 988 P.2d at 528 (holding that while Tennessee law governed contract, Wyoming court will enforce law of foreign jurisdiction “so long as that law is not contrary to Wyoming law, public policy, or the general interests of Wyoming’s citizens”).

As stated by the Bremen Court, “A contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or judicial decision.” 407 U.S. at 15; see also Roby v. Corp. of Lloyd’s, 996 F.2d 1353, 1363 (2d Cir. 1993) (although parties chose English law in contract, holding under Bremen that forum selection clause is unreasonable if it “contravene[s] a strong public policy of the forum state”). Likewise, this Court has recognized that when determining whether to extend comity to another state’s laws, “[o]f primary importance [to Utah courts] is whether [Utah’s] public policies . . . would be contravened if comity were extended.” Trillium, U.S.A., Inc. v. Board of County Comm’rs, 2001 UT 101, ¶ 19, 37 P.3d 1093 (quoting

Jackett v. Los Angeles Dep't of Water & Power, 771 P.2d 1074, 1076 (Utah Ct. App. 1989)).

Utah public policy relating to the venue for construction disputes is set forth in Utah Code Ann. § 13-8-3. Under this provision, if there is a dispute involving construction work performed in Utah and a Utah resident, a forum selection clause that requires litigation of that construction dispute in a forum other than Utah violates Utah's public policy and is unenforceable. See Utah Code Ann. § 13-8-3(2). Utah is not alone in recognizing the importance of keeping construction litigation within the forum where the property is located.² Admittedly, the present case involves an inverse scenario—namely a Utah forum selection clause involving improvements to Wyoming real property. However, the same Utah public policy should apply when a Utah court is asked to adjudicate disputes over real property in Wyoming. The Court should refuse to enforce a Utah forum selection clause involving Wyoming real property where the Utah resident is also resident in Wyoming, maintains offices in Wyoming, and seeks out business in Wyoming. As a matter of public policy, there is no compelling reason for Utah courts to waste judicial resources serving as the adjudicator of Wyoming's real property disputes.

² See V. Frederic Lyon & Douglas W. Ackerman, Controlling Disputes by Controlling the Forum: Forum Selection Clauses in Construction Contracts, 22 Construction Law. 15, 21 & nn.70–72 (Fall 2002) (citing similar provisions in Florida, Illinois, Minnesota, North Carolina, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, and Utah).

B. Public Policy Concerns Militate in Favor of Refusing to Enforce Jacobsen’s Forum Selection Clause, Which Generates Duplicative, Bifurcated Litigation over the Same Facts.

Jacobsen’s filing of litigation in two states was spawned by the forum selection clause in Jacobsen’s Contract; therefore, enforcement of the forum selection clause is unreasonable, seriously inconvenient, and against public policy. See Durdahl, 988 P.2d at 528, 530; Prows, 868 P.2d at 812–13. The perpetuation of this action in Utah will not eliminate the second Jacobsen litigation that Subcontractors must defend in Wyoming regarding the same facts, nor the Payment Bond litigation that will occur in Wyoming regarding the same facts.

This Court in Prows recognized Utah’s public policy of avoiding bifurcated litigation. The Utah-resident plaintiff in that case, Prows, brought suit in Utah against two co-defendants, Flying J in Utah and Pinpoint in New York, notwithstanding a New York forum selection clause in the contract to which Pinpoint, but not Flying J, was a party. Prows, 868 P.2d at 809–10. Pinpoint moved to dismiss for lack of venue, seeking to enforce the New York forum selection clause, which would have resulted in a New York action against Pinpoint and a Utah action against Flying J. Id. at 813. The trial court denied the motion to dismiss and this Court affirmed, recognizing that “[r]equiring a bifurcated trial on the same issues contravenes the ‘objective of modern procedure,’ which is to ‘litigate all claims in one action if that is possible.’” Id. at 813 (quoting Dyersburg Mach. Works, Inc. v. Rentenbach Eng’g Co., 650 S.W.2d 378, 380–81 (Tenn.

1983)). Based on these “policy considerations” and other factors, such as the unfairness, inconvenience, and increased cost of maintaining two separate actions over the same facts, the Court affirmed the trial court’s ruling invalidating the forum selection clause.

Id.

The result here should be no different. Indeed, Subcontractors and Jacobsen are already involved in Jacobsen’s mechanic’s lien litigation in Wyoming. See Memorandum in Opposition to Defendants’ Motion to Dismiss at Ex. B. [R.96–107.] Attempting to avoid Teton Builders’ Wyoming lien foreclosure action, Jacobsen has provided the Payment Bond, issued by US Fidelity, to the owner of the Property, FS Jackson Hole. [R.118.] However, the Payment Bond does not, as Jacobsen suggested to the trial court, open Utah’s courts to all of Subcontractors’ claims relating to the Property.

While Subcontractors’ counterclaim against Jacobsen can be brought in Wyoming or Utah, claims related to Subcontractors’ mechanic’s lien and the Payment Bond are inseparably connected to Wyoming. Based on the filing of the Payment Bond, the mechanic’s lien is discharged and the Payment Bond is substituted for the lien. See Wyo. Stat. Ann. § 29-1-310. Nevertheless, Teton Builders cannot bring an action in Utah on the Payment Bond unless the trial court in Utah is able to exercise personal jurisdiction over the owner, FS Jackson Hole, and eventually perhaps the bonding company, US Fidelity.

As with Flying J in the Prows case, neither FS Jackson Hole nor US Fidelity was a party to Jacobsen's Contract containing the forum selection clause. Moreover, like Flying J in Prows, there was no evidence below that FS Jackson Hole—domiciled in Wyoming—or US Fidelity—domiciled in Minnesota—is subject to personal jurisdiction in the selected forum (Utah).³ As a result, there may be no basis for Teton Builders to sue in Utah on the Payment Bond. Indeed, for lack of personal jurisdiction, Utah courts ““would be closed to the suit”” on the Payment Bond—yet another proper basis under Prows for invalidating the forum selection clause. 868 P.2d at 812 n.5 (quoting Restatement (Second) of Conflict of Laws § 80, cmt. c).

Jacobsen's dual litigation in Wyoming and Utah will try the exact same facts. At the heart of this case is whether Teton Builders performed under Jacobsen's Contract for improvements to the Property located in Wyoming. In any Wyoming action on the Payment Bond, precisely the same facts will be tried, with possibly different

³ Based on the trial court record quoted in Prows, the trial court appeared to assume—without taking relevant evidence—that Flying J was not subject to personal jurisdiction in New York:

To require the plaintiff to go to New York to litigate where Flying J cannot be a part of a lawsuit, because clearly you can't get Flying J there unless there's personal jurisdiction on some basis we haven't talked about, then this entire issue can't be resolved in one case, we're going to have to try part of it here, part of it in New York, and that assuming the State of New York will take it.

868 P.2d at 812 (quoting trial court record) (emphasis supplied). Similarly, in the present case, the record only reflects that FS Jackson Hole and US Fidelity are domiciled outside Utah. Since there is no evidence that either entity is subject to personal jurisdiction in Utah, the Court can, as in Prows, determine that dual litigation will likely result from enforcing the forum selection clause—not to mention the dual litigation that has already resulted from Jacobsen's filing of two separate actions.

outcomes. Permitting Jacobsen, a large general contractor found in multiple states, to pursue such dual litigation effectively doubles the smaller Subcontractors' litigation expenses. Subcontractors must retain lawyers in both Wyoming and Utah. Depositions and other discovery must be performed in both Wyoming and Utah. Two separate trials will be held over identical issues. Then, when the two cases are concluded, the parties face the possibility of conflicting rulings from Utah and Wyoming courts on the same claims or issues, which will lead to a morass of conflicting enforcement issues.

Such a result is unfair and unreasonable, and contravenes Utah's public policy. As the plaintiff maintained in Prows, dual litigation over the same facts is "chaotic and prohibitively expensive." 868 P.2d at 812. This Court should maintain the public policy recognized in Prows and spare the parties the expense and uncertainty that will likely result from two competing lawsuits by reversing the trial court's ruling enforcing Jacobsen's forum selection clause. This will require the parties to pursue the action in Wyoming, where the property is, among all of the parties and involving all relevant claims arising from this Wyoming construction project. On remand, the trial court should then be instructed to dismiss this action for lack of personal jurisdiction.

II. THE TRIAL COURT ERRED WHEN APPLYING HENDERSON AND FINDING A RATIONAL NEXUS BASED SOLELY ON JACOBSEN’S UTAH HEAD OFFICE.

Even if the forum selection clause is enforceable, the trial court still should have dismissed for lack of personal jurisdiction. The trial court determined under the “rational nexus” test of Phone Directories Co. v. Henderson, 2000 UT 64, 8 P.3d 256, that a rational nexus with Utah exists in this case solely on the basis of Jacobsen’s head office being located in Utah.

The trial court erred in applying the “rational nexus” test for two reasons. First, based on the plurality in Henderson, the “rational nexus” test only applies when there is a consent-to-jurisdiction clause in the parties’ contract. Since Jacobsen’s Contract did not contain any consent-to-jurisdiction clause, the trial court should have applied the traditional minimum contacts analysis. Second, even if the “rational nexus” test applied to this case—and it does not—there can be no rational nexus with Utah in an action over improvements to real property located in Wyoming. There is no connection to Utah at all, apart from plaintiff’s Utah head office.

A. Henderson’s “Rational Nexus” Test Only Applies When There is a Consent-to-Jurisdiction Clause.

Based on the concurrences to the plurality opinion in Henderson, there is no basis for even applying the Henderson “rational nexus” test in this case, which involves a forum selection clause, but no consent-to-jurisdiction clause. On this basis, the Court should reverse.

The Henderson Court examined a contract between a Utah-based plaintiff, Phone Directories Co., and its defendant employee in California, Henderson. Phone Directories Co. v. Henderson, 2000 UT 64, ¶¶ 3–4, 8 P.3d 256. The parties’ contract in that case contained a forum—or venue—selection clause selecting Utah, along with a consent-to-jurisdiction clause under which the parties agreed to submit to the jurisdiction of the Utah courts. Id. at ¶ 7 & n.2.

The plaintiff’s Utah office was not the only connection to Utah in Henderson. There, Henderson visited Phone Directories’ Utah offices, negotiated the contract in Utah, and made numerous other contacts with plaintiff’s Utah offices. Id. at ¶ 16.

Writing for the plurality, Justice Durham observed that “a forum selection/consent to jurisdiction clause by itself is not sufficient to confer personal jurisdiction over a defendant as a matter of law.” Id. at ¶ 14 (Durham, J., plurality opinion). Rather, there must still be “a rational nexus between the forum selected and/or consented to, and either the parties to the contract or the transactions that are the subject matter of the contract.” Id. This standard for personal jurisdiction is a lesser standard for the plaintiff to meet than that required by the Due Process Clause and Utah’s long-arm statute—i.e., the minimum contacts analysis. See id. However, only Judge Bench (sitting by designation) joined in the lead opinion.

Justice Wilkins (with Justice Russon) concurred in the result, writing that personal jurisdiction was appropriate pursuant to the minimum contacts analysis, and that there was no basis for creating a new test under the facts of Henderson. Id. at ¶ 23 (Wilkins, J., concurring). Then-Chief-Justice Howe also concurred in the result of Justice Durham’s opinion, but only with respect to the enforceability of the forum selection clause, which according to Justice Howe is determined by previous rulings of this Court. Id. at ¶ 20 (Howe, C.J., concurring). Justice Howe joined in Justice Durham’s adoption of a “rational nexus” test only with respect to the consent-to-jurisdiction clause. Id. at ¶ 22 (Howe, C.J., concurring). In sum, based on the concurring opinions in Henderson, the “rational nexus” test may only apply to forum selection clauses where there is also a consent-to-jurisdiction clause.

In the instant case, the parties never bargained for a consent-to-jurisdiction clause. There is no such clause in Jacobsen’s Contract. [R.9–17.] Rather, Jacobsen’s Contract provides solely for venue in Utah. Contract at ¶ 7(C) (Exhibit A, attached). [R.16.] As a result, under Henderson, there is no basis for applying the “rational nexus” test to the personal jurisdiction issue in this case. Rather, Jacobsen bears the burden of establishing requisite minimum contacts, a burden which it has not met. Jacobsen has not refuted that Subcontractors have no contacts at all with Utah, but instead assumed this fact for purposes of Subcontractors’ motion to dismiss. See Memorandum Opposing

Defendants' Motion to Dismiss at 1. [R.62.] On this basis, there is no personal jurisdiction and the Court should reverse.

B. There Can Be No Rational Nexus Based Solely on the Plaintiff's Domicile, Particularly When the Entire Action Is Based on Improvements to Real Property Outside Utah.

Alternatively, even if Jacobsen's forum selection clause invoked the lesser "rational nexus" test of Henderson (and it does not), Jacobsen cannot meet its burden of showing a rational nexus in this case because all relevant factors militate in favor of resolution in and are inseparably connected with Wyoming. The Henderson plurality recognized that consent "by itself is not sufficient to confer personal jurisdiction over a defendant as a matter of law." Id. at ¶ 14 (plurality opinion). Rather, the plaintiff must still establish "a rational nexus between this state and either the parties to or the subject matter of the contract." Id. at ¶ 15.

A sufficient rational nexus existed in Henderson, where the defendant at least visited the plaintiff's Utah offices, negotiated the contract in Utah, and had numerous contacts with plaintiff's Utah offices. 2000 UT 64 at ¶ 16. According to at least two Justices, these contacts were even sufficient to satisfy the minimum contacts analysis. Id. at ¶ 23 (Wilkins, J., concurring).

This action, in contrast, is a complete stranger to Utah. Subcontractors lack any contacts at all with Utah. Jacobsen's form Contract was executed, negotiated, and performed in Wyoming through Jacobsen's Wyoming office by Jacobsen's Wyoming-based personnel. Jacobsen's Contract provides for the construction of improvements on

real property located in Wyoming. Subcontractors are Wyoming residents with no contacts whatsoever to Utah. Jacobsen's Contract designates that Wyoming law applies. The single connection to Utah in this action is that Jacobsen is a Utah-based company, even though Jacobsen acted in, maintained offices in and was itself a resident of Wyoming.

By finding a rational nexus in this case, the court below stretched Henderson to a most absurd end because, after its ruling, a Utah general contractor plaintiff may require all of its construction disputes in sister states involving real property in those states to be brought in Utah. Based on the trial court's ruling below, all that need be shown is that the plaintiff is domiciled in Utah and nothing more; the Henderson rule requiring consent to jurisdiction and some additional nexus is essentially rendered meaningless. If the trial court's ruling is upheld, Henderson is useful only in cases where none of the parties resided in Utah and where the contract was not entered into or to be performed in this state. Rather than permit such a result, the Court should lend meaning to Henderson by reversing the trial court's denial of Subcontractors' motion to dismiss and concluding that there is no rational nexus with Utah in this case. Jacobsen may still pursue its claims in its second action filed in Wyoming, whose courts are open to all additional claims that can be brought with respect to the Property or the Payment Bond.

CONCLUSION

For the reasons stated herein, Subcontractors Teton Builders and Thomas R. Hunter respectfully request that this Court reverse the trial court's order denying the motion to dismiss for lack of personal jurisdiction and remand to the trial court with instructions to dismiss the action for lack of personal jurisdiction.

DATED this 20th day of February, 2004.

DURHAM JONES & PINEGAR, P.C.

By: 

R. Stephen Marshall

Erik A. Olson

Attorneys for Appellants Thomas R. Hunter
and Teton Builders

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of February, 2004, I caused two copies of the foregoing **BRIEF OF APPELLANT** to be mailed in the United States mail, first-class postage prepaid to the following:

Stephen E. W. Hale
Jeffrey D. Stevens
Matthew J. Ball
Parr Waddoups Brown Gee & Loveless
185 South State, Suite 1300
Salt Lake City, Utah 84111

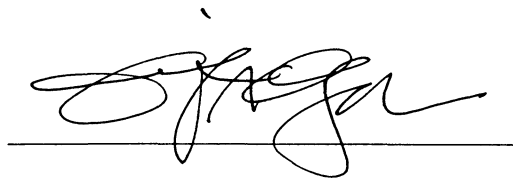
A handwritten signature in black ink, appearing to be "J. W. Hale", is written over a horizontal line.

TABLE OF APPELLANTS' EXHIBITS

- A. Master Subcontract Agreement [R.9–18]
- B. Subcontract Work Order [R.20–27]
- C. Transcript of August 8, 2003, Hearing on Defendants' Motion to Dismiss
- D. Order Denying Defendants' Motion to Dismiss for Lack of Personal Jurisdiction [R.140–41]

Tab A

MASTER SUBCONTRACT AGREEMENT

Rev. 9/00

Agreement No. 1983

THIS AGREEMENT, made at Salt Lake City, Utah, as of the 3rd day of June 20 02 by and between
JOHNSON CONSTRUCTION COMPANY, INC., hereinafter referred to as Contractor, and Teton Builders 1200 Gregory Lane Jackson, WY 83001 an independent contractor,
hereinafter referred to as Subcontractor. The term Subcontractor as used herein includes Subcontractor's suppliers and subcontractors.
Provisions used in this Agreement are general in nature and have no legal effect. This Master Subcontract Agreement (MSA) sets out
general rights and responsibilities of the parties hereto for work to be performed by Subcontractor on one or more future projects.
Specific terms and conditions related to a specific project will be set out in a subsequently-executed Subcontractor Work Order
(SWO), the terms of which shall be deemed part of this Agreement.

For and in consideration of the covenants herein contained, Contractor and Subcontractor agree as follows:

SCOPE OF WORK

General. Subcontractor shall furnish and pay for all supervision, labor, materials, tools, equipment, scaffolding, templates, testing, permits, fees, etc. required to do and complete all of the work set out in a SWO in strict accordance with the Subcontract Documents which are: (1) this Agreement; (2) the Prime Contract which is, as used herein, the agreement between Owner and Contractor and the contract documents related thereto, including General, Supplementary and other Conditions of the contract, drawings, the project manual/specifications, Addenda per Paragraph 1C of a SWO, change orders, construction directives or modifications to the Prime Contract issued subsequent to the execution of the agreement between Owner and Contractor (whether before or after the execution of the applicable SWO), and any other contract documents listed in the agreement between Owner and Contractor; (3) Change Authorizations or modifications to a SWO issued by Contractor after execution of the applicable SWO; (4) any subsequently-issued SWO tied to this Master Subcontract Agreement; and (5) other documents listed herein or in a SWO. The Subcontract Documents are as fully a part of this Agreement as if attached hereto or repeated herein. Subcontractor may review relevant portions of the Subcontract Documents at Contractor's main office with reasonable notice. Contractor and Subcontractor are hereby strictly bound to each other by the terms and requirements of the Prime Contract insofar as those terms and requirements are applicable to this Agreement and to the work to be done by Subcontractor. If any of the terms or requirements of the Prime Contract are contradictory with any of the terms or requirements of this Agreement and/or the applicable SWO, the terms and conditions which place the highest duty and/or more stringent requirements upon Subcontractor shall govern (e.g. Paragraph 3G). Any notation such as "by contractor" or "by general contractor" in the Subcontract Documents connected with work which would, absent the notation, be the responsibility of Subcontractor per this Agreement, shall be interpreted to read "by Subcontractor".

2. PROSECUTION OF WORK, SAFETY, E.E.O., ETC.

- A. Commencement of Work/Execution of a SWO. A SWO shall not be binding upon the parties hereto unless the Prime Contract related to the SWO is executed by the parties thereto and approval for Contractor to proceed under the Prime Contract is given by Owner or its representative. If Subcontractor has received its copy of a SWO for signature and thereafter works for more than five (5) work days on site prior to signing the SWO, said work shall be deemed to be acceptance by Subcontractor of the SWO in its entirety. By signing the SWO or, as noted herein, working on site, Subcontractor represents that it has (1) visited and inspected the site of the work, and (2) carefully reviewed the Subcontract Documents and is thus aware of any impact, relationship, or interference which the site, site conditions, climate, construction sequence, Subcontract Documents, and/or the work of other subcontractors or contractors will have upon Subcontractor's rights, duties, access, operations, efficiency, etc.
- B. Performance. Time is strictly of the essence of this Agreement. Subcontractor therefore agrees: (1) to procure and prepare its materials so as to be ready to begin work when directed by Contractor; (2) to plan, prosecute, and complete its work in a prompt and diligent manner so as not to delay, disrupt, hinder or interfere with the work of Contractor or other subcontractors; (3) to commence the several parts thereof at such times and proceed therewith in such order as may be directed by Contractor; (4) to provide, at its expense, additional workers and/or to work on an overtime or shift basis should Contractor reasonably so direct; (5) to do all layout, cutting, fitting and patching of its work as may be required to make its several parts come together properly and to fit it to receive or be received by the work of Contractor or other subcontractors, all as shown upon or reasonably implied by the Subcontract Documents; (6) to proceed in a skillful and expeditious manner, with sufficient labor, materials, tools, equipment, and supplies; and (7) to complete the several parts and the whole of said work as provided herein so that, in conjunction with other subcontractors engaged thereon, Subcontractor will insure the uninterrupted progress of the project and enable Contractor to complete the project as scheduled by Contractor. Subcontractor and its employees will not participate in or honor any union picketing, strike, leafleting, slowdown, work stoppage, etc.

- C. Schedules. For purposes of scheduling the work, Contractor may periodically develop and modify project schedule(s). Contractor retains the right to modify said schedule(s), change work sequences and priorities, and to otherwise schedule the work so as to achieve timely project completion and interim project milestone dates. Subcontractor agrees to adapt its efforts and to meet Contractor's schedule(s) as modified without additional cost to Contractor and/or Owner.
- D. Time Extensions and Compensation Related Thereto. As between Contractor and Subcontractor, the time for Subcontractor's performance may be extended in writing at any time by Contractor. Subcontractor shall receive compensation from Contractor for a delay but, only to the extent that Contractor receives compensation from Owner for costs and/or damages incurred by Subcontractor as a result of said delay. Further, Subcontractor shall not be entitled to either additional time or additional compensation related to delays unless written claim for same is received by Contractor within seven (7) days of the commencement of a particular cause of delay. Any claim for additional time related to a change in the work or changed conditions must be submitted with Subcontractor's pricing information for said change (see Article 5). For delays and/or damages attributable to suppliers or other subcontractors, see Paragraph 2G.
- E. Failure to Prosecute the Work/Insolvency. If Subcontractor shall at any time: (1) refuse or neglect to supply a sufficient number of properly skilled workers or sufficient materials of the proper quality, or (2) fail in any respect to prosecute the work with promptness, or (3) fail promptly to remove and replace work condemned by Owner, Architect or Contractor and make good the work of others damaged by said replacement, or (4) cause by any action or omission the stoppage of, delay of or interference with the work of Contractor or any other subcontractor, or (5) fail in the performance of any of the material covenants of the Subcontract Documents, or (6) to be adjudged a bankrupt or make a general assignment for the benefit of creditors, or (7) become insolvent or a debtor in reorganization, receivership, composition or arrangement proceedings; then three (3) days after delivery of a written notice to Subcontractor indicating the existence of any of the foregoing causes, and unless the cause specified in such notice is eliminated within such three (3) days, Contractor at its option may provide, either by itself or through others, labor and materials to prosecute and complete the work and shall deduct the cost thereof from any amounts then due or thereafter to become due to Subcontractor. In any such event, after such notice and Subcontractor's failure to eliminate such cause within the three (3) days specified, Contractor may at its option (and without prejudice to any other remedy Contractor may have) terminate all or part of this Agreement and a related SWO "for cause" and, for the purpose of completing the work, take possession of all or part of the materials and equipment of Subcontractor at the project site, all of which Subcontractor hereby assigns to Contractor. Contractor may then complete the work by whatever reasonable method Contractor deems expedient. In case of such partial or total termination for cause, Subcontractor shall not be entitled to receive any further payment until the work required by the SWO is fully complete and accepted by Owner and Architect; and at such time, if the unpaid balance of the amount to be paid hereunder exceeds Contractor's cost, such excess shall be paid by Contractor to Subcontractor, but if Contractor's cost exceeds the unpaid balance, Subcontractor shall promptly pay the difference to Contractor. "Cost" as used in this Paragraph 2E shall include: (1) Contractor's expenses incurred in taking over and completing Subcontractor's work, (2) damages incurred by Contractor due to Subcontractor's non-performance, etc., and (3) reasonable charges for Contractor's overhead and profit.
- F. Damages. If Subcontractor fails to prosecute the work as required in this Agreement and/or a SWO, Subcontractor shall be liable for (1) either actual or liquidated damages per the Subcontract Documents to compensate Owner for its costs related to Subcontractor's non-performance, and also (2) actual damages incurred by Contractor and its subcontractors and suppliers related to Subcontractor's non-performance. Subcontractor's responsibility for such damages shall exist regardless of whether Contractor elects to take over Subcontractor's work per Paragraph 2E. Contractor and Subcontractor shall not be liable to one another for any delays arising out of acts of God, strikes (except as described in Paragraph 2B), or other causes explicitly determined to be beyond their control; except in the event that Owner assesses damages or penalties against Contractor, then Subcontractor shall be responsible for such portion of said assessment as is attributable to Subcontractor, regardless of the cause of delay.
- G. Suppliers and Other Subcontractors. Subcontractor agrees that it has a duty to coordinate and communicate with suppliers and other subcontractors on the project. Contractor shall not be liable to Subcontractor for any damages, loss or expense resulting from acts or omissions (whether or not negligent), failure to perform, delays in performance, or defaults of a supplier or another subcontractor in connection with the performance of any of the work covered by the Prime Contract and/or this Agreement and/or a SWO. Any claim or invoice of Subcontractor for such damages, loss or expense shall be made and any action shall be filed, directly against said other party without making Owner or Contractor a party to any action brought upon such claim. Subcontractor agrees that any project supplier or subcontractor shall have a direct right of action against Subcontractor for damages, loss or expense resulting from Subcontractor's acts or omissions (whether or not negligent), failure to perform, delays in performance, or default.
- H. Safety. Subcontractor agrees to provide its employees with safe tools, equipment, etc.; to provide them with a safe place to work; to perform the work under this Agreement in a safe manner with high regard for the safety of its employees and others; and to comply with prevailing safety regulations, whether federal, state, local or otherwise imposed. Whenever

Subcontractor is working on the project, it shall have on site a competent safety representative who, in addition to his or her other duties, shall be responsible for implementing and administering Subcontractor's safety program, including consistent safety training of Subcontractor's employees and holding documented weekly jobsite safety meetings with its employees. Contractor shall have the right (but not the duty) to review said documentation. Subcontractor shall immediately remedy any unsafe conditions brought to its attention or discovered by Subcontractor involving its work and/or posing a danger to persons or property. Subcontractor, on behalf of its employees, grants to Contractor the right to periodically make random searches of vehicles on site, lunch boxes, tool-boxes, etc. for controlled or prohibited substances and/or stolen tools, materials, etc. Subcontractor shall not permit its employees at the project to use publicly audible radios or to wear head sets except as are used for job site communications. Subcontractor's on-site employees shall wear long or short sleeve shirts, long pants, sturdy shoes or boots, and hard hats (except when Subcontractor obtains a written waiver from Contractor for specific areas of the project where hard hats are not required by governmental or Owner safety regulations). Only certified model ANSI Z89.1-1986 class B conventional hardhats shall be worn. Bump caps and hard hats without a rounded dome, such as cowboy hardhats, are not allowed. Subcontractor shall have on site a first-aid kit adequate for the needs of its employees. Smoking or chewing of tobacco by Subcontractor's employees will be permitted only in Contractor-designated areas. Prior to bringing on site a substance or material for which a Material Safety Data Sheet (MSDS) is required by governmental regulations, Subcontractor shall provide said MSDS to Contractor. Contractor shall provide temporary lighting for general access (e.g. corridors) and Subcontractor shall provide all necessary task lighting in its work areas.

- I. E.E.O./Affirmative Action/Wage-Hour Requirements. Subcontractor shall fully comply with wage-hour regulations and shall take vigorous affirmative action to comply with E.E.O. and Affirmative Action Clauses 41 CFR 60-1.4, 41 CFR 60-250.4, and 41 CFR 60-741.4 as revised, amended or superseded whenever required by law or by the Subcontract Documents, and is encouraged to do so in the absence of such requirement. Subcontractor shall also comply in all respects with the terms for employment and payment of labor required by Owner and/or any constituted authority having legal jurisdiction over the work.
- J. Fines. If Subcontractor's alleged acts or omissions result in a fine or penalty being levied against Contractor by any lawful regulatory agency or court, then the amount so levied shall be for Subcontractor's account and may be deducted from amounts otherwise due Subcontractor.
- K. Supervision/Authority. Subcontractor shall provide competent and continuous supervision of its work. Instructions given by Contractor to Subcontractor's superintendent or foreman, and documents executed by and commitments made by said superintendent or foreman shall be binding upon Subcontractor. Unless Subcontractor provides Contractor with a list defining those employees who are authorized to sign for Subcontractor, any employee of Subcontractor who signs a document for Subcontractor shall be deemed to be an authorized representative of Subcontractor. Said list must be sent via certified U.S. mail, and shall become operative seven (7) days after it is received by Contractor.
- L. Progress Reports. Subcontractor shall furnish to Contractor periodic progress reports on Subcontractor's work as reasonably requested, including information on the status of materials and equipment which may be in the course of preparation or manufacture.
- M. Acceptance of the Work of Others. Should the proper performance or appearance of Subcontractor's work depend wholly or partially upon any work or materials furnished by Contractor or others, Subcontractor agrees to use all reasonable means necessary to discover any relevant defects therein and report same in writing to Contractor before proceeding with its work which is affected thereby and shall allow Contractor a reasonable time in which to remedy such defects. In the event Subcontractor does not so report to Contractor in writing, then it shall be assumed that Subcontractor has fully accepted the work of others as being satisfactory and Subcontractor shall be fully responsible thereafter for satisfactory performance of the work covered by this Agreement, regardless of the defective work of others.
- N. Incidental Charges. Unless otherwise noted in this Agreement or a related SWO, reasonable amounts for unloading, hoisting, clean-up, templates, layout or other services provided by Contractor for Subcontractor, and reasonable amounts for Contractor's equipment, tools, etc. used by Subcontractor shall be deducted from amounts otherwise due Subcontractor. Backcharge type charges for incidental extra work performed by one party at the request of the other party, or for the benefit of the other party, or in the event of default by the other party shall be charged at actual field cost plus a 15% charge for home office overhead and profit.
- O. Permits, Fees and Codes. Subcontractor shall, at its own cost and expense, pay all fees related to the execution of its work; apply for and obtain all necessary permits, licenses, etc.; and conform strictly to the laws, building codes and ordinances in force insofar as applicable to the work covered by a SWO.

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- J. Fines. If Subcontractor's alleged acts or omissions result in a fine or penalty being levied against Contractor by any lawful regulatory agency or court, then the amount so levied shall be for Subcontractor's account and may be deducted from amounts otherwise due Subcontractor.
- K. Supervision/Authority. Subcontractor shall provide competent and continuous supervision of its work. Instructions given by Contractor to Subcontractor's superintendent or foreman, and documents executed by and commitments made by said superintendent or foreman shall be binding upon Subcontractor. Unless Subcontractor provides Contractor with a list defining those employees who are authorized to sign for Subcontractor, any employee of Subcontractor who signs a document for Subcontractor shall be deemed to be an authorized representative of Subcontractor. Said list must be sent via certified U.S. mail, and shall become operative seven (7) days after it is received by Contractor.
- L. Progress Reports. Subcontractor shall furnish to Contractor periodic progress reports on Subcontractor's work as reasonably requested, including information on the status of materials and equipment which may be in the course of preparation or manufacture.
- M. Acceptance of the Work of Others. Should the proper performance or appearance of Subcontractor's work depend wholly or partially upon any work or materials furnished by Contractor or others, Subcontractor agrees to use all reasonable means necessary to discover any relevant defects therein and report same in writing to Contractor before proceeding with its work which is affected thereby and shall allow Contractor a reasonable time in which to remedy such defects. In the event Subcontractor does not so report to Contractor in writing, then it shall be assumed that Subcontractor has fully accepted the work of others as being satisfactory and Subcontractor shall be fully responsible thereafter for satisfactory performance of the work covered by this Agreement, regardless of the defective work of others.
- N. Incidental Charges. Unless otherwise noted in this Agreement or a related SWO, reasonable amounts for unloading, hoisting, clean-up, templates, layout or other services provided by Contractor for Subcontractor, and reasonable amounts for Contractor's equipment, tools, etc. used by Subcontractor shall be deducted from amounts otherwise due Subcontractor. Backcharge type charges for incidental extra work performed by one party at the request of the other party, or for the benefit of the other party, or in the event of default by the other party shall be charged at actual field cost plus a 15% charge for home office overhead and profit.
- O. Permits, Fees and Codes. Subcontractor shall, at its own cost and expense, pay all fees related to the execution of its work; apply for and obtain all necessary permits, licenses, etc.; and conform strictly to the laws, building codes and ordinances in force insofar as applicable to the work covered by a SWO.

- P Independent Contractor/Taxes. Subcontractor represents and agrees that it is an independent contractor in fact and also within the scope of the United States Internal Revenue Code; Social Security and unemployment insurance laws and regulations; applicable safety, health and environmental laws and regulations (e.g. OSHA, MSHA); and applicable collective bargaining agreements and is solely responsible for: (1) its compliance with such laws, regulations, and agreements, (2) all payroll taxes, and (3) all trust fund and other deductions, withholdings and contributions payable under such laws, regulations and agreements. The contract amount includes all applicable sales and use taxes; franchise, excise and other taxes; and governmental impositions of all kinds and is not subject to any addition for any such taxes or impositions now or hereafter levied.
- Q Guarantee/Warranty. During the guarantee (or warranty) period(s) established in the Subcontract Documents, and if no such period(s) be therein stipulated, then for a period of one (1) year from date of total project completion, Subcontractor agrees to promptly make good, solely at its expense, any work performed by Subcontractor which does not comply with requirements of the Subcontract Documents (including defective installation work and/or materials) and all damage and other losses resulting therefrom. Subcontractor further agrees to provide, in writing, any guarantees, maintenance agreements or other documents related to the work above described required by the Subcontract Documents. Subcontractor's responsibility for latent defects shall extend beyond the guarantee period to the maximum extent applicable statutes permit.

3. INSURANCE AND DUTY TO DEFEND, INDEMNIFY & HOLD HARMLESS

- A. Certificates of Insurance. Prior to commencing its work on site and prior to receiving a payment otherwise due per this Agreement or a SWO, Subcontractor shall furnish and thereafter maintain certificates of insurance and indemnification evidencing compliance with (1) the indemnification provisions of Paragraph 3E, and (2) the insurance-related terms of this Agreement and the applicable SWO. Said certificates of insurance and the policies represented thereby shall not be cancelled or modified until thirty (30) days after written notice has been given to Contractor of such cancellation or modification. Required coverages shall be maintained without interruption from the date Subcontractor commences work under a SWO until at least the date of Subcontractor's receipt of final payment for the project. If the Subcontract Documents require all or part of Subcontractor's insurance coverage to remain in force after completion and/or final payment, a certificate evidencing continuation of such coverage shall be provided to Contractor prior to Subcontractor's being entitled to final payment or payment of retainage.
- B. Worker's Compensation Insurance. Subcontractor shall provide and maintain Worker's Compensation insurance at the levels required by statute and Employer's Liability insurance with the following limits: (1) bodily injury by accident, \$100,000 each accident; (2) bodily injury by disease, \$100,000 each employee; and (3) bodily injury by disease, \$500,000 policy limit.
- C. Liability Insurance. Subcontractor shall maintain such Commercial General Liability insurance, including automobile and blanket contractual liability, as will protect Subcontractor from claims for damage because of bodily injury, including death, or damage because of injury to or loss, destruction, or loss of use of property which may arise from its operations under this Agreement or a related SWO, whether such operations be by Subcontractor or its subcontractors or anyone directly or indirectly employed by either of them. Subcontractor's liability insurance shall include Owner and Contractor as additional named insureds. Subcontractor's insurance shall provide the minimum limits of coverage set out in Paragraph 1F of the SWO. Automobile Liability coverage shall be for all owned vehicles including non-owned, hired liability. Commercial General Liability coverage shall be written on an occurrence basis rather than on a claims-made basis.
- D. Builder's Risk Insurance and Waiver of Rights. Subcontractor shall satisfy itself as to the existence, coverage and deductibles of Builder's Risk, Property and/or Equipment insurance prior to commencement of its work on a project. Upon Subcontractor's written request, Contractor shall provide Subcontractor with a copy of the Builder's Risk insurance policy and any other Property or Equipment insurance in force for a project if said insurance has been procured by Contractor. Until final acceptance of a project by Owner, Subcontractor shall be responsible for (1) loss of or damage to its stored and installed materials, and (2) its pro rata share of any deductible amount associated with an otherwise insured loss. Contractor and Subcontractor waive all rights against each other and Owner, Architect, separate contractors, and other subcontractors for loss or damage to the extent said loss or damage is covered by Builder's Risk or any other Property or Equipment insurance, except such rights as they may have to the proceeds of such insurance. However, unless the Subcontract Documents otherwise provide, such waiver shall not extend to the acts of Architect arising out of (1) the preparation or approval of maps, drawings, opinions, reports, surveys, change orders, designs or specifications or (2) the giving of or the failure to give directions or instructions provided such giving or failure to give is the primary cause of the loss or damage. If the policies of insurance referred to herein require an endorsement to provide for continued coverage where there is a waiver of subrogation, the owners of such policies will cause them to be so endorsed.
- E. Duty to Indemnify, Defend and Hold Harmless. To the fullest extent permitted by law, Subcontractor shall indemnify,

defend and hold harmless Contractor and Owner from and against any and all claims, demands, damages, liabilities, expenses and attorney fees (hereinafter collectively "loss") incurred by Contractor and/or Owner and arising out of, allegedly arising out of, or in any way related to the performance of Subcontractor's work (or failure to perform said work) including but not limited to: (1) loss incurred on account of any breach, or alleged breach, by Subcontractor of the obligations and covenants of this Agreement or a related SWO; (2) loss incurred for injuries to, or death of, persons including Contractor's employees, Subcontractor's employees and the employees of any other subcontractor, contractor, independent contractor, property owner or their lessees or assigns, and the heirs and personal representatives of such persons; (3) loss incurred arising from damage to real and/or personal property; (4) loss resulting directly or indirectly from use by Subcontractor of any tools, equipment, facilities, materials or employees of Contractor, whether with or without Contractor's knowledge or consent; (5) loss on account of the use of a bid depository or otherwise resulting from awarding this work to Subcontractor. Subcontractor's duty to indemnify and defend set out herein absolutely obligates Subcontractor to pay on behalf of Contractor and Owner all loss at such time as Contractor and/or Owner become legally obligated to pay such loss on account of claims of any kind being made against them arising from, allegedly arising from or in any way related to Subcontractor's performance or default under this Agreement or a related SWO including, but not limited to, damages, judgments, settlements, costs, expenses and attorney fees. Upon written request of Contractor in accordance with Subcontractor's obligations hereunder, Subcontractor shall further have the duty to defend and to pay all costs and expenses incidental to any suit, arbitration, mediation or proceeding against Contractor and/or Owner arising from, allegedly arising from or in any way related to, Subcontractor's performance or default under this Agreement or a related SWO solely at Subcontractor's expense without any right or claim to reimbursement from Contractor and/or Owner even if the allegations of the suit, arbitration, mediation, claim or proceeding prove to be groundless, false or fraudulent. This indemnification in favor of Contractor and Owner is intended to provide Contractor and Owner with the fullest indemnification permitted by law from any and all losses whatsoever including, without limitations, attorneys' fees, costs and expenses, related to, resulting from, or arising out of this Agreement or a related SWO.

- F. No Limitation Upon Liability. In any claim against Contractor and/or Owner by any employee of Subcontractor, anyone directly or indirectly employed by Subcontractor, or anyone for whose acts Subcontractor may be liable, the indemnification, duty to defend and hold harmless obligations in this Agreement or a related SWO shall not be limited (1) by any limitation on the amount or type of damages, compensation or benefits payable by or for Subcontractor under worker's compensation, disability benefit or other employee benefit acts or regulations, or (2) to the policy limits of any insurance coverage which Subcontractor maintains or is required to maintain.
- G. Prime Contract Requirements. If the Prime Contract requires of subcontractors broader coverage, defense, indemnification, and/or hold harmless provisions; other named insureds; etc. than set out in this Article 3, then such coverage, indemnification, etc. shall be provided and maintained by Subcontractor at no additional cost to Contractor.

4. PAYMENTS

- A. Cost Breakdown. Within thirty (30) days of the execution of the applicable SWO, Subcontractor shall submit for Contractor's review and approval a detailed, true cost breakdown of the contract amount sufficiently itemized as to work elements, labor, equipment, materials, etc. to allow Contractor to monitor Subcontractor's progress and to evaluate Subcontractor's periodic billings. Subcontractor's overhead and profit shall be distributed on a pro rata basis to each line item. The cost breakdown shall also include the estimated worker hours anticipated for each element of the work. An intentionally distorted or misrepresented cost breakdown shall be deemed to be fraudulent.
- B. Billings/Payments. Contractor shall make, on account of the contract amount (adjusted by any Change Authorizations), monthly payments to Subcontractor for that portion of the work satisfactorily performed in the preceding month in accordance with monthly billings prepared by Subcontractor and as approved by Contractor, Architect and Owner. As an absolute condition precedent to Subcontractor's being entitled to a particular payment, Contractor shall have received the corresponding periodic payment from Owner including the approved portion of Subcontractor's monthly billing. In the event Contractor does not receive from Subcontractor a proper and reasonable monthly billing prior to the date set forth in Paragraph 1D of the SWO, Contractor may include in its monthly billing to Owner such amount as Contractor shall deem proper for the work of Subcontractor, and Subcontractor agrees to accept the approved portion thereof as its monthly payment.
- C. Payments Withheld. Payments otherwise due Subcontractor, including payment of retainage and final payment, may be withheld by Contractor on account of: (1) failure of Subcontractor to sign this Agreement or the applicable SWO, (2) failure of Guarantor(s) to sign this Agreement or the applicable SWO if required, (3) failure of Subcontractor to provide surety bonds if required, (4) failure of Subcontractor to provide acceptable and current certificates of insurance per Paragraph 3A, (5) failure of Subcontractor to provide an acceptable cost breakdown per Paragraph 4A, (6) failure of Subcontractor to complete Contractor's supplier affidavit and monthly lien release forms, (7) defective work of Subcontractor not remedied, (8) failure of Subcontractor to make payments owing to its employees, suppliers or subcontractors for material, services or labor, (9) claim(s) filed by or involving Subcontractor or reasonable evidence indicating the probability of such a claim being filed, (10) failure of Subcontractor to perform per a schedule or commitment made by Subcontractor, (11) failure of Subcontractor to perform per Contractor's schedule, or (12) a

reasonable doubt that Subcontractor can complete its work for the contract amount then unpaid. If any of the foregoing conditions exist and are not removed within three (3) days of Contractor's written notice to Subcontractor, Contractor may rectify the same at Subcontractor's expense.

- D Right to Offset/Joint Checks Contractor may offset against any sums due Subcontractor per this Agreement or a related SWO any amounts which are, in Contractor's good faith opinion, owed to Contractor (or others) by Subcontractor, whether or not arising out of this Agreement or a related SWO and notwithstanding possible dispute by Subcontractor of Contractor's opinion. If an offset is disputed, it shall be dealt with per Paragraph 7C. Contractor may also, when it deems proper in its sole discretion, issue joint checks to Subcontractor and Subcontractor's suppliers and subcontractors. Contractor's options set out in this Paragraph 4D confer absolutely no enforceable rights upon any third party.
- E Implied Acceptance Payment to Subcontractor pursuant to monthly or final billings shall not constitute or imply acceptance by Contractor, Architect or Owner of any portion of Subcontractor's work.
- F Liens Subcontractor shall complete Contractor's monthly lien release and supplier affidavit forms. Except for liens arising out of Owner's failure to pay Contractor and Contractor's resultant non-payment of Subcontractor, Subcontractor shall save and keep the project and improvements referred to in a SWO and the lands upon which they are situated free from all liens and encumbrances arising out of its work, including, but not limited to, mechanic's and materialmen's liens. If Subcontractor fails to remove any lien, by bonding or otherwise, Contractor may retain sufficient funds out of any amounts due or thereafter to become due from Contractor to Subcontractor to pay the same and all costs incurred by reason thereof, and may pay said lien and costs out of any funds at any time in the hands of Contractor owing to Subcontractor.
- G Final Payment and Retainage The percentage of Subcontractor's approved monthly billings set forth in Paragraph 1E of the SWO and any other portion of the contract amount which is unpaid at the time of project completion shall be retained by Contractor and absolutely shall not be paid to Subcontractor until: (1) Contractor determines that none of the conditions set out in Paragraph 4C exist which would permit Contractor to withhold payment; (2) Contractor receives final project payment from Owner; (3) Architect and Owner accept Subcontractor's work, guarantees, etc.; (4) Subcontractor furnishes Contractor with satisfactory evidence that all obligations incurred by Subcontractor pursuant to the applicable SWO have been paid in full; (5) Subcontractor furnishes Contractor with consent of Subcontractor's surety if any; (6) Subcontractor furnishes Contractor with consent of Guarantors if any, and (7) Subcontractor furnishes Contractor with certificates of insurance evidencing extension of insurance coverage beyond final payment if required (see Paragraph 3A).

5. CHANGES IN THE WORK/CHANGED CONDITIONS

Contractor may add to or deduct from the work required by a SWO and any changes so made shall be defined by Contractor's written Change Authorization setting forth the changes involved and the value and time impact thereof, which value and time impact shall be mutually agreed upon between Contractor and Subcontractor and Owner if such be possible, and if such mutual agreement is not possible, then the value and time impact shall be determined as provided in Paragraph 7C of this Agreement. In either event, Subcontractor agrees to proceed with the work as changed when so ordered in writing by Contractor so as not to delay the progress of the work and pending determination of the value thereof. No claim for additional compensation, whether on account of extra labor and/or materials furnished, changed conditions, or otherwise, shall be paid unless the same is furnished pursuant to a written order signed by Contractor issued prior to the furnishing of the same. Subcontractor shall provide Contractor with detailed pricing and time extension information for a proposed change in the work within seven (7) days of receipt of information regarding said proposed change or within seven (7) days of receiving an instruction which Subcontractor believes constitutes a change - whichever occurs first. Subcontractor shall provide Contractor with detailed pricing and time extension information for alleged changed conditions within seven (7) days of encountering alleged changed conditions. Subcontractor shall not be entitled to compensation or time extension for alleged changed conditions unless written claim for same is received by Contractor within said seven (7) day period.

6. SUSPENSION/TERMINATION

- A Suspension Contractor may, for its convenience or by direction, suspend the work, either in whole or in part, at any time upon written notice to Subcontractor stating the nature, effective date and anticipated duration of such suspension whereupon Subcontractor shall suspend its work to the extent specified and shall place no further orders or perform no other work except as permitted by Contractor's notice of suspension. During the period of such suspension Subcontractor shall protect and care for all work, materials and equipment at the project site or at storage areas under its responsibility. The contract amount shall be adjusted as provided in Article 5 if the cost of the work is increased or decreased by Change Authorization as a result of such suspension. If additional time for completion of the work is required as a result of such suspension, Subcontractor shall submit a written request for additional time in accordance with Articles 2 and 5. Failure to submit a timely written request for additional time due to such suspension shall result in

no extension of time being granted.

- B. Termination for Convenience. In the event Contractor is directed by Owner to terminate all of its work prior to project completion, then an equitable settlement for work performed under this Agreement prior to such termination will be made as provided by the Subcontract Documents if such provision is made; or if none such exists, next by mutual agreement (which agreement may be to arbitrate or litigate or compromise and settle); or, failing either of these methods, then as provided in Paragraph 7C. In no event shall Subcontractor be entitled to prospective profits on unperformed work.
- C. Termination for Cause. See Paragraph 2E.

DISPUTES

- A. Scope of Prime Contract. In the event of a dispute between Contractor and Subcontractor with respect to whether the Prime Contract, including drawings and specifications, requires Contractor (and thus, perhaps, Subcontractor) to furnish any material or perform any labor, the decision of Architect shall be conclusive and binding. Should there be no architect over the work, then the matter in question shall be resolved per Paragraph 7C.
- B. Subcontractor's Scope/Costs. In the event of a dispute between Contractor and Subcontractor covering the scope or costs of Subcontractor's work (e.g. whether Subcontractor is obligated to furnish certain items or to perform certain work clearly required of Contractor by the Prime Contract), the dispute shall be settled in the manner provided by the Prime Contract documents for settlement of such disputes. Should there be no manner of settlement so provided, the dispute shall be resolved per Paragraph 7C.
- C. Methods of Resolution. If there arises a claim or dispute concerning matters in connection with this Agreement or a related SWO (for which dispute, provision for settlement is not otherwise made with the execution of the SWO), then the claimant shall mail or deliver written notice of the claim to the other party within the time limits provided in the Prime Contract or seven (7) days, whichever is shorter. Within thirty (30) days after mailing or delivery of the written notice of claim, the claimant shall mail or deliver to the other party a written summary of all principal facts relating to the claim and a detailed itemization, with substantiation, of the amount claimed. If Contractor is claimant, said summary/itemization shall also contain a written election by the Contractor to either (a) pursue the matter through civil litigation, or (b) submit the matter for binding arbitration. Said election shall bind both parties hereto. If Subcontractor is claimant, within forty-five (45) days after receipt by Contractor of said summary/itemization, Contractor shall give Subcontractor notice of Contractor's election to either litigate or arbitrate the matter. Said election shall bind both parties hereto. If the election is to litigate, each of the parties hereto irrevocably waives the right to a trial by jury in any and all actions or proceedings brought with respect to this Agreement and/or a related SWO or any provision thereof or the enforceability thereof. If the election is to arbitrate, the arbitration shall be in accordance with the Construction Industry Rules of the American Arbitration Association. No arbitration shall include by consolidation, joinder, or in any other manner, parties other than Contractor, Subcontractor and any other person or entity substantially involved in a common question of fact or law, whose presence is required if complete relief is to be accorded in the arbitration. The foregoing agreement to arbitrate shall be specifically enforceable under applicable law in any court having jurisdiction thereof. All arbitration proceedings and litigation shall take place within Salt Lake County, State of Utah. Subcontractor shall carry on its work and maintain its progress during any legal or arbitration proceedings.
- D. Recovery of Attorney Fees, Interest, Etc. In the event it becomes necessary for either party to enforce the provisions of this Agreement or a related SWO or to obtain redress for the breach or violation of any provision hereof, whether by litigation, arbitration, or otherwise, the prevailing party shall be entitled to recover from the other party all costs and expenses associated with such action, including statutory interest and reasonable attorney fees except as limited herein. Where Subcontractor is determined to be the prevailing party, Subcontractor shall not be entitled to recover said costs and expenses (including attorney fees) if the final decision or judgment (excluding costs, expenses, attorney fees, and/or interest which are incurred after Subcontractor's receipt of Contractor's last written offer) is less favorable to Subcontractor than the last written offer of settlement from Contractor provided that said last written offer is made to Subcontractor at least ten (10) days prior to the commencement of arbitration hearings or trial. Subcontractor shall have five (5) days after receipt of such an offer to accept it in writing.

8. ADDITIONAL PROVISIONS

- A. Bonds. If payment and performance bonds are required by Paragraph 1G of the SWO, Subcontractor shall furnish to Contractor, at Subcontractor's expense, 100% payment and performance bonds guaranteeing the faithful performance of this Agreement and the payment of all labor and material bills incurred in the execution of the work covered by this Agreement and the applicable SWO. Notwithstanding any language to the contrary which may appear on the bonds themselves, said bonds shall automatically extend and apply to all work performed pursuant to Change Authorizations, to

Subcontractor's responsibility for actual and/or liquidated damages, and to Subcontractor's guarantee/warranty obligations. Bonds shall be written by a surety company acceptable to Contractor and in a form satisfactory to Contractor.

- B. Guarantors. If one or more Guarantors are required by Paragraph 1H of the SWO, the Guarantors, in consideration of Contractor's entering into the SWO, agree to be jointly and severally responsible with Subcontractor for Subcontractor's performance of this Agreement and the SWO including Subcontractor's duty to Contractor and Owner to indemnify, defend and hold harmless per Paragraph 3E. The obligations of each Guarantor shall be identical to the obligations which a surety would have per Paragraph 8A.
- C. Subletting/Assignment. Subcontractor agrees not to transfer or sublet the work of a SWO or any part thereof without the prior written consent of Contractor. Subcontractor's right to moneys due hereunder is non-assignable except with the written consent of Contractor. Any assignment of moneys due hereunder made without such consent is void.
- D. Owner Approval/Contact. This Agreement and the SWO may be, per the Prime Contract, subject to approval of Subcontractor by Architect and/or Owner. Notwithstanding the above, unless Contractor provides written permission, Subcontractor shall have no direct dealings with Owner and shall not disclose to Owner any of the provisions or terms of this Agreement or the applicable SWO.
- E. Entire Agreement/Third Parties/Modifications. All verbal or written terms, conditions, proposals, opinions, representations, negotiations and agreements made prior to the date of this Agreement are hereby expressly voided. This Agreement and separately executed SWO's shall be the sole agreements between the parties. They shall be binding upon the heirs, administrators, executors, successors and assigns of the parties hereto. Except as specifically prescribed herein, this Agreement and a SWO shall not create any rights of, or confer benefits upon, third parties. Except for routine Change Authorizations, no modification or change of the terms of this Agreement or a SWO shall be binding on Contractor unless approved in writing by an officer thereof.
- F. Notice. Any notice required to be given to a party hereto shall be directed to such party and mailed by certified mail, or sent via electronic facsimile machine (fax), or personally delivered. Unless otherwise noted in this Agreement or the applicable SWO, such notice shall be effective at the time received at the street address indicated herein of such party. Notice received via fax after 5:00pm on a business day shall be effective at 9:00am on the next business day. Notice received via fax before 9:00am on a business day shall be effective at 9:00am that same day. Notice received via fax on a holiday or weekend shall be effective at 9:00am on the first business day thereafter.
- G. Nonenforcement Not a Waiver. Failure on the part of either party to exercise its rights under the provisions of this Agreement or a SWO for any breach of the provisions therein by the other shall not constitute a waiver of such rights for any subsequent breach of any provision therein.
- H. Severability. Any provision of this Agreement or a SWO determined to be in violation of any law applicable thereto shall be void but that shall not affect the validity and enforceability of all other provisions therein.
- I. Governing Law. This Agreement and the applicable SWO shall be deemed to have been made in and shall be interpreted under the laws of the place where the project is located.

TETON BUILDERS
Subcontractor

By

Signature/Title/Date

JACOBSEN CONSTRUCTION COMPANY, INC.
Contractor

By

Signature/Title/Date

Distribution: White/Subcontractor, Yellow/Accounting
Blue/Project Office, Green/Control



JACOBSEN

Jacobsen Construction Company, Inc.

FAX MEMORANDUM

To: Roger Henriksen

Company: Parr Waddoups

Fax #: 532-7750

Pages: This fax should contain 17 pages (including this cover page and attachments).
Call the number below if all pages are not received.

From: Richard G. Kirkham

Phone: (801) 973-0500

Date: 2/3/03

COMMENTS:

Roger

Here is the subcontract information on Tetou Builders.

They are the subcontractor on our Four Seasons project in
Jackson that I talked to you about last week (they have
not been able to complete their work). Please give me
or call.

Thanks

RK

Tab B

ORIGINAL

Teton Builders.WO

**JACOBSEN**

Jacobsen Construction Company, Inc.

SUBCONTRACT WORK ORDER

SUBCONTRACTOR Teton Builders 1200 Gregory Lane Jackson, WY 83001 Ph. (307) 733-1143 Fax: (307) 733-2028	PROJECT NAME Four Seasons - Jackson Hole, Wyoming		JCC JOB NO 01066
	DATE May 3, 2002	MSA NO. 1983	WORK ORDER NO 01066-27
	GENERAL DESCRIPTION OF WORK TO BE PERFORMED BY SUBCONTRACTOR -Rough Carpentry-		

MASTER TERMS

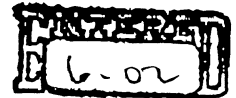
The terms and conditions of the Master Subcontract Agreement (MSA) dated 3rd of June, 2001 between Contractor and Subcontractor shall govern this Work Order and are fully incorporated herein by reference.

"Contractor" per the MSA is Jacobsen Construction Company, Inc., 3131 West 2210 South Salt Lake City, Utah 84119. Subcontractor shall perform the work required by this Subcontract Work Order in accordance with the following:

RECEIVED**JUN 10 2002****1. BASIC INFORMATION**

Jacobsen Construction

- A. Project: Four Seasons Resort
Project Location: Jackson Hole, Wyoming
Owner: FS Jackson Hole Development Company, LLC
Architect (or Engineer): Hill-Glazier
- B. Contract amount: One million one hundred four thousand nine hundred seventy six
Dollars (\$ 1,104,976.00)
- C. Addenda: N/A through and including N/A
- D. Day of each month by which Subcontractor's monthly billing is to be received by Contractor: 20th
- E. Retainage: 10 % of Subcontractor's approved monthly billings
- F. Liability insurance minimum limits (See Paragraph 3C of MSA)
Commercial General Liability, Occurrence and in the Aggregate \$ 1,000,000 per occurrence
\$ 2,000,000 aggregate
Automobile Liability \$ 1,000,000
- G. Payment and performance bonds are (check one):
 Required (See Paragraph 8A of MSA)
X Not Required (Paragraph 8A of MSA does not apply to this Agreement)
- H. Guarantor(s) are (check one):
X Required (See Paragraph 8B of MSA). Guarantors shall be:
 Not required (Paragraph 8B of MSA does not apply to this Work Order)
- I. Certified payrolls from Subcontractor are (check one): Required X Not required
- J. Shop drawings, etc. (check one):
X Complete shop drawings, catalog cuts, samples, etc. shall be submitted in 6 copies with 1 reproducible of shop drawings to 7650 Granite Loop Road, Teton village, Jackson, Wyoming 83025 - Project Site no later than as soon as possible.



Not required

K. Drawings and specifications applicable hereto are (check one):

- Listed in the Subcontract Documents
 X Listed in Exhibit "C" attached hereto

L. Jacobsen information

Project No. 0166 Code 06100-S
Contractor's License No./State N/A - Wyoming
Mailing Address 7650 Granite Loop Road, Teton Village, Jackson, WY 83025
Street Address same as above
Phones: Office 307-734-7157 Office Fax 307-739-2123 Project 307-734-0533
E-mail Address: to be provided

M. Subcontractor information

Organization (check one): Corporation X Partnership
Individual Joint Venture
Federal Tax Identification No. Contact Person Tom Hunter
Status: Small Business FBE MBE
Contractor's License No./State N/A - Wyoming
Phones: Office (307) 733-1143 Office Fax: (307) 733-2028 E-mail Address:

N. Clean-up and trash removal

Subcontractor is responsible for regular and prompt clean up of all debris and rubbish occasioned by its work. Subcontractor shall transport all such debris and rubbish to (check one):

- An off-site disposal site selected and paid for by Subcontractor.
 Contractor's on-site dumpster. Subcontractor shall pay its pro rata share of the costs of the dumpster and dump fees.
 X Contractor's on-site dumpster. Contractor shall pay the costs of the dumpster and dump fees

In addition, Contractor may periodically organize a general project clean-up. If Subcontractor is then working on site, Subcontractor shall provide its pro rata share of labor to assist in said clean-up

2. SPECIFIC SCOPE OF WORK

Perform all work required by and in accordance with the Subcontract Documents which include but are not necessarily limited to the Drawings titled "Four Seasons Resort Jackson Hole, Wyoming", prepared by Hill glazier Architects, particularly General Conditions, Supplementary General Conditions and Specification Sections:

Division 1 - General Requirements

Sections - All (As they relate to the performance of this Subcontract)

Specification Sections

06070 - Wood Treatment (As it relates to the performance of this Subcontract)
06100 - Rough Carpentry
06101 - Miscellaneous Carpentry (As it relates to the performance of this Subcontract)
06170 - Prefabricated Structural Wood
06192 - Prefabricated Structural Wood Trusses

A. Subcontractor's scope of work includes, but is not limited to the following items:

- I. The word "provide" is intended to be inclusive to furnish, fabricate, receive, unload, store, install, erect, etc. such that the material or system is complete and operational and is in its permanent location ready to be accepted and used by the Owner.

2. Subcontractor shall be aware that the Owner is expecting the finished project to be high quality in appearance, workmanship, durability, and other such considerations. Subcontractor shall use such measures as to obtain the desired outcome.
3. Provide coordination with other subcontractors whose work abuts the work contained herein.
4. Provide all labor, materials, equipment and fasteners for rough framing of the Condominium Structure – Area 06. It is the intent of this work scope to provide all rough carpentry labor and materials as required to successfully complete the 4-way inspection.
5. Provide species and grade of lumber as identified in the construction documents. Drywall finishes will require a Level 05 Finish and the rough carpentry scope of work will be a factor in achieving this level of finish.
6. Supply all materials for a complete installation including, dimensional lumber, sheathing, glue-laminated beams, parallel beams, "T" joists, micro lam, rim boards, timbers, etc. for a complete installation.
7. Provide all hoisting required for the installation and erection of all rough carpentry work, inclusive of forklifts as required
8. Supply and install all nails, glue, hardware, specialty hardware, etc., for the rough carpentry scope of work, as required by local codes and as indicated on the Contract Documents including inclusive of Simpson hangers, straps, hurricane clips, clips, saddles, etc.
9. Provide all framing associated with the stairs including treads and risers. Finished wood treads and balustrades will be provided and installed by others.
10. Provide installation of the exterior deck structures. Finished decking is by others.
11. Provide cleanup of structure on a regular basis. Deposit debris and waste materials in the Construction Manager provided dumpster.
12. The rough carpentry scope of work is inclusive of the structural framing and includes the installation of exterior and interior wood framed walls, wall sheathing, floor joists, floor sheathing, roof trusses, stick built roof systems, roof overbuilds, roof sheathing, blocking, fascias, curved roof edges, structural timbers, timber trusses, plates, headers, beams, stair construction, attic access installation, draft stops, etc
13. Provide the framing as required for the construction of the chimneys; refer to details AB-8.2 118, AB-8 2 118A, and AB-8 2 118B.
14. Install board and batten siding, trim materials, and exterior building paper at the shared wall on grid 158 and 160 between grid 135 and -111, refer to elevation 14 on A5.10. Refer to details on AB 8.4 33 for the installation requirements of siding materials.
15. Install the through wall flashing material inclusive of all blocking materials; refer to details 2/AB-8.4.54, 1/AB-8.4.56, 1/AB-8.4.56.
16. The cost of the roof trusses is noted as a cash allowance below and will be adjusted based on the final cost from the supplier. Overhead and profit for this line item is included in the overall contract amount and shall not be added to this line item.

17. The bridge connecting area 04 and area 06 will be coordinated with Teton Builders erection schedule

18.

Teton Builders SWO#01066-27



JACOBSEN

Jacobsen Construction Company, Inc.

JACKSON FOUR SEASONS PROJECT

Attachment D to Work Order # 01066-27

1. Teton Builders schedule requirements are predicated upon material delivery dates. The erection schedule will be based upon original building durations provided at time of bid, but will begin upon material delivery dates.
2. Jacobsen agrees to hold erection of the bridge between areas 4 and 6 until a mutually agreeable time that will allow Teton Builders access to their work area.
3. Material delivered off site and paid for with project funds will become the property of the owner. Off site stored materials will be paid for with the following conditions:
 - a. Teton Builders to provide an affidavit stating that all materials were purchased for the sole purpose of use on the Four Seasons resort and will not be used for any other purpose.
 - b. Teton Builders will provide a certificate of insurance on the stored materials.
 - c. Fee will not be assessed on stored materials. Fee may only be charged against materials on site.
 - d. Copies of purchase agreements, invoices and delivery tickets must be provided to Jacobsen Construction.
4. The cash allowance of \$75,000 for roof trusses includes all delivery fees, taxes, and transportation costs, F.O.B. jobsite.
5. This SWO applies only to Area 6 of the Four Seasons Resort.
6. Jacobsen shall provide level 6 Top of Concrete elevations and Grid lines.
7. Gypsum board is by others.
8. Jacobsen Construction shall make provide assistance with cranes on a limited basis. Crane time must be coordinated with Jacobsen a minimum of 24 hours prior.

Heng - JCC PM

B. The Contract amount was derived as follows:

Base Bid

Proposal Dated April 26, 2002

Rough Carpentry Materials	\$ - 379,804
Roof Trusses (Allowance)	\$ 75,000
Wood I Joists	\$ 55,288
Glue Lams	\$ 42,612
LVL's or Parallam Beams	\$ 26,974
Hardware	\$ 42,658
Rough Carpentry Labor	\$ 472,640
Labor to install siding at shared wall	<u>\$ 10,000</u>

Total Contract Amount

\$1,104,976

C. The following items will be provided by others:

1. One set of the construction drawings and project manual as prepared by Hill Glazier Architects. Subcontractor will be required to purchase any additional sets of drawings and project manuals needed to perform its scope of work.
2. Others will provide embedded anchor bolts in concrete foundations.
3. Wood To steel specialty connectors at the moment frames will be provided by others.
4. Others will supply the board and batten siding, trim, and waterproof membrane at the shared wall on grid 158 and 160 between grid 135 and 111, refer to elevation 14 on A5.10. Co-ordination accepting offloading and distribution to the final installation shall be by Scout Enterprises.
5. Others will supply the through wall flashing material.
6. Exterior Timbers, siding, fascia boards, and trim as noted on the architectural drawings.
7. Others will perform installation of doors and windows.

3. SUPPLEMENTARY PROVISIONS

1. The amount of any additive change order (Change Authorization) to the Contract Amount will be limited to the actual, direct cost to the Subcontractor of making that change plus a combined total of fifteen percent (15%) of such actual cost of the Subcontractor's overhead and profit.
2. Subcontractor shall use reasonable efforts to avoid labor disputes that could hamper or delay the completion of the work. Whether or not resulting from Subcontractor's failure to use reasonable efforts to avoid same, in no event shall a labor dispute (other than an industry-wide/regional labor problem) give rise to a claim by Subcontractor for an increase in the Contract Amount.
3. Subcontractor shall furnish to any and all lenders providing funds for the construction or permanent financing of the Project with such documents, instruments and certificates as may reasonably be required by lenders in a form acceptable to lenders with respect to the construction of the Project and the payment of the costs thereof.
4. Subcontractor shall bear the cost (without reimbursement) resulting from the act or omission, or the fault or negligence or failure to fulfill a specific responsibility of the Subcontractor and its agents or employees, or anyone directly or indirectly employed by them or for whose acts any of them may be liable including but not limited to costs for the correction of damaged, defective or nonconforming work, disposal and

replacement of materials and equipment incorrectly ordered or supplied, and making good damage to property not forming part of the work.

5. In the event that the Contractor defaults under this Subcontract Work Order of the applicable Master Subcontract Agreement or in the event that the Contractor is replaced by the Owner or the Owner's construction lender as the Contractor for the project covered by this Subcontract Work Order, at the request and option of the Owner or the Owner's construction lender, Subcontractor will perform under and in accordance with the terms of this Subcontract Work Order and applicable Master Subcontract Agreement for any replacement Contractor. None of these provisions shall be construed to impose on Owner or the Owner's construction lender any obligation with respect to the Subcontractor whatsoever.
6. This Subcontract Work Order and Subcontractor bonds, if any, may be assigned to Owner and/or the lender, in their sole discretion, in the event of the termination of the contract between the Owner and Contractor.
7. Unless otherwise required by the Contract Documents, the form of warranty shown in Exhibit "A" shall be used on this Project.
8. Subcontractor shall connect and coordinate the Subcontractor's construction and operations with the Owner's FF&E contractors as required by the contract documents.
9. Contractor shall not be obligated to make payment to Subcontractor with respect to any Application for Payment unless:
 - a. Subcontractor delivers to Contractor concurrently with such Application for Payment, conditional or unconditional, as applicable, lien waivers and releases in form substantially similar to the forms attached hereto as Exhibit "B", and
 - b. Subcontractor shall provide Contractor with reasonable evidence that Subcontractor has complied with the following conditions to payment:
 - i. Subcontractor has attached to such lien waiver a full and complete list of the names and addresses of all Subcontractors, Sub-subcontractors, material suppliers (and their respective Subcontractors, Sub-subcontractors and material suppliers) (collectively, the "Subs") which Subcontractor or any of the Subs has hired to perform any portion of the Work or to provide any of the materials or equipment to be used in connection with performing any portion of the Work (the "List of Subs").
 - ii. Subcontractor has included a provision in each Subcontract and purchase order pertaining to the Work and/or the Project which requires each of the Subs to notify Subcontractor of the names and addresses of each of the Subs they have hired to perform any portion of the Work or to provide any of the materials or equipment to be used in connection with performing any portion of the Work and Subcontractor has incorporated the information so provided by each of the Subs into its List of Subs.
 - iii. Subcontractor has paid all of the Subs for all work performed and materials and equipment provided (both on-site and off-site), except as expressly noted to the contrary,
 - iv. Subcontractor has required each of the Subs to provide conditional mechanic's lien waivers and releases, in form and substance satisfactory to Contractor, Owner and Lenders, relating to that portion of the Work for which the Application for Payment (to which the lien waiver and certification is attached) is being submitted and each of the Subs' conditional lien waivers are attached to Subcontractor's lien waiver, and
 - v. Subcontractor has required each of the Subs to provide unconditional mechanic's lien waivers and releases, in form and substance satisfactory to Contractor, Owner and Lenders, relating to that portion

of the Work for which all prior progress payments were received and each of the Sub's unconditional lien waivers are attached to Contractor's lien waiver.

10. Subcontractor understands and acknowledges that, while this subcontract will be construed pursuant to the laws of Wyoming, the underlying contract between the Contractor and the Owner is governed instead by the laws of California and includes specific provisions for the resolution of disputes in that state. Subcontractor may, but is not required to, appear and participate to the extent allowed by California law in any dispute between Jacobsen and the Owner that involves the performance of, or amounts due to Subcontractor, Recognizing that the underlying contract governed by the laws of California, Subcontractor agrees to accept and be bound by the final resolution of any such dispute whether or not Subcontractor elects to participate therein.
11. All policies of insurance required under the terms of this Subcontract Work Order and Master Subcontract Agreement shall name Jacobsen Construction Company, Inc., FS Jackson Hole Development Company, LLC, Louis Dreyfus Properties, LLC, Louis Dreyfus Property Group, Inc., Four Seasons Hotels and Resorts, Jackson Hole Mountain Resort, The Robert Green Company and their respective members, managers, partners, officers, directors, affiliates, agents, independent contractors, employees, successors and assignees as additional insureds using ISO additional insured endorsement CG 20 10 or a substitute providing equivalent coverage and shall contain a waiver of subrogation in favor of Owner, Owner's lender, The Robert Green Company and their respective members, managers, partners, directors, officers, affiliates, agents, independent contractors, employees, successors and assignees. In addition, all such policies shall be primary and non-contributing and shall contain an agreement on the part of the insurers that in the event of cancellation of the policy, or a reduction as to coverage or limits thereunder, whether initiated by the insurer or any insured, the insurer shall give not less than thirty (30) days advance written notice by registered or certified mail to Owner and Contractor.
12. The Subcontractor shall be required to provide adequate forces to meet the schedule. The subcontractor will be required to provide labor as required and shall be responsible for costs associated with working beyond a standard 40 hour work week, if required. Subcontractors shall provide adequate materials and crew to maintain schedule. Subcontractor shall be responsible for damages due to schedule delay attributable to the Subcontractor. The Owner will assess liquidated Damages if the entire project is not completed on schedule. Subcontractor's portion of the liquidated damages, if assessed, will be commensurate to the degree in which it caused the delay to the project.
13. Subcontractor shall schedule delivery of construction materials to avoid peak traffic periods. Peak traffic periods are between the hours of 8:30a.m. – 9:30 a.m. and between 3:30 p.m. - 4:30 p.m
14. On site parking will be limited, therefore van-pooling or car-pooling will be required by the Subcontractors performing work on the site. Construction parking will be prohibited in the Village common lots, or in the surrounding neighborhoods. Parking will be permitted at Stilson Ranch Lot / US 22 and Wyoming 390 Shuttle to and from the site will be provided by the Contractor.
15. **This work will be phased.** Subcontractor shall conform to the construction-phasing schedule as outlined in the Construction Documents. Owner will occupy portions of the building during the construction period, as outlined in the documents.
16. Subcontractor shall verify dimensions as shown on the Drawings and field verify as required to insure proper performance of its work. Subcontractor shall be responsible for all coring, cutting, patching, sealing, caulking and finishing necessary to complete its work. Subcontractor shall protect nearby landscaping, equipment, and finishes from damage caused by its operations. Any damaged areas shall be repaired or replaced as directed by the Contractor at Subcontractors expense.
17. The Subcontractor shall provide the following prior to Substantial Completion:
 - i. Two sets of as built drawings.

ii. Two framed valve charts listing each valve by number, system and function.

18. Three months prior to substantial completion the Contractor will provide the following to the Owner, therefore the Subcontractor shall provide the following in a timely matter to the Contractor for submission,
- iii. Two sets of operating and maintenance manuals for all mechanical and electrical equipment
 - iv. Two sets of manufacturers recommended maintenance procedures for all architectural and interior design materials.
- 19 All personnel of the subcontractor, which will be performing work on the site, shall attend an orientation meeting organized by the contractor's on site personnel prior to performing work on the site.

Jacobsen Construction Company, Inc.
Contractor

By: _____

~~Dennis Cigana / Senior Estimator~~
JAMES H. EMERY PROJECT MANAGER

istribution: White/Subcontractor, Yellow/Accounting
lue/Project Office, Green/Control

Teton Builders
Subcontractor

By: _____

Signature/Title/Date

~~_____~~ PRES. 6-10-02

Guarantor per Paragraphs 1H and 8B of MSA

By: _____

Signature/Title/Date

~~_____~~ 6-10-02

Guarantor's Address of Record.

Guarantor per Paragraphs 1H and 8B of MSA

By: _____

Signature/Title/Date

Guarantor's Address of Record:

Tab C

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

JACOBSEN CONSTRUCTION,	:	Case No. 030905324
	:	
Plaintiffs,	:	Appellate Case No. 20030727-SC
	:	
v	:	
	:	
TETON BUILDERS, et al.,	:	
	:	
Defendants.	:	

MOTION TO DISMISS AUGUST 8, 2003

BEFORE

THE HONORABLE ROBERT K. HILDER

CAROLYN ERICKSON, CSR
CERTIFIED COURT TRANSCRIBER

1775 East Ellen Way
Sandy, Utah 84092
801-523-1186

COPY

APPEARANCES

For the Plaintiff:

MATTHEW J. BALL
ATTORNEY AT LAW

For the Defendant:

ERIK A. OLSON
ATTORNEY AT LAW

* * *

1 SALT LAKE CITY, UTAH - AUGUST 8, 2003

2 HONORABLE ROBERT K. HILDER, JUDGE PRESIDING

3 P R O C E E D I N G S

4 THE COURT: This is Teton Builders and Thomas Hunter,
5 case number 030905324. Counsel, please state appearances.

6 MR. OLSON: Good morning, Your Honor, Erik Olson for
7 the defendants.

8 MR. BALL: Your Honor, Matt Ball for Jacobsen
9 Construction Company and this is Richard Kirkham, the Chief
10 Financial Officer of Jacobsen Construction.

11 THE COURT: Good morning.

12 Okay. We are here on the Defendant's Motion to
13 Dismiss based on, I guess it's lack of jurisdiction and the
14 main defense is the contract, the form selection clause. Sort
15 of enjoyable reading your memoranda. I read them very
16 carefully, as well as the, mainly the *Phone Directories* case
17 and I have to say I, I just wondered if this is a continuation
18 of the battle between you two officers to style new phone
19 directories, at least the names in there look very familiar.
20 But that's been going on for, but it also explained to me why
21 you knew it so well. I should say you really carved that case
22 up and I understand why you did, but it's certainly an
23 illustration of why it's so hard to deal with those fractioned
24 decisions. I did find that frustrating in a way. I know the
25 Court gives you all the guidance it can, but when you got to

1 start pausing them the way you do that in that phone
2 directories case to figure out what the priority or majority
3 is, it gets difficult to say the least. But I think on the,
4 the motion, and it's your motion if I'm reading correctly, Mr.
5 Ball?

6 MR. BALL: No, Your Honor.

7 THE COURT: No, I'm reversing it? I do that a lot.

8 MR. OLSON: It's, right, it's mine.

9 THE COURT: Okay. I don't know what it is about this
10 case. I had reversed the firms for some reason. I know the
11 parties. My apologies on that.

12 On your motion, Mr. Olson, you don't spend a lot of
13 time initially on the, on the basic jurisdiction issues and
14 this is not a general jurisdiction. This would have to be
15 minimum contacts nexus case. But when Mr. Ball makes his point
16 that, you know, this doesn't really count because of the
17 contract, you do come back and analyze that. But I think this
18 contract is just absolutely critical and, of course, it is the
19 choice of law is critical, and it's sort of interesting to me
20 as we try to apply Wyoming law, but we keep coming back to Utah
21 law to interpret Wyoming law, particularly on the issue of
22 whether the form selection clause is unreasonable. But I'll
23 tell you, I'm leaning that the form selection clause is enough.
24 But I'm by no means all the way there, and that's partly
25 because of the language of their long arm and the interest of

1 the State in exerting jurisdiction as far as the constitution,
2 due process clause permits, and one question I have is why
3 doesn't due process, why isn't it satisfied if someone makes a
4 decision, even in something as limited as a form selection
5 clause, even without a consent to jurisdiction? And boy when
6 you guys start dividing form selection and consent to
7 jurisdiction, I really think we're slicing it thin, but I
8 understand the legal argument, and I respect the schooling
9 role. But why doesn't that deal with the constitutional
10 concern?

11 And the other concern is essentially the relationship
12 that's argued between the parties and all subject matter that
13 must exist, because the form selection clause alone is not
14 enough as Justice Durham said. I think it's, your argument
15 says it'd have to be both parties, Mr. Olson, the way the
16 language reads. It says parties in the plural, correct, that's
17 one point you made?

18 MR. OLSON: Sort of. I can explain that a little.

19 THE COURT: Yeah, and I'm just giving you this
20 background so that you can focus on the things that are
21 concerning me.

22 I'm not sure that that's very persuasive because if
23 it was both parties, in all cases, you wouldn't often have much
24 of a dispute over form to start with. Probably wouldn't want
25 to be here in the first place, or there, wherever it is. So, I

1 think it's reasonable to read it as either the subject matter
2 or one of the parties to the contrary.

3 The other thing, finally, that's not all that you
4 want to argue I'm sure, but on issue of Wyoming law, in terms
5 of construing whether it's form selection or consent to
6 jurisdiction in a contract under Wyoming law do you still need
7 minimum contacts? I think the closest analysis I saw was
8 people are stuck with the contract. I don't know if that's all
9 the Wyoming law on that topic, but I suspect it is, which is
10 why I thought I saw, or maybe I missed it as it got to be about
11 11:00 last night. I hope I didn't.

12 Before we start, Mr. Peterson, you have the whole
13 9:00 calendar. I'm hearing an argument on a jurisdiction
14 matter. I will not be disturbed at all if you call people and
15 move around and deal with them. So -

16 MR. PETERSON: Thank you very much.

17 THE COURT: - please don't hesitate, okay? Thank you.
18 Go ahead Mr. Olson.

19 MR. OLSON: Thanks, Your Honor, it sounds like I have
20 an up hill battle. But I'm confident that I'll be able to
21 resolve the Court's concern -

22 THE COURT: It's always interesting and I don't know
23 if you do or not, but, I mean, yeah you do, but it's so well
24 presented on both sides, I'm looking forward to your argument.

25 MR. OLSON: I appreciate that, thanks, Your Honor.

1 What I would first like to do is explain what Utah
2 law says. There's been some confusion about that. I did
3 participate in, in the *Phone Directories* case. I can't say I
4 fully understand the Supreme Court's decision, and all of the,
5 all of the different opinions that were handed down in that
6 case, but I would like to go through that case and go through
7 some of the other standards that Utah has set forth in this
8 type of case. When we look at these standards, it is certain
9 that there is no jurisdiction in this case and I'll explain
10 that. The Court's already started with the general proposition
11 that, that we know is the case, that in Utah to establish
12 personal jurisdiction you have to go through the traditional
13 minimum contacts analysis.

14 THE COURT: Uh-huh (affirmative).

15 MR. OLSON: Consistent with the due process clause and
16 the State long arm statute. We are only aware of one Utah
17 case, and it's the *Phone Directories, Henderson* case that
18 create any sort of exception to that traditional minimum
19 contacts analysis and that's what it is. It is an exception to
20 the standard rule. In *Phone Directories* we have this rational
21 nexus test that applies when there is a consent to jurisdiction
22 clause.

23 Now it, it has to be pointed out that based on the
24 concurrences in that case, the exception to the minimum
25 contacts analysis does not extend, explicitly at least, by that

1 opinion to form selection clauses. Based on Justice Howe's
2 concurrence where he stated that the enforceability of a form
3 selection clause is still governed by other rulings that the
4 Supreme Court has handed down, which had nothing to do with
5 personal jurisdiction, this Court cannot extend *Henderson* to a
6 form selection clause. The Court in, in *Henderson* certainly
7 drew a distinction between form selection clauses and consent
8 to jurisdiction clauses. I understand that the lead opinion
9 did not. But that lead opinion is just a plurality opinion
10 based on this concurrence.

11 THE COURT: In the statute, given the status of the
12 law in this state, I mean, the way you're presenting this case,
13 or the fact that this feels like first impression when you come
14 right down to it, and our best direction is *Phone Directories*
15 and Wyoming law to the extent that you can find some. Is that
16 a fair statement?

17 MR. OLSON: I don't think so. I don't think it's
18 necessarily a case of first impression. I guess, I guess the
19 Court is correct in stating that no reported Utah decision has
20 ever had the same facts as this case.

21 THE COURT: Oh, yeah.

22 [over talking]

23 MR. OLSON: So, yeah, I guess that's, the fact that
24 makes it a case of first impression, then I think the Court is
25 correct there. Are there standards in Utah that govern this

1 case? Yes. That's why we think it's not a case of first
2 impression. But there is Utah law that governs here.

3 Based on the concurrences in the *Phone Directories*
4 case, where Justice Howe comes back and says no, the form
5 selection clauses are governed by the *Prows* case we have to go
6 back to the *Prows* case and figure out whether the *Prows* case
7 enacted some sort of exception to the minimum contacts
8 analysis. We know that it didn't. In *Prows* the Court was
9 looking at venue and that is the distinction that we're drawing
10 here. Consent to jurisdiction clauses are agreements as to
11 personal jurisdiction. Form selection clauses are agreements
12 as to venue. They're completely separate issues.

13 THE COURT: [inaudible] that distinction. Now I mean
14 you agree to venue, but without jurisdiction isn't venue
15 meaningless? It, I mean when we're outside, when we're going
16 from state to state. I can see if someone is going to a venue
17 different within a state, which wouldn't have anything to do
18 with an interstate agreement. But how does that help?

19 MR. OLSON: Your Honor, we don't know what the
20 parties, we don't know what the parties proposed and perhaps
21 rejected in that case. That evidence is not before the court.
22 We have no way of saying with any certainty that, that Jacobsen
23 didn't propose consent to jurisdiction clause to the defendants
24 and that was rejected. We have no way of saying that did or

1 didn't happen -

2 THE COURT: But this involves -

3 MR. OLSON: We're stuck with -

4 THE COURT: [inaudible] let's suppose they did and
5 jurisdiction was rejected, venue was accepted. How could you
6 ever in fact trigger and use the venue if you don't have
7 jurisdiction? (inaudible). I mean I may be missing something.
8 I just don't see how you can have venue here if you can't get
9 the body here.

10 MR. OLSON: I understand that. I understand that.

11 THE COURT: And that's one of the underlying concerns
12 I have here, whether this forum selection clause has any meaning
13 and we go back. One thing our Supreme Court is pretty clear on
14 is people take the contract they write. And there are
15 exceptions and [inaudible] a question of ambiguity and beyond.
16 But if it's not ambiguous, it's only going to be bound by what
17 they did unless it's a policy or statute as it was, is that
18 statute in Utah law. But again, I'm not sure that applies
19 here. You see my problem? Is it really meaningless?

20 MR. OLSON: I don't think it's meaningless.

21 THE COURT: Okay.

22 MR. OLSON: There could have been facts after they
23 negotiate, or there could have been events that took place
24 after they negotiated that contract that would have given them
25 jurisdiction in Utah. None of those events have come to pass.

1 THE COURT: - venue and then they would have found
2 their jurisdiction through contacts or some other effect.

3 MR. OLSON: Absolutely.

4 THE COURT: And that would be the main one.

5 MR. OLSON: Absolutely. The bottom line is, yes,
6 court's hold parties to the terms of their contracts and their
7 not -

8 THE COURT: I was thinking in terms of how this is
9 presented in the, in the light of where we are today, that
10 would appear not be giving them the ability to bring up here.
11 But there could be circumstances, I understand.

12 MR. OLSON: There could, and, and this contract was
13 signed a few years ago. We don't know what was going through
14 the parties mind at the time. All we, all we know is what,
15 what we have in front of us in this contract, and there is no -

16 THE COURT: There's no boilerplate. They did
17 negotiate a place of litigation. They also negotiated a law
18 and they were two different things to control. So they were
19 talking and negotiating.

20 MR. OLSON: That's correct. That's correct.

21 I would say, Your Honor, that Utah courts have drawn
22 a distinction between the two types of provisions. In
23 *Henderson*, for example, Justice Durham very easily could have
24 responded to Justice Howe in her lead opinion by pointing out
25 that it doesn't matter what he says about a form selection

1 clause, because they're essentially the same thing. Form
2 selection clause is essentially a consent to jurisdiction, so
3 let's focus on the consent to jurisdiction analysis and
4 everything else about form selection clauses is meaningless.

5 THE COURT: I agree with you they're not the same
6 thing. But there is some overlap I believe and my question I
7 guess is can you have some implied consent in a forum selection
8 and then you express consent in a consent jurisdiction where if
9 you've got consent to jurisdiction you need nothing more. If
10 you have a forum selection with an implied consent, you may
11 need more like the rational nexus. I mean is that a fair
12 distinction?

13 MR. OLSON: Some cases have gone that way. As we've
14 pointed out in our, in our memoranda, Jacobsen's directed the
15 court to some cases from other jurisdictions that have gone
16 that way, that have found implied consent. I haven't taken any
17 effort to distinguish those cases, because that's what those
18 cases hold. There are also cases, as I've cited, in other
19 states that stand for the opposite view, that point out that
20 there is no overlap. Rather, that a consent to jurisdiction
21 clause is a consent to jurisdiction, while a forum selection
22 clause is merely a stipulation as to venue. So other courts
23 have drawn that distinction.

24 THE COURT: Uh-huh (affirmative).

25 MR. OLSON: Utah courts, well we're stuck with what

1 Utah says. We're stuck with what the Utah Supreme Court has
2 handed us and in Utah the courts have drawn a distinction
3 between the two. The courts have never pointed out that there's
4 any overlap between the two and again, based on Justice
5 Durham's failure to respond in any way to Justice Howe's
6 concurrence regarding the separation between the two and the
7 different analysis that applies to the two, we don't see any
8 way that the court can find there's some sort of confluence
9 between the two types of provisions.

10 We would argue, Your Honor, taking it a step further
11 and I would like to, you know, I could spend all day talking
12 about this *Henderson* case and it might not get us anywhere.
13 What I would like to do is proceed to some of the Court's
14 concerns with respect to what the *Henderson* standard is and how
15 we square ourselves under that. Even if the Court is to
16 determine that *Henderson* applies, that there is some sort of
17 implied consent to jurisdiction, and again we dispute that and
18 I've explained that already, even if we're to buy into
19 Jacobsen's argument that there was an implied consent to
20 personal jurisdiction and that *Henderson* applies, we still have
21 to satisfy this *Henderson* rational nexus test. The Court has
22 correctly stated the test. There has to be a rational nexus
23 between this state and either the parties to, either the
24 parties to or the subject matter of the contract. In *Henderson*

1 there were both. Not only was there a connection between both
2 parties to Utah. But there was also a connection between the
3 subject matter of the contract and Utah and perhaps that's what
4 the Court is missing, and, you know, it's stating, Your Honor,
5 stating the concern that, you know, maybe we just need either
6 of the parties, because you know we may never have a case where
7 we've got both defendants that are residents of the State of
8 Utah, then there would really be no meaning to, to this test.
9 But that's not what the standard is -

10 THE COURT: - there'd be no meaning. I mean it
11 would be such an easy decision there -

12 MR. OLSON: Correct.

13 THE COURT: - in fact, probably if you had both
14 parties to resident here they wouldn't be contesting it is
15 really what I'm saying. They'd be happy to be here, it's
16 convenient. In most cases you're only going to have one, and
17 of course what we're trying to avoid is the remote forum to
18 both. I think that's one reason we have the rational nexus
19 test. I mean we've got Wyoming and Utah, we don't want a
20 Delaware forum, and that wouldn't make a lot of sense to any of
21 us. People might do it, they might do it just to be difficult.
22 I mean we, I think we've all seen contracts stranger than that.
23 But that's really what I'm asking, why does it need to be both
24 and most cases where they are both, I don't think you'd have an
25 issue there, I guess what I'm saying.

1 MR. OLSON: Your Honor, I don't think it's just a
2 matter of convenience.

3 THE COURT: Uh-huh (affirmative).

4 MR. OLSON: I don't think that the rational nexus test
5 is merely limited to preventing inconvenience to the parties.
6 It goes a lot further than that. The court certainly didn't
7 state that in the *Henderson* case. When you look at *Henderson* -
8 and this is what's important - there was a connection to Utah
9 for both parties. The defendant in that case, he was a
10 resident of California, but he telephoned the plaintiff's
11 office in Utah to request employment. The very employment
12 contract at issue he signed at the Utah office of plaintiff.

13 THE COURT: Uh-huh (affirmative).

14 MR. OLSON: He telephoned the office to continue
15 negotiating the contract. Once it was finally complete and he
16 had a copy of it, he then mailed it to the Utah office. So the
17 defendant in that case, had a connection with Utah just as the
18 plaintiff *Phone Directories* is a Utah corporation with its
19 principle place of business in Utah.

20 Here we do not have that. We have no connection
21 whatsoever between the defendants and the plaintiff and that is
22 the distinction between *Phone Directories* and it would be a
23 major leap of faith to extend *Phone Directories* to this case
24 and then find that under *Phone Directories* we have this

1 connection with both parties. Here we've got Mr. Hunter and
2 his company, the two defendants, they have absolutely no
3 contact with Utah. We've submitted -

4 THE COURT: That's absolutely accepted for this
5 argument.

6 MR. OLSON: Yeah, that hasn't been disputed so far in
7 this case. We've submitted an affidavit and there hasn't been
8 any, any contrary evidence provided. But based on those
9 contacts, there are none, there's no basis for this Court
10 extending personal jurisdiction in this case. You can't say
11 that just because one party has a connection to Utah we have a
12 rational nexus between either the parties to or the subject
13 matter of the contract.

14 THE COURT: Well, what's it mean to have a rational
15 nexus to a party?

16 MR. OLSON: There has to be some connection to that
17 state. As the court explained it's something lesser than
18 minimum contacts analysis. We concede that. You don't have to
19 show purposeful availment. You don't have to show something
20 beyond some tenuous contact with Utah. Like for example, in
21 the minimum contacts, contacts, you know, a couple of telephone
22 calls are probably not going to get you personal jurisdiction
23 or a letter drafted is not going to get you personal
24 jurisdiction. Even entering into a contract with a Utah entity
25 does not alone get you personal jurisdiction. Here -

1 THE COURT: Not - but, but I'm talking about the, the
2 rational connection nexus with that party. Jacobsen's a party,
3 they're very much I guess a Salt Lake County entity. Why
4 doesn't that satisfy? I mean is that not a rational nexus?
5 One party to the agreement and the actual transaction being a
6 Utah, Salt Lake County resident I assume of long standing, the
7 name looks familiar, but I mean is that not, I guess, am I
8 missing something on what rational nexus would be required?
9 Assuming one party's enough. I know you don't concede that.

10 MR. OLSON: Sure. Assuming one party is enough, yeah,
11 Jacobsen certainly has a rational nexus to Utah.

12 THE COURT: All right.

13 MR. OLSON: If that were the standard. So yes, Your
14 Honor, that's correct. Our position is that that's not the
15 standard and that you have -

16 THE COURT: I mean you can come back to anything you
17 want. But we've talked about *Phone Directories* and what it
18 tells us about the impact of a forum selection and/or a consent
19 to jurisdiction clause on the need for otherwise showing a
20 basis for personal jurisdiction, what should, shouldn't we be
21 looking at Wyoming law on this? And if so, what is there?

22 MR. OLSON: Here's, here's why we're not looking to
23 Wyoming law. Well, here's how, why we are to a certain extent
24 and I'll explain the difference.

25 THE COURT: Okay.

1 MR. OLSON: Personal jurisdiction issues are governed
2 by Utah's long arm statute and the due process clause. That's
3 pretty clear from Utah law.

4 THE COURT: Yeah.

5 MR. OLSON: And in Utah court, at least with respect
6 to the personal jurisdiction issue -

7 THE COURT: I think they have to be because where
8 we're starting the jurisdiction have to do so within the
9 boundaries of the constitution. But then talking about impact
10 of the court which is part of the contract and the
11 interpretation of the contract is governed by Wyoming.

12 MR. OLSON: Exactly. We have clarified that in our,
13 in our briefs. I think, I think both of us have, have stuck,
14 have stuck pretty closely to that. That the interpretation of
15 the form selection clause, or I'm sorry, of the consent to
16 jurisdiction clause is governed by Wyoming law. That is the
17 interpretation of it -

18 THE COURT: - talk us to the impact of it on
19 jurisdiction analysis because that's Utah.

20 MR. OLSON: Precisely.

21 THE COURT: [inaudible] back and forth here I'm
22 struggling with.

23 MR. OLSON: But that's precisely it. That, that's the
24 distinction, so -

25 THE COURT: Okay.

1 MR. OLSON: - we can look to Utah - we can look to
2 Wyoming law which states generally the same as Utah law that,
3 you know, it's consistent with what was stated in the *Prows*
4 case that those are generally enforced, except when they're
5 unreasonable, and -

6 THE COURT: It seems like a different standard on
7 reasonable, the best I could tell. It seems like it might be
8 harder to show unreasonable in Wyoming than it is in Utah,
9 apart from the statute.

10 MR. OLSON: Perhaps. We don't have a lot of case law
11 on that unfortunately.

12 THE COURT: Yeah.

13 MR. OLSON: We've got this, we've got this one Wyoming
14 case that's a very recent case, I think it's a 2000 case, this
15 *Deardall* case, where the court comes out and generally seems to
16 follow the restatement. We've got the *Prows* case in 1993 in
17 Utah that generally seems to follow the restatement. In *Prows*
18 perhaps you could say it's a more lenient standard because in
19 *Prows* the court found it unenforceable, while in this Wyoming
20 case it was found to be enforceable. But I think generally
21 we're dealing with the same issue. Both cases state that they
22 will not be enforced if they are unreasonable, and the party
23 claiming unreasonableness does have a high burden to meet in
24 establishing that they're unreasonable.

1 But the reason that, that, that this Wyoming law and
2 the enforceability of the forum selection clause is not really
3 at the crux of this argument is that in neither of those cases
4 that is in all of the governing cases we have on the
5 enforceability of forum selection clauses personal jurisdiction
6 was not at issue. The court, the court didn't come out and
7 say, you know, this is a jurisdiction issue. In both of those
8 cases the court was looking at a motion under 12(b)(3) to
9 dismiss for lack of venue.

10 THE COURT: Uh-huh (affirmative).

11 MR. OLSON: We're dealing with venue issues here and
12 that's all we have in both of those cases and that's one of the
13 reasons we would argue that that is a venue issue, it is not a
14 jurisdiction issue. So we can argue about the enforceability
15 of that all we want, but even if it's enforceable, then you're
16 still going to have to get over the hurdle of personal
17 jurisdiction, and that is what they can't get over in this
18 case.

19 But the final issue, Your Honor, and then I'll sit
20 down unless the Court has any other questions, is that if the
21 forum selection clause is unenforceable, then, you know, we're
22 not even going to get to the court, to their position that
23 there's some sort of implied consent to personal jurisdiction.

24 THE COURT: No, I agree. I think the enforceability
25 is absolutely [inaudible] and -

1 MR. OLSON: So, and we've addressed that in our briefs
2 and I'm not going to rehash all the arguments, but I, I will
3 just emphasize the one point that we raised that in, that in
4 Utah we have a public policy against enforcing Wyoming
5 contract, or enforcing -

6 THE COURT: I'm really interested in your position
7 that, that could be a measure under Wyoming law or is that what
8 you're really saying? Are you saying here in Utah we should
9 not even under Wyoming law deem something enforceable that Utah
10 simply would not as a matter of public policy. I mean does
11 Utah even get a say in this?

12 MR. OLSON: Utah does. In determining whether to
13 extend comity to another state, Utah courts look to Utah public
14 policies. That has been established. We've cited a case in our
15 reply brief -

16 [over talking]

17 THE COURT: But is comity the same as if, if we're
18 following an agreement or by Wyoming law, is that a comity
19 question or the parties contract we're abiding by?

20 MR. OLSON: That's a good question. I think, I think
21 it's still a comity question because the court is looking to
22 Wyoming law. When a court in Utah is being asked to extend the
23 law of another state, then that is a comity question.

24 THE COURT: I guess it's true to say that under comity
25 the law of the selected state, I mean this doesn't seem as

1 egregious as some, but I could think of an egregious example.
2 We all could. Go back a 100 or so years and it might be
3 related to slavery or something. So you say, oh, what am I
4 going to do here? So I guess that's the analogy, although I'm
5 stretching it a little.

6 MR. OLSON: Well, yeah, taking that analogy, say there
7 is a contract for slavery and we know in Utah there are public
8 policies against that, you know, going back a 100 years -

9 THE COURT: More than a hundred.

10 MR. OLSON: There still are. There still are public
11 policies against that. But using that, using the Court's
12 analogy, you have a contract provision that under Utah law
13 would be against Utah public policy, and that's exactly what we
14 have here. We have something that we think is against Utah
15 public policy that this Court is being asked to hold up and we
16 think that's the result that should not, should not happen
17 based on Utah public policy, which does govern this analysis.

18 THE COURT: Uh-huh (affirmative).

19 MR. OLSON: And we would add, Your Honor, taking it a
20 step further, based on the fact that this Court lacks personal
21 jurisdiction in this case, this choice of venue, of course,
22 should not be enforced. That, that goes without saying. The
23 Court does not need to enforce the party's choice of venue if
24 there is no personal jurisdiction. That is one reason that
25 that is unenforceable, and based on that the Court should go

1 ahead and dismiss pursuant to Rule 12(b)(2).

2 THE COURT: Thank you for an excellent argument, Mr.
3 Olson.

4 Mr. Ball?

5 MR. BALL: Thank you, Your Honor.

6 Preliminarily, Your Honor, Mr. Olson suggested that
7 it was, we had to cross some sort of a hurdle here today. Mr.
8 Olson's the moving party, of course, and has the burden of
9 establishing that there is in fact no personal jurisdiction if
10 that indeed is what he is trying to do. So we don't have a
11 burden to meet here in the sense that Mr. Olson suggests that
12 we do.

13 Now if you, if you were to read *Henderson* as we've,
14 as has been discussed today, to require a nexus with, with
15 only, with both of the parties before the Court, I can't see
16 and I've read the case carefully as has everybody else here, I
17 can't see how *Henderson* adds a single thing to the law. I mean
18 it seems to me that the court at that time in that case was,
19 was announcing an exception. But if it, if the case is to be
20 read, really to be read to require a nexus with both of the
21 parties, I don't see how it adds anything to the law. I mean
22 if we're prepared to accept that this, this rational nexus is
23 somehow a reduced standard from minimum contacts, the court did
24 a very poor job of suggesting, you know, where that line ought
25 to actually be drawn and if that, you know, if that was what

1 they were doing it was somewhat revolutionary at least and I
2 would have expected them to have given us some more guidance
3 than they did.

4 And I think - Teton Builders is really just
5 absolutely, I mean I've read all their Briefs. I've listened
6 to the argument and I still haven't heard an answer to the, to
7 what I think is the fundamental question here and that is these
8 people agreed, this company agreed to litigate here and they
9 never have answered the question satisfactorily why should they
10 be allowed, why should they want and why should they be allowed
11 to suddenly back pedal away from that agreement? I think you
12 raised a due process concern earlier, Your Honor, and I think
13 that that concern is quite easily taken care of with the fact
14 that they just agreed to litigate here. They may not have
15 gotten into the nuance of personal juris -

16 THE COURT: Well, I think, maybe it's not a good
17 analogy, but I think of the old jurisdiction cases where they
18 say, you know, if you avail yourself the benefits of acting
19 within a foreign state you should expect to be held within that
20 state. This isn't the same, but you've intentionally taken a
21 step. You've done business with someone from a state and venue
22 will be, at least venue, as Mr. Olson says. The question is
23 whether it's more than venue, whether it's jurisdiction, but,
24 yeah, it does seem to me to some extent the due process
25 concern.

1 MR. BALL: I think it's quite, as I say, readily taken
2 care of and although the contract doesn't get into the nuance
3 of personal jurisdiction necessarily, at least explicitly, it's
4 pretty clear that they agreed to litigate here. I think it
5 uses that, you know, uses the phrase that litigation will take
6 place in Utah.

7 THE COURT: Arbitration, litigation or something like
8 that.

9 MR. BALL: Yeah, and this can't be a surprise to them.
10 They can't be taken off guard and they can't seriously contend
11 that they didn't really agree to be haled into court here.
12 Whether they agreed to be subject to the court's jurisdiction
13 or not, expressly, and I don't think that that concern has been
14 addressed at all by Teton Builders anywhere.

15 Now without wishing to, to bore the Court with
16 rehashing what it's already dealt with and heard, I suggest to
17 you, to the Court that, that the forum selection clause in this
18 contract just has to be read to include a consent to
19 jurisdiction, an implied consent to jurisdiction. It is
20 absolutely meaningless if not, and it's, as we all know the
21 Court has a responsibility and a duty to, to give meaning to -

22 THE COURT: Well, and you gave me a lot of cases from
23 other jurisdictions and I appreciated your thoroughness. But
24 take a minute on what Justice Howe was doing in *Phone*
25 *Directories*, I mean whether that does mean we've got to treat

1 them separately.

2 MR. BALL: I wish I understood what Justice Howe was
3 doing and I'm afraid I simply don't. It's not at all clear to
4 me that he even intended there to be a distinction. It's not
5 at all clear to me -

6 THE COURT: Well, I'm not sure I'm persuaded of it
7 either. But there's, there's some evidence of it there.

8 MR. BALL: There is some, but even if, even if there
9 is a distinction as Mr. Olson suggests, that there should be
10 under Justice Howe's concurrence, we submit, Your Honor, that
11 it's irrelevant. Wyoming law controls here and what the court
12 did in *Henderson* really has no bearing on this case at all.

13 THE COURT: Wyoming controls as to enforceability and
14 as to whether that's sufficient to deal with the contacts issue
15 or just as to enforceability?

16 MR. BALL: I suggest to you that it applies to both,
17 Your Honor, and we've briefed it and -

18 THE COURT: Even when Utah though is the state
19 ultimately exerting the jurisdiction, which has constitutional
20 ramifications. I mean at some point if we're going to say
21 we're going to exert jurisdiction, shouldn't it be on the basis
22 of our own law and we stand behind it, right or wrong in that -

23 MR. BALL: As you pointed out earlier, Utah extends
24 jurisdiction to the fullest limits of due process.

25 THE COURT: Yeah.

1 MR. BALL: And I think I, you know, I've addressed the
2 fact that I can't see how due process could in any way be
3 offended in this case by exerting jurisdiction over Teton
4 Builders when they've agreed to litigate here. When they
5 knowingly signed a contract with a provision in that wasn't
6 hidden, wasn't boilerplate, wasn't in small print, that clearly
7 indicates that the parties will litigate here.

8 THE COURT: Setting that aside for a minute because I
9 do understand that position, back to what Wyoming law controls
10 and what it doesn't if you'd clarify for me. I may have side
11 tracked you there a little.

12 MR. BALL: No, not at all, Your Honor. It's our
13 position that Wyoming law controls both the interpretation of
14 the contract and because the parties agreed that Wyoming law
15 would govern everything to do with the contract, that it
16 controls jurisdiction as well. At the end of the day though
17 whether it does or does not, I think is ultimately irrelevant
18 because I think jurisdiction lies here whether you go with the
19 *Deardall* analysis of reasonableness or whether you go with
20 *Henderson* and the rational nexus because as I mentioned
21 earlier, the rational nexus, *Henderson* doesn't add anything if
22 it doesn't require only rational nexus with one of the parties,
23 which we quite clearly have here and I think Mr. Olson concedes
24 that we have here. So, whichever way we get there, the result
25 ought to be the same and that is that jurisdiction lies here.

1 Even if for some reason we, we have a problem
2 implying a consent to jurisdiction into this form selection
3 clause, and we didn't brief this terribly thoroughly, but I
4 think it's pretty clear that we have a waiver here. We have
5 knowing relinquishment, voluntary relinquishment of a known
6 right. That's the standard that's set out in the *Gees Dorfey*
7 *Doughty* case and, of course, having agreed explicitly to
8 litigate here, I don't know how Teton Builders could in any way
9 seriously argue that they haven't voluntarily relinquished
10 their right. They're not claiming that a gun was held to their
11 head when they signed the contract or anything of that nature.
12 So there's, the contract was clearly voluntarily entered into
13 and they clearly could have, although obviously didn't bargain
14 for the right to litigate in Wyoming. So even if we've got
15 problems with the forum selection clause, even if there's a, an
16 important absence there, I think we have got a waiver and the
17 same time - and therefore, we can get to the same place along
18 either path.

19 Now I mentioned earlier that it, that it's Teton
20 Builders burden before the Court today to show that this, this
21 contract provision is unreasonable and in *Deardall* we learn
22 that it's a heavy burden. It's not just a burden, it's a heavy
23 burden and, of course, they really haven't come close in my
24 estimation to meeting that heavy burden. Teton Builders' best
25 argument is based on this Utah statute that clearly I think

1 under the terms of the contract which provide that Wyoming law
2 governs has no bearing on, on the court's decision today -

3 THE COURT: Are you going to address the comity
4 argument? I'd rather enjoy it if so. In terms of why should
5 we enforce anything under Wyoming law if it is repugnant to
6 Utah public policy, especially when it's addressed as
7 explicitly as in our statute?

8 MR. BALL: I think we have to address Wyoming law,
9 because that's what the parties agreed the court would address.
10 Mr. Olson hasn't provided us any indication of what Wyoming's
11 public policy suggests about a contract of this nature. All
12 we're, all we have is this, is the Utah statute, which
13 admittedly suggest that there's a public policy in Utah. But
14 this is a Wyoming construction project. One of the parties is
15 from Wyoming. There's no reason that a Utah statute needs to
16 have any bearing on anything to do with this case. The parties
17 agreed that in fact it wouldn't have anything to do with this
18 case. So in terms of comity, everybody expected us to be
19 looking to Wyoming, that Wyoming law therefore should govern
20 and I think comity is -

21 THE COURT: Is it a question of degree of repugnance?
22 I mean we did an analogy that's pretty out there, but I mean is
23 there some point where the public policy is so strong that we
24 would say forget Wyoming law, we're not going to follow it?
25 That somewhere on the continuum it's okay or is that not even

1 an issue?

2 MR. BALL: I don't know that I have an answer to that
3 question, Your Honor. I don't know whether, what the, whether
4 there is a point on the continuum or not. Either way, we have
5 what we have here and that is we have Wyoming law. So, I don't
6 know how to answer that question, I'm afraid.

7 THE COURT: Well, that's a candid answer. I'm not
8 sure I do.

9 MR. BALL: At the end of the day, Your Honor, unless,
10 unless you have further questions for me, I submit that this is
11 a pretty straightforward case. If the forum selection clause
12 doesn't include -

13 THE COURT: That's probably our strongest point of
14 disagreement about being straightforward. Straightforward sort
15 of, but it's a very close call for me, I'll be very candid.

16 MR. BALL: I understand.

17 THE COURT: And I'm leaning towards your side and I
18 think I'm going to rule for your side. But it's close.
19 Because there's a number of issues counter [inaudible]
20 policies, considerations. But I do think when you spell it all
21 out, I'm inclined to say we can accept jurisdiction, I'll be
22 more specific in a moment, within the bounds of the due process
23 clause and under those circumstances we should [inaudible]
24 agree with the parties and we should leave it to the Supreme
25 Court to tell us if we're off base, but I think at some point

1 you're going to have to be clearer on this issue of forum
2 selection consent to jurisdiction. So -

3 MR. BALL: I think that would be very helpful.

4 THE COURT: Yeah, it would have been. I'm not sure
5 that this case be the one. I'd rather see you resolve it.
6 But, why don't you sit down?

7 I'm telling you candidly, Mr. Olson, I think you've
8 done a tremendous job and I think it's, it is close. It felt
9 close as I read it carefully for a couple of hours last night,
10 as I read, the only case I read in detail was [inaudible]
11 Services and your *Prows*, and your argument made it still even
12 closer. But I'm still, I'll tell you my basic summary and tell
13 me if I'm just off, okay. Again, [inaudible] argue no matter
14 what.

15 Essentially the parties contracted for a forum
16 selection clause. Now I think we have a strong line of case
17 law in this state that we're going to honor the contracts of
18 the parties, sometimes even when it leads to what perhaps may
19 not be a very equitable result and I say that partly because I
20 was reversed a couple of years ago on not enforcing an
21 arbitration clause. Well, the arbitration clause in fact
22 didn't give them anything. It was like we agree to arbitrate
23 and if we don't successfully arbitrate within 60 days it's back
24 to square one and rescind, and my position from the bench was
25 there's no meaningful dispute resolution here, you just stall

1 for 60 days and there's nothing. I think Justice Wilkins wrote
2 a very good decision in which he very courteously pointed out
3 that it didn't make a lot of sense to him either, but it's what
4 they contracted for, and that's what they enforced and that
5 comes up in many different contexts.

6 So without ambiguity, without undue influence or
7 something of the kind, the contract I think is a very important
8 beginning point. Then we go to enforceability. There I think
9 we all agree Wyoming law applies. Wyoming has a high standard.
10 It says basically we're going to enforce these clauses. I
11 think given the Wyoming standard of enforceability, there's a
12 strong suggestion that as long as the contract is there, it
13 also implies consent and that's what I believe happens here,
14 under Wyoming law.

15 I think we then do shift to Utah law to decide if
16 this implied consent is sufficient to also extend jurisdiction
17 to someone who otherwise is neither doing business generally or
18 has established minimum contacts. For the purposes of this
19 argument and ruling there are no minimum contacts, no general
20 jurisdiction. But I find that under Utah law there is, under
21 foreign services, a rational nexus to one party and one party
22 is enough.

23 The public policy concern you identified very well in
24 the comity argument. I think if it applies at all, it is a
25 continuum. I think there could be a type of circumstance in a

1 public policy where we absolutely would say, you know, this
2 just offends all our notions of, say, fair play, which gets us
3 into due process, [inaudible] due process, and then at that
4 point we'd probably disregard Wyoming law. I've seen nothing
5 in this case that identifies to that extent and I think that
6 the agreement, the relationship to the state, the knowledge of
7 where the venue is certainly is sufficient to assure that
8 traditional notions of fair play and substantial justice are
9 not offended and so I'm denying the motion to dismiss, and I
10 hope you two, if you're not there now, get to the point where
11 you enjoy Friday mornings starting this way as much as I have.
12 Thank you.

13 Prepare the order Mr. Ball, sir.

14 MR. BALL: Thank you, Your Honor.

15 MR. OLSON: Thank you, Your Honor.

16 (Whereupon the hearing was concluded)

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CERTIFICATE

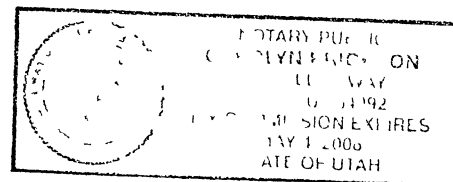
I HEREBY CERTIFY that the foregoing transcript in the before mentioned hearing held before Judge Robert K. Hilder was transcribed by me from a video recording and is a full, true and correct transcription of the requested proceedings as set forth in the preceding pages to the best of my ability.

Signed this 24th day of November, 2003 in Sandy, Utah.

Carolyn Erickson

Carolyn Erickson
Certified Shorthand Reporter
Certified Court Transcriber

My Commission expires May 4, 2006

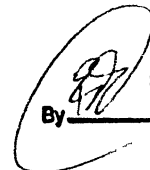


Tab D

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FILED DISTRICT COURT
Third Judicial District

 **AUG 20 2003**
SALT LAKE COUNTY
By _____ Deputy Clerk

Attorneys for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

JACOBSEN CONSTRUCTION COMPANY,
INC., a Utah corporation,

Plaintiff,

vs.

TETON BUILDERS, a Wyoming corporation,
and THOMAS R. HUNTER, an individual,

Defendants.

**ORDER DENYING DEFENDANTS'
MOTION TO DISMISS FOR LACK
OF PERSONAL JURISDICTION**

Civil No. 030905324

Judge Robert K. Hilder

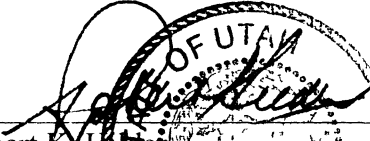
Defendants Teton Builders and Thomas R. Hunter's (collectively, "Defendants") Motion to Dismiss for Lack of Personal Jurisdiction came before the Court for hearing on August 8, 2003, at 8:30 a.m. Plaintiff Jacobsen Construction Company, Inc. was represented at the hearing by Matthew J. Ball of Parr Waddoups Brown Gee & Loveless, P.C. Defendants were represented by Erik A. Olson of Durham Jones & Pinegar, P.C.

The Court has reviewed the memoranda and supporting evidence filed by the parties, having heard the arguments of counsel, and being fully advised in the premises,

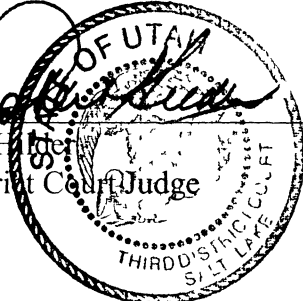
IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendants' Motion to Dismiss for Lack of Personal Jurisdiction is DENIED.

DATED this 20th day of August, 2003.

By the Court:



Robert K. Hilder
Third District Court Judge



Approved as to form:



R. Stephen Marshall
Erik A. Olson
Attorney for Defendants