

2010

White Cap Construction Supply, Inc. v. Star Mountain Construction, Inc., et al : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

WHITE CAP CONSTRUCTION SUPPLY,
INC.,

Plaintiff,

v.

STAR MOUNTAIN CONSTRUCTION,
INC., et al

Defendants.

Case No. 20101007-CA

District Ct. No.: 050500453

Trial Judge: Hon. Bruce C. Lubeck
Hon. Keith Kelly

SHAMROCK PLUMBING, LLC,

Cross-Claim Plaintiff/Appellee,

vs.

SILVER BARON PARTNERS, L.C.,
DAEDALUS USA, INC., et al

Cross-Claim Defendants/Appellants

BRIEF OF APPELLANTS

Appeal from Orders of the
Third Judicial District Court
Summit County, Utah

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UTAH APPELLATE COURTS
APR 28 2011

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WHITE CAP CONSTRUCTION SUPPLY,
INC.,

V.

Defendants.

VS.

Cross-Claim Defendants/Appellants

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LIST OF ALL PARTIES IN THE DISTRICT COURT

The following parties and attorneys appeared in the proceeding in the District Court:

1. Appellants Silver Baron Partners, L.C., a Utah limited liability company, and Daedalus USA, Inc., a Utah Corporation, are represented by Joseph M. Chambers, Josh Chambers, and Maybell Romero, Harris, Preston & Chambers, LLP, Logan, Utah.

2. Appellee Shamrock Plumbing LLC, a Utah limited liability company, is represented by Mel S. Martin, Murray, Utah, Matthew G. Cooper, Murray, Utah, and Jeremy C. Sink, McKay, Burton & Thurman, Salt Lake City, Utah.

3. Other parties that were dismissed at earlier stages of this case and are not party to this appeal include White Cap Construction Supply; Star Mountain Construction; Ed Zite; Fred W. Fairclough Jr.; Christine Fairclough; Thomas Strebel; Idaho Pacific Lumber Co.; Bingglei Rock Products, Inc.; and Western States Equipment Co.

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STATEMENT OF JURISDICTION

The Utah Supreme Court had appellate jurisdiction over this matter pursuant to Utah Code Ann. § 78A-3-102(3)(j) and Utah R. App. P. 3 and 4. The Utah Court of Appeals now has jurisdiction over this matter pursuant to Utah Code Ann. §§ 78A-3-102(4) and 78A-4-103(2)(j).

ISSUES PRESENTED FOR REVIEW

Issue No. 1: *Was Daedalus USA, Inc. (“Contractor”) entitled under the subcontract to withhold payment from Shamrock Plumbing, LLC (“Subcontractor”)?*

Standard of Review: “When [. . .] a contract is unambiguous and can be interpreted as a matter of law, we review the district court’s interpretation for correctness, according no deference to the district court.” *Mid-America Pipeline Co. v. Four-Four, Inc.*, 2009 UT 43, ¶ 16, 216 P.3d 352 (citing *Peterson v. Sunrider Corp.*, 2002 UT 43, ¶ 14, 48 P.3d 918). “Questions of contract interpretation not requiring resort to extrinsic evidence are matters of law, and on such questions we accord the trial court’s interpretation no presumption of correctness.” *Lloyd v. Lloyd*, 2009 UT App 314, ¶ 6, 221 P.3d 884 (quoting *Coalville City v. Lundgren*, 930 P.2d 1206, 1209 (Utah Ct. App. 1997)). “The district court’s construction of contract language is given no particular weight and is reviewed for correctness as a matter of law.” *Doctors’ Co. v. Drezga*, 2009 UT 60, ¶ 9, 218 P.3d 598 (citing *LDS Hosp. v. Capitol Life Ins. Co.*, 765 P.2d 857, 858 (Utah 1988)).

Preservation: This issue was preserved in Appellants’ Objection to Form and Content of Proposed Judgment and Request for Clarification of Ruling (R. 710-19);

Appellants' Reply and Opposition Memorandum (R 750- 57); oral argument held April 6, 2010 (R. 758; 902); the evidentiary hearing held June 11, 2010 (R. 777; 903); Objection to Content of Proposed Judgment (R. 790-93); and, more generally, at trial of this matter insofar as the court was asked to interpret and apply the contract in rendering its decision (*see* R. 899-901).

Issue No. 2: *If Contractor was entitled under the subcontract to withhold payment from Subcontractor, is Subcontractor entitled to any pre-judgment interest? Can Subcontractor be awarded pre-judgment interest on the amount Contractor was entitled to withhold?*

Standard of Review: "The trial court's award of prejudgment interest, and the amount thereof, present [] a question of law which we review for correctness." *Kealamakia, Inc. v. Kealamakia*, 2009 UT App 148, ¶ 4, 213 P.3d 13 (alteration in original)(internal citations and quotations omitted). "The trial court's decision on plaintiff's entitlement to prejudgment interest presents a question of law which we review for correctness." *Andreason v. Aetna Cas. & Sur. Co.*, 848 P.2d 171, 177 (Utah App. 1993).

Preservation: This issue was preserved in Appellants' Objection to Form and Content of Proposed Judgment and Request for Clarification of Ruling (R. 710-19); Appellants' Reply and Opposition Memorandum (R 750- 57); oral argument held April 6, 2010 (R. 758; 902); the evidentiary hearing held June 11, 2010 (R. 777; 903); Objection to Content of Proposed Judgment (R. 790-93); and, more generally, at trial of this matter

insofar as the court was asked to interpret and apply the contract in rendering its decision (see R. 899-901).

Issue No. 3: *Where expert witnesses were not identified or designated pursuant to Utah R. Civ. P. 26(a)(3)(A) and objections were timely raised at trial was it error for the trial court to admit such expert witness testimony? Were Appellants entitled to a new trial under Utah R. Civ. P. 59?*

Standard of Review: Interpretation of Utah R. Civ. P. 26, as well as the rest of “the Utah Rules of Civil procedure is a question of law that we review for correctness.” *Drew v. Lee*, 2011 UT 15, ¶ 7, 678 Utah Adv. Rep. 4; *Pete v. Youngblood*, 2006 UT App. 303, ¶ 7, 141 P.3d 629 (citing *Goldberg v. Jay Timmons & Assocs.*, 896 P.2d 1241, 1242 (Utah Ct. App. 1995)). “We review the trial court’s impositions of sanctions for failure to comply with those rules, including the exclusion of testimony, for an abuse of discretion.” *Id.* (citing *Featherstone v. Schaerrer*, 2001 UT 86, ¶ 31, 34 P.3d 194; *Tuck v. Godfrey*, 1999 UT App 127, ¶ 15, 981 P.2d 407). “Under our rule 59, it is well settled that, as a general matter, the trial court has broad discretion to grant or deny a motion for a new trial. Under this standard of review, we will reverse only if there is no reasonable basis for the decision.” *Smith v. Fairfax Realty, Inc.*, 2003 UT 41, ¶ 25, 82 P.3d 1064 (quoting *Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 804-05 (Utah 1991)).

Preservation: This issue was preserved at trial (see, e.g., R. 899, pp. 91-95, 100, 106-7, 112, 118, 135, 137, 192-93, 236, 241, 245, 251, 255, 86; see also generally R. 899); in Appellants’ Motion for New Trial and the accompany memorandum and declaration (R. 830-46); the Reply Memorandum and Request for Oral Argument (R.

867-69); and the Objection to Admissibility of Exhibits, Testimony of Witnesses, and Use of Depositions (R. 629-40).

STATEMENT OF APPLICABLE PROVISIONS

Utah R. Civ. P. 26: Set forth in its entirety in App. C-1.

STATEMENT OF THE CASE

A. NATURE OF THE CASE: This appeal involves the interpretation and enforcement of a construction contract (Ex. D-2; App. B-1). It is an appeal from the final orders and judgment of the Third District Court, Summit County, which awarded a monetary judgment for damages to Subcontractor against Contractor under the subcontract, and for damages and attorney fees to Subcontractor against Owner under Utah Code Ann. § 14-2-2.

B. COURSE OF PROCEEDINGS AND DISPOSITION IN COURT
BELOW: The case was filed in 2005 initially as a multi-party construction dispute arising from a construction project to build a luxury condominium hotel in Deer Valley, Utah. (R. 1-13.) All other parties have been dismissed except Subcontractor (Cross-Claim Plaintiff/Appellee) and Owner and Contractor (Cross-Claim Defendants/Appellants).

On October 13, 2005, Subcontractor filed a Cross-Claim against Owner and Contractor. (R. 41-50.) The Cross-Claims alleged causes of action for mechanics' lien foreclosure, breach of contract, quantum meruit, and a claim under Utah Code Ann. § 14-2-2. (*Id.*) The Subcontractor's mechanics' lien claim was dismissed on June 21, 2007. (R. 158-68.)

On January 13, 2009, prior counsel for Owner and Contractor withdrew from the case. (R. 253-55.) Current Counsel for Owner and Contractor appeared March 23, 2009. (R. 296-97.) On May 14, 2009, Subcontractor filed a Notice of Readiness for Trial (R. 337-79) and on May 21, 2009, Owner and Contractor objected to the Notice of Readiness and requested a Rule 16 Pretrial Conference. (R. 383-86.) The primary objection to the Notice of Readiness was that neither party had yet designated any expert witnesses for trial. (*See* R. 383-86, 401-03, 904.) Because the case involved a construction dispute, counsel for Owner and Contractor felt that proper presentation of the case would necessitate the use of expert witnesses. (*See id.*) The then-controlling scheduling order, entered before current counsel for Owner and Contractor became involved in the case, cut off discovery around December 31, 2008. (R. 229-30.)

On July 21, 2009 the trial court conducted a pretrial conference. (R. 401-03.) Owner and Contractor's counsel requested that the court re-open discovery for the purposes of designating expert witnesses for use at trial and also to take two depositions that had been scheduled prior the discovery cutoff, but had been cancelled by prior counsel shortly before he withdrew. (*See* R. 401-03, 253-55, 904.) Subcontractor's counsel objected to re-opening discovery for purposes of designating expert witnesses, including the designation of Subcontractor's own expert witnesses. (R. 904, pp. 6-14.) All parties, and the trial court, were on notice that neither side was going to trial having any expert witness designated.¹ (*See* R. 401-03, 904.) The trial court allowed the

¹ Mr. Chambers (Owner's and Contractor's counsel): I don't think either side has designated an expert witness on the case. R. 904, p. 8. Mr. Martin (Subcontractor's

Owner's and Contractor's counsel to take the depositions of Bret Christiansen (Colvin Engineering employee) and Bill Payne (Shamrock employee). (*Id.*) The trial court concluded the pretrial conference by establishing a cutoff date for dispositive motions and setting the matter for a four-day bench trial beginning January 20, 2010. (*Id.*; R. 404-06; 904, pp. 6-14.

On October 20, 2009, Owner and Contractor filed a Motion for Partial Summary Judgment and Motion in Limine. (R. 432-450.) Both motions were opposed. (R. 469-492.) On December 4, 2009 the trial court entered its Ruling and Order. (R. 530-543; *see also* App. A-1.) In its Ruling and Order, the trial court found:

Thus, the motion for partial summary judgment is GRANTED in part and DENIED in part. The court finds and concludes as above, that the [Subcontractor's] work was not completed timely and that [Subcontractor] has breached the contract on that issue. The court finds and concludes also that [Subcontractor] did not give written notice of [design] deficiencies, that was a breach but the question of the materiality of that breach remains for trial.

(R. 539-40.) The motion for partial summary judgment purportedly narrowed some of the issues (*see* R. 530-43), and the matter went to trial on January 20, 21 and 22, 2010 (*see* R. 849-901). At the trial of this matter, over objections from Owner and Contractor, and to their prejudice, Subcontractor was allowed to introduce expert testimony from witnesses not designated as experts pursuant to Utah R. Civ. P. 26(a)(3)(A). (R. 899, pp.

counsel): We're way passed, your honor, and neither side has designated an expert. R. 904, p. 9. Mr. Chambers: What is the Court inclined to do about experts? R. 904, p. 13. The Court: (addressing Mr. Martin) You probably didn't do it because you don't see a need for one. Mr. Martin: There's no need, Your Honor. R. 904, p. 13. The Minutes of the Scheduling Conference also contains the following: "Discovery will not be opened for expert witnesses." R. 401.

91-95, 100, 106-7, 192-93, 112, 118, 135, 137, 236, 241, 245, 251, 255, 86; *see also* generally R. 899.)

On January 29, 2010, after the trial concluded, the trial court entered its decision in the form of a Memorandum Decision, awarding judgment to Subcontractor and against Contractor and Owner. (R. 665-93; *see also* App. A-2.) The trial court re-examined and changed its position with respect to one of the summary judgment rulings. (R. 678; App. A-2; *cf.* R. 530-43; App. A-1.) Post-trial proceedings were necessary based upon the Memorandum Decision. (R. 655-93; R. 902-03.) Additionally, each party filed their respective objections and a request for clarification of the trial court's memorandum decision. (R. 710-19; 730-43.)

On June 11, 2010, the trial court conducted an evidentiary hearing. On June 18, 2010 the trial court entered a Supplemental Memorandum Decision.² (R. 781-789; *see also* App. A-3.) On July 27, 2010, the trial court entered a Judgment (R. 798-801) and later modified such on July 30, 2010 to two judgments – one for \$237,518 as joint and several judgment and the other for \$49,400 against Owner only.³

On August 10, 2010 Owner and Contractor filed a motion for a new trial under Utah R. Civ. P. 59, raising again the issue of improper introduction of surprise expert

² The trial court's Memorandum Decision (R. 665-93) and Supplemental Memorandum Decision (R. 781-89) contain the formal Findings of Facts and Conclusions of Law.

³ These are identified as Judgments #4 and #5, respectively, in the trial court docket. These judgments were not included in the Clerk's Certificate of Proceedings, dated February 23, 2011.

testimony. (R. 830-43.)⁴ The motion was denied on November 10, 2010. (R. 880-83.)

Appellants timely filed their notice of appeal on December 10, 2010. (R. 888-90.)

STATEMENT OF FACTS

Parties and Subcontract

1. Appellant Silver Baron (“Owner”) hired Appellant Daedalus as the general contractor (“Contractor”) for the construction of a luxury condominium hotel in Deer Valley, Utah. (R. 669.) Contractor hired Appellee Shamrock Plumbing (“Subcontractor”) to perform all mechanical, plumbing, and HVAC work on the construction project. (*Id.*) The mechanical, plumbing and HVAC subcontract between Contractor and Subcontractor was for \$1,119,083. (R. 670; Ex. D-2; *see also* App. B-1.) The subcontract was signed June 7, 2004, but Subcontractor actually began work in April 2004. (R. 668-70.)

2. Before the actual signing of the subcontract, Contractor went over the subcontract with Bill Payne, Subcontractor’s representative, and emphasized time frames; Contractor had a contract with Owner, which had a lease with Premier Resorts for occupancy of the units by December 1, 2004. (R. 669.) The subcontract provided that work was to commence April 26, 2004, and be substantially completed by September 20, 2004. (R. 671.) The subcontract stated time was of the essence. (*Id.*) The subcontract also provided, at ¶ 9, that contractor had the right to revise the subcontract schedule to

⁴ Judge Lubeck conducted all proceedings prior to the Motion for New Trial. Judge Lubeck was transferred to West Jordan and Judge Keith Kelly ruled on the Motion for New Trial.

accommodate changes in conditions affecting the work. (*Id.*) Paragraph 3 of the subcontract provided that Subcontractor had examined all Contract Documents, which included the specifications and schedules relevant to performing the Subcontract work. (R. 669-71, 677-78.)

Boiler – Water Heater Venting System Design Incompatibility

3. The subcontract provided, at ¶ 10:

In the event Subcontractor finds any design deficiency, error in measurements, or errors in the Contract Documents or conditions which Subcontractor believes to be at variance with approved plans, Subcontractor shall have an absolute duty to immediately provide written notice thereof to Contractor. Contractor shall have the right at any time to make changes to drawings and in the subcontract work. If any changes cause a material increase or decrease in the amount of work, Subcontractor agrees to accept any such changes subject to this paragraph and to proceed without delay in the Subcontract Work. Subcontractor shall submit a written claim for any required adjustment to the Contract Amount with a breakdown, supporting invoices and/or quotes. If Contractor or Subcontractor cannot agree on the amount of the addition or deletion, the dispute for adjustment shall be submitted to binding arbitration in Summit County, Utah, and Subcontractor shall nevertheless and unconditionally proceed with the material changes, if directed by Contractor during the pendency of arbitration. If Subcontractor makes such changes or any other changes to the Subcontract Work without written direction from Contractor, such changes constitutes an agreement by Subcontractor that it will not be paid for that changed work and Subcontractor shall be liable for any and all losses, costs, expenses, damages, and liability of any nature whatsoever associated with or in any way arising out of any such change made without written direction from Contractor. (R. 670-71; emphasis original.)

4. In April 2004, before the subcontract was signed, Subcontractor determined that two design specified items (the Bryant boiler and the A.O Smith water heaters) were

incompatible, would not function properly together, and would create a danger for human safety due to incompatible venting. (R. 673.) The Bryant boiler had a positive pressure flue and the water heaters had an atmospheric pressure flue and are not compatible. (*Id.*)

5. At the time the subcontract was signed Subcontractor did not directly advise Contractor of the design incompatibility of the two systems and Subcontractor should have done such; that given the strong language of ¶ 10 of the subcontract, that Subcontractor had an “absolute duty” to advise contractor in writing of a change in equipment or design deficiency; and that the burden was on Subcontractor to obtain approval for the boiler and venting system substitution “FROM CONTRACTOR,” not from an engineer with whom Subcontractor had no contract. (R. 675; emphasis original.) The trial court determined Subcontractor materially breached the subcontract with Contractor by failing to provide written notice of the design deficiency when it became aware of the design deficiency in the project, and then later substituted equipment (a Rite boiler for a Bryant boiler and additional venting system modifications) without authorization from Contractor. (R. 675-76, 689.) The trial court determined this was “a most material breach” and that it was Subcontractor’s responsibility to obtain Contractor’s consent by advising Contractor in writing, and that this duty under the subcontract was not fulfilled by making an oral statement well before the subcontract was even signed. (R. 675-76, 689.) The trial court observed that “Even if [Subcontractor] is correct that at the time of advising [Contractor] there was no written contract, that duty arose when the contract was signed. If, as [Subcontractor] claims, the possible danger of

having an incompatible system was life threatening, the Court finds and concludes that the duty on [Subcontractor], negotiated for by [Contractor], is clear.” (R. 676.)

6. Subcontractor installed the Rite boiler and other venting components without notice to Contractor. (*See* R. 689.) The trial court concluded that the Rite boiler was not equivalent because it was not what Contractor wanted and its upkeep and maintenance and operation involved a system Contractor specifically did not want or contract for. (*Id.*) Subcontractor also failed to properly install a “mixer valve” which caused over heating in the units until that was remedied in February 2005. (*Id.*)

7. On April 26, 2005, Contractor sent a letter to Subcontractor asking, among other things, that the non-specified defective equipment (boiler and changes to venting system) be replaced. (R. 787; Ex. D-22.) Contractor claimed the right under the subcontract to withhold payment until the specified equipment was installed. (*See* R. 787; Ex. D-2; App. B-1.) Subcontractor did not act on Contractor’s written demand. (*See* R. 783; Ex. D-19.) Subcontractor maintained throughout trial that it had the right to make “equivalent substitutions” of equipment, and that the Rite boiler and related changes to the venting systems were equivalent. Consequently, the non-specified boiler system was still in place at the time of the June 11, 2010 evidentiary hearing. (R. 899, pp. 100; R. 142-43; 903-04; 783.)

8. The court found that Contractor was entitled to what it bargained for, the contracted-for specified system and not a system of the choosing of Subcontractor, and that because of the breach, Subcontractor was responsible for either the replacement of

the boiler and allied venting system or to pay Contractor the cost of having another subcontractor do such work and provide the correct equipment. (*See* R. 690.)

9. The trial court specifically determined in Finding # 7 that ¶ 17 of the subcontract allowed Contractor to withhold payment to protect contractor from loss, including costs and attorney fees, on account of defective subcontractor work not remedied and for other reasons. (R. 672; Ex. D-2; App. B-1.) Paragraph 17 also provided that attorney fees could be sought if incurred enforcing the subcontract. (*Id.*)

10. The trial court determined the true cost of the “fix” of Subcontractor’s non-conforming work was \$80,000 and ordered the judgment to be reduced by the \$80,000 amount. (*See* R. 785.) Even though the trial court determined that Subcontractor had materially breached the subcontract, the trial court made no finding as to Contractor’s attorney fees incurred as damages in enforcing the subcontract. (*See generally* R. 665-93; 781-89; 785-86.)

Defective Installation of Mixing Valve – Overheating of Units

11. Problems with Subcontractor’s work began almost immediately after occupancy. (R. 681-82.) The luxury units, especially on the top floor, were very hot, as were the hallways. (*Id.*) The project was heated by water circulating from the boiler through the units and halls, and then coil fans blew that radiant heated air into the units and halls. (R. 682.) With the venting system installed by Subcontractor, the heat of each unit was not controlled by a thermostat in each room. (*Id.*) The boiler installed was controlled by what is called a VFD, or variable frequency driver. (*Id.*) Under the lease, Premier’s guests paid \$1000-1500 per night and had temperatures of 80 or 90 degrees F

or above, and were told to open the windows by Premier agents. (*Id.*) Most of the guests asked for and many received refunds. (*Id.*)

12. After the “over heating” problem became evident, all parties involved began examining the problem, and various solutions were proposed, none of which worked until sometime in February 2005. (*Id.*) The trial court found that the problem causing the overheating was the lack of installation of a “mixer valve” in the boiler water circulation system. (R. 783.) When the mixer valve was installed, the overheating problem ceased. Subcontractor did not do the work properly and did not install the mixer valve and the system did not work properly until mid February 2005. (*See* R. 683.) However even though the units continued to experience overheating problems through mid February 2005, the trial court found that the missed mixing valve did NOT delay the occupancy date by Owner and thus the damages resulting from that breach of contract to perform proper work are in issue. (R. 685.)

Substantial Completion by September 20, 2004

13. The subcontract provided that work was to be substantially completed by September 20, 2004. (R. 671.) Prior to trial, the court entered an order granting partial summary judgment in favor of the Owner and Contractor holding that the subcontract was unambiguous. (R. 676.) More specifically the court stated: “The court finds and concludes as above, that the [Subcontractor’s] work was not completed timely and that [Subcontractor] has breached the contract on that issue. The court finds and concludes also that [Subcontractor] did not give written notice of [the design] deficiencies, that was a breach but the question of the materiality of that breach remains for trial.” (R. 530-43.)

14. Following trial, the court modified its position about the subcontract being unambiguous. In finding 13 the court stated:

The Court has already ruled on December 4, 2009, on motion for summary judgment, that the subcontract was unambiguous. That, after presentation of the facts at trial, was wrong at least in part. The Court determined it was not disputed that [Subcontractor] had not provided a written notice of a deficiency in the design as required by paragraph 10 and that such was a breach, and the Court now finds, as above, that factually and legally that is still correct. The Court reserved and found there was a factual issue about whether that breach was material, which is a question of law for the Court but the Court needed further factual development to make that determination. The Court also determined that there had not been substantial completion of the work by September 20, 2004, and that remains true and undisputed. The Court allowed evidence, and thus this trial, to allow evidence to be presented to determine if the failure to substantially complete the work under the contract affected the damage claims of the parties. The reasons for the delay were to be factually determined. (R. 676.)

15. Contractor had a deadline of December 1, 2004 to turn the project over to Owner, which had a lease with Premier Resorts to allow Premier Resorts to lease the units for the holiday season, and thereafter. (R. 677.) The project was on a deadline and time was of the essence. (*Id.*) Under ¶ 2.2.5 of the prime contract, if the work was not done on time by Contractor, then Contractor was obligated to lend Owner each month an amount equal to the difference between what Owner would have received in promised fixed rentals (from Premier Resorts) and the actual net revenue that Owner did receive, not to exceed \$400,000. (*Id.*) Owner was able to take possession was December 18, 2004 rather than December 1, 2004, approximately one half month late. (*Id.*) Owner asserted that because there was no transfer by the date required, December 1, 2004, it failed to receive the promised fixed rents but instead shared in the actual rents with

Premier, resulting in damages of over \$678,000, the difference between what the fixed rent (base monthly rental) would have been, and the variable rate (on a 60-40 split in favor of Silver Baron over Premier) rents actually received. (R. 687.)

16. Contractor claimed it paid the \$400,000 liquidated damages required under the prime contract to Owner when Owner was dissolved. (R. 688.) Contractor was unable to make the \$400,000 loan required by the prime contract and nothing happened until Owner was dissolved, then Owner was credited the sum of \$400,000. (*Id.*)

17. During the work by Subcontractor several changes were requested but only three signed change orders exist. (R. 679.) In none of them did Subcontractor request an extension of time to complete the work, though the change order forms allowed a space for such a request to be made. (*Id.*)

18. Notwithstanding the subcontract substantial completion deadline date of September 20, 2004 (and that no extension had been granted by any change order) Subcontractor first ordered a boiler—the non specified Rite boiler—on September 1, 2004. (R. 675.) The trial court found that the construction of the building was delayed overall by various factors, some of which were not of Subcontractor's making or caused by Subcontractor. (R. 679.)

19. The court found from an examination of the work records and the testimony that Subcontractor had a crew of varying sizes but that the work did not get done quickly enough to comply with the September 20, 2004 date. (*Id.*) However, the court found a legal ambiguity in the subcontract itself—with the September 20, 2004 substantial

completion date—but in at least two other places (§ 9 and Exhibit B) that date was meant to have some flexibility in it. The trial court stated that it:

[...] cannot find that date was intended to be a fixed immovable date and it was not. There were delays “built into” the contract which as noted in a [work] schedule given by [Contractor] to [Subcontractor] called for the final mechanical work to be done by November 11, 2004. The entire course of conduct between these parties and their practice shows flexibility up to a certain point, as there must be, depending on many circumstances in a project such as this. While the minutiae of the times need not be detailed, obviously there were other trades that were part of the delay, as well as [Contractor] itself. For example, it is undisputed that on November 23, 2004, [Subcontractor] notified [Contractor] that [Subcontractor] could not finish because various counter tops, cabinets, paint and tile were not completed in various named units and so the finish plumbing could not be finished in those 12 units detailed. While the evidence is not strong as to why that was so, November 23, 2004, is well after the claimed September 20 substantial completion date and yet other trades were still not completed with their work so that [Subcontractor] could complete its work. The Court is aware that such delay occasioned by lack of cabinets or counter tops perhaps was only a minor delay because [Subcontractor] had at that point probably only to install finish faucets and handles and such after counter tops are installed, a short task for a crew of 4-8 people. Further, though it is disputed as to its effect, there seems little dispute that in fact a main water line was not available until November 17, 2004. That is the responsibility of [Contractor]. Even though there was another water line available for some purposes, the main line was not available until then and that was not [Subcontractor]’s responsibility. **Even though there is a non-waiver provision, clearly in early December 2004 [Contractor] stated that [Contractor] needed the plumbing done by December 8 and called for increased manpower from [Subcontractor]. The Court generally finds in favor of [Contractor] on that issue, that [Contractor] asked for increased manpower and [Subcontractor] did not provide it.** However, overall the Court cannot join [Contractor] in putting the blame for the failure to turn over the project on December 1, 2004 to [Owner] all on [Subcontractor]. Clearly some delay was caused by [Subcontractor] but there was some delay of an unknown duration in the overall project because of a structural steel issue about design and cost in Quadrant 3 of Building F. While some trades, perhaps even [Subcontractor], perhaps were not unduly delayed, the Court finds that the overall project was

delayed as much as 60 days from some of those issues apart from [Subcontractor], and that cannot all be upon [Subcontractor]. (R. 679-81, emphasis added.)

20. Even though Subcontractor did not install the heating system “mixing valve” until mid February 2005, and continued to do certain repair and finish work into March 2005, the trial court found that Subcontractor had substantially completed its work under the Subcontract on December 18, 2004. (*Id.*) A temporary certificate of occupancy was issued by Park City December on 22 or 23, 2004, allowing occupancy of the units. (R. 681.) This finding implies that the trial court made a legal conclusion that “substantial completion” and “occupancy” are synonymous, even though the court found that heating system was not functioning properly until mid February 2005, after the missed mixing valve was installed.

Judgment, Costs and Attorney Fees

21. Following the June 11, 2010 evidentiary hearing, the trial court made additional findings and conclusions. The trial court found that:

A. Contractor breached the subcontract by failing to pay Subcontractor \$209,915.00. (R. 784.) However, because Subcontractor did not install the system Contractor had contracted for, the trial court ordered Subcontractor to install the proper “fix” and correct the system by re-installing the proper (contract-specified) boiler and new flue system. (R. 784-85.)

B. Subcontractor breached the subcontract by failing to provide written notice of its knowledge that there was a design deficiency and of Subcontractor’s intent to substitute non-specified equipment without notifying or obtaining the consent of

contractor. (*Id.*) In addition the trial court concluded that even though this breach was material and had occurred upon the signing of the subcontract that:

[. . .] However, even considering the first breach rule, the court finds that the breach by [Subcontractor] was not one that resulted in [Contractor]' right to fail to pay. Even though the contract has many provisions allowing [Contractor] to withhold payment for various reasons, the promise of [Subcontractor] to give written notice is not a dependent or reciprocal obligation tied to payment. The court has found that notice was given by [Subcontractor], but not written notice. [Contractor] in letters asked [Subcontractor] to change the system and [Subcontractor] did not do so, but this order of the court, reducing the damages for non-payment by the amount of the re-installation of the "new" system amounts to the only damages suffered by [Contractor]. (R. 785-86.)

Even though the trial court had previously found, as Finding 7, that ¶ 17 of the Subcontract allowed "Contractor to withhold payment to protect contractor from loss, including costs and attorney fees, on account of defective subcontractor work not remedied and for other reasons" (R. 672), the trial court made no findings as to Contractor's attorney fees and collection costs incurred as damages in enforcing the subcontract due to Subcontractor's breach. (*See generally* R. 665-93; 781-89; *see also* R. 786.) The declaration made by counsel for Owner and Contractor apportioned approximate legal fees to the various claims. (R. 720-727.)

C. The trial court over the objection of Owner and Contractor allowed prejudgment interest. (*See* R. 787.) Even though it required a post trial evidentiary hearing to determine the amount of the "proper fix" to remedy Subcontractor's deficient and non-conforming work, the trial court found the Subcontractor's damages to be "certain, minus the reinstallation work" and allowed prejudgment interest on the entire gross sum due

Subcontractor (\$209,915), not the net amount of the judgment (\$209,915 minus \$80,000). (*See id.*)

D. As a conclusion of law, the trial court awarded Subcontractor \$129,915 (\$209,915 minus the installation costs of \$80,000) against Owner and Contractor, jointly and severally; pre-judgment interest on the entire \$209,915; and, against Owner, costs in an amount of \$4,400 and attorney fees of \$45,000. (*Id.*) With respect to Contractor, Subcontractor was awarded its judgment under the subcontract. (*See* R. 784-87.) With respect to Owner, Subcontractor was awarded its judgment under Utah Code Ann. § 14-2-2. (*See id.*)

SUMMARY OF ARGUMENT

The plain terms of the subcontract allow Contractor to withhold payment from Subcontractor due to Subcontractor's deficient and non-conforming work. The court found Subcontractor in material breach of the subcontract. The court also found that remedying Subcontractor's work under the agreement would cost \$80,000, which was offset from the amounts the court awarded to Subcontractor for payment. However, at least eight separate provisions under the subcontract and warranty expressly allow Contractor to withhold the amounts the trial court awarded as judgment to Subcontractor. This includes paragraph 17 of the subcontract, which provides for attorney fees and collection costs to be withheld as damages, which counsel for Contractor and Owner apportioned at approximately \$60,000.

As Contractor was entitled to withhold payment from Subcontractor as discussed above, any award of prejudgment interest to Subcontractor is improper; to make such an

award ignores the plain terms of the agreement. Prejudgment interest may only be awarded when a loss can be fixed as of a definite time and calculated with certainty. Due to Subcontractor's deficient and non-conforming work, the loss to Subcontractor was undeterminable until the court found that it would cost \$80,000 to remediate the work.

At trial, the court allowed what amounted to expert testimony from three of Subcontractor's witnesses. At an earlier pretrial, the trial court refused to reopen discovery so that both Contractor and Subcontractor could designate expert witnesses. At no point prior to trial were any expert witnesses designated by any party as required under Utah R. Civ. P. 26(a)(3)(A). Although the testimony of the witnesses in question went far beyond the typical juror's knowledge or common experience, the trial court erroneously admitted the testimony as that of lay witnesses. Without any designation or notice as required, the expert testimony of the witnesses should have been excluded. The opinion of Subcontractor's expert witnesses significantly affected the trial court's decision. As Contractor and Owner were subjected to undue prejudice and surprise, a new trial should have been granted pursuant to Rule 59.

ARGUMENT

I. *Contractor Was Entitled under the Subcontract to Withhold Payment from Subcontractor to Enforce the Subcontract.*

"The district court's construction of contract language is given no particular weight and is reviewed for correctness as a matter of law." *Doctors' Co. v. Drezga*, 2009 UT 60, ¶ 9, 218 P.3d 598 (citing *LDS Hosp. v. Capitol Life Ins. Co.*, 765 P.2d 857, 858 (Utah 1988)).

The trial court ruled that Contractor owes Subcontractor \$256,786 (minus \$126,871 in offsets) for payment under the subcontract. *See* R. 798-801, 689-92; *see generally* R. 781-89. The subcontract, however, expressly allows Contractor to withhold this amount from Subcontractor based upon Subcontractor's defective and non-conforming work. Subcontractor's breaches of the subcontract are documented in the trial court's Findings of Facts and Conclusions of Law, which were specifically incorporated into the final judgment and order. *See generally* R. 665-93; R. 691.

1. *Contractor Was Entitled under the Subcontract to Withhold Payment from Subcontractor Amounting to at Least \$256,786 Including Collection Costs and Attorney Fees for Enforcing the Subcontract.*

"In evaluating the contract, [the appellate] court must first ascertain whether the contract was integrated and second whether it was ambiguous. *Bailey-Allen Co. v. Kurzet*, 876 P.2d 421, 424 (Utah Ct. App. 1994)(citing *Ron Case Roofing & Asphalt Paving, Inc. v. Blomquist*, 773 P.2d 1382, 1385 (Utah 1989)); *see also Tangren Family Trust v. Tangren*, 2008 UT 20, 182 P.3d 326 (analyzing integration and ambiguity in contract interpretation).

The trial court found that the subcontract was integrated. R. 536; *see also* Ex. D-2, § 29; App. B-1. The trial court found no ambiguity in the subcontract, except that the substantial completion date "had some flexibility in it." R. 673-74, 676, 679; *see also* R. 536. Contractor is not challenging the substantial completion date for purposes of this appeal.

While the trial court found that Subcontractor had breached the subcontract, and that at least one of these breaches was "a most material breach" (R. 689-90; *see also* R.

668, 676, 685, 538-41, 785), the court misinterpreted the subcontract by failing to recognize Contractor's bargained-for right to withhold payments from Subcontractor for the defective and non-conforming work comprising the breach(es).

The subcontract between Contractor and Subcontractor provides in relevant (though lengthy) portion:

[. . .]

3. REVIEW OF CONTRACT DOCUMENTS AND PROJECT SITE:

Subcontractor acknowledges that prior to its execution of this Subcontract Agreement: (i) it has reviewed and examined all of the construction plans, drawings, models, specifications, measurements, schedules and addenda for the Project that it deems relevant to the performance of the Subcontract Work [. . .]

[. . .]

4. PROGRESS PAYMENTS: Contractor shall pay Subcontractor the Subcontract Price and other amounts that may come due to the Subcontractor under this Subcontract on a percentage of completion basis, as determined by Contractor [. . .] As long as Subcontractor is in compliance with this Subcontract, Contractor shall pay Subcontractor each progress payment within ten working days after receipt by Contractor of Contractor's payment from Owner.

Contractor may withhold monthly progress payments, in whole or in part, in order to protect Contractor and/or Owner from loss from:

4.1 Defective work not remedied, material not furnished, clean-up not performed or any other non-complying aspects of the Subcontract Work;

[. . .]

4.5 Unsatisfactory prosecution of the Subcontract Work by Subcontractor;

[. . .]

4.10 Any other conditions of any nature which may arise from Subcontractors action or failure to act which, in Contractor's reasonable opinion, will result in loss to Owner and/or Contractor.

When the grounds set forth in subparagraphs 4.1 through 4.10 are removed by Subcontractor to the satisfaction of Contractor, payment of the amounts so withheld will be made by Contractor pursuant to the procedures set forth in paragraph 4 above.

[. . .]

5. FINAL PAYMENT: The balance of the Subcontract Price and any other amounts owed to Subcontractor under the terms of this Subcontract shall be due and payable when all of the following have occurred: (a) completion and acceptance of the Work by Owner; [. . .] (c) removal of any grounds for withholding payments under paragraph 4 above; [. . .]

6. INVOICE PROCESSING: [. . .] In order for any application for payment to be "properly prepared," all of the following must be true with respect to each application for payment:

6.1 The Subcontract Work billed is complete in the opinion of Contractor at the time of receipt of the application;

[. . .]

10. SUBCONTRACT CHANGE ORDERS: In the event Subcontractor finds any design deficiency, error in measurements, or errors in the Contract Documents or conditions which Subcontractor believes to be at variance with approved plans, Subcontractor shall have an absolute duty to immediately provide written notice thereof to Contractor. [. . .] If any changes cause a material increase or decrease in the amount of work, Subcontractor agrees to accept any such changes subject to this paragraph and to proceed without delay to perform the Subcontract Work as changed. Prior to the commencement of any such material changes in the Subcontract Work, Subcontractor shall submit a written claim for any required adjustment to the Contract Amount with a breakdown, supporting invoices and/or quotes. [. . .] If Subcontractor makes such change or any other changes to the Subcontract Work without written direction from Contractor, such change constitutes an agreement by Subcontractor that it will not be paid for that changed work and Subcontractor shall be liable for any and all losses, costs, expenses, damages, and liability of any nature whatsoever associated with or in any way arising out of any such change made without written direction from Contractor.

[. . .]

11. MATERIALS, INSPECTION, TESTING AND CLEAN-UP: [. . .] Contractor shall have the right to reject improper or defective material or workmanship or require correction without charge to Contractor.

[. . .]

13. WARRANTY: [. . .] The obligations of the Subcontractor under subparagraphs 13.1 through 13.4⁵ shall include the correction of the defective or non-conforming Subcontract Work that appears within one year following the completion and acceptance of the Subcontract Work [. . .]

The obligations of the Subcontractor under subparagraphs 13.1 through 13.4 shall include the correction of the defective or non-conforming Subcontract Work, the removal and replacement of other portions of the Work that are necessary to be removed to gain access to the Subcontract Work to be corrected, the repair or replacement of any damage caused by said defective or non-conforming Subcontract Work, and all consequential damages suffered by Contractor or Owner as a result of said defective or non-conforming Subcontract Work or the failure of Subcontractor to promptly and properly correct same. [. . .]

[. . .]

17. WITHHOLDING PAYMENT. Contractor may withhold all or part of any payment to the extent necessary to protect Contractor from loss, including costs and attorney's fees, on account of (i) defective Subcontract Work not remedied; [. . .] or (vii) any other ground for withholding payment allowed by law or as otherwise provided in this Subcontract Agreement including but not limited to attorney's fees incurred by Contractor to enforce this Subcontract or remedy Subcontractor's default. When the above matters are rectified, such amounts as then due and owing shall be paid or credited to Subcontractor.

[. . .]

26. WAIVER: The provisions of this Subcontract Agreement requiring written notice may not be waived by oral agreement, act, or failure to act or object, by Contractor. No restriction, condition, obligation or provision of this Subcontract Agreement shall be deemed to have been abrogated, or waived, by reason of any failure or failures to enforce by Contractor. Subcontractor hereby acknowledges and agrees that no individual employee of Contractor has the authority either

⁵ See Ex. D-2 and Add. B-1 for a copy of the subcontract. The entire agreement has not been quoted above, but can be found in Add. B-1.

express, implied or apparent, to waive the notice provisions set forth in this Agreement with respect to the making of claims for additional compensation, time extensions, or otherwise. Any such written notice must be delivered in the time required by this Agreement and cannot be waived except by a written waiver executed by an individual authorized by the President of Contractor.

[. . .]

29. ENTIRE AGREEMENT: This Subcontract Agreement constitutes the entire agreement of the parties, and may not be modified or amended except in writing. Parol evidence shall not be admitted in interpretation of the provisions of this Subcontract Agreement.

Ex. D-2; App. B-1.

The "Warranty/Guarantee" provided by Subcontractor to Contractor states in relevant part:

[Subcontractor] do[es] hereby warranty and guarantee that the parts of the work described above which we have furnished and/or installed for:

The Lodges at Deer Valley, Park City, UT

Is in accordance with the contract documents and that all said work as installed will fulfill or exceed all of the warranty and guarantee requirements.

[Subcontractor] agree[s] to repair or replace work installed by [Subcontractor], together with any adjacent work which is displaced or damaged by so doing, that proves to be defective in workmanship, material or operation within a period of one (1) year from the date of final acceptance of the entire work by Owner, ordinary wear and tear and unusual neglect or abuse expected.

In the event of [Subcontractor's] failure to comply with the above mentioned conditions within a reasonable time period determined by the Owner, after notification in writing, we, the undersigned, all collectively and separately hereby authorize the Owner to have said defective work repaired and/or replaced and made good and agree to pay the Owner upon demand all monies that were expended in making good said defective work, including all collection costs and reasonable attorney fees.

Ex. D-7; App. B-2.

Under the above quoted subcontract and warranty provisions, Contractor is entitled to withhold payment from Subcontractor for certain stated conditions related to Subcontractor's defective and non-conforming work. Exs. D-2, D-7; Apps. B-2, B-2. Specifically, Contractor is allowed to withhold payment under Sections 4, 5, 6, 10, 11, 13, 17,⁶ and the warranty. *Id.* (These contract sections will be discussed in more detail below.)

The trial court found that Subcontractor had breached the agreement by failing to provide written notice of a design defect and intent to substitute equipment (R. 675-76, 689)(concluding that such breach was "a most material breach"), that the boilers and related venting system substituted by Subcontractor were installed without notice to Contractor, were not equivalent and involved a system that Contractor did not want (R. 685, 689), that Subcontractor's failure to properly install a mixer valve caused serious overheating problems of the building even months after "substantial completion" (R. 682-85, 689)(concluding that Subcontractor "did not do the work properly and did not install

⁶ The Subcontract also contains a provision under Section 15 for declaring the Subcontract "null and void" and for exercising additional remedies. Ex. D-2, § 15; App. B-1. Although Contractor never exercised (and candidly admitted so in trial) the remedies under Section 15, it maintained all of the contractual payment withholding rights as Section 15 states that the Contractor, "without any prejudice to any rights or remedies," shall have the right, in its sole discretion, to exercise the remedies in Section 15. *Id.*

Interestingly, the trial court also briefly addresses Contractor's right to withhold payments under Section 17 of the subcontract to remedy defective work, but does not return to its analysis of this section except briefly to note that Subcontractor is not entitled to attorney fees under the same provision. R. 672, 690.

that mixer valve properly [] until mid February 2005”), and that Subcontractor was responsible for either replacement of the substituted boiler and allied venting system or the cost of having another subcontractor provide such work and equipment (R. 690). The cost to remedy Subcontractor’s work was later determined to be \$80,000, not including attorney fees and collection costs to enforce correction of the breach. *See generally* R. 781-89. The actions of, and defective work performed by, Subcontractor directly violated the subcontract.

On February 22, 2005 and April 26, 2005, Mr. Alan Wright, on behalf of Contractor, sent written notifications to Subcontractor that the equipment was not installed as originally designed and contracted for, leading to serious overheating problems, including problems with the boiler, and formally requested Subcontractor replace the defective equipment or litigation would be necessary. Exs. D-18, D-22; *see also* R. 687. Subcontractor responded by stating that, with one exception unrelated to this appeal, “[Subcontractor] has completed all contractual obligations as of the end of the workday February 18, 2005.” Ex. D-19. This necessitated the current litigation, which was the only available remedy to the “most material” breach of Subcontractor after Subcontractor refused to correct.

The trial court specifically found that Subcontractor’s material breach led to offsets of \$80,000 as a “fix” required to remedy Subcontractor’s work. R. 785. The trial court, despite the significant cost of the remedial “fix,” found that Subcontractor “did the work and has not been paid,” resulting in an award of \$256,786 (minus \$126,871 in offsets) for Subcontractor.

Given the trial court's determination of Subcontractor's material breach, the award for Subcontractor misinterprets the payment withholding provisions of the subcontract.

Specifically, among other rights, the subcontract allows Contractor to:

- Withhold monthly progress payments resulting from Subcontractor's defective work not remedied and other non-complying subcontract work until such time as the work complies with the subcontract (Ex. D-2, § 4; App. B-1)
- Withhold final payment and any other amounts owed to Subcontractor until completion of Subcontractor's work and acceptance by owner, and until Subcontractor's defective work is remedied and other non-complying subcontract work complies with the subcontract (Ex. D-2, § 5; App. B-1)
- Charge Subcontractor for all losses, costs, expenses, and damages arising from Subcontractor's changes made without written direction from Contractor (Ex. D-2, § 6; App. B-1)
- Withhold any payment to Subcontractor arising from Subcontractor's changes made without written direction from Contractor (Ex. D-2, § 6; App. B-1)
- Require Subcontractor to remove or replace all defective or non-conforming subcontract work, and charge Subcontractor for any consequential damages resulting from all defective or non-conforming subcontract work, including Subcontractor's failure to promptly and properly correct the same (Ex. D-2, § 13; App. B-1)
- Withhold all or part of any payment to protect Contractor from loss, including costs and attorney fees, on account of Subcontractor's defective subcontract work not remedied, and to withhold payment, including amounts to cover Contractor's attorney fees, incurred to enforce the subcontract. Only when these subcontract matters are rectified is Contractor required to pay or credit Subcontractor. (Ex. D-2, § 17; App. B-1)
- Require Subcontractor to pay Owner all monies, including collection costs and attorney fees, expended in making good Subcontractor's defective work (Ex. D-7; App. B-2)

“Under well-accepted rules of contract interpretation, [the appellate courts] look to the language of the contract to determine its meaning and the intent of the contracting parties ... [w]here the language within the four corners of the contract is unambiguous, the parties’ intentions are determined from the plain meaning of the contractual language, and the contract may be interpreted as a matter of law.” *Stone v. Flint*, 2010 UT App 199, ¶ 1, 238 P.3d 70 (quoting *Café Rio, Inc. v. Larkin-Gifford-Overton, LLC*, 2009 UT 27, ¶ 25, 207 P.3d 1235). The above subcontract provisions are unambiguous, and the plain meaning expressly allows Contractor to withhold payment until Subcontractor’s work is remedied, and to withhold amounts for the collection costs and attorney fees required to enforce the agreement. *See* Exs. D-2, §§ 4-6, 13, 17; D-7; Apps. B-1, B-2.

Importantly, as the trial court found, Contractor did not contest, in terms of “pure math,” the amount claimed by Subcontractor. R. 686. Rather, Contractor and Owner contested that this amount was due and owing since Subcontractor had materially breached the contract and “did not do the work properly” (R. 685, 689), refused to replace its defective and non-conforming work (*see* Ex. D-19), and because litigation was necessary to bring Subcontractor’s work into compliance with the agreement. In the course of litigation, through its current counsel, contractor apportioned approximately \$60,000 towards enforcing the contract. *See* R. 725.

While the trial court found that Subcontractor “did the work and has not been paid” (R. 689), it also found that Subcontractor materially breached the contract by failing to provide written notice of design defect and intent to substitute equipment (*id.*), that the boilers were not equivalent and involved a system that Contractor and Owner did

not want (*id.*), that the failure to properly install a mixer valve caused overheating of the building (R. 682-85; 689), and that Subcontractor was responsible for either replacement of the boiler and allied venting system or the cost of having another subcontractor provide such work and equipment (R. 690), which cost was later determined to be \$80,000 (*see generally* R. 781-89).

As shown above, these are the breaches and non-conforming work of Subcontractor for which Contractor was specifically entitled to withhold payments, including all anticipated collection costs and attorney fees, under the Subcontract. *See* Exs. D-2, §§ 4-6, 13, 17; D-7; Apps. B-1, B-2. The amount awarded to Subcontractor by the trial court for having “d[one] the work]” was only due and owing under the subcontract upon conclusion of the litigation, and only after taking into account the amounts Contractor was entitled to withhold for collection costs and attorney fees in litigation since litigation was required to bring Subcontractor’s work into compliance with the specifications of the subcontract.⁷ *See* Exs. D-18, D-19, D-22.

The trial court erred by not recognizing Contractor’s bargained-for right to withhold payments from Subcontractor for the defective and non-conforming work

⁷ Because the trial court concluded as a matter of law that the breach did not allow Contractor to withhold payment (*see generally* R. 689-91), the court did not address the allocated portion of attorney fees (approximately \$60,000 (*see* R. 725)) that Contractor claimed toward enforcing the subcontract. Contractor enforced the contract, as evidenced by Subcontractor being ordered to either “replace[] the boiler and allied venting system or to pay [Contractor] the cost of having another subcontractor do such work and provide such equipment.” *See* R. 690.

performed by Subcontractor. Contractor was entitled to withhold at least \$256,786 under the agreement until the work was remedied and the subcontract enforced. Contractor respectfully requests that this issue be remanded to the trial court for determination as to the exact amount Contractor was entitled to withhold, including for collection costs and attorney fees (including for the appeal) pursuant to the subcontract. Contractor is seeking recovery of attorney fees incurred on appeal under the subcontract.

2. *At a Minimum, Contractor Was Entitled under the Subcontract to Withhold Payment from Subcontractor Amounting to at Least \$80,000 Plus Collection Costs and Attorney Fees for Enforcing the Subcontract.*

The trial court recognized that the “fix” required by Subcontractor’s defective and non-conforming work amounted to approximately \$80,000, and that such amount would be properly deducted from the judgment to Subcontractor.⁸ *See generally* R. 781-89.

While finding that the amount of \$80,000 was required to remedy Subcontractor’s work, the trial court misinterpreted the subcontract by not recognizing that Contractor was entitled to withhold the \$80,000 and to include amounts for attorney fees and costs pursuant to the agreement. *See* Exs. D-2, §§ 4-6, 13, 17; D-7; Apps. B-1, B-2.

Contractor gave notice to Subcontractor that the work was not installed as designed, and requested that the defective equipment be replaced. Exs. D-18, D-22; *see also* R. 687. Subcontractor refused to bring its work into conformance with the subcontract. *See* D-19. This necessitated the current litigation, which was the only

⁸ The trial court stated that Subcontractor “is responsible for either the replacement of the boiler and allied venting system or to pay [Contractor] the cost of having another subcontractor do such work and provide such equipment.” R. 690.

available remedy to Subcontractor's "most material" breach and led to the "fix" of other work that Subcontractor did not do correctly. *See* R. 689, 785. Without judicial involvement, Subcontractor would not have replaced the boiler or met its contractual obligations. Under the subcontract, then, Contractor was specifically entitled to withhold at least \$80,000 plus collection costs and attorney fees for enforcing the agreement.

The trial court erred by not recognizing that Contractor, in prevailing on its \$80,000 offset against Subcontractor, had correctly withheld such amounts under the agreement, and that litigation to enforce such provisions was necessary to receive the benefit of its bargain with Subcontractor. Accordingly, under the subcontract, Contractor was entitled to withhold the \$80,000 plus its attorney fees and collection costs for enforcing the agreement.

Contractor was entitled to withhold at least \$80,000 and collection costs and attorney fees under the agreement. Contractor respectfully requests that this issue be remanded to the trial court for determination as to the exact amount Contractor was entitled to withhold, including for collection costs and attorney fees (including for the appeal) pursuant to the subcontract. Contractor is seeking recovery of attorney fees incurred on appeal under the subcontract.

II. *As Contractor Was Entitled to Withhold Payment from Subcontractor, Subcontractor Is Not Entitled to Prejudgment Interest.*

"The trial court's award of prejudgment interest, and the amount thereof, present [] a question of law which we review for correctness." *Kealamakia, Inc. v. Kealamakia*, 2009 UT App 148, ¶ 4, 213 P.3d 13 (alteration in original)(internal citations and

quotations omitted). Also, the “trial court’s decisions on plaintiff’s entitlement to prejudgment interest presents a question of law which we review for correctness.”

Andreason v. Aetna Cas. & Sur. Co., 848 P.2d 171, 177 (Utah App. 1993).

1. *As Contractor Was Entitled under the Subcontract to Withhold Payment from Subcontractor, Prejudgment Interest is Improper.*

The subcontract between Contractor and Subcontractor allows Contractor to withhold payment for deficient or non-conforming work under at least eight different sections of the contract. Exs. D-2, §§ 4, 5, 6, 10, 11, 13, 17; D-7; Adds. B-1, B-2; *see also* Section I, *supra*. Contractor did not dispute the amount of payment claimed by Subcontractor, but instead disputed whether such amount was due and owing, and whether Subcontractor should be paid at all until it remedied its deficient and non-conforming work. *See* R. 686. After the trial, the court found that “[Subcontractor] did the work and has not been paid.” R. 689. After the supplemental evidentiary hearing the trial court stated, however, that “[i]t is not the system desired and bargained for [by Contractor] [....]” R. 787-88. The trial court made findings that Subcontractor materially breached the contract by failing to provide written notice of design defects and intent to substitute equipment (R. 689), that the boilers were not equivalent and involved a system the Contractor did not want (*id.*), that the failure to properly install a mixer valve caused overheating of the building (*id.*), and that Subcontractor is responsible for either the replacement of the boiler and allied venting system or the cost of having another subcontractor provide such work and equipment (R. 690). Given these breaches and deficient work by Subcontractor and the express terms of the subcontract, Contractor

was entitled to withhold payments under the Subcontract and any award of prejudgment interest against Contractor is improper.

2. *Prejudgment Interest Was Improper until a Definite Sum Could Be Fixed.*

Prejudgment interest is properly awarded when a “loss ha[s] been fixed as of a definite time and the amount of the loss can be calculated with mathematical accuracy in accordance with the well-established rules of damages.” *Bailey-Allen Co., Inc. v. Kurzet*, 876 P.2d 421, 427 (Utah Ct. App. 1994)(quoting *Bellon v. Malnar*, 808 P.2d 1089, 1097 (Utah 1991))(internal quotations omitted). “On the other hand, where damages are incomplete or cannot be calculated with mathematical accuracy [...] the amount of the damage must be ascertained and assessed by the trier of the fact at the trial, and in such cases prejudgment interest is not allowed.” *Bjork v. April Indus., Inc.*, 560 P.2d 315, 317 (Utah 1977).

In its Memorandum Decision dated January 29, 2010, the court held that “[Contractor] is entitled to what it bargained for, a system of its choosing and not the choosing of [Subcontractor]. [Subcontractor] is responsible for either the replacement of the boiler and allied venting system or to pay [Contractor] the cost of having another subcontractor do such work and provide such equipment.” R. 690. The trial court made no findings as to how much such work should or would cost since the final amount due to Subcontractor was simply not determinable at that time. Later, after the supplemental evidentiary hearing, the trial court held and ordered that:

[Subcontractor] is to install the proper fix and remediate the system [...] The court finds and concludes that in fact that can be done for an amount less than [Contractor] claims but more than [Subcontractor] claims. The court is somewhat

unguided here [...] Thus, the court will find and conclude, as best it can, that the true cost of this fix is \$80,000.00 [...]

R. 785 (internal quotations omitted). The trial court then went on to order the amount due Subcontractor reduced by \$80,000.00. *Id.* Until this finding was made, the amount due Subcontractor was unknown and the loss as of a specific date not capable of being calculated with any mathematical certainty.

As Subcontractor installed a system that was defective and never requested by Contractor, and as Subcontractor provided only incomplete and deficient work at best, prejudgment interest should not be based on the \$209,915.00 calculation. Allowing the amount of judgment to be reduced by \$80,000.00 only after prejudgment interest has been added to the \$209,915.00 amount does not take into consideration that Contractor was saddled with a system that it did not want and for which it did not bargain. Rather, the \$80,000.00 cost of the “fix,” as determined by the trial court, along with the \$60,000 in attorney fees apportioned by Contractor, should have been counted against the value of the defective work provided by Subcontractor, and prejudgment interest should not have been awarded.

While it may be true that Subcontractor “did not have use of this sum owed” (R. 787), at least some part of this sum relates to a system that was defective and for work that was deficient. The appropriate cost of a “fix” of the defective system and services provided by Subcontractor was only determined by the trial court after the supplemental hearing. If damages to Subcontractor could be computed with mathematical accuracy at all, it could, at best, only be determined once the cost of a “fix” was also determined. In

this particular case, that would be starting on June 18, 2010, and not April 2005. As such, prejudgment interest is inappropriate in this case, and should be disallowed.

3. *At a Minimum, as Contractor was Entitled to Withhold at Least \$80,000 from Subcontractor, Prejudgment Interest Should Be Awarded on No More Than \$129,915 of the Judgment.*

When a “breach consists of a failure to pay a definite sum in money or to render a performance with fixed or ascertainable monetary value, interest is recoverable from the time for performance on the amount due less all deductions to which the party in breach is entitled.” RESTATEMENT (SECOND) OF CONTRACTS § 354(1) (2011). If the Court finds and concludes that prejudgment interest for Subcontractor is appropriate, any such award should be calculated with the deduction to which Contractor is entitled, \$80,000.00, withheld from the \$209,915.00 sum. At most, any award of prejudgment interest should be calculated on the sum of \$129,915.00 (\$209,915.00 minus \$80,000.00), less the collection costs and attorney fees Contractor was entitled to withhold for enforcing the contract. *See* Section I, *supra*.

III. *As Expert Witnesses Were Not Identified or Designated Pursuant to Utah R. Civ. P. 26(a)(3)(A), It Was Error for the Trial Court to Admit Expert Testimony. Appellants Were Entitled to a New Trial Under Utah R. Civ. P. 59.*

On July 21, 2009 the trial court conducted a pretrial conference. *See* R. 401-03, 904. Because the case was a complex construction dispute, counsel for Contractor and Owner anticipated the need for expert testimony, and requested that the court open discovery as neither side had designated any expert witnesses. *See* R. 383-86, 401-03; *see generally* R. 904. Subcontractor’s counsel objected and acknowledged that neither

side had designated any expert witnesses. R. 904, pp. 6-14.⁹ Under Utah R. Civ. P. 26(a)(3)(A), disclosure of a party's expert witness is mandatory: "A party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Utah Rules of Evidence."

During the examination of Subcontractor's second witness, Bill Payne, counsel for Owner and Contractor objected to the witness providing what amounted to expert opinion testimony on matters that were beyond the realm of common experience:¹⁰

MR. MARTIN:

Q. And a Bryant boiler was specified originally?

A. Correct.

Q. With pressurized fluing?

A. Yes.

Q. Why couldn't it be used?

A. The design - -

MR. CHAMBERS: I'm going to object, foundation. Let me make sure the Court understands. In order for him to testify as to this, because it's beyond the scope and knowledge of the average person and involves technical or specialized knowledge, it would be treated as expert testimony and he's not laid the foundation for the expert testimony. If he attempted to lay the foundation for the expert testimony, it would violate this Court's rulings that discovery experts would

⁹ Mr. Chambers (Owner's and Contractor's counsel): I don't think either side has designated an expert witness on the case. R. 904, p. 8. Mr. Martin (Subcontractor's counsel): We're way passed, your honor, and neither side has designated an expert. R. 904, p. 9. Mr. Chambers: What is the Court inclined to do about experts? R. 904, p. 13. The Court: (addressing Mr. Martin) You probably didn't do it because you don't see a need for one. Mr. Martin: There's no need, Your Honor. R. 904, p. 13. The Minutes of the Scheduling Conference also contains the following: "Discovery will not be opened for expert witnesses." R. 401.

¹⁰ This dialogue begins at R. 899, p. 91.

have been disclosed by the discovery cut-off deadline. No experts by either party were disclosed. We made a motion to re-open for the purpose of designating [them], and [Subcontractor] opposed it. So if they are going to go down the road of attempting to get in expert testimony at this point in time, not only have we not had the expert report, we've not had an opportunity to [have notice] and it prejudices us substantially.

MR. MARTIN: May I respond, Your Honor?

THE COURT: Just a minute.

MR. MARTIN: Okay.

THE COURT: Yes.

MR. MARTIN: Rule 701 allows a lay witness to give opinion and inferences that are rationally based on his perception. His opinions and inferences are rationally based on his perception. They are helpful to a clear understanding of his testimony, or a determination of a fact in issue and not based on scientific, technical or other specialized knowledge. I am simply trying to ask Mr. Payne what he did and why he did what he did.

THE COURT: Well, let me make sure I - - It's hard to, you know, when you are sitting here and not familiar with all of these. I realize I've done some motions on it, so [Contractor's] position is, with respect to this boiler, that first, I guess, it wasn't - - there was no need to change it?

MR. CHAMBERS: No. I think [Contractor's] position is that they proceeded to change the boiler, without following the contract provisions.

THE COURT: Without notice, okay. So you're not going to have anybody say anything about the boiler, other than notice and such?

MR. CHAMBERS: I - - we were foreclosed by the time we took Bret Christiansen's deposition. We were denied the opportunity to go out and get any

other contrary evidence, that . . . we'd made the motion to re-open. Let me also just indicate, we did some research on this and, may I approach?¹¹

THE COURT: Sure.

MR. CHAMBERS: We - - This is an interesting case because it deals directly with what Mr. Martin indicated about 701 and the use of lay witnesses to give some expertise testimony based on their perception. What this case [*State v. Rothlisberger*] does is indicate that Utah, basically, adopts the narrow viewpoint on what expert testimony is and if it's based on, and I'm reading from paragraph 11 on page 7, if it involves scientific, technical or other specialized knowledge, then it is expert testimony that has to comport with the rules. Rule 26 and, you know, I'm going to be very honest with the Court. I've raised this issue with Mr. Martin and I suspected that it would [create] a great deal of frustration for the Court on both of us because we didn't designate experts and it sort of deprives you, but, of a certain scope of this, but that is what it is.

THE COURT: Well, I mean, you know, again, I obviously don't see the end from the beginning at this point because I don't have the understanding of the case you do, but it seems to me that even without an expert, they ought to be able to come in here and say why we changed the boiler. It may be wrong, and I realize and I **agree it's something of an opinion, but he's licensed.** He has experience and it's not, I mean, what I'm going to hear, I think, about what he's going to say is I changed it because I didn't think it did this or that, or it was incompatible with this or that, and it wouldn't function properly with this or that. Then, again, I mean, I wouldn't accept that as necessarily correct, but that's why he did it.

I mean, I don't think they ought to be restricted to come in and saying we changed the boiler, without any explanation, and really, again, your - - if I'm understanding what you are telling me, your position in it isn't that necessarily they shouldn't have. They simply didn't follow the contract procedures. So, again, I don't see that he's, I mean, I don't know that he can convince me with his level of expertise. Maybe it is so technical that he can't do it. [. . .]

¹¹ Though not reflected in the transcript, counsel for Contractor and Owner here provided the trial court and opposing counsel with a copy of *State v. Rothlisberger*, 2004 UT App 226, 95 P.3d 1193, discussed below.

R. 899, pp. 91-95 (emphasis added by Appellants).

Similar objections were made as to the testimony of Rusty Shoemake. *See* R. 899, pp. 236, 241, 245, 251, 255. Rusty Shoemake's testimony went far beyond lay knowledge or common experience; the trial court also treated Mr. Shoemake as an expert witness based on his testimony of 25 years of experience (*see* R. 899, pp. 254-55):

Mr. Martin: Well, Okay. If you had to grade Shamrock's performance of work on the project, what would you grade it?

Mr. Chambers: Object, foundation.

The Court: Overruled. He stated his experience of some 25 years, so –

Mr. Shoemake: I would grade them a B+ or A- in my professional opinion.

Besides the above opinion testimony, the other portions of Mr. Shoemake's testimony that fall within the realm of expert testimony, and which should have been inadmissible, are as follows:

1. That in his opinion Subcontractor complied with construction schedule "to the best of their ability." R. 899, p. 240.
2. That it was beyond Subcontractor's ability to make up for schedule delays. R. 899, p. 241.
3. That the schedule delays were caused by design issues on the building. R. 899, p. 241.
4. That Subcontractor bore no fault in the delay. R. 899, p. 241.
5. That Subcontractor provided adequate manpower to the job. R. 899, p. 245.
6. That Subcontractor did not delay the project. R. 899, p. 245.
7. That in his professional opinion there was no way Subcontractor could have finished on time. R. 899, pp. 245-46.

8. That there was a scheduling delay of seven to ten weeks due to a design-steel issue. R. 899, p. 247.
9. That Subcontractor was delayed by the design-steel issue. R. 899, p. 247.
10. That even though Subcontractor had not asked to extend the substantial completion deadline that “In a professional manner one should have been given Subcontractor.” R. 899, p. 251.
11. That in his opinion the delays were caused by Contractor. No examples were provided, but purely opinion testimony. R. 899, p. 252.
12. That it was never possible for Subcontractor to meet its contractual substantial completion deadline of September 20, 2004. R. 899, p. 252.

Similar expert testimony, over Appellants’ counsel’s objection, was also allowed as to the testimony of Bill Payne (*see* R. 899, pp. 86, 100, 106-7, 112, 118, 135, 137) and Bret Christiansen (*see* R. 899, pp. 197-202).

1. *Expert Testimony by Witnesses Payne, Shoemake, and Christiansen Should Not Have Been Allowed Without Prior Disclosures Required under Utah R. Civ. P. 26(a)(3)(A).*

In *Drew v. Lee*, 2011 UT 15, 678 Utah Adv. Rep. 4, the Utah Supreme Court explained the purpose of Utah R. Civ. P. 26 and the provisions of (a)(3)(A) and (a)(3)(B). The *Drew* Court found that both provisions served to provide “opposing parties a reasonable opportunity to prepare for an effective cross examination” of an expert, and that this “purpose is preserved because parties are still required to identify their experts under Rule 26(a)(3)(A), and opposing counsel can use a variety of discovery rules to obtain all the information needed to question the expert at trial.” *Id.* at ¶ 28 (citation omitted). *See also Turner v. Nelson*, 872 P.2d 1021, 1023 (Utah 1994)(explaining that

pretrial witness disclosure rules provide an opposing party with the opportunity to “investigat[e] the witness[’s] testimony” and “prepar[e] an effective cross-examination”).

While addressing a similar issue arising in the context of a criminal case, this Court in *State v. Rothlisberger* provided valuable guidance in distinguishing between lay witness testimony that is “rationally based on the perception of the witness” and governed by Utah R. Evid. 701, and expert testimony that is based on “scientific, technical, or other specialized knowledge” governed by Utah R. Evid. 702.

Rothlisberger, 2004 UT App 226, ¶ 11, 95 P.3d 1193, decision *aff’d*, 2006 UT 49, 147 P.3d 1176. *Accord*, *Pete v. Youngblood*, 2006 UT App 303, 141 P.3d 629.

The Court in *Rothlisberger* adopted a “narrow interpretive approach” in determining whether a witness must be designated as an expert “to testify regarding a particular subject.” *Id.* at ¶ 15. In doing so, the Court held that if testimony is “beyond the realm of common experience of a juror” that it is expert testimony:

[...] [W]e think it is clear that when a witness seeks to testify regarding matters that are necessarily based on that witness’s scientific, technical, or specialized knowledge, that witness must be qualified as an expert under rule 702 of the Utah Rules of Evidence, **and all reliability, reporting, or otherwise applicable statutory commands must then be followed with respect to that testimony.**

Id. at ¶ 20 (internal quotations omitted and emphasis added).

At issue in *Rothlisberger* was whether a police officer’s testimony “regarding the significance of” a “quantity of methamphetamine found” was based on “scientific, technical, or other specialized knowledge.” *Id.* at ¶ 23. After holding that the testimony did constitute expert testimony, the Court concluded that the trial court abused its

discretion by characterizing it as lay witness testimony and admitting it even though the State did not comply with expert witness notice and designation requirements.¹²

Like *Rothlisberger*, this case presents a situation where, after the appropriate objection was made to the testimony of Payne, Shoemake, and Christiansen, the trial court determined that the testimony in question was not inadmissible expert testimony, but admissible lay witness testimony. *See, e.g.*, R. 899, pp. 106-08, 91-95. The subject matter of the testimony in question, however, was far “beyond the realm of common experience of a common juror,” and plainly constituted expert testimony. *See Rothlisberger*, 2004 UT App 226, ¶ 26. Because these witnesses were never designated as expert witnesses pursuant to Utah R. Civ. P. 26(a)(3)(A), the testimony should have been excluded. The trial court abused its discretion by allowing expert testimony under the guise of lay witness testimony, and the objections raised by counsel for Contractor and Owner should have been sustained.

2. *Since Inappropriate Expert Testimony Was Admitted at the Trial, a New Trial Should Have Been Granted under Utah R. Civ. P. 59.*

Utah R. Civ. P. 59 allows for a new trial on the following grounds:

(a)(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial.

[...]

(a)(3) Accident or surprise, which ordinary prudence could not have guarded against.

¹² In *Rothlisberger*, the relevant statute dealing with expert notice requirements was Utah Code Ann. § 77-17-13 (2003).

[...]

(a)(7) Error in law.

The trial court, as detailed above, erred by allowing expert testimony from witnesses who had never been properly designated as such under Utah R. Civ. P. 26. As Contractor and Owner were unable to anticipate the use of expert testimony at trial by Subcontractor (since Subcontractor had not designated any such experts), the expert testimony amounted to surprise against which Contractor and Owner could not have guarded, even exercising ordinary prudence.

The testimony in question significantly affected the outcome of the trial. Prior to trial, the trial court granted Contractor partial summary judgment, finding that the subcontract was unambiguous and that Subcontractor had breached the subcontract as it did not timely complete its work. R. 539-40. Subsequent to Mr. Shoemake's testimony, however, the trial court found the subcontract to be ambiguous with regard to the substantial completion date and provisions allowing Contractor to schedule and coordinate work with all of the subcontractors on the jobsite. *See* R. 675, 679, 689. Importantly, the trial court adopted Mr. Shoemake's opinion testimony almost entirely regarding delay, responsibility for delay, and the structural steel issue, finding that Subcontractor was relieved of the substantial completion date under the subcontract. *See* R. 679-81. The trial court came to this decision even though (1) the subcontract was integrated and contained provisions prohibiting any waivers or modifications except in writing, (2) Subcontractor never requested an extension of time, and (3) the boiler was

never ordered from the supplier until 20 days before the subcontract's substantial completion date. R. 675, 679-681; Ex. D-2; App. B-1.

Because the trial court erred by admitting the expert testimony as lay witness testimony, Owner and Contractor did not receive the benefit of the mandatory disclosure requirements of Utah R. Civ. P. 26(a)(3)(A) and (B), and were deprived of the opportunity to prepare for trial by investigating the witness's testimony or to prepare an effective cross-examination.

Following trial, Owner and Contractor moved for a new trial alleging the trial court's admission of this testimony resulted in an unfair trial. R. 830-43. While the trial court has broad discretion in ruling upon a motion for a new trial (*see Smith v. Fairfax Realty, Inc.*, 2003 UT 41, 82 P.3d 1064), there is no reasonable basis exists for the decision not to grant the new trial in light of the expert testimony introduced through Subcontractor's witnesses. These witnesses were never designated as experts (*see generally* Record) as mandated by Utah R. Civ. P. 26(a)(3)(A). Contractor and Owner were subjected to surprise testimony against which they could not guard. The opinion of Subcontractor's expert witnesses significantly affected the trial court's decision. *See* R. 679-81. The expert testimony should not have been admitted, Owner and Contractor should have been granted a new trial, and the judgment against them set aside.

CONCLUSION

For the reasons set forth above in Argument III, Owner and Contractor request that the Court of Appeals reverse the trial court and order a new trial. In addition, Owner and Contractor request that the Court of Appeals reverse the trial court's Conclusions of Law

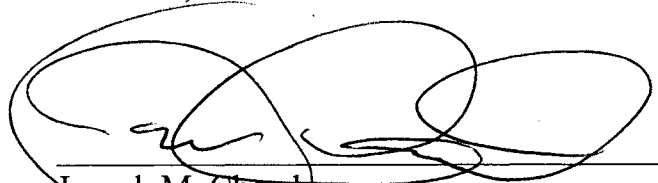
regarding the interpretation and application of the contract, remanding the matter to the trial court for a determination as to the exact amount Contractor was entitled to withhold. Upon remand, Owner and Contractor request specific instructions that the contract expressly allows Contractor to withhold payment from the Subcontractor to enforce the subcontract, including collection costs and attorney fees incurred to remedy the Subcontractor's breach. These attorney fees and collection costs should be determined and calculated as contractual damages, pursuant to the parties' agreement.

Furthermore, for the reasons set forth above in Argument II, the trial court should be reversed as to the prejudgment interest awarded to Subcontractor.

Lastly, Owner and Contractor request an award of their attorney fees incurred on appeal, also to be included as contractual damages.

DATED this 20th day of April 2011.

HARRIS, PRESTON & CHAMBERS

A large, stylized handwritten signature in black ink, appearing to read 'J. M. Chambers', is written over a horizontal line.

Joseph M. Chambers
Attorneys for Appellants

CERTIFICATE OF SERVICE

I certify that one (1) original and seven (7) true and correct copies of the foregoing **Brief of Appellants** and **Addenda** were mailed by first class mail with sufficient postage prepaid this ~~26~~^{28th} day of April 2011 to the following:

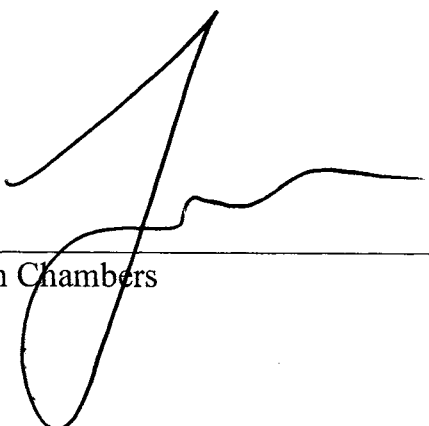
Utah Court of Appeals
450 South State Street
P.O. Box 140230
Salt Lake City, Utah 84114-0230

I also certify that two (2) true and correct copies of the foregoing **Brief of Appellants** and **Addenda** were mailed by first class mail with sufficient postage prepaid this ~~26~~^{28th} day of April 2011 to the following:

Mel S. Martin
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Josh Chambers

Appendix A-1

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

WHITE CAP CONSTRUCTION SUPPLY, INC, Plaintiff, vs. STAR MOUNTAIN CONSTRUCTION, ED ZITE, SILVER BARON PARTNERS LC, DAEDALUS USA INC, et.al, Defendants.	RULING and ORDER Case No. 050500453 Judge BRUCE C. LUBECK DATE: December 4, 2009
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The above matter came before the court for decision on motion for Daedalus and Silver Baron (Daedalus) for partial summary judgment and a motion in limine.

Daedalus filed these motions October 20, 2009. Plaintiff filed an opposition response on November 4, 2009. Daedalus filed a reply on November 30, 2009. A request to submit was filed by plaintiff on November 30, 2009. Based thereon oral argument was mistakenly scheduled for February 2, 2010. Trial in this matter is set for January 20, 2010.

After the matter was scheduled, the court began its examination of the file. The court has determined that oral argument would not benefit the court. Neither party requested a hearing and the issues are such that the court will decide them based on the pleadings.

ARGUMENTS

Daedalus moves the court for an order limiting Shamrock, cross claim plaintiff, from introducing certain evidence and seeks a determination from the court that Shamrock breached its contract with Daedalus in May 2004 when Shamrock determined the plans were deficient and failed to provide written notice to Daedalus; when Shamrock failed to complete the subcontract work by September 20, 2004; that Shamrock cannot claim damages because of waiver and estoppel; and Shamrock is liable to Daedalus or Silver Baron for lost revenue and damages of at least \$678,160 because Shamrock failed to complete the subcontract work timely and so the building was unable to be delivered to a tenant, Premier Resorts by December 1, 2004.

Daedalus claims as undisputed facts that Silver Baron is the owner of a condominium project, Daedalus is the general contractor, and Shamrock is a subcontractor hired by Daedalus to install the mechanical system, HVAC, and plumbing. The contract between Silver Baron and Daedalus was in December 2003 and in May 2004 Shamrock was hired as a subcontractor, to install plumbing, mechanical and HVAC for just over \$1.1 million. Work was to begin April 28, 2004, and be substantially complete by September 20, 2004. Work was not complete until May 2005 according to Shamrock. Under the contract, Shamrock was to notify Daedalus if

Shamrock found any design deficiency. Shamrock did not give written notice, however, even though Shamrock has admitted it knew in May 2004 that the boiler was incompatible. The contract indicates that oral notice is not sufficient. There were three Change Orders which increased the contract price by just over \$124,000. Those did not extend the time for substantial completion. No request was made by Shamrock for extension of time. Shamrock installed, without approval of Daedalus, a cheaper boiler. Daedalus was, under its contract with Silver Baron, to deliver the building to Silver Baron by November 1, 2004, or be subject to liquidated damages. Silver Baron had a contract with Premier Resorts as a tenant, which stated that if the building was not delivered by December 1, 2004, to Premier Resorts a formula would be used as to damages. Silver Baron lost \$678,160 in rents, which is prior to assessing the \$400,000 liquidated damage provision. The mechanical system still does not function properly.

From these facts Daedalus and Silver Baron argue the breach of Shamrock in not giving written notice of the claimed deficiency in design was a material breach.

Further, there is no dispute that the project was not substantially complete by September 20, 2004, as Shamrock was working on the project at least through February 2005 and there is evidence work was still ongoing in May 2005.

The contract provides that if there is delay, from any cause whatever, no damages could be sought by Shamrock, but its only remedy was to seek an extension in writing with justification for the request for delay. No extension was requested by Shamrock.

Because Shamrock failed to complete the work, Daedalus could not deliver the building timely, Silver Baron could not deliver the building to its tenant, and damages have resulted.

In opposition Shamrock disputes several of the facts alleged by Daedalus.

Shamrock asserts the contract dated May 2004 was not signed until June 8, 2004.

Shamrock verbally notified Daedalus of the defect in design. Further, Daedalus had actual notice of the design incompatibility before the contract was signed and no written notice was required. Shamrock did not delay the project in any event.

Daedalus requested the changes and Shamrock was not asked during the work to sign a Change Order. Daedalus was aware of the delays on an ongoing basis.

The delays were caused by Daedalus or Silver Baron. After the project completion, Shamrock was asked to create documents after the fact.

The change in boiler was agreed to as the parties before the contract discussed the incompatible boiler, and the engineer for

Daedalus knew of the solution Shamrock chose and the architect for Daedalus told the inspectors that Daedalus had changed the system.

Shamrock claims the boiler problems did not delay the work, but the failures of the boiler were the fault of the engineer, not Shamrock.

Shamrock claims the system has passed inspection and is functioning properly.

As additional facts Shamrock claims Silver Baron and Daedalus have common ownership. Daedalus caused the delays and did not request change orders. The failures of the system were defects in the pilot light, not in the installation. There was no chilled water system which system was the responsibility of Daedalus, not Shamrock. Shamrock claims substantial completion was by December 18, 2004, but Daedalus requested Shamrock to do additional work, which it did until March 2005. There were no requests for change orders until after completion. Daedalus' project engineer has stated Shamrock was not responsible for the delays, but Daedalus was, and that the work was done properly. The delays were because of structural steel changes, there was no water source supplied by Daedalus, the water heaters were defective, and other delays caused by Daedalus. The contract provides that if Daedalus believes Shamrock is not timely, Daedalus must give written notice the contract is null and void

before any delay damages may be sought.

Shamrock argues the failure to provide written notice of the defect was not a material breach, as Daedalus had actual notice before the contract was signed.

While the work was not done by September 20, 2004, that was the fault of Daedalus, not Shamrock.

Daedalus did not give notice to terminate the contract and the work was not untimely. Shamrock claims Daedalus has breached the covenant of good faith and fair dealing.

In reply Daedalus largely repeats its prior arguments and refutes Shamrock's attempts to show by extrinsic evidence that the breaches were not Shamrock's fault.

DISCUSSION

As to the summary judgment motion, Daedalus moves for summary judgment on issues on which it bears the burden of proof at trial-that Shamrock breached the contract. Thus, Daedalus must show there is no issue of material fact. Upon that showing Shamrock must show there is a genuine issue for trial. *Orvis v. Johnson*, 177 P.3d 600 (UT 2008).

The most recent definitive pronouncement on extrinsic evidence as it relates to integrated contracts is found in *Tangren Family ?Trust v. Tangren*, 2008 UT 20.

There our Supreme Court disapproved and overruled many prior cases, some discussed by these parties, containing language contrary to *Tangren*.

The Supreme Court made clear that a trial court must first determine whether an agreement is integrated. If it is integrated, then parol evidence may be admitted only if the court makes a subsequent determination that the language of the agreement is ambiguous. Formerly, for a court to determine if a contract is integrated, the court could examine any evidence. Here, the subcontractor agreement between Daedalus and Shamrock, contains a clear integration clause in paragraph 29. It provides a mechanism, through Change Orders, if there are to be changes in the scope and cost of work. Thus, the court must conclude that the agreement is integrated. The court under *Tangren* does not now consider further evidence to see if a contract is integrated unless certain other conditions exist.

An examination by the court of the subcontractor agreement at issue reveals no ambiguity in the relevant terms or provisions, and Shamrock has not argued there is ambiguity.

The next step, as announced in *Tangren*, is to determine the claims of the parties. "Where a contract by an explicit term purports to be integrated, we will nevertheless allow extrinsic evidence in support of an argument that the contract is not, in fact, valid for certain reasons we have specified. We have held

that extrinsic evidence is appropriately considered, even in the face of a clear integration clause, where the contract is alleged to be a forgery, a joke, a sham, lacking in consideration, or where a contract is voidable for fraud, duress, mistake, or illegality. By their very nature, these bases for invalidation of a contract are not necessarily provable by a reference to the contract itself." As in *Tangren*, here Shamrock does not even allege, nor argue, that this contract is invalid for one of these named reasons. "Thus, we will not allow extrinsic evidence of a separate agreement to be considered on the question of integration in the face of a clear integration clause. To the extent any of our prior cases provide otherwise, we overrule those cases."

The court next, under *Tangren*, must determine if the agreement is ambiguous. "Ambiguity exists in a contract term or provision if it is capable of more than one reasonable interpretation because of uncertain meanings of terms, missing terms, or other facial deficiencies. . . . [W]e determine the meaning of a general contractual term based on the specific enumerations that surround that term." *Café Rio Inc v. Larkin-Gifford-Overton LLC*, 2009 UT 6.

Thus, here, Shamrock's attempt to create a factual dispute

about some of the terms is unavailing.

The court concludes that indeed it is undisputed that Shamrock did not inform Daedalus in writing that there was a defect in design. That failure was a breach of a clear term of the contract, paragraph 10.

However, whether that breach is material is at this point largely a question of fact. The breach must be material for any claim of damages to be viable. Shamrock has succeeded in creating in the mind of the court a factual dispute about whether that breach is material. The factual dispute exists because if in fact Daedalus had actual knowledge of the incompatibility of the equipment, and agreed with Shamrock to seek a solution, the failure to give written notice would not be material. The court believes that the facts surrounding that issue are in genuine dispute. While the agreement makes time of the essence, Shamrock has provided evidence, though not with the precision better achieved by citation to a specific document or portion of deposition, which creates a genuine issue of material fact as to whether that breach is material.

Similarly, as to the claim that Shamrock did not complete the work by September 20, 2004. Shamrock acknowledges that and that was also a breach. Paragraph 7 sets a substantial completion date of September 20, 2004. Shamrock acknowledges the work was

not done but asserts it is because of Daedalus' conduct. The contract provides for a mechanism to achieve change, and that is contained in paragraphs 9 and 10. Those paragraphs make clear that Shamrock must in writing request extensions and if Shamrock does additional work, and expects to be paid, those provisions must be complied with. The contract is meant to avoid the very thing occurring in this case, a subcontractor claiming that the work was not timely because of the general contractor. The contract, as guided by the law set forth in *Tangren*, does not allow Shamrock to now claim it was late in its completion because the contractor orally asked Shamrock to do other work. Neither party is unsophisticated as indicated by the nature of this contract and it being over a one million dollar agreement. Shamrock admits there were no change orders and no requests in writing for extensions of the completion date. Even though Shamrock has shown other evidence, claiming that the delay was the fault of Daedalus, that evidence as parol evidence cannot be considered in this instance to defeat the claim there was a breach because time was of the essence and there are written provisions governing how to avoid such issues as this. The time of completion is certainly material without further factual development.

Thus, the motion for partial summary judgment is GRANTED in

part and DENIED in part. The court finds and concludes as above, that the work was not completed timely and that Shamrock has breached the contract on that issue. The court finds and concludes also that Shamrock did not give written notice of deficiencies, that was a breach but the question of the materiality of that breach remains for trial.

As to the other requests of Daedalus, the motion in limine, that must be DENIED.

Shamrock is entitled to present evidence surrounding the facts as the facts relate to the claim for damages by each party. The amount of damages Daedalus claims is dependent upon the completion date and the date which the building became available for Silver Baron and then for its tenant, Premier Resorts. Those dates in turn are dependent on the facts related to WHY the building became available on those dates. Even though the contract specifies a set completion date, and the court has ruled Shamrock may not by parol or extrinsic evidence seek to justify that delay and thus demonstrate there was no breach, the court does believe there is a factual dispute about the date of completion and the reasons for that date of completion. Allowing Shamrock to explain WHY the delay occurred goes to the question of what damages may flow from the breach of failure to timely complete the work.

Thus, the motion in limine seeking to disallow Shamrock from introducing evidence as to Shamrock's damages is DENIED. The court will allow Shamrock to present evidence, again NOT to demonstrate that there was no breach of the timeliness requirement in the contract, but as to the reasons for such delay as that evidence relates directly to the damage claims of each party. If the evidence shows some of the fault for the delay is the result of Daedalus' conduct, the date of occupation of the building and the amount of damages is directly impacted. If none of the fault belongs to Daedalus, damages proven for delay would be visited upon Shamrock solely.

The court cannot now determine that there is no factual dispute about the amount of damages. Shamrock has, though a bit artfully, created a genuine issue of material fact. There is a genuine issue of material fact about the amount of any damage to either party because there is a fundamental dispute about who caused the delay in completion and what proportion of the delay is attributable to either party.

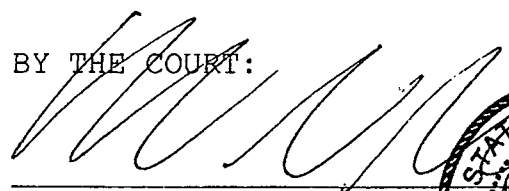
This Ruling and Order is the Order of the court and no other order is required.

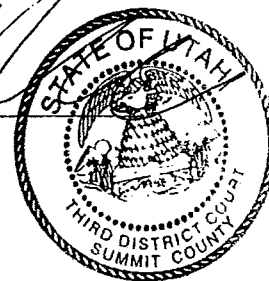
WHEN TRIAL WAS SET THE PARTIES INDICATED THEY NEEDED FOUR

DAYS. GIVEN THE COURT'S CRIMINAL CALENDAR, TRIAL WAS SET FOR JANUARY 20, 21, 22 AND THE FOLLOWING WEDNESDAY JANUARY 27, 2010. AGAIN BECAUSE OF THAT CRIMINAL CALENDAR AND THE CONSTITUTIONAL RIGHT TO A SPEEDY CRIMINAL TRIAL, THE COURT HAS HAD TO SCHEDULE TWO CRIMINAL FELONY TRIALS FOR JANUARY 27, 2010. THIS CASE MUST BE TRIED AND COMPLETED ON JANUARY 20, 21, AND 22, 2010. COUNSEL AND THE PARTIES MUST GEAR THEIR PRESENTATIONS TO THIS NEW SCHEDULE..

DATED this 4 day of Dec, 2009.

BY THE COURT:


BRUCE C. LUBECK
DISTRICT COURT JUDGE



Case No: 050500453
Date: Dec 04, 2009

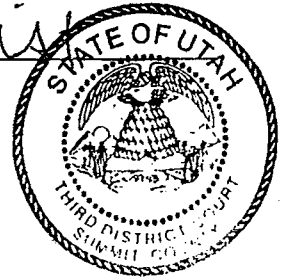
CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 050500453 by the method and on the date specified.

MAIL: JOSEPH M CHAMBERS 31 FEDERAL AVE LOGAN, UT 84321
MAIL: JOSH M CHAMBERS 31 FEDERAL AVE LOGAN UT 84321
MAIL: MATTHEW G COOPER 5282 S COMMERCE DR # D-292 MURRAY UT 84107
MAIL: LEWIS M FRANCIS 170 S MAIN ST STE 1500 SALT LAKE CITY UT 84101-1644
MAIL: MELVIN S MARTIN 5282 S COMMERCE DR STE D-292 MURRAY UT 84107
MAIL: HAROLD C VERHAAREN 5217 S STATE ST 4TH FLR SALT LAKE CITY UT 84107

Date: 12/04/09

B. Blangquist
Deputy Court Clerk



Appendix A-2

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

WHITE CAP CONSTRUCTION SUPPLY,
INC,

Plaintiff,

vs.

SHAMROCK PLUMBING, LLC, et.al.,

Defendant.

SHAMROCK PLUMBING LLC,

Cross claim plaintiff,

vs.

SILVER BARON PARTNERS, LC;
DAEDALUS USA INC.; FRED W.
FAIRCLOUGH; and CHRISTINE
FAIRCLOUGH,

Cross claim defendants.

MEMORANDUM DECISION

Case No. 050500453

Judge BRUCE C. LUBECK

DATE: January 29, 2010

The above matter came before the court for a bench trial on
January 20, 21, and 22, 2010.

Third party plaintiff (hereinafter plaintiff) Shamrock was
present through Mel S. Martin and cross claim defendants Daedalus
and Silver Baron (hereinafter defendants) were present through
Joseph M. Chambers and Josh Chambers.

BACKGROUND

White Cap as plaintiff filed this case September 2, 2005. The complaint alleged in summary that it was a subcontractor to Daedalus on a project in early 2004 . Shamrock was alleged to claim an interest in the property through a lien Shamrock had filed.

On October 13, 2005, Shamrock filed an answer and cross claim against Silver Baron, Daedalus, and Fred and Christine Fairclough.

Shamrock in its causes of action (1) sought to foreclose a mechanic's lien, alleging that Daedalus as general contractor and agent of Silver Baron contracted with Shamrock to provide plumbing and mechanical materials and services. Shamrock began work April 26, 2004, and the last work was March 8, 2005. Shamrock claimed \$275,128 and that it had not been paid. On March 23, 2005, Shamrock recorded a lien and sent notice to Silver Baron. Other claims are (2) breach of contract, (3) quantum meruit, and (4) failure to bond by Silver Baron under UCA 14-2-1.

The case brought by White Cap was dismissed against all defendants, except Shamrock, on November 7, 2005. Shamrock was dismissed as a defendant on December 5, 2005. Thus, only these claims by Shamrock and Daedalus and Silver Baron remain.

On February 15, 2006, default certificates were entered against all cross claim defendants. Those were set aside April

18, 2006 after motion.

These cross claim defendants Silver Baron and Daedalus filed an answer and counter claim against Shamrock for (1) breach of contract alleging Shamrock did not timely do its work under their sub contract with Daedalus, under which Silver Baron was a third party beneficiary. Further, the work was not done properly.

Shamrock filed an answer to the counterclaim on May 15, 2006.

Almost a year later a motion was filed by Silver Baron and the court on June 20, 2007, dismissed Shamrock's lien foreclosure claim as untimely. A case management order was entered in December 2007. It was amended by stipulation in June 2008 and again in September 2008.

On April 29, 2008, the Faircloughs were dismissed.

After motion by Shamrock, and withdrawal of counsel for defendants, an order was entered March 5, 2009, striking the counter claim and answer of defendants and judgment was entered for Shamrock in the amount of \$418,095. Shortly thereafter new and current counsel entered and that judgment, after motion, was set aside April 23, 2009. The court did grant Shamrock attorney fees in the sum of \$5500.

On July 21, 2009, this trial date was scheduled.

Thereafter various motions were filed and after oral argument the court on December 4, 2009, the court concluded the

work was not timely done by Shamrock under the contract and that no written notice of deficiency was given by Shamrock and that was a breach, but that such issue remained open as to whether that was a material breach. The court further ruled Shamrock could present its evidence as the claimed damages of Daedalus were dependent on the completion date and why that was the date of completion and why it was not achieved. The court ruled the amount of damages was in dispute and must be tried.

On December 31, 2009,¹ Shamrock moved to prevent the testimony of certain witnesses. The court issued a brief ruling on January 15, 2010. On the morning of the first day of trial defendants also moved to exclude and objected to various witnesses and exhibits. The court ruled orally that it would hear the testimony and allow objections to be lodged during the trial.

The court heard evidence, received exhibits, heard argument of counsel, and is fully advised. The court took the matter under advisement.

The court finds as follows:

FINDINGS OF FACT

1. Silver Baron owned The Lodges at Deer Valley and hired

Daedalus as the general contractor for Building F. The project was a luxury condominium hotel in Deer Valley. Daedalus hired Shamrock as a sub-contractor to do mechanical and plumbing work. Currently Daedalus is owned 75% by Lynn Padan and 25% by Alan Wright. Silver Baron is now dissolved. During the time involved in this case, 2004 and 2005, Daedalus was a member of Silver Baron along with Padan and several others. This was design-build project in which Daedalus participated in design, not as the general contractor but as a consultant, then the architect EMA made plans, presented them to Silver Baron, and Silver Baron selected Daedalus as the general contractor, who hired many subcontractors, including Shamrock.

2. Shamrock and Daedalus signed a contract June 7, 2004, but Shamrock actually had begun work in April 2004. Neither party offered an explanation as to why the contract was signed well after the work began by Shamrock. The court finds that during that time, before the actual signing of the contract in June 2004, Daedalus went over the sub-contract with Shamrock, through Shamrock's representative Payne, and stressed time frames because as will be found below Daedalus had a contract with Silver Baron, who had a contract with Premier Resorts for occupancy of the units. The sub-contract at issue has exhibits and refers to drawings and specifications. Among those are the engineering specifications completed by Colvin Engineering, who had a

contract with EMA, the architect who had a contract with and was hired by Silver Baron. AME and Silver Baron had a contract, and AME and Colvin had a contract. Bill Payne was the principle Shamrock project manager. Rusty Shoemake was the project supervisor for Daedalus and Roy Bartee was the project manager for Daedalus. The "chain of command" for Daedalus was thus Rusty Shoemake as the supervisor who reported to Bartee, a licensed architect, the manager who reported to Wright the vice president who reported to Padan the president. All have considerable and impressive experience in the construction field.

3. The sub-contract was for the base amount of \$1,119,083. It provided for changes and those are the main issues in this case. This case presents the seemingly ever-present tension and conflict between contractors and sub-contractors.

4. The sub-contract provided, at paragraph 10:

In the event Subcontractor finds any design deficiency, error in measurements, or errors in the Contract Documents or conditions which Subcontractor believes to be at variance with approved plans, Subcontractor shall have an absolute duty to immediately provide written notice thereof to Contractor. Contractor shall have the right at any time to make changes to drawings and in the subcontract work. If any changes cause a material increase or decrease in the amount of work, Subcontractor agrees to accept any such changes subject to this paragraph and to proceed without delay in the Subcontract Work. Subcontractor shall submit a written claim for any required adjustment to the Contract Amount with a breakdown, supporting invoices and/or quotes. If Contractor and Subcontractor cannot agree on the amount of the addition or deletion, the dispute for adjustment shall be submitted to binding arbitration in Summit County, Utah, and Subcontractor shall nevertheless and unconditionally proceed with the material changes, if directed by Contractor

during the pendency of arbitration. If Subcontractor makes such changes or any other changes to the Subcontract Work without written direction from Contractor, such changes constitutes an agreement by Subcontractor that it will not be paid for that changed work and Subcontractor shall be liable for any and all losses, costs, expenses, damages, and liability of any nature whatsoever associated with or in any way arising out of any such change made without written direction from Contractor. (Emphasis added).

The subcontract work under the contract means all work required to be performed by Subcontractor under the Sub-contract.

4. The Sub-Contract provided the subcontract work was to commence April 26, 2004, and be substantially completed by September 20, 2004. It stated time was of the essence. The Sub-contract also provided, at paragraph 9, that contractor had the right to revise the Contract Schedule to accommodate changes in conditions affecting the work. At paragraph 3 the Sub-contract provided that subcontractor had examined all the Contract Documents, which included the specifications and schedules relevant to do the subcontract work.

5. The Sub-contract at paragraph 15 provided the procedure if contractor believed there was a default. If contractor believed the subcontractor failed to follow supervision, to do the work timely, to correct deficiencies when requested, to pay its workers or material men, to provide adequate labor or materials to meet schedules, to attend progress meetings, or other wise failed to perform any covenant, contractor could, without terminating the subcontract, give a two working day

written notice declare the Sub-contract null and void and do any or all of the following: (1) assess delay penalties of \$1500 per day for each day the subcontract work remained incomplete, (2) supply its own workers or materials and charge costs to subcontractor and include 20% profit, (3) contract with other subcontractors and charge the cost to subcontractor, (4) withhold payment, (5) use tools and implements of subcontractor or (6) file a legal action for damages including consequential damages and loss of profits, including those for liquidated damages or consequential damages for which contractor may be liable to third parties.

6. Daedalus never provided such written notice nor declared the contract null and void. Daedalus claims it issued a written notice by email, but could not find it. The court finds otherwise that there was no written notice nor was the contract ever declared null and void as Daedalus has failed to prove that by a preponderance of the evidence.

7. Under paragraph 17 of the Sub-contract contractor could withhold payment to protect contractor from loss, including costs and attorney fees, on account of defective subcontractor work not remedied and for other reasons. It provided that attorney fees could be sought if incurred enforcing the subcontract.

8. Exhibit B to the Subcontract, Specified Provisions, was incorporated into the Subcontract. It provided, among other

things, in paragraph 1 (c), that subcontractor was to attend weekly progress meetings.

Furthermore, and not withstanding anything in this Subcontract Agreement to the contrary, Subcontractor agrees to be bound by such modifications to the Project Schedule as are discussed at the weekly progress meetings unless written objection is made by Subcontractor within 48 hours of the occurrence of such meeting.

9. The engineering specifications, part of the Contract Documents, called for a Bryant boiler and A.O. Smith water heaters. At some point in time this became problematic.

10. In April 2004, before the Subcontract was signed, Shamrock determined that those two items (boiler and water heaters) were incompatible and would not function properly together and would create a danger for human safety due to the incompatible venting process. The Bryant boiler had a positive pressure flue and the water heaters had an atmospheric pressure flue and they are not compatible and would cause dangerous situations.

11. An exhibit shows that Daedalus on April 26, 2004, provided a work schedule to Shamrock which provided the plumbing work was to be done by October 1, 2004, and the mechanical work was to be done by November 11, 2004. Those dates of course vary from the Sub-contract dates of substantial completion by September 20, 2004. Thus, the court finds and concludes that the contract documents are ambiguous as subject to two reasonable interpretations as to the time of completion and thus the trial

was needed to determine the intent of the parties. While the time schedule provided on April 26, 2004, is not a contract document, the Sub-contract makes clear that contractor can adjust the schedule and subcontractor is to follow it. Overall the court finds that the time schedule in the Sub-contract is ambiguous because of that feature of the Sub-contract.

12. The sequencing of events appears clear to the parties but not to the court. The court cannot find that any of the parties are wilfully misleading the court yet the evidence is in conflict. While it is the role of the court as fact finder to reconcile those conflicts as best as can be accomplished, the burden of proof in this case lies with each party on their claims. The timing of some things remains unproven by the parties and unknown by a preponderance of the evidence to the court. Yet, the court finds that before the Sub-contract was signed, sometime in April 2004, Shamrock through Payne advised Bartee of Daedalus that the boiler and water heaters were incompatible and would not work together. Bartee told Shamrock to work it out with Colvin, the mechanical engineer. The court, unless it wholly rejects the testimony of Colvin's representative Bret Christiansen, cannot find Christiansen was even on the project then in April 2004. The court finds Christiansen did not even appear on the scene for Colvin until much later, well after the contract was signed. That is based on the testimony of

Christiansen himself, backed up by Wright who said Christiansen was only on site at the end of the project for a month. The court finds thus that Shamrock did not advise Colvin until shortly before Shamrock ordered the boiler. Christiansen testified, and the court credits that testimony, that Shamrock approached Colvin about installing a different boiler from the specifications, different from the Bryant boiler. Colvin was advised by Shamrock that installing another boiler would be faster and it would not be more expensive and there would be a delay in obtaining the Bryant boiler. Colvin at first indicated that should not be done but then relented and that is when, on September 1, 2004, Shamrock first ordered the boiler. Shamrock ordered a Rite boiler on September 1, 2004. The court finds that at the time of the contract, Shamrock did not directly advise Daedalus at the time of the contract of the incompatibility of the two systems and Shamrock should have done such. The court finds and concludes that given the strong language of paragraph 10, emphasized above by the court, that Shamrock had an absolute duty to advise contractor in writing of a change in equipment or design deficiency. The burden was on Shamrock to obtain that approval FROM CONTRACTOR, not from an engineer with whom Shamrock had no contract. While obviously Bartee could have and should have done more to follow through, the court concludes that under the Sub-contract it was Shamrock's responsibility to obtain

Daedalus' consent by advising Daedalus in writing, and that duty under the contract was not fulfilled by an oral statement well before the contract was even signed. Even if Shamrock is correct that at the time of advising Daedalus there was no written contract, that duty arose when the contract was signed. If, as Shamrock claims, the possible danger of having an incompatible system was life threatening, the court finds and concludes that the duty on Shamrock, negotiated for by Daedalus, is clear.

13. The court has already ruled on December 4, 2009, on motion for summary judgment, that the subcontract was unambiguous. That, after presentation of the facts at trial, was wrong at least in part. The court determined it was not disputed that Shamrock had not provided a written notice of a deficiency in the design as required by paragraph 10 and that such was a breach, and the court now finds, as above, that factually and legally that is still correct. The court reserved and found there was a factual issue about whether that breach was material, which is a question of law for the court but the court needed further factual development to make that determination. The court also determined that there had not been substantial completion of the work by September 20, 2004, and that remains true and undisputed. The court allowed evidence, and thus this trial, to allow evidence to be presented to determine if the failure to substantially complete the work under the contract

affected the damage claims of the parties. The reasons for the delay were to be factually determined.

14. The last work done was in March 2005 and a lien was filed by Shamrock. The lien foreclosure claim of Shamrock was dismissed because it was not timely enforced.

15. Daedalus had a deadline to turn the project over to Silver Baron who had a contract with Premier to allow Premier to lease the units for the holiday season, and thereafter, so the project was on a deadline and time was of the essence.

16. Under the Daedalus-Silver Baron prime contract, signed in 2003, the project was to be turned over to Silver Baron by November 1, 2004, but that was later negotiated, evidently orally as there were no documents showing such, and extended to December 1, 2004. Under paragraph 2.2.5 of the prime contract, if the work was not done on time by Daedalus, Daedalus was to lend Silver Baron each month an amount equal to the difference between what Silver Baron would have received in rentals and the net revenue that Silver Baron did receive, not to exceed \$400,000. Here, the date Silver Baron was able to actually take possession was December 18, 2004 rather than December 1, 2004, approximately one half month. Under that prime contract, if the work was done on time, there was no liquidated damage provision.

17. There was a lease between Silver Baron and Premier, from October 2003, which relates to this. At the time of that lease

Snow Park was the predecessor of Silver Baron, thus the lease was actually between Snow Park Associates and Premier Resorts. In substance that allowed Snow Park (succeeded to by Silver Baron) to lease the premises, and Snow Park in turn leased the units to others and under the lease shared the profits with Silver Baron. It provided, in summary, in sections 2.5 and 2.6, that Snow Park was to be able to begin renting on December 1, 2004, which date was defined in the lease as the commencement date and the delivery of possession date, the defined possession date, was November 1, 2004, or when Snow Park delivered possession of the units to Premier, and the date was set at November 1, 2004, unless extended pursuant to the lease. The court finds that because the date in the agreement between Daedalus and Silver Baron was extended from November 1 to December 1, 2004 when Silver Baron could take possession of the building, those dates of the Snow Park lease were also necessarily extended as Snow Park could not take possession November 1, 2004, if Silver Baron did not have possession until December 1, 2004. Snow Park was to pay a monthly base rent to Silver Baron, which was \$4417 for a two bedroom unit and \$5583 for a three bedroom unit. That was the fixed rate. If there was a delay in occupation beyond December 1, 2004, there was to be a one time extension for one 1 year. Here, a temporary certificate of occupancy was issued December 22 or 23, 2004, by Park City, so Snow Park could begin

rentals then. If a unit was sold or removed by Snow Park, the agreement ceased to apply to that unit under the lease.

18. During the work by Shamrock several changes were requested but only three signed change orders exist. In none of them did Shamrock request an extension of time to complete the work though the change order forms allowed a space for such a request to be made.

19. During the weekly progress meetings Shamrock was often asked to do different work by Daedalus.

20. The construction of the building was delayed overall by various factors, some of which were not of Shamrock's making or caused by Shamrock. The court finds from an examination of the work records and the testimony that Shamrock had a crew of varying sizes but that the work did not get done quickly enough to comply with the September 20, 2004, date. However, the court finds that the ambiguity in the contract itself, with the September 20, 2004 date set but in at least two other places (paragraph 9 and Exhibit B) that date was obviously meant to have some flexibility in it. The court cannot find that date was intended to be a fixed immovable date and it was not. Changes were made and other factors interfered with it, some of those not of Shamrock's making. There were delays "built into" the contract which as noted in a schedule given by Daedalus to Shamrock called for the final mechanical work to be done by November 11, 2004.

The entire course of conduct between these parties and their practice shows flexibility up to a certain point, as there must be, depending on many circumstances in a project such as this. While the minutiae of the times need not be detailed, obviously there were other trades that were part of the delay, as well as Daedalus itself. For example, it is undisputed that on November 23, 2004, Shamrock notified Daedalus that Shamrock could not finish because various counter tops, cabinets, paint and tile were not completed in various named units and so the finish plumbing could not be finished in those 12 units detailed. While the evidence is not strong as to why that was so, November 23, 2004, is well after the claimed September 20 substantial completion date and yet other trades were still not completed with their work so that Shamrock could complete its work. The court is aware that such delay occasioned by lack of cabinets or counter tops perhaps was only a minor delay because Shamrock had at that point probably only to install finish faucets and handles and such after counter tops are installed, a short task for a crew of 4-8 people. Further, though it is disputed as to its effect, there seems little dispute that in fact a main water line was not available until November 17, 2004. That is the responsibility of Daedalus. Even though there was another water line available for some purposes, the main line was not available until then and that was not Shamrock's responsibility. Even

though there is a non-waiver provision, clearly in early December 2004 Daedalus stated that Daedalus needed the plumbing done by December 8 and called for increased manpower from Shamrock. The court generally finds in favor of Daedalus on that issue, that Daedalus asked for increased manpower and Shamrock did not provide it. However, overall the court cannot join Daedalus in putting the blame for the failure to turn over the project on December 1, 2004 to Silver Baron all on Shamrock. Clearly some delay was caused by Shamrock but there was some delay of an unknown duration in the overall project because of a structural steel issue about design and cost in Quadrant 3 of Building F. While some trades, perhaps even Shamrock, perhaps were not unduly delayed, the court finds that the overall project was delayed as much as 60 days from some of those issues apart from Shamrock, and that cannot all be upon Shamrock.

21. Even though Shamrock continued to do certain repair and finish work into March 2005, the court finds that Shamrock had substantially completed its work under the Sub-contract on December 18, 2004. A temporary certificate of occupancy was issued by Park City December 22 or 23, 2004, allowing occupancy of the units.

22. The buildings were occupied in December for rentals. Problems with the work Shamrock had done began almost immediately. During that time problems became evident, as the

units, especially on the top floor, were very hot as well as the hallways.

23. The hot water also had a problem which turned out to be a defective part manufactured by A.O. Smith, which recalled the part and replaced them, and that was not Shamrock's doing at all.

24. Once the units were turned over to Silver Baron for rental by Premier, there was excess heat in the units and the halls. This project was heated by water circulating from the boiler through the units and halls, and then coil fans blew that radiant heated air into the units and halls. With the venting system installed by Shamrock, the heat of each unit was not controlled by a thermostat in each room. The boiler installed was controlled by what is called a VFD, or variable frequency driver. Under the leases by Premier guests paid \$1000-1500 per night and had temperatures of 80 or 90 degrees F or above, and were told to open the windows by Premier agents. Most of the guest asked for and many received refunds. Those amounts were not shown directly to the court, however.

25. After that "over heating" problem was evident, all involved began examining the problem, and various solutions were proposed, none of which worked until sometime in February 2005. The parties disagree on the solution. The court is obviously no expert but applies its common sense to the issue. Shamrock claims, based on the testimony of the mechanical engineer,

Christiansen, that the solution was basically air conditioning, or a chill line to combat the heat. Daedalus claims, and the court finds, that the problem was the installation, or lack of installation, of a mixer valve in the boiler water circulation system.

26. On February 3, 2005, Christiansen told Daedalus, in summary, that chilled water piping being installed on Building F will cool the temperatures. The court finds based on all the evidence that on February 15, 2005, Wright and Padan were still trying solve the problem. Earlier all (Daedalus, Shamrock Colvin, manufacturers' representatives) had several meetings and no solutions to the overheating were found. Padan deduced that because there was only one heat source, the boiler, that must be the problem. It was set to heat the water at 180 degrees F. That boiler was manually turned down to 110 degrees and the building was properly cooled at that point. That, however, created its own problem with the boiler which would be affected as to its performance and longevity. Then on February 15, 2005, Padan and Wright went into the mechanical room at 11:30 pm. There they found two Shamrock employees working on the system. That is highly in conflict and the court does not determine the issue on the basis that anyone is being intentionally deceptive, but the documents and circumstances lead the court to these findings. Those employees of Shamrock were working on and installing a

mixer valve. Shamrock insists that was on the culinary water and Daedalus insists it was on this issue of overheating from the boiler. The court concludes that the greater amount of evidence supports Daedalus. First, there is a daily log of January 18, 2005, showing receipt by Shamrock of "material for hot water heat loop that was missed." Then these employees were seen working at 11:30 at night and Padan and Wright identified with photographs the hot water heating loop and mixer valve those men were working on. It is apparent from photos and the evident scorching on the insulation that work was done in that area after the installation of the insulation. Further, the daily work report log codes the work as "48" which is under the system of Shamrock "hot water piping." There are two other codes for culinary water, one under ground and one above ground. Those are coded as 43 and 44. This work done on February 15, 2005, was again coded as hot water piping, 48. There appear no categories for boiler work. From all this, and what the court believes is a strong dose of common sense, the court cannot accept that hot radiant air at a high temperature is sent through a 84,000 square foot building and the only way to cool it is through a counter cool air or chiller pipe. It makes far more sense that the explanation of Daedalus personnel is the answer. The boiler had two components, one of which ran the water at 180 degrees and it circulated through the building and provided the heat. It was to be cooled by the other

function, cooler water that ran the culinary water, for showers and washing and such, at 120 degrees. In fact Shamrock had failed to put a mixer valve in which affected the flow of water through the building and the cooler water from the culinary system was not being mixed with the original 180 degree water and so the radiant air was always too hot, unless the boiler was turned down to 110 or some lower temperature. When that new mixer valve was installed, the over heating problem ceased. The court finds that Shamrock did not do the work properly and did not install that mixer valve properly originally until mid February 2005. Again, as noted, the part arrived January 18, 2005, for a valve "missed." As will be discussed, however, that did NOT delay the occupancy date by Silver Baron and thus the damages resulting from that breach of contract to perform proper work are in issue.

27. Daedalus did not obtain what it wanted, and did not get written notice of such change. Daedalus wants it removed and a better system installed.

28. Another problem that developed after rentals began in late December 2004 was not Shamrock's doing, but the water heaters would randomly kick on and off, there would be no hot water at times and at times there would be and the guests were at the mercy of the water heaters. That turned out to be, after much investigation during the same time period and by a

determination of the manufacturer of the water heaters, A.O. Smith, to be a problem in the circuit board of those heaters. Those circuit boards were in fact recalled and new ones installed by A.O. Smith and they then functioned. That is NOT attributable to Shamrock as those heaters were the ones specified by the architect and engineer.

29. Instead of the Bryant boiler and associated system a Rite boiler was substituted at a slightly less overall cost, but increased venting expense, but Shamrock has not bill for that greater cost.

30. Daedalus was not aware of that change until sometime in October 2004.

31. Shamrock billed Daedalus \$1,309,512 but that was in error due to a mistaken double billing in the sum of \$18,342. Thus the correct billing should have been \$1,291,170. Daedalus claims Shamrock has billed more, \$1,305,638. Shamrock claims that Daedalus owes it \$256,787. As pure math, Daedalus does not contest that figure but asserts of course breaches by Shamrock and damages owing to Daedalus offset that amount.

30. Shamrock still owes its subcontractors a total of \$112,686, which is part of the claimed \$256,786 Shamrock claims it is owed by Daedalus. One of those subs of Shamrock is Stewart Heating. That entity is operated by a friend of Padan, and because of the dispute Stewart was not paid. As a small

contractor Stewart was struggling and Daedalus determined to "pay" Stewart directly and issued on its books a \$50,000 loan to Stewart, to be repaid if and when Shamrock paid Stewart. In fact Shamrock owes Stewart the sum of \$46,871.

31. On April 26, 2005, Daedalus sent a letter to Shamrock asking, among other things, that the defective equipment be replaced.

32. Silver Baron asserts that because there was no transfer by the date set, it shared in the rents with Premier, resulting in damages of over \$678,000, the difference between what the fixed rent (base monthly rental) would have been and the variable rate (on a 60-40 split in favor of Silver Baron over Premier).

33. Daedalus felt strongly about subcontract provisions and having the specified boiler.

34. At first Silver Baron attempted to sell fractional shares of these units as a residence club but then opted to begin selling the units outright in mid-2005. They were all sold by sometime in 2006, though the evidence was not convincing as to when that was, and most were sold in 2005. Silver Baron did not provide evidence of its profit from those sales. Silver Baron promised to provide tax return information to Shamrock at Padan's deposition and failed to do so after three formal discovery requests, blaming their change in lawyers for that oversight. No such documents were produced nor shown to the court. The court

finds Silver Baron, for some reason, failed to provide that legitimate discovery consisting of their tax return information which would have shown any profit made on these sales. Daedalus also failed to provide, until recently, their claimed damage calculations. Silver Baron's evidence on its damages is too speculative to amount to convincing evidence, sufficient to award such delay damages even under the contract.

35. Neither Daedalus nor Silver Baron had a performance bond.

36. Daedalus claims it paid, under their prime contract, \$400,000 to Silver Baron when Silver Baron was dissolved. Daedalus was unable to make the loan required by the prime contract and nothing happened until Silver Baron was dissolved, then Silver Baron was credited the sum of \$400,000, but it is not clear to the court just when that happened. Padan was and is the principle in both Daedalus and Silver Baron.

37. Shamrock filed a post-trial motion to admit exhibits 21, 22 and 27, urging Shamrock mistakenly believed they had been admitted as they were discussed at trial. The court will admit those exhibits and has considered them in this decision.

Based on the above findings and discussion, the court makes the following:

CONCLUSIONS OF LAW

1. Shamrock did the work and has not been paid. Daedalus has breached the contract by failing to pay \$256,786 and owes Shamrock that amount, less whatever the cost of replacing the current system as discussed below.

2. Shamrock breached the contract by failing to provide written notice of its knowledge that there was a design deficiency and of Shamrock's intent to substitute equipment. The court concludes that under this negotiated contract that was a most material breach.

3. Shamrock installed the other boiler without notice. The court concludes that it was not equivalent because it was not what Daedalus wanted and its upkeep and maintenance and operation involve a system Daedalus specifically did not want. Shamrock also failed to properly install the mixer valve which caused the over heating in the units until that was remedied in February 2005.

4. Daedalus failed to give written notice and did not declare the contract null and void for failure to timely complete the work.

4. Shamrock caused some delay but did not delay the date that Daedalus could turn over the project to Silver Baron such that Shamrock is responsible for any delay damages. Not only is Shamrock not responsible for any rental losses alleged by Silver

Baron, Shamrock is not responsible for the claimed \$400,000 Daedalus allegedly lost to Silver Baron. Moreover, under the Daedalus-Silver Baron prime contract, if there was a delay by Daedalus in turning the project to Silver Baron, the rental provisions were merely extended by one year and there are and can be no delay damages attributable to Shamrock for rental loss. Even if Shamrock did cause some delay, whatever rentals Silver Baron lost are not the responsibility of Shamrock entirely and the evidence is not such that the court can find any particular portion or percentage of fault by Shamrock in delay of the overall project.

5. Daedalus is entitled to what it bargained for, a system of its choosing and not of the choosing of Shamrock. Shamrock is responsible for either the replacement of the boiler and allied venting system or to pay Daedalus the cost of having another subcontractor do such work and provide such equipment.

6. Under the Sub-contract Shamrock does not appear to the court to be entitled to attorney fees against Daedalus. The paragraph 17 provision relied on by Shamrock refers to contractor being able to recover fees under certain circumstances but it does not provide that the subcontractor can recover attorney fees as best the court can discern.

7. Because Silver Baron did not obtain a bond, under UCA 14-2-2, as the owner Silver Baron is liable for the reasonable

damages as above concluded. Shamrock is entitled under that statute as the prevailing party overall to its attorney fees to be taxed as costs in the action.

8. Shamrock is entitled to pre-judgment interest, but not on the amount it owed Stewart, since April 2005.

9. Shamrock is not entitled to the amount paid (loaned) by Daedalus to Stewart, \$46,871. Thus, the amount owing by Daedalus to Shamrock is \$256,786 minus the amount owed to Stewart which Daedalus has paid, \$46,781, and minus the cost of replacement of the system installed defectively and not bargained for by Daedalus.

Shamrock is to prepare an order and judgment in compliance with URCP, Rule 7(f) setting forth this ruling. THIS MEMORANDUM DECISION IS INCORPORATED INTO THE FINAL JUDGMENT AND ORDER. Plaintiff should provide, in the proposed order, a provision awarding attorney fees in the amount of \$_____. A rule 73 affidavit should be filed, and that can be objected to as to necessity and reasonableness and any other basis in law and the

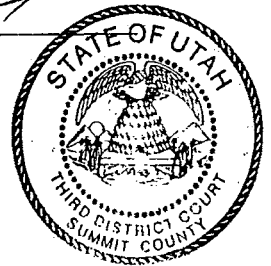
court will then fill in the amount the court determines should be awarded to Shamrock against Silver Baron.

DATED this 29 day of Jan, 2010.

BY THE COURT:



BRUCE C. LUBECK
DISTRICT COURT JUDGE



Case No: 050500453 Date: Jan 29, 2010

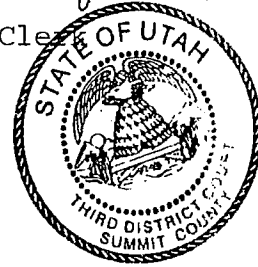
CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 050500453 by the method and on the date specified.

MAIL: JOSEPH M CHAMBERS 31 FEDERAL AVE LOGAN, UT 84321
MAIL: JOSH M CHAMBERS 31 FEDERAL AVE LOGAN UT 84321
MAIL: MELVIN S MARTIN 5282 S COMMERCE DR STE D-292 MURRAY UT 84107

Date: 01/29/10

B. Blangust
Deputy Court Clerk



Appendix A-3

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SUMMIT COUNTY STATE OF UTAH

WHITE CAP CONSTRUCTION SUPPLY,
INC,

Plaintiff,

vs.

SHAMROCK PLUMBING, LLC, et.al.,

Defendant.

SHAMROCK PLUMBING LLC,

Cross claim plaintiff,

vs.

SILVER BARON PARTNERS, LC;
DAEDALUS USA INC.; FRED W.
FAIRCLOUGH; and CHRISTINE
FAIRCLOUGH,

Cross claim defendants.

**SUPPLEMENTAL MEMORANDUM
DECISION**

Case No. 050500453

Judge BRUCE C. LUBECK

DATE: June 15, 2010

The above matter came before the court for a supplemental evidentiary hearing and argument on June 11, 2010, in the West Jordan Department of the court.

Third party plaintiff (hereinafter plaintiff) Shamrock was present through Mel S. Martin and cross claim defendants Daedalus and Silver Baron (hereinafter defendants) were present through Joseph M. Chambers and Josh Chambers.

BACKGROUND

The above matter came before the court for a bench trial on January 20, 21, and 22, 2010. The court issued a 28 page memorandum decision on January 29, 2010.

On February 5, 2010, plaintiff filed an affidavit seeking attorney fees. Defendants filed a counter declaration on February 19, 2010.

Thereafter on February 19, 2010, defendants filed an objection to a proposed judgment provided by plaintiff and a request to clarify the court's ruling. Defendant also urged it was the prevailing party and should be awarded attorney fees. Plaintiff filed a response on March 2, 2010, and also asked for clarification of the court's ruling. Defendants filed a combined reply and opposition on March 23, 2010.

Oral argument was held April 6, 2010 and the court issued a Minute Entry on April 15, 2010, scheduling a further evidentiary hearing in the West Jordan Department due to the re-assignment of the undersigned judge. That hearing was held, together with further oral argument, and the court took the issues under advisement.

The court finds supplemental facts as follows:

FINDINGS OF FACT

1. The system that was eventually installed in Building F by Shamrock remains to this date in Building F and is functioning. Daedalus continues to contend, however, that it did not get the system it desired. The court so found in its January 29, 2010 memorandum decision.

2. Later Building G was constructed by Daedalus, using other tradesmen rather than Shamrock. That building is basically the same as Building F in its design and function and purpose. The mechanical engineer who designed that Building G heating system testified at this hearing and the hot water system in Building G is tied into the system of Building F. That was done in 2007, well after the Building F issues of 2004-05.

3. That expert, Peterson, opined in common with Shamrock in 2004 that the specifications as called for were not permitted by the International Fuel Gas Code in that a natural draft appliance could not be connected into a system operating with a positive pressure system.

4. The specifications were not followed and in place is the Rite boiler with a negative pressure, or natural draft at the vent connector and two A.O. Smith water heaters which were as specified.

5. This expert opined that there were two options to eliminate the induced draft fan. In essence the two options were to replace the Rite boiler or the two water heaters. In the first, Option 1, there would need to be a new boiler which he estimated would cost \$45,900 and new flues for the water heaters which would cost \$16,500.

6. Defendant's project supervisor, Roy Bartee, opined that to do such work in what is called Option 1 would not cost \$54,200 (\$35,900+\$16,500) but would cost approximately \$133,000 because of the need for a good deal of other structural changes involving walls and roofs and other trades such as electricians, drywall, painting, and other sub contractors together with permit costs.

Based on the above findings and discussion, and the previous findings and discussion and conclusions of law, the court makes the following:

CONCLUSIONS OF LAW

1. To the extent the findings are conclusions of law and that these conclusions of law contain findings of fact, each is to be treated as a finding or conclusion as appropriate.

2. Shamrock did the work and has not been paid. Daedalus has breached the contract by failing to pay \$209,915. However, because Shamrock did not install the system Daedalus wanted, and

indeed Shamrock could not do so and comply with applicable codes, Shamrock is to install the proper "fix" and remediate the system as Peterson outlines in his Option 1, by re-installing the proper boiler and new flue system. The court finds and concludes that in fact that can be done for an amount less than Daedalus claims but more than Shamrock claims. The court is somewhat unguided here but notes that Peterson is a licensed mechanical engineer but his figures were in his words an "estimate" or even a "guestimate" and were not a bid. Barteo, a man of great expertise and experience, has considered factors the court believes Peterson has also included. Thus, the court will find and conclude, as best it can, that the true cost of this "fix is \$80,000 and that amount of judgment is to be reduced by that latter figure.

2. Shamrock breached the contract by failing to provide written notice of its knowledge that there was a design deficiency and of Shamrock's intent to substitute equipment. However, even considering the first breach rule, the court finds that the breach by Shamrock was not one that resulted in Daedalus' right to fail to pay. Even though the contract has many provisions allowing Daedalus to withhold payment for various reasons, the promise of Shamrock to give written notice is not a dependent or reciprocal obligation tied to payment. The court has found that notice was given by Shamrock, but not written

notice. Daedalus in letters asked Shamrock to change the system and Shamrock did not do so, but this order of the court, reducing the damages for non-payment by the amount of the re-installation of the "new" system amounts to the only damages suffered by Daedalus.

3. As found previously, Daedalus did not give written notice of termination of the contract nor declare it null and void.

4. The court indicated that Shamrock was entitled to attorney fees not under the sub-contract but under the bonding statute. Shamrock is entitled under that bonding statute as the prevailing party overall to its attorney fees to be taxed as costs in the action.

5. The court now, however, agrees with defendants that the entirety of the claim for fees by Shamrock is not justified. Shamrock did not prevail on its lien foreclosure claim and did not prevail on some of the issues for which it seeks attorney fees, such as the default judgment being set aside and the summary judgment motion. The affidavit of Shamrock does not properly differentiate some of those claims, successful and unsuccessful. However, using the flexible and reasoned approach, Daedalus did not prevail on its claim for delay damages either. The court believes Shamrock is entitled under the bonding statute to attorney fees. The court cannot second guess an affidavit that a particular task ought to take a certain amount of time,

for example, 1.2 hours rather than 3 hours, nor that costs should have been X rather than Y because of the cost, for example, of trial binders or postage or mileage. As best the court can calculate, carefully going over the affidavits of counsel, the court believes that using the flexible and reasoned approach and parsing out the tasks that were clearly not successful for Shamrock, Shamrock is entitled to costs in the sum of \$4400 and attorney fees in the sum of \$45,000. The court full well realizes those are rounded figures but again the court believes Shamrock prevailed overall, but not on some claims, and the court cannot figure on an hour-to-hour basis any closer than that sum. Thus, Shamrock is entitled to attorney fees and costs as found and concluded herein.

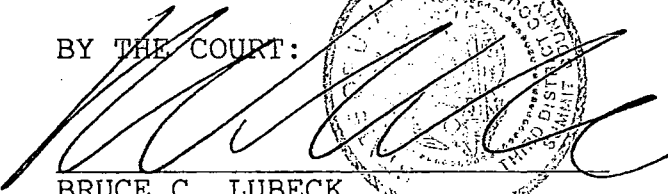
5. As to pre-judgment interest, the court again believes that Shamrock is correct, that Shamrock did not have the use of this sum owed and again the pure math figures were not really disputed. Even though this complex case shows the difficulty between sub-contractors and contractors, the court believes the sum known and certain, minus the re-installation work, is justified. Interest is to be calculated on the \$209,915 figure from April 2005 to this date. Even though the amount due is now reduced by the cost of re-installation, the court believes the sum was certain and fixed and known. In fact and in deed, the system is still working and being used by the owners after more

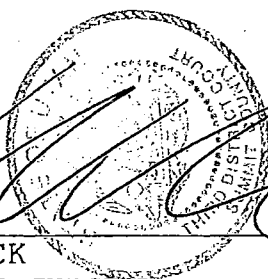
than five years. It is not the system desired and bargained for, however, but under the law the court believes the sum certain was calculable, now minus the re-installation costs, from April 2005.

Shamrock is to prepare an order and judgment in compliance with URCP, Rule 7(f) setting forth this supplemental ruling showing the judgment against Daedalus for the breach claim and Silver Baron for the bonding claim. THIS SUPPLEMENTAL MEMORANDUM DECISION and the January 29, 2010, MEMORANDUM DECISION ARE INCORPORATED INTO THE FINAL JUDGMENT AND ORDER.

DATED this 15 day of June, 2010.

BY THE COURT:


BRUCE C. LUBECK
DISTRICT COURT JUDGE



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 050500453 by the method and on the date specified.

MAIL: JOSEPH M CHAMBERS 31 FEDERAL AVE LOGAN, UT 84321

MAIL: JOSH M CHAMBERS 31 FEDERAL AVE LOGAN UT 84321

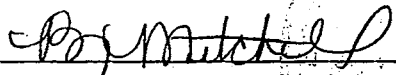
MAIL: MATTHEW G COOPER 5286 S COMMERCE DR STE A-136 MURRAY UT 84107

MAIL: LEWIS M FRANCIS 170 S MAIN ST STE 1500 SALT LAKE CITY UT 84101-1644

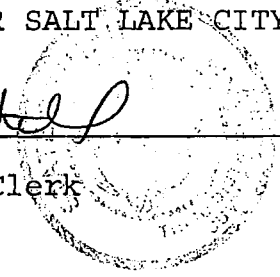
MAIL: MELVIN S MARTIN 5286 S COMMERCE DR STE A-136 MURRAY UT 84107

MAIL: HAROLD C VERHAAREN 5217 S STATE ST 4TH FLR SALT LAKE CITY UT 84107

Date: June 10, 2010



Deputy Court Clerk



Appendix B-1

Job Name: Lodges at Deer Valley
Building F
Job No.: 1422
Phase Code: 15-011
Contract No.: 1422-08

SUBCONTRACT AGREEMENT

Contractor:
Daedalus USA, Inc.
1850 Sidewinder Drive, Suite 320
P.O. Box 1937
Park City, Utah 84060
(801) 647-0065
(801) 658-1159 Fax

Subcontractor:
Shamrock Plumbing, LLC
340 West 500 North
North Salt Lake, Utah 84054
(801) 295-1690
(801) 295-1699 Fax

EXECUTED
6/7/04

APRIL 26th - SEPT 20th
1500 P/MAY

92 DAYS TO COMPLETE
120 UNTIL THE HEATING
ISSUE WAS RESOLVED

$92 \times 1,500 = 138,000$
 $120 \times 1,500 = 180,000$

AGREEMENT:

This Subcontract Agreement is entered this 20th day of May, 2004 by and between DAEDALUS USA, INC. ("Contractor") and Shamrock Plumbing, LLC, ("Subcontractor") for subcontract work to be performed on the designated portion of the following project in Park City, Utah (the "Project"):

Project Description:

The Lodges at Deer Valley – Building F
4 Story 24 unit condominium building with below grade parking structure
Approximately 84,024 square feet

For the purposes of this Agreement, the following Definitions shall apply:

General Contract: The agreement between Owner and Contractor.

Work: All work required to be performed by Contractor pursuant to the terms of the General Contract, including Subcontract Work.

Site: The real property on which the Work is to be performed, as more particularly described in the Contract Documents.

Subcontract Work: All work required to be performed by Subcontractor pursuant to the terms of this Subcontract.

Contract Schedule: Contractor's schedule for performance of the Work.

Subcontract Price: The price Contractor agrees to pay Subcontractor for performance by Subcontractor of the Subcontract Work.

Working Day: For purposes of this Subcontract, working day shall mean Monday through Friday, except holidays.

For good and valuable consideration, Contractor and Subcontractor agree as follows:

DAE

0036

Job Name: Lodges at Deer Valley
Building F
Job No.: 1422
Phase Code: 15-011
Contract No.: 1422-08

1. **THE WORK :** The work of Subcontractor under this Subcontract Agreement (the "Subcontract Work") shall include the HVAC and Plumbing work as described in the Contract Documents per EXHIBIT "A", including all labor, material, equipment, services and other items required to complete such portion of the Work and in accordance with the following clarifications:
 - 1.1. All Subcontract Work shall comply with all applicable local, state and national codes and follow the installation procedures outlined in the ICBO approval for any product used.
 - 1.2. The following items are specifically included in this contract:
SEE EXHIBIT "B"
 - 1.3. The following items are specifically excluded from this contract:
SEE EXHIBIT "B"
2. **SUBCONTRACT AMOUNT:** The amount to be paid to Subcontractor for the Subcontract Work (the "Subcontract Amount") shall be One Million One Hundred Nineteen Thousand Eight Three Dollars (\$1,119,083) and shall include all costs of the Subcontract Work including tax, freight and other charges.
 - 2.1. Unit prices, if any, are as follows:
SEE EXHIBIT "B"
 - 2.2. Alternates, if any, are as follows:
SEE EXHIBIT "B"
3. **REVIEW OF CONTRACT DOCUMENTS AND PROJECT SITE:** Subcontractor acknowledges that prior to its execution of this Subcontract Agreement: (i) it has reviewed and examined all of the construction plans, drawings, models, specifications, measurements, schedules and addenda for the Project that it deems relevant to the performance of the Subcontract Work (collectively, the "Contract Documents"), (ii) it has examined, inspected and investigated the location and condition of the Site on which the Subcontract Work is to be performed (the "Site"), (iii) it knows the conditions under which the Subcontract Work is to be performed, (iv) it has determined that the Contract Documents are sufficient to enable Subcontractor to determine the Subcontract Amount for completion of its Subcontract Work; and (v) it has examined and approves of all lines, grade, elevations, and its price reflects all work necessary and incidental to provide a complete project. Subcontractor is entering into this Subcontract Agreement on the basis of Subcontractor's own examination, inspection, review, and investigation of the Contract Documents and the Site, and is not relying on the opinion or representations of Contractor. No allowance in the form of any additional compensation, including, without limitation, any adjustment to the Subcontract Amount, is to be made by reason of any error of the Subcontractor in its review, inspection and interpretation of the Construction Documents or the Site. Subcontractor shall assure and guarantee that all of its own subcontractors are subject to all terms of this Subcontract Agreement.
4. **PROGRESS PAYMENTS:** Contractor shall pay Subcontractor the Subcontract Price and other amounts that may come due to Subcontractor under this Subcontract on a percentage of completion basis, as determined by Contractor and, if Owner has reserved a right to so determine, by Owner (or Architect or other designee of Owner), when and as Contractor receives payment in unrestricted funds from Owner, for the Subcontract Work completed by Subcontractor; provided, however, that (a) Contractor may retain as security for Subcontractor's fulfillment of its obligations under this Subcontract an amount equal to five(5%) percent of Subcontractor's gross billings, or such other amount as is set forth in this Subcontract Agreement, (b) payments by Contractor to Subcontractor are to be made exclusively from funds paid by

DAE

0037

Job Name: Lodges at Deer Valley
Building F
Job No.: 422
Phase Code: 15-011
Contract No.: 1422-08

Owner to Contractor as unrestricted funds for the Subcontract Work performed by Subcontractor, and (c) Contractor's obligation to make payments to Subcontractor is based solely on Contractor's receipt of payment of unrestricted funds from Owner. Subcontractor specifically assumes the risk of nonpayment should Owner fail to pay Contractor. As long as Subcontractor is in compliance with this Subcontract, Contractor shall pay Subcontractor each progress payment within ten working days after receipt by Contractor of Contractor's payment from Owner.

Contractor may withhold monthly progress payments, in whole or in part, in order to protect Contractor and/or Owner from loss from:

- 4.1 Defective work not remedied, material not furnished, clean-up not performed or any other non-complying aspects of the Subcontract Work;
- 4.2 Claims, levies, attachments, stop notices or court orders filed or which Contractor has reasonable cause to believe are likely to be filed against Subcontractor, including claims covered by insurance until such claims are accepted by insurance carrier;
- 4.3 Failure of Subcontractor to make timely and proper payments for materials, equipment, transportation or shipping costs, taxes, fees or payments to its subcontractors for labor (including fringe benefits owed and payments due under collective bargaining agreements), or any other claims of any nature growing out of the Subcontract Work;
- 4.4 Reasonable indication that the Subcontract Work will not be completed for the remaining unpaid balance of the Subcontract Price or in compliance with the Contract Schedule;
- 4.5 Unsatisfactory prosecution of the Subcontract Work by Subcontractor;
- 4.6 Failure to deliver to Contractor requested releases, lien waivers, supplier affidavit forms, insurance certificates, "as built" drawings, written guarantees or warranties or the approvals of the Subcontract Work required by any authority having jurisdiction;
- 4.7 Damage to any portion of the Work, another contractor or subcontractor, Owner and/or Contractor;
- 4.8 Filing by or against Subcontractor of a petition for bankruptcy or reorganization;
- 4.9 Any claim or potential claim under any law related to the protection of human health or the environment, including without limitation any claim related to a release by Subcontractor of a hazardous substance, hazardous waste, or other pollutant or contaminant on the Site;
- 4.10 Any other conditions of any nature which may arise from Subcontractors action or failure to act which, in Contractor's reasonable opinion, will result in loss to Owner and/or Contractor.

When the grounds set forth in subparagraphs 4.1 through 4.10 are removed by Subcontractor to the satisfaction of Contractor, payment of the amounts so withheld will be made by Contractor pursuant to the procedures set forth in paragraph 4 above. However, as a condition to resuming such payments, Contractor may require that Subcontractor furnish releases in a form satisfactory to Contractor for all claims made under subparagraphs 4.1 through 4.10 and/or supporting invoices, receipts or other records satisfactory to Contractor to substantiate the amounts owed or paid.

5. FINAL PAYMENT: The balance of the Subcontract Price and any other amounts owed to Subcontractor under the terms of this Subcontract shall be due and payable when all of the following have occurred: (a) completion and acceptance of the Work by Owner; (b) within ten days following receipt by Contractor from Owner of the entire amount, including any and all retention due Contractor from Owner; (c) removal of any grounds for withholding payments under paragraph 4 above; (d) receipt by Contractor of

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CB *[Signature]*

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satisfactory proof that all claims, including taxes, arising out of the Subcontract Work (and any liens related thereto) have been released; and, (e) receipt by Contractor of satisfactory proof that all labor, including fringe benefits owed and payments due under collective bargaining agreements, and all Subcontractor's material suppliers have been paid and are waiving their lien rights upon the final payment of the balance due. If minor items remain to be completed by Subcontractor, Contractor may retain a sum equal to two hundred (200%) percent of Contractor's estimated cost to complete any unfinished items.

6. **INVOICE PROCESSING:** The billing cut-off for this project is the 25th day of each month. Invoices received by the 25th day of the month will be paid on the 25th day of the following month contingent upon Contractor's receipt of a properly prepared application for payment. Any applications for payment received sixty (60) days or more after work has been completed shall not be honored. All applications for payment must be submitted to Contractor's office. In order for any application for payment to be "properly prepared," all of the following must be true with respect to each application for payment:

6.1 The Subcontract Work billed is complete in the opinion of Contractor at the time of receipt of the application;

6.2 Subcontractor's insurance policies are in full force and effect;

6.3 All prices must agree with the contract amount and progress payment schedule of values;

6.4 The application shall include appropriate lien releases and waiver of claims arising out of Subcontractor's performance of the Subcontract Work on the forms provided by Contractor;

6.5 Contractor has the right, but not the obligation, to make any payment due to Subcontractor hereunder by joint check to Subcontractor and its sub-subcontractors, material suppliers, or employees which have performed work or furnished materials under this Subcontract, irrespective of whether lien releases have been submitted.

7. **DATE OF COMMENCEMENT AND SUBSTANTIAL COMPLETION:** The date of commencement of the Subcontract Work shall be April 26, 2004, unless the Contractor issues a notice to proceed of a different date. Contractor shall substantially complete the Subcontract Work not later than September 20, 2004, ~~calendar days after the Subcontract date of commencement,~~ subject to adjustments to this Subcontract Agreement. ~~The date of substantial completion shall therefore be~~

8. **TIME:** Time is of essence for this Subcontract. Subcontractor agrees to diligently perform the Subcontract Work in accordance with the Contract Schedule. Without limiting the generality of the foregoing, Subcontractor shall perform the Subcontract Work in accordance with the Contract Documents at such a rate and in such a manner as not to delay the Work, the Contract Schedule, or final completion of the project. Subcontractor shall begin the Subcontract Work within five working days after receipt of written notice to proceed from the Contractor and thereafter perform the Subcontract Work continuously and expeditiously in accordance with the requirements of this Subcontract as determined by Contractor.

9. **SCHEDULE:** During the progress of the Work, Contractor shall have the right to revise the Contract Schedule to accommodate changes in conditions affecting the Work if deemed by Contractor to be necessary or convenient to the overall progress of the Work. Subcontractor shall adjust its operations to conform to all Contract Schedule changes and shall make no claim for acceleration or delay by reason of the schedule revisions as long as the revisions are reasonable, taking into account the scope and complexity of the Work. Contractor shall have complete control of the Site and shall have the right to decide the time and order in which the various portions of the Subcontract Work shall be performed. If the Subcontract Work is divided into parts, Subcontractor will perform several or all parts simultaneously if required by Contractor. Subcontractor shall have no claim for damages against Contractor for delay, hindrances, obstructions to its work, or other such events no matter how or by whom caused. In case of

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such delays, hindrances, or obstructions not due in any part to Subcontractor fault, Subcontractor shall be entitled only to such extension of time or performance as may be allowed by Contractor provided that Subcontractor has given all written request notices and can substantiate the delay in a form and substance to the satisfaction of the Owner and Contractor.

10. **SUBCONTRACT CHANGE ORDERS:** In the event Subcontractor finds any design deficiency, error in measurements, or errors in the Contract Documents or conditions which Subcontractor believes to be at variance with approved plans, Subcontractor shall have an absolute duty to immediately provide written notice thereof to Contractor. Contractor shall have the right at any time to make changes to drawings and in the Subcontract Work. If any changes cause a material increase or decrease in the amount of work, Subcontractor agrees to accept any such changes subject to this paragraph and to proceed without delay to perform the Subcontract Work as changed. Prior to the commencement of any such material changes in the Subcontract Work, Subcontractor shall submit a written claim for any required adjustment to the Contract Amount with a breakdown, supporting invoices and/or quotes. If Contractor and Subcontractor cannot agree on the amount of the addition or deletion, the dispute for adjustment shall be submitted to binding arbitration in Summit County, Utah, and Subcontractor shall nevertheless and unconditionally proceed with the material changes, if directed by Contractor during the pendency of arbitration. If Subcontractor makes such change or any other changes to the Subcontract Work without written direction from Contractor, such change constitutes an agreement by Subcontractor that it will not be paid for that changed work and Subcontractor shall be liable for any and all losses, costs, expenses, damages, and liability of any nature whatsoever associated with or in any way arising out of any such change made without written direction from Contractor.
11. **MATERIALS, INSPECTION, TESTING AND CLEAN-UP:** Subcontractor warrants that all materials used in the Subcontract Work shall be new, free from defects, and be in quantities sufficient to facilitate the expeditious execution of the Subcontract Work. Subcontractor shall, upon request, furnish for approval full information and/or samples concerning the materials. Machinery, equipment, materials, and articles installed or used without approval shall be used at the risk of subsequent rejection by Contractor. All material and workmanship shall be subject to inspection, examination, and testing, at any and all times during manufacture and/or construction. Contractor shall have the right to reject improper or defective material or workmanship or require correction without charge to Contractor. Subcontractor shall promptly segregate and remove rejected material and its construction debris daily from the Site. In addition, Subcontractor shall at all times keep the premises and surrounding area free from accumulation of waste materials, rubbish, or unclean conditions.
12. **CONSTRUCTION MEETINGS:** Subcontractor will attend construction progress meetings as directed by the Contractor.
13. **WARRANTY:** If the General Contract requires Contractor to warranty or guarantee materials or workmanship, Subcontractor hereby warrants and guarantees the Subcontract Work for the same period and to the same extent. This warranty shall run to Contractor and the Owner and their successors and assigns. In addition to and without limiting the scope of the warranties herein provided, Subcontractor warrants the Subcontract Work as follows:
- 13.1 Any design work required to be performed by Subcontractor as part of the Subcontract Work shall be performed (a) by duly licensed and certified architects and engineers, (b) with due diligence and to a professional standard of competence, quality and technical accuracy, and (c) in strict conformity with all requirements of this Subcontract.
- 13.2 All materials and equipment furnished pursuant to this Subcontract will be new unless otherwise specified by Contractor, and shall comply strictly with any applicable environmental requirements.
- 13.3 All Subcontract Work will be thorough, first class, sound, workmanlike and of substantial quality; constructed by qualified, careful and efficient workers; and free from defects in design, workmanship

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and materials, and will conform to all provisions of this Subcontract.

- 13.4 The warranties and guarantees provided in subparagraphs 13.1 through 13.3 shall apply to all defective or non-conforming Subcontract Work that appears within one year following the completion and acceptance of the Subcontract Work, or for the period for which Contractor is obligated to Owner to correct such defective or non-conforming Work, whichever is longer; provided, however, that if such defective or non-conforming Work is latent; i.e., not reasonably ascertainable prior to or within one year following completion of and acceptance of the Subcontract Work, then such warranty shall apply to each latent defective or non-conforming Work that appears for a period of time equal to the statute of limitation period applicable to such latent defective or non-conforming Work, or for the period for which the Contractor is obligated to Owner to correct said latent defective or non-conforming Work, whichever is longer.

The obligations of the Subcontractor under subparagraphs 13.1 through 13.4 shall include the correction of the defective or non-conforming Subcontract Work, the removal and replacement of other portions of the Work that are necessary to be removed to gain access to the Subcontract Work to be corrected, the repair or replacement of any damage caused by said defective or non-conforming Subcontract Work, and all consequential damages suffered by Contractor or Owner as a result of said defective or non-conforming Subcontract Work or the failure of Subcontractor to promptly and properly correct same. Subcontractor shall promptly remove from the Site all defective or non-conforming materials, which Contractor requires to be replaced, at Subcontractor's sole expense. If Subcontractor fails to promptly correct any defect or non-conformity as directed by Contractor, Contractor may correct the defect or non-conformity and charge its cost to correct to Subcontractor in accordance with paragraph 19 below.

The provisions of the warranties provided in paragraph 13, together with any applicable warranties and guarantees of Subcontractor's subcontractors and suppliers, shall survive inspection, approval, testing and acceptance of and payment for the Subcontract Work and shall run to and inure to the benefit of Contractor and Owner and their successors and assigns.

14. **ASSIGNMENTS AND SUBCONTRACTING:** No part of this Subcontract may be assigned or subcontracted without the prior written approval of Contractor.
15. **DEFAULT, SUBCONTRACT TERMINATION:** If Subcontractor, in the opinion of Contractor, at any time (i) fails to supply supervision, properly skilled workers and proper materials; (ii) fails to properly and diligently prosecute the Subcontract Work in a timely manner according to the schedule as established or modified from time to time by Contractor; (iii) fails to provide an action plan suitable to Contractor for correction of any deficiency when so requested by Contractor; (iv) fails to make prompt payment of its workers, subcontractors, materialmen, laborers, or suppliers; (v) fails to provide adequate quantities of labor or materials to meet schedules; (vi) fails to attend construction progress meetings as directed by Contractor; (vii) either loses its license or fails to renew its license; or (viii) otherwise fails to perform any term, covenant or condition contained in this Subcontract, including but not limited to clean-up; Contractor, without any prejudice to any rights or remedies, and without terminating this Subcontract shall have the right, in its sole discretion, upon a two working day written notice to Subcontractor, to declare this Subcontract null and void, and to exercise any or all of the following remedies:
- 15.1 **Assess delay penalties against Subcontractor in the amount \$1,500.00 per calendar day for each day that the Subcontract Work remains incomplete;**
- 15.2 **Supply such of its own workers and quantity of materials, equipment, and other facilities as Contractor deems necessary for the orderly progress of or completion of the Subcontract Work or any part thereof which Subcontractor has failed to complete or perform, and charge the costs to Subcontractor, including overhead at 20% profit, together with attorney's fees incurred as a result of Subcontractor's failure of performance;**

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15.3 Contract with other subcontractors to perform such part of the Subcontract Work as Contractor shall determine will provide the most expeditious completion thereof, and charge the cost to Subcontractor, including costs which exceed the unpaid Contract Amount;

15.4 Withhold payment of any monies due Subcontractor pending corrective action to the extent required by and to the satisfaction of Contractor;

15.5 Use any materials, implements, equipment, appliances, or tools furnished by or belonging to Subcontractor to complete the Subcontract Work without any further compensation to Subcontractor;

15.6 File legal action for damages, including consequential damages and loss of profits. Subcontractor shall also be liable for all losses, costs, expenses, liabilities, and damages including consequential damages and liquidated damages, sustained by Contractor, or for which Contractor may be liable to third parties because of Subcontractor's default, delay or negligence.

In the event of any emergency affecting the safety of persons or property, Contractor may proceed as described above without notice.

16. **TERMINATION OR MODIFICATION FOR CONVENIENCE.** Contractor may, at any time with a five (5) working day written notice, terminate or modify Subcontractor's services and the Subcontract Work at Contractor's sole convenience. Upon receipt of such notice, Subcontractor shall, unless the notice directs otherwise, immediately discontinue or modify the Subcontract Work and placing of orders for materials, facilities and supplies in connection with the performance of this Subcontract and shall, if requested, make every reasonable effort to procure cancellation or modification of all existing orders or contracts upon terms satisfactory to Contractor, or at the option of Contractor, give Contractor the right to assume those obligations directly, including all benefits to be derived therefrom. Subcontractor shall only be entitled to payment of the actual portion of the Subcontract Work completed in conformity with this Subcontract, as of the date of termination. There shall be deducted from such sums the amount of any payments made to Subcontractor prior to the date of termination or modification and all applicable back charges. No other claim shall be made as compensation for compensatory or consequential damages. Subcontractor shall not be entitled to any claim or claim of lien against Contractor or any other person or entity for any additional compensation or damages in the event of such termination or modification and payment.

17. **WITHHOLDING PAYMENT.** Contractor may withhold all or part of any payment to the extent necessary to protect Contractor from loss, including costs and attorney's fees, on account of (i) defective Subcontract Work not remedied; (ii) claims filed or reasonable evidence indicating probable filing of claim; (iii) failure of Subcontractor to make payments promptly to its subcontractors or for material, or labor; (iv) reasonable doubt that this Subcontract can be completed for the balance then unpaid; (v) damage to other subcontractors; (vi) penalties assessed against Contractor or Subcontractor for failure of Subcontractor to comply with laws; or (vii) any other ground for withholding payment allowed by law or as otherwise provided in this Subcontract Agreement including but not limited to attorney's fees incurred by Contractor to enforce this Subcontract or remedy Subcontractor's default. When the above matters are rectified, such amounts as then due and owing shall be paid or credited to Subcontractor.

18. **PROTECTION OF WORK AND SECURITY:** Subcontractor shall take all necessary precautions to protect the Project, all construction work, materials, employees, equipment and the work of other trades from theft, vandalism, collapse, wind and other damage. In the event that Subcontractor, or any of its employees, subcontractors, suppliers or deliverymen, cause damage to the Project or the property of Contractor, the Subcontractor shall promptly remedy such damage to the satisfaction of Contractor. In the event Subcontractor fails to remedy such damages to Contractor's satisfaction within two (2) working days of notice thereof from Contractor, Contractor may remedy the damage itself and deduct the cost thereof from such payments currently due, or thereafter to become due, the Subcontractor in accordance with Paragraph 19.

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19. **BACK CHARGES:** Contractor shall have the right to make back charges plus a 20% administrative charge (the "Back Charges") to Subcontractor for damages remedied by Contractor on behalf of Subcontractor or for damages remedied on behalf of Subcontractor under other subcontracts with Contractor. In the event that the retained amount is insufficient to satisfy the Back Charge(s), Subcontractor shall pay the amount of the Back Charge(s) within fifteen (15) working days after Subcontractor's receipt of an invoice thereof.

Prior to the execution of this agreement, the Contractor had a portion of work, which is included in the contract amount and Subcontractor scope of work (see exhibit B attached hereto), performed by another contractor on a "Time and Materials" basis. Subcontractor (Shamrock) shall be responsible for both function of and payment for said work.

20. **INSURANCE:** Subcontractor shall maintain at its sole cost and expense and with insurers reasonably approved by Contractor, during the entire term of this Subcontract:

20.1 Statutory Worker's Compensation Insurance; and

20.2 Comprehensive general liability insurance, with limits of at least \$1,000,000 per person per accident, and at least \$1,000,000 property damage, or Combined Single Limit of at least \$2,000,000, aggregate consisting of both bodily injury and property damage coverage, and including products liability coverage and contractual liability expressly covering, without limitation, all of Subcontractor's obligations, including, but not limited, to the following: premises/operations, products/completed operations, owners/contractors protective, independent contractors, blanket contractual liability, broad form property damage, automobile, and personal injury. In the event the Contract Documents require higher coverage or additional coverages then Subcontractor agrees to provide such higher and additional coverages as are required in the Contract or Contract Document of the Contractor.

20.3 Contractor, and its personnel, shall be named as additional insureds under the comprehensive general liability policy and the Workman's Compensation Insurance. The policy shall stipulate that the insurance afforded the additional insured shall apply as primary insurance, and that any other insurance carried by Contractor, its officers, directors, and employees will be excess only and will not contribute to Subcontractor's insurance.

20.4 Subcontractor's Certificate of Insurance shall indicate that the Subcontractor's insured coverage includes Residential Construction Operations.

20.5 Waiver of Subrogation: Subcontractor shall obtain from each of its insurers a waiver of subrogation on Commercial General Liability in favor of Contractor and Owner with respect to Losses arising out of or in connection with the work.

20.6 Certificates of insurance acceptable to the contractor shall be filed with the Contractor prior to commencement of the Subcontractor's Work. These certificates and the insurance policies required by this agreement shall contain a provision that coverage afforded under the policies will not be canceled or allowed to expire until at least 30 days prior written notice has been given to the Contractor. If any of the foregoing insurance coverages are required to remain in force after final payment and are reasonably available, an additional certificate evidencing continuation of such coverage shall be submitted with the final application for payment as required in paragraph 5. If the insurer does not furnish any information concerning reduction of coverage, the Subcontractor shall furnish it with reasonable promptness according to the Subcontractor's information and belief.

20.7 The Contractor shall furnish to the Subcontractor satisfactory evidence of insurance required of the Contractor under this agreement.

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- 20.8 No acceptance of insurance certificates by Contractor shall in any way limit or relieve Subcontractor of its duties and responsibilities.
21. **SUBCONTRACTORS INDEMNITY:** Subcontractor agrees to indemnify, defend and hold harmless Contractor, including its officers, agents, employees, subsidiary companies, architect and owners, and each of them (individually "Indemnified Party" and collectively, the "Indemnified Parties") from and against any and all claims, causes of action, liabilities, losses, costs, damages and/or expenses in law or equity (including, without limitation, attorney's fees and expenses) of every kind and nature whatsoever (collectively, the "Claim") regardless of types or amounts of insurance carried by Subcontractor arising out of or in connection with this Subcontract, the Work hereunder, or any other work performed by Subcontractor arising out of this contract, and arising out of any act or omission to act or willful misconduct by Subcontractor, anyone directly or indirectly employed by Subcontractor, or anyone for whose acts Subcontractor may be liable, regardless of any concurrent negligence whether active or passive, primary or secondary, by any other entity.
22. **COMPLIANCE WITH LAWS:** Subcontractor agrees to be bound by all applicable federal, state and local laws, orders, rules and regulations, including, but not limited to, federal, state and local tax laws, social security act, unemployment compensation acts, workers' compensation acts, OSHA, the Toxic Substance Control Act, the Fair Labor Standards Act, as applicable, Equal Employment Opportunity Act and the rules and regulations issued pursuant thereto which are hereby incorporated by reference in this Subcontract Agreement. Subcontractor agrees to indemnify, defend and hold harmless Contractor and its customers from any liability, loss or damage arising out of Subcontractor's failure to so comply.
23. **SAFETY AND SITE RULES AND REGULATIONS:** Subcontractor shall be responsible to report in writing to the Contractor any safety hazards on the Site that it becomes aware of in accordance with Exhibit "C" - Project Safety Program. Subcontractor shall take all necessary steps to maintain good order and professional conduct of its employees, agents, and subcontractors. Subcontractor agrees to be bound by the Site Rules and Regulations and Safety Procedures as may be posted on the Site. In order to maintain communication on job site, each subcontractor shall procure, at Subcontractor's sole expense, and as designated by Contractor, a mobile phone and/or a radio compatible with Contractor's radio frequencies.
24. **DISPUTE RESOLUTION:** Subcontractor agrees to strictly adhere to the requirements of any provisions in the General Contract Documents relating to notice, submission, processing and resolution of claims or disputes. Any and all claims or disputes not specifically covered elsewhere in this Agreement arising out of or relating to this Agreement or breach thereof shall be decided, at the sole discretion of Contractor, either by submission to (1) arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association or (2) judicial decision by the Third District Court of Summit County; provided however, the determination by Owner, the Engineer, Architect, or any Court, Board of Arbitration or any tribunal pursuant to the provisions of the General Contract Documents with respect to any dispute or claim relating to this Agreement or the Work performed or to be performed hereunder shall be binding upon Subcontractor, and Subcontractor agrees to accept such determination, provided Subcontractor shall have been given reasonable notice of such dispute, proceeding or litigation and an opportunity to defend or present claims. At the sole discretion of Contractor, any arbitration with Subcontractor shall be consolidated with any other arbitration proceeding relating to the work under the General Contract. The parties agree to waive their rights to trial by jury.
25. **GOVERNING LAW:** The laws of the state of Utah shall govern the terms of this Subcontract Agreement and any resulting contract disputes.
26. **WAIVER:** The provisions of this Subcontract Agreement requiring written notice may not be waived by oral agreement, act, or failure to act or object, by Contractor. No restriction, condition, obligation or provision of this Subcontract Agreement shall be deemed to have been abrogated, or waived, by reason of any failure or failures to enforce by Contractor. Subcontractor hereby acknowledges and agrees that

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no individual employee of Contractor has the authority either express, implied or apparent, to waive the notice provisions set forth in this Agreement with respect to the making of claims for additional compensation, time extensions, or otherwise. Any such written notice must be delivered in the time required by this Agreement and cannot be waived except by a written waiver executed by an individual authorized by the President of Contractor.

27. **SEVERABILITY:** The invalidity of any one or more paragraphs, subparagraphs, phrases, sentences or sections hereof shall not affect the remaining portions of this Subcontract or any part thereof. In the event that any portion or portions of this Subcontract should be deemed invalid or should operate to render this Subcontract invalid, this Subcontract shall be construed as if such paragraphs, subparagraphs, phrases, sentences or sections thereof had not been included in the Subcontract.

28. **ADDITIONAL PROVISIONS:**

28.1 Exhibit "A" Contract Document List, dated May 20, 2004
28.2 Exhibit "B" Subcontract Specific Provisions, dated May 20, 2004
28.3 Exhibit "C" Project Specific Safety Program, dated May 20, 2004

28.4. Shamrock Plumbing will contract with Stewart's Heating and Refrigeration as its HVAC subcontractor to perform HVAC work under the subcontract scope of work. Shamrock is responsible for coordinating the complete installation of all HVAC and plumbing, to provide a complete and operational system. The contractor will look to Shamrock for completion of the entire scope of work; both Plumbing and HVAC. Quality of installation, system functionality and warranty of the entire HVAC system is the responsibility of the primary Subcontractor (Shamrock).

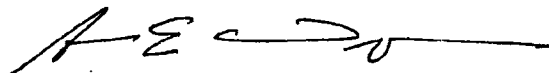
29. **ENTIRE AGREEMENT:** This Subcontract Agreement constitutes the entire agreement of the parties, and may not be modified or amended except in writing. Parol evidence shall not be admitted in interpretation of the provisions of this Subcontract Agreement.

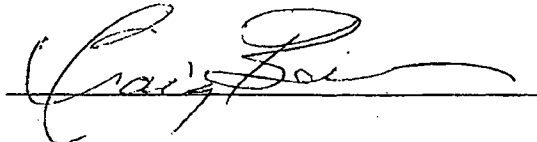
DATED as first above written.

Contractor:

Subcontractor:

DAEDALUS USA, INC.


FOR DAEDALUS



92-251990-5501
(Contractor's State License No.)

5034847-5501
(Contractor's State License No.)

Sr. Vice President Initial: 

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0045

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For Daedalus USA Use Only:

Contractor's State License verified by _____.

Worker's Comp. Insurance verified by _____.

General Liability Insurance verified by _____.

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EXHIBIT "A"
DAEDALUS USA, INC.
CONTRACT DOCUMENT LIST

May 20, 2004

JOB NAME: Lodges at Deer Valley - Building F
JOB NO.: 1422
PHASE CODE: 15-011
SUBCONTRACTOR: Shamrock Plumbing, LLC
CONTRACT NO.: 1422-08

THIS LIST COMPRISES ALL OF THE DRAWINGS, SPECIFICATIONS & REPORTS INCLUDED IN THE
CONTRACT DOCUMENTS

SHEET	DESCRIPTION	ORIGINAL DATE ISSUED	REV. NO.	CURRENT REV. DATE
ARCHITECTURAL DRAWINGS - Prepared By: EMA Architects, LLC				
G-001	Cover Sheet	06/30/2003	3	03/22/2004
G-002	Code Review, General Notes	06/30/2003	3	03/22/2004
G-003	Specifications	06/30/2003	3	03/22/2004
G-004	Specifications	06/30/2003	3	03/22/2004
G-005	Specifications	06/30/2003	3	03/22/2004
G-006	Specifications	06/30/2003	3	03/22/2004
G-007	Specifications	06/30/2003	3	03/22/2004
G-008	Not in Current Set	06/30/2003	2	02/06/2004
G-009	Not in Current Set	02/06/2004	N/A	02/06/2004
G-010	Not in Current Set	02/07/2004	N/A	02/06/2004
G-011	Not in Current Set	02/08/2004	N/A	02/06/2004
G-012	Not in Current Set	02/09/2004	N/A	02/06/2004
A-000	Overall Site Plan	06/30/2003	2	02/06/2004
A-001	Project Site Plan	06/30/2003	3	03/22/2004
A-002	Enlarged Ramp Plan	06/30/2003	2	02/06/2004
A-100	Basement Floor Plan	06/30/2003	3	03/22/2004
A-101	Level One Floor Plan	06/30/2003	3	03/22/2004
A-102	Level Two Floor Plan	06/30/2003	3	03/22/2004
A-103	Level Three Floor Plan	06/30/2003	3	03/22/2004
A-104	Loft Level Floor Plan	06/30/2003	3	03/22/2004
A-105	Roof Plan	06/30/2003	3	03/22/2004
A-106	Typical Unit Floor Plan - Type 'A'	02/06/2004	3	03/22/2004
A-107	Typical Unit Floor Plan - Type 'B'	02/06/2004	3	03/22/2004
A-108	Typical Unit Floor Plan - Type 'C'	02/06/2004	3	03/22/2004
A-109	Typical Unit Floor Plan - Type 'D'	02/06/2004	3	03/22/2004
A-110	Typical Unit Floor Plan - Type 'E'	02/06/2004	3	03/22/2004
A111	Enlarged Plan 'E' Unit Upgrade	03/22/2004	3	03/22/2004
A-201	Exterior Elevation	06/30/2003	3	03/22/2004
A-202	Exterior Elevation	06/30/2003	3	03/22/2004
A-301	Building Section	06/30/2003	3	03/22/2004
A-302	Building Section	02/06/2004	3	03/22/2004
A-303	Building Section	02/06/2004	3	03/22/2004
A-304	Building Section	02/06/2004	3	03/22/2004
A-305	Building Section	02/06/2004	3	03/22/2004
A-306	Building Section	02/06/2004	3	03/22/2004
A-307	Building Section	06/30/2003	3	03/22/2004
A-308	Building Section	03/22/2004	3	03/22/2004
A-601	Wall and Ceiling Types	02/06/2004	3	03/22/2004
A-602	Building Details	02/06/2004	3	03/22/2004
A-603	Building Details	02/06/2004	3	03/22/2004

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EXHIBIT "A"
DAEDALUS USA, INC.
CONTRACT DOCUMENT LIST

May 20, 2004

SHEET	DESCRIPTION	ORIGINAL DATE ISSUED	REV. NO.	CURRENT REV. DATE
A-604	Building Details	02/06/2004	3	03/22/2004
A-605	Building Details	02/06/2004	3	03/22/2004
A-606	Building Details	02/06/2004	3	03/22/2004
A-607	Building Details	02/06/2004	3	03/22/2004
A-608	Building Details	03/22/2004	3	03/22/2004
A-609	Building Details	03/22/2004	3	03/22/2004
A-701	Door & Window Schedule	02/06/2004	3	03/22/2004
A-702	Door & Window Details	02/06/2004	3	03/22/2004
A-703	Door & Window Details	02/06/2004	3	03/22/2004
A-801	Vertical Circulation Plans	06/30/2003	3	03/22/2004
A-802	Unit Stair Sections	02/06/2004	3	03/22/2004
A-900	Basement Reflected Ceiling Plan	02/06/2004	3	03/22/2004
A-901	Level 1 Reflected Ceiling Plan	02/06/2004	3	03/22/2004
A-902	Level 2 Reflected Ceiling Plan	02/06/2004	3	03/22/2004
A-903	Level 3 Reflected Ceiling Plan	02/06/2004	3	03/22/2004
A-904	Level 4 Reflected Ceiling Plan	02/06/2004	3	03/22/2004

CIVIL DRAWINGS - Prepared By: Mountain Cross Engineering, Inc.

C-100	Civil Subsurface Drainage Plan	06/30/2003	1	05/04/2004
C-200	Civil Site Utility Plan	06/30/2003	1	05/04/2004
C-300	Civil Details	06/30/2003	1	05/04/2004

STRUCTURAL DRAWINGS - Prepared By: ARW Engineers

S-001	Structural Notes & Schedules	06/30/2003	1	04/23/2004
S-002	Shear Wall Schedule and Details	02/06/2004	1	04/23/2004
S-003	Special Inspection Schedule	06/30/2003	1	04/23/2004
S-101	Footing & Foundation Plan	06/30/2003	1	04/23/2004
S-101B	Footing & Foundation Plan	06/30/2003	1	04/23/2004
S-102	Level 1 Floor Framing Plan	06/30/2003	1	04/23/2004
S-102B	Level 1 Floor Framing Plan	06/30/2003	1	04/23/2004
S-102C	Level 1 Shear Wall Plan	02/06/2004	1	04/23/2004
S-103	Level 2 Floor Framing Plan	02/06/2004	1	04/23/2004
S-103B	Level 2 Shear Wall Plan	02/06/2004	1	04/23/2004
S-104	Level 3 Floor Framing Plan	02/06/2004	1	04/23/2004
S-104B	Level 3 Shear Wall Plan	02/06/2004	1	04/23/2004
S-105	Loft Floor Framing Plan	02/06/2004	1	04/23/2004
S-105B	Loft Shear Wall Plan	02/06/2004	1	04/23/2004
S-106	Roof Framing Plan	02/06/2004	1	04/23/2004
S-201	Typical Structural Details	06/30/2003	1	04/23/2004
S-202	Typical Structural Details	06/30/2003	1	04/23/2004
S-203	Footing Details	06/30/2003	1	04/23/2004
S-204	Floor Framing Details	06/30/2003	1	04/23/2004
S-205	Braced Frame Details	02/06/2004	1	04/23/2004
S-206	Wood Framing Details	02/06/2004	1	04/23/2004
S-207	Wood Framing Details	02/06/2004	1	04/23/2004
S-208	Wood Framing Details	02/06/2004	1	04/23/2004

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EXHIBIT "A"
DAEDALUS USA, INC.
CONTRACT DOCUMENT LIST

May 20, 2004

SHEET	DESCRIPTION	ORIGINAL DATE ISSUED	REV. NO.	CURRENT REV. DATE
ELECTRICAL DRAWINGS - Prepared By: BNA Consulting Engineers				
E-001	Schedule & Notes	06/30/2003	N/A	12/16/2003
E-002	Electrical Site Plan	06/30/2003	4	04/23/2004
E-003	Basement Level Plan	06/30/2003	4	04/23/2004
E-004	Electrical Raceway Risers	02/06/2004	4	04/23/2004
E-100	Symbols, Schedules & Notes	02/06/2004	4	04/23/2004
E-101	Specifications	02/06/2004	4	04/23/2004
E-102	Specifications	02/06/2004	4	04/23/2004
E-200	Lighting Plan - Basement Level	02/06/2004	4	04/23/2004
E-201	Lighting Plan - First Floor	02/06/2004	4	04/23/2004
E-202	Lighting Plan - Second Floor	02/06/2004	4	04/23/2004
E-203	Lighting Plan - Third Floor	02/06/2004	4	04/23/2004
E-204	Lighting Plan - Fourth Floor	02/06/2004	4	04/23/2004
E-300	Power Plan - Basement Level	02/06/2004	4	04/23/2004
E-301	Power Plan - First Floor	02/06/2004	4	04/23/2004
E-302	Power Plan - Second Floor	02/06/2004	4	04/23/2004
E-303	Power Plan - Third Floor	02/06/2004	4	04/23/2004
E-304	Power Plan - Fourth Floor	02/06/2004	4	04/23/2004
E-305	Enlarged Mechanical Room Plan	02/06/2004	4	04/23/2004
E-401	Enlarged Unit Plan	02/06/2004	4	04/23/2004
E-402	Enlarged Unit Plan	02/06/2004	4	04/23/2004
E-403	Enlarged Unit Plan	02/06/2004	4	04/23/2004
E-404	Enlarged Unit Plan	02/06/2004	4	04/23/2004
E-405	Enlarged Unit Plan	02/06/2004	4	04/23/2004
E-501	One Line Diagram	02/06/2004	4	04/23/2004
E-601	Panel Board Schedules	02/06/2004	4	04/23/2004
E-602	Panel Board Schedules	02/06/2004	4	04/23/2004
E-603	Panel Board Schedules	04/23/2004	4	04/23/2004
E-701	Electrical Details	02/06/2004	4	04/23/2004
E-702	Electrical Details	02/06/2004	4	04/23/2004

MECHANICAL DRAWINGS - Prepared By: Colvin Engineering Associates				
MF-100	Mechanical Basement Level Plan - Block-outs	02/06/2004	N/A	02/06/2004
P-001	Plumbing Legend & Schedules	06/30/2003	1	12/15/2003
P-100	Underfloor Basement Plumbing Plan	06/30/2003	1	12/15/2003
M-001	Legend, Abbreviations & Index	02/06/2004	3	05/03/2004
M-100	Mechanical Basement Floor Plan	02/06/2004	3	05/03/2004
M-101	Mechanical / Plumbing Level 1 Floor Plan	02/06/2004	3	05/03/2004
M-102	Mechanical / Plumbing Level 2 Floor Plan	02/06/2004	3	05/03/2004
M-103	Mechanical / Plumbing Level 3 Floor Plan	02/06/2004	3	05/03/2004
M-104	Mechanical / Plumbing Level 4 Floor Plan	02/06/2004	3	05/03/2004
M-105	Mechanical Roof Plan	02/06/2004	3	05/03/2004
M-106	Snow Melt Plan	02/06/2004	3	05/03/2004
M-201	Chilled and Heating Water Piping Schematics	02/06/2004	3	05/03/2004
M-202	Natural Gas Schematic	02/06/2004	3	05/03/2004
M-203	Piping Schematics	02/06/2004	3	05/03/2004
M-204	Plumbing Isometric	04/23/2004	3	05/03/2004
M-401	Mechanical / Plumbing Enlarged Plan	02/06/2004	3	05/03/2004
M-402	Mechanical / Plumbing Enlarged Plan	02/06/2004	3	05/03/2004

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EXHIBIT "A"
DAEDALUS USA, INC.
CONTRACT DOCUMENT LIST

May 20, 2004

SHEET	DESCRIPTION	ORIGINAL	REV.	CURRENT
		DATE ISSUED	NO.	REV. DATE
M-403	Mechanical / Plumbing Enlarged Plan	02/06/2004	3	05/03/2004
M-404	Mechanical / Plumbing Enlarged Plan	02/06/2004	3	05/03/2004
M-405	Mechanical / Plumbing Enlarged Plan	02/06/2004	3	05/03/2004
M-406	Mechanical / Plumbing Enlarged Plan	02/06/2004	3	05/03/2004
M-407	Mechanical / Plumbing Enlarged Plan	02/06/2004	3	05/03/2004
M-408	Mechanical / Plumbing Enlarged Plan	02/06/2004	3	05/03/2004
M-409	Mechanical / Plumbing Enlarged Plan	02/06/2004	3	05/03/2004
M-410	Mechanical / Plumbing Enlarged Plan	02/06/2004	3	05/03/2004
M-411	Mechanical / Plumbing Enlarged Plan	02/06/2004	3	05/03/2004
M-412	Mechanical / Plumbing Enlarged Plan	04/24/2004	3	05/03/2004
M-501	Mechanical Details	02/06/2004	3	05/03/2004
M-502	Mechanical Details	02/06/2004	3	05/03/2004
M-601	Mechanical Schedules	02/06/2004	3	05/03/2004
M-602	Plumbing Schedules	02/06/2004	3	05/03/2004
M-701	Mechanical Specifications	02/06/2004	3	05/03/2004
M-702	Mechanical Specifications	02/06/2004	3	05/03/2004
M-703	Mechanical Specifications	02/06/2004	3	05/03/2004
M-704	Mechanical Specifications	02/06/2004	3	05/03/2004
M-705	Mechanical Specifications	02/06/2004	3	05/03/2004
M-706	Mechanical Specifications	02/20/2004	3	05/03/2004

SOILS REPORT - Prepared By: AMEC Earth & Environmental, Inc.

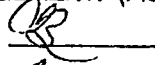
Job No. 3-817-004428


06/30/2003 N/A

N/A

Geotechnical Investigation

ACKNOWLEDGEMENT: (Please Initial and return with Subcontract Agreement)

Subcontractor: 

Contractor: 

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EXHIBIT "B"
DAEDALUS USA, INC.
SUBCONTRACT SPECIFIC PROVISIONS

May 20, 2004

JOB NAME: Lodges at Deer Valley – Building F
JOB NO.: 1422
PHASE CODE: 15-011
SUBCONTRACTOR: Shamrock Plumbing, LLC
CONTRACT NO.: 1422-08

The following is a general description of portions of the Contract Documents, together with any deviations therefrom or additions thereto, which apply to the Subcontract Work to be performed by Subcontractor. The Subcontractor is responsible for all of the Subcontract Work that appears in the Contract Documents, whether or not included in the following description, unless specifically excluded herein. Subcontractor acknowledges that the contract amount includes all items necessary for the completion of work as designed:

I. GENERAL REQUIREMENTS:

1. In addition to Subcontractor's other duties under the Subcontract Agreement, Subcontractor shall;
 - a. Submit with its proposed schedule the time required to prepare and approve shop drawings, to fabricate and deliver materials and equipment, and to install the Subcontract Work.
 - b. Furnish Contractor within thirty (30) days of execution of this Agreement a list of major material and equipment suppliers required for the Subcontract Work, including name, address, and telephone number of the supplier and the date on which such material and equipment is expected to be delivered to the Site.
 - c. Cause a qualified supervisory representative (while Subcontractor has personnel at the Project site and for two (2) weeks prior thereto) to attend weekly progress meetings. Furthermore, and notwithstanding anything in this Subcontract Agreement to the contrary, Subcontractor agrees to be bound by such modifications to the Project Schedule as are discussed at the weekly progress meetings unless written objection is made by Subcontractor within forty-eight (48) hours of the occurrence of such meeting.
 - d. Subcontractor shall provide scheduling and coordination of all inspections pertaining to the Subcontract Work. Subcontractor must designate and have present individuals, as required, to schedule, coordinate, and achieve all required inspections. Subcontractor must also notify the Contractor, within two (2) hours of inspection visits, of the outcome of the inspection. Subcontractor will be responsible for all re-inspection fees and penalties associated with Subcontract Work.
2. **Use of Contractor's tools:** Subcontractor shall not use Contractor's tools without prior approval from Contractor. If Subcontractor utilizes Contractor's tools or equipment, Subcontractor shall do so at its own risk. In the event that one or more of Contractor's personnel operate said tools or equipment to assist Subcontractor in performing the Subcontract Work, said personnel shall be employees of Subcontractor for all purposes while so operating said tools or equipment, whether or not such personnel are placed on Subcontractor's payroll.
3. **Submittals:** Subcontractor shall submit to the Contractor for approval all shop drawings, product data and samples for all work, material and equipment required by the Contract Documents, including any amendments or modifications thereto. By submitting these, Subcontractor represents that it has reviewed and verified all required materials, field

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EXHIBIT "B"
DAEDALUS USA, INC.
SUBCONTRACT SPECIFIC PROVISIONS

May 20, 2004

measurements and field construction criteria and has checked and coordinated the information with the requirements of the Subcontract Work and the Contract Documents. Approval by the Architect or Contractor of any submittal by Subcontractor does not relieve Subcontractor from responsibility for errors or omissions in any such submittals and or from any deviation from the requirements of the Contract Documents. Subcontractor is strictly responsible for any additional costs to it or others resulting in any way from use of nonspecified material or equipment.

4. **Occupancy:** Whenever it may be useful or necessary for Contractor to do so, Contractor or Owner shall be permitted to occupy and use any portion of the Subcontract Work which has been either partially or fully completed by Subcontractor before final inspection and acceptance thereof by Owner. Such use or occupation shall not relieve Subcontractor of its guarantee of said Subcontract Work nor of its obligation to correct/repair/replace, at its own expense, any defect in materials and workmanship that may occur or develop.
5. **Hazard Communication Standard:** Prior to the start of the Subcontract Work, Subcontractor shall furnish Contractor's Project Superintendent with Hazardous Material Safety Data Sheets (MSDS) for all Subcontractor furnished materials.
6. **Parking:** Parking for Subcontractor's employees shall be located in an area designated by Contractor's Project Superintendent.
7. **Safety Meetings:** Subcontractor shall conduct weekly safety meetings with its on-site employees and provide Contractor's Project Superintendent with safety meeting documentation.
8. **Layout:** Subcontractor shall provide all layout engineering from main control lines and a benchmark provided by Contractor.
9. **Cleanup:** Subcontractor shall perform continuous cleanup of the Subcontract Work area, including removal of all rubble, boxes, crates, cartons and any other debris generated by Subcontractor on a daily basis. Cleanup debris shall be placed in on-site trash containers provided by Contractor. Subcontractor shall leave its work area(s) broom clean at the end of each day. Should Subcontractor fail to perform cleanup as defined herein, the Contractor shall, after a written two working day notice, have the right to perform the required cleanup for Subcontractor and deduct all associated costs for such services from the Subcontract Amount in accordance with Paragraph 17 of the Subcontract Agreement. Subcontractor shall remove all debris materials classified as hazardous from the Site and dispose of them in accordance with all federal, state and local laws. Subcontractor shall not dispose of any hazardous materials in Contractor's on-site trash containers.
10. **Schedule:** Subcontractor warrants that it has reviewed the Contract Schedule attached as Exhibit "D", and affirms that it has included all costs necessary in the Subcontract Price to comply with this schedule. If the Subcontractor fails to commence, perform, finish or deliver parts of the Subcontract Work in accordance with the Contract Schedule, Contractor has the right to, upon two working day's notice, to furnish additional labor materials and equipment at Subcontractor's sole cost and expense and if such labor is not available, Contractor shall have the right to require Subcontractor, at Subcontractor's sole cost and expense, to work overtime or multiple shifts (and/or weekends and holidays) to such extent as, in Contractor's opinion, is necessary to accelerate and complete the Subcontract Work in accordance with the Contract Schedule.
11. **Overtime:** Overtime authorized for reimbursement by Contractor shall be chargeable at actual expense of the premium portion of the labor only, plus legally applicable labor taxes and fringes.



EXHIBIT "B"
DAEDALUS USA, INC.
SUBCONTRACT SPECIFIC PROVISIONS

May 20, 2004

No markup for overhead and profit will be allowed on the premium portion of overtime. All other overtime shall be at Subcontractor's sole expense.

12. **Time and Material:** In any case where time and material, hourly rate or overtime work is authorized by Contractor, Subcontractor shall be responsible to obtain time sheets and material delivery records signed on a daily basis by Contractor. Subcontractor shall include a copy of signed time sheets and material delivery records with its request for a Subcontract Change Order to the Contractor. No payment will be made for time and material, hourly rate or overtime work performed by Subcontractor without prior approval by Contractor and Contractor signed time sheets and material delivery records.
13. **Back Charges:** Should the Subcontractor default or neglect to carry out the Subcontract Work in accordance with the Contract Documents, including the terms and conditions of this Subcontract Agreement, and fails to within two working days after receipt of written notice from Contractor to commence and continue correction of such default or neglect with diligence and promptness. The Contractor shall have the right, without prejudice to any other remedy Contractor may have, to take any action necessary to correct such deficiencies. In such case an appropriate deductive Subcontract Change Order shall be prepared and issued to Subcontractor for all costs and damages incurred by Contractor for correcting such deficiencies, including a twenty (20%) percent administrative charge. If the payments then, or thereafter, due Subcontractor are not sufficient to cover such deductive amount, the Subcontractor shall pay the difference to Contractor within fifteen (15) working days after Subcontractor's receipt of an invoice thereof.

II. INCLUSIONS:

1. Provide all labor, materials, equipment, tools, incidentals and supervision required to furnish and install HVAC and Plumbing and all other appurtenances required for a complete installation in accordance with the Contract Documents, applicable codes and governing agencies.

a. **SUBCONTRACT AMOUNT:**

Phase	Description	Amount
05-011	Plumbing Work	\$744,600
05-011	Stewart's Heating	351,440
05-011	Additional Inclusions	
	Permits and fees	2,500
	Fire Caulking and Stopping	5,000
	Concrete coring and patching	5,000

Total Subcontract Amount: \$ 1,119,083.00

2. The Subcontractor shall provide all required plumbing and HVAC work for a complete system which principally includes, but is not limited to the following.

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EXHIBIT "B"
DAEDALUS USA, INC.
SUBCONTRACT SPECIFIC PROVISIONS

May 20, 2004

- a. Furnish and install all fixtures and piping, including, but not limited to: water heater, water softener, toilets, sinks, shower pans, tubs, washer hookups, faucets, floor drains, hose bibs, drain piping, vent piping, and supply piping.
- b. Subcontractor shall provide a floor drain by laundry facilities and water heater.
- c. Subcontractor to connect the water heater to the gas line. The gas line is to be provided by others.
- d. Subcontractor to connect the dishwasher to the plumbing.
- e. Subcontractor shall provide all trenching required for their work.
- f. Subcontractor shall provide all block outs and sleeves through floors, walls, and ceilings required for their work.
- g. Subcontractor shall coordinate with the framing Subcontractor for location and size of all required backing for the plumbing.
- h. Subcontractor shall furnish and install fire stops, fire retardant compound and/or safing to seal all of the Subcontractor's penetrations through fire-rated assemblies.
- i. Subcontractor shall furnish all pipe flashings and sheet metal jacks for their work. Pipe flashings and sheet metal jacks are to be installed by others.
- j. Furnish and install all equipment required to complete the HVAC system, including, but not limited to: furnace, fan coil unit, and air conditioning unit.
- k. Furnish and install all required ducting, including, but not limited to: ducting, supply registers, return-air grills, combustion air ducting, and weather caps.
- l. Furnish and install smoke dampers as required by code or by the Contract Documents.
- m. Furnish and install ducting for clothes dryer.
- n. Furnish and install ducting to all exhaust fans. Exhaust fans provided by electrician.
- o. Furnish and install a set back thermostat and all required low-voltage wiring. Provide temporary thermostats for use during construction.
- p. XXX
- q. Furnish and install all refrigerant lines. Provide protection from nail puncher for all lines.
- r. Furnish and install all condensate drain lines and piping for all mechanical equipment.
- s. Furnish and install all natural gas lines including gas line service to gas ranges, gas dryers, gas fireplaces, and water heater.
- t. Subcontractor to connect gas dryer and gas ranges to gas lines after appliance installation.
- u. XXX.
- v. Subcontractor shall furnish all pipe flashings and sheet metal jacks for their work. Pipe flashings and sheet metal jacks are to be installed by others.
- w. Subcontractor shall provide all block outs and sleeves through floors, walls, and ceilings required for their work.
- x. Subcontractor shall coordinate with the framing Subcontractor for location and size of all required backing for the HVAC.
- y. Subcontractor shall furnish and install fire stops, fire retardant compound and/or safing to seal all of the Subcontractor's penetrations through fire-rated assemblies.
- z. Subcontractor will provide all layout and drilling of holes for penetrations through the concrete on metal deck.
- aa. Subcontractor will provide fastening system for horizontal fan coil units. General Contractor will provide framed rough opening of.
- bb. Furnish and install Access panels.
- cc. Subcontractor shall be responsible for fire caulking of all plumbing and mechanical penetrations through rated walls, ceilings, and floors.
- dd. Subcontractor shall be responsible for coordination of its requirements with the structural steel drawings. Includes fire stops, fire retardant compound and/or having to seal all of the Subcontractor's penetrations through fire-rated construction as required.
- ee. Furnish and install specified labeling, stenciling, tagging and identification of work included in this subcontract.

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EXHIBIT "B"
DAEDALUS USA, INC.
SUBCONTRACT SPECIFIC PROVISIONS

May 20, 2004

- ff. Subcontractor to perform flushing, start-up, testing, and balancing of its systems as specified.
- gg. Subcontractor to seal all penetrations.
- hh. Subcontractor will provide all gas flex hose connections where necessary for gas connections at fireplace, range, etc.
- ii. Subcontractor will responsible for caulking around toilet base, sinks, and fixtures to provide a finish product.
- jj. Subcontractor shall perform all low voltage electrical control wiring required for the temperature controls and instrumentation.
- kk. Subcontractor shall furnish and install any miscellaneous iron shown on the mechanical drawings, or required for completion of Subcontractor's Work which is not shown on the Architectural or Structural Drawings.
- ll. Subcontractor shall be responsible for lifting and hoisting of it's own materials or equipment.
- mm. Subcontractor will be responsible for coordination with the chimney vent cap installer (Stewarts) to provide adequate vent pipe at chimney vents.
- nn. Include all prime and /or finish painting of plumbing work and equipment if it is specifically required by the contract documents to be performed by the plumbing contractor.
- oo. All clamps, hangers, supports, wires and seismic anchorage for all work in this subcontract.
- pp. All drains to be set at required heights and to be taped or protected in some manner as to not allow construction debris or grout from the Tile Installation process to enter the waste water system. Floor drains must be polished at completion of Plumbing Finish Trim.
- qq. Subcontractor shall provide removal, repair, capping off, re-routing of existing services where required for connection to and interface with existing work.
- rr. Subcontractor will be responsible for Mechanical Sound and Vibration Control as listed in project documents.
- ss. Subcontractor shall be responsible for all trash or shall participate in the cost of the on site dumpster.
- tt.

III. EXCLUSIONS:

- 1. Chiller Line from Building E to Building F
- 2. All Fireplace venting is bid for direct vent.

IV. UNIT PRICES:

V. ALTERNATES:

ACKNOWLEDGEMENT: (Please initial and return with Subcontract Agreement)

Subcontractor: CP

Contractor: [Signature]

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EXHIBIT "C"
DAEDALUS USA, INC.
PROJECT SPECIFIC SAFETY PROGRAM

May 20, 2004


JOB NAME: Lodges at Deer Valley – Building F
JOB NO: 1422
PHASE CODE: 15-011
SUBCONTRACTOR: Shamrock Plumbing
CONTRACT NO.: 1422-08

The Contractor's Project Superintendent shall be in charge of all safety requirements and regulations on the project site. Contractor shall provide Subcontractor a copy of Contractor's Project Safety Program. Subcontractor shall comply with the following:

1. Subcontractor shall comply with all Federal Occupational Safety and Health Act (OSHA) and Utah Occupational Safety and Health Act (UOSHA) rules and regulations, including Hazard Communication Standards and the requirement to provide the appropriate Material Safety Data Sheets (MSDS).
2. Subcontractor shall be solely responsible for all fines, penalties and costs resulting from safety violations on the Subcontract Work.
3. Subcontractor shall comply with Contractor's Project Safety Program dated February 20, 2001 (attached) and cooperate with Contractor's field supervisors to prevent or eliminate conditions that could result in personal injury.
4. Subcontractor shall furnish and maintain all safety equipment required in the execution of the Subcontract Work.
5. Hard hats shall be worn at all times as required by OSHA and UOSHA.
6. Subcontractor shall provide Contractor an accident report for any accident that results in either personal injury or property damage.
7. Individuals who do not comply with Contractor's Project Safety Program will be asked to leave the project site. Repeated safety violations, or refusal to comply with the Safety Program is cause for termination of this Subcontract Agreement.

ACKNOWLEDGEMENT: (Please initial and return with Subcontract Agreement)

Subcontractor: 

Contractor: 

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Appendix B-2

Shamrock



Plumbing, LLC

WARRANTY/ GUARANTEE FOR Daedalus - USA

We, the undersigned do hereby warranty and guarantee that the parts of the work described above which we have furnished and/or installed for:

The Lodges At Deer Valley
Park City, UT

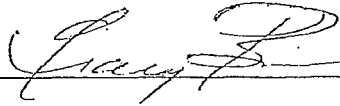
Is in accordance with the contract documents and that all said work as installed will fulfill or exceed all of the warranty and guarantee requirements. We agree to repair or replace work installed by us, together with any adjacent work which is displaced or damaged by so doing, that proves to be defective in workmanship, material or operation within a period of one (1) year from the date of final acceptance of the entire work by the Owner, ordinary wear and tear and unusual neglect or abuse expected.

In the event of our failure to comply with the above mentioned conditions within a reasonable time period determined by the Owner, after notification in writing, we, the undersigned, all collectively and separately hereby authorize the Owner to have said defective work repaired and /or replaced and made good and agree to pay the Owner upon demand all monies that were expended in making good said defective work, including all collection costs and reasonable attorney fees.

PROJECT SUBSTANTIAL COMPLETION DATE: December 18, 2004

Date: April 8, 2005

Contractor: Shamrock Plumbing LLC.

Representative/Title:  Craig Barrus, Vice President.

State License Number: 5034847-5501

LOCAL REPRESENTATIVE: For maintenance, repair or replacement services contact:

Name: Bill Payne

Address: 340 West 500 North, North Salt Lake, UT 84054

Phone #: 801-295-1690

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Appendix C

West's Utah Code Annotated Currentness

State Court Rules

☞ Utah Rules of Civil Procedure (Refs & Annos)

☞ Part V. Depositions and Discovery

➔ **RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY**

(a) Required disclosures; Discovery methods.

(a)(1) *Initial disclosures.* Except in cases exempt under subdivision (a)(2) and except as otherwise stipulated or directed by order, a party shall, without awaiting a discovery request, provide to other parties:

(a)(1)(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information supporting its claims or defenses, unless solely for impeachment, identifying the subjects of the information;

(a)(1)(B) a copy of, or a description by category and location of, all discoverable documents, data compilations, electronically stored information, and tangible things in the possession, custody, or control of the party supporting its claims or defenses, unless solely for impeachment;

(a)(1)(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 all discoverable documents or other evidentiary material on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(a)(1)(D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the case or to indemnify or reimburse for payments made to satisfy the judgment.

Unless otherwise stipulated by the parties or ordered by the court, the disclosures required by subdivision (a)(1) shall be made within 14 days after the meeting of the parties under subdivision (f). Unless otherwise stipulated by the parties or ordered by the court, a party joined after the meeting of the parties shall make these disclosures within 30 days after being served. A party shall make initial disclosures based on the information then reasonably available and is not excused from making disclosures because the party has not fully completed the investigation of the case or because the party challenges the

sufficiency of another party's disclosures or because another party has not made disclosures.

(a)(2) *Exemptions.*

(a)(2)(A) The requirements of subdivision (a)(1) and subdivision (f) do not apply to actions:

(a)(2)(A)(i) based on contract in which the amount demanded in the pleadings is \$20,000 or less;

(a)(2)(A)(ii) for judicial review of adjudicative proceedings or rule making proceedings of an administrative agency;

(a)(2)(A)(iii) governed by Rule 65B or Rule 65C;

(a)(2)(A)(iv) to enforce an arbitration award;

(a)(2)(A)(v) for water rights general adjudication under Title 73, Chapter 4; and

(a)(2)(A)(vi) in which any party not admitted to practice law in Utah is not represented by counsel.

(a)(2)(B) In an exempt action, the matters subject to disclosure under subpart (a)(1) are subject to discovery under subpart (b).

(a)(3) Disclosure of expert testimony.

(a)(3)(A) A party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Utah Rules of Evidence.

(a)(3)(B) Unless otherwise stipulated by the parties or ordered by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness or party. The report shall contain the subject matter on which the expert is expected to testify; the substance of the facts and opinions to which the expert is expected to testify; a summary of the grounds for each opinion; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(a)(3)(C) Unless otherwise stipulated by the parties or ordered by the court, the disclosures required by subdivision (a)(3) shall be made within 30 days after the expiration of fact discovery as provided by subdivision (d) or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (3)(B), within 60 days after the disclosure made by the other party.

(a)(4) *Pretrial disclosures.* A party shall provide to other parties the following information regarding the evidence that it may present at trial other than solely for impeachment:

(a)(4)(A) the name and, if not previously provided, the address and telephone number of each witness, separately identifying witnesses the party expects to present and witnesses the party may call if the need arises;

(a)(4)(B) the designation of witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and

(a)(4)(C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

Unless otherwise stipulated by the parties or ordered by the court, the disclosures required by subdivision (a)(4) shall be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by the court, a party may serve and file a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under subparagraph (B) and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under subparagraph (C). Objections not so disclosed, other than objections under Rules 402 and 403 of the Utah Rules of Evidence, shall be deemed waived unless excused by the court for good cause shown.

(a)(5) *Form of disclosures.* Unless otherwise stipulated by the parties or ordered by the court, all disclosures under paragraphs (1), (3) and (4) shall be made in writing, signed and served.

(a)(6) *Methods to discover additional matter.* Parties may obtain discovery by one or more of the following methods: depositions upon

oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) Discovery scope and limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(b)(1) *In general.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(b)(2) A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. The party shall expressly make any claim that the source is not reasonably accessible, describing the source, the nature and extent of the burden, the nature of the information not provided, and any other information that will enable other parties to assess the claim. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may order discovery from such sources if the requesting party shows good cause, considering the limitations of subsection (b)(3). The court may specify conditions for the discovery.

(b)(3) *Limitations.* The frequency or extent of use of the discovery methods set forth in Subdivision (a)(6) shall be limited by the court if it determines that:

(b)(3)(A) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(b)(3)(B) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

(b)(3)(C) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Subdivision (c).

(b)(4) *Trial preparation: Materials.* Subject to the provisions of Subdivision (b)(5) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under Subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(b)(5) *Trial preparation: Experts.*

(b)(5)(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report is required under subdivision (a)(3)(B), any deposition shall be conducted within 60 days after the report is provided.

(b)(5)(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not

expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(b)(5)(C) Unless manifest injustice would result,

(b)(5)(C)(i) The court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under Subdivision (b)(5) of this rule; and

(b)(5)(C)(ii) With respect to discovery obtained under Subdivision (b)(5)(A) of this rule the court may require, and with respect to discovery obtained under Subdivision (b)(5)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(b)(6) *Claims of Privilege or Protection of Trial Preparation Materials.*

(b)(6)(A) Information withheld. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(b)(6)(B) Information produced. If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

(c) Protective orders. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other

affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(c)(1) that the discovery not be had;

(c)(2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(c)(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(c)(4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(c)(5) that discovery be conducted with no one present except persons designated by the court;

(c)(6) that a deposition after being sealed be opened only by order of the court;

(c)(7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

(c)(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) Sequence and timing of discovery. Except for cases exempt under subdivision (a)(2), except as authorized under these rules, or unless otherwise stipulated by the parties or ordered by the court, a party may not seek discovery from any source before the parties have met and conferred as required by subdivision (f). Unless otherwise stipulated by the parties or ordered by the court, fact discovery shall be completed within 240 days after the first answer is filed. Unless the

court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of responses. A party who has made a disclosure under subdivision (a) or responded to a request for discovery with a response is under a duty to supplement the disclosure or response to include information thereafter acquired if ordered by the court or in the following circumstances:

(e)(1) A party is under a duty to supplement at appropriate intervals disclosures under subdivision (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under subdivision (a)(3)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert.

(e)(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

(f) Discovery and scheduling conference.

The following applies to all cases not exempt under subdivision (a)(2), except as otherwise stipulated or directed by order.

(f)(1) The parties shall, as soon as practicable after commencement of the action, meet in person or by telephone to discuss the nature and basis of their claims and defenses, to discuss the possibilities for settlement of the action, to make or arrange for the disclosures required by subdivision (a)(1), to discuss any issues relating to preserving discoverable information and to develop a stipulated discovery plan. Plaintiff's counsel shall schedule the meeting. The attorneys of record shall be present at the meeting and shall attempt in good faith to agree upon the discovery plan.

(f)(2) The plan shall include:

(f)(2)(A) what changes should be made in the timing, form, or requirement for disclosures under subdivision (a), including a statement as to when disclosures under subdivision (a)(1) were made or will be made;

(f)(2)(B) the subjects on which discovery may be needed, when discovery should be completed, whether discovery should be conducted in phases and whether discovery should be limited to particular issues;

(f)(2)(C) any issues relating to preservation, disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(f)(2)(D) any issues relating to claims of privilege or of protection as trial-preparation material, including--if the parties agree on a procedure to assert such claims after production--whether to ask the court to include their agreement in an order;

(f)(2)(E) what changes should be made in the limitations on discovery imposed under these rules, and what other limitations should be imposed;

(f)(2)(F) the deadline for filing the description of the factual and legal basis for allocating fault to a non-party and the identity of the non-party; and

(f)(2)(G) any other orders that should be entered by the court.

(f)(3) Plaintiff's counsel shall submit to the court within 14 days after the meeting and in any event no more than 60 days after the first answer is filed a proposed form of order in conformity with the parties' stipulated discovery plan. The proposed form of order shall also include each of the subjects listed in Rule 16(b)(1)-(8), except that the date or dates for pretrial conferences, final pretrial conference and trial shall be scheduled with the court or may be deferred until the close of discovery. If the parties are unable to agree to the terms of a discovery plan or any part thereof, the plaintiff shall and any party may move the court for entry of a discovery order on any topic on which the parties are unable to agree. Unless otherwise ordered by the court, the presumptions established by these rules shall govern any subject not included within the parties' stipulated discovery plan.

(f)(4) Any party may request a scheduling and management conference or order under Rule 16(b).

(f)(5) A party joined after the meeting of the parties is bound by the stipulated discovery plan and discovery order, unless the court orders on stipulation or motion a modification of the discovery plan and order. The stipulation or motion shall be filed within a reasonable time after joinder.

(g) Signing of discovery requests, responses, and objections. Every request for discovery or response or objection thereto made by a party shall be signed by at least one attorney of record or by the party if the party is not represented, whose address shall be stated. The signature of the attorney or party constitutes a certification that the person has read the request, response, or objection and that to the best of the person's knowledge, information, and belief formed after reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney fee.

(h) Deposition where action pending in another state. Any party to an action or proceeding in another state may take the deposition of any person within this state, in the same manner and subject to the same conditions and limitations as if such action or proceeding were pending in this state, provided that in order to obtain a subpoena the notice of the taking of such deposition shall be filed with the clerk of the court of the county in which the person whose deposition is to be taken resides or is to be served, and provided further that all matters arising during the taking of such deposition which by the rules are required to be submitted to the court shall be submitted to the court in the county where the deposition is being taken.

(i) Filing.

(i)(1) Unless otherwise ordered by the court, a party shall not file disclosures or requests for discovery with the court, but shall file only the original certificate of service stating that the disclosures or requests for discovery have been served on the other parties and the date of service. Unless otherwise ordered by the court, a party shall not file a response to a request for discovery with the court, but shall file only the original certificate of service stating that the response has been served on the other parties and the date of service. Except as provided in Rule 30(f)(1), Rule 32 or unless otherwise ordered by the court, depositions shall not be filed with the court.

(i)(2) A party filing a motion under subdivision (c) or a motion under Rule 37(a) shall attach to the motion a copy of the request for discovery or the response which is at issue.

CREDIT(S)

[Effective May 2, 2005; amended effective November 1, 2007; November, 2008.]