

2015

**Rocky Mountain Builders Supply, Inc., Dba Ck Builders Plaintiff/  
Appellant, v. Steve Marks, Defendant/ Appellee.**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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ROCKY MOUNTAIN BUILDERS )  
SUPPLY, INC., dba CK BUILDERS )

Plaintiff/Appellant, )

v. )

STEVE MARKS, )

Defendant/Appellee. )

**BRIEF OF THE  
PLAINTIFF/APPELLANT**

Appellate Case No. 20150456-CA

---oo0oo---

Appeal from Order of Dismissal of the Fourth District Court,  
Utah County  
The Honorable Samuel McVey, District Court Judge, Presiding District Court Case  
No. 140500095

---oo0oo---

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OCT 28 2015



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## **I. JURISDICTION OF THE APPELLATE COURT**

This court has jurisdiction over this matter in accordance with Utah Code Ann. 78A-4-103(2)(j) as it is a matter which has been transferred to the Utah Court of Appeals by the Utah Supreme Court.

## **II. ISSUES PRESENTED FOR APPEAL**

The following issues are presented for review:

### **A. Is the Forum Selection Clause Contract Enforceable?**

The first issue presented on appeal is whether the forum selection /consent to jurisdiction clause (hereinafter, the “Forum Selection Clause”) in the contract between the parties is enforceable. A forum selection clause is enforceable as long as it is not unjust or unreasonable. Restatement (Second) of Conflict of Laws § 80 (Supp.1988). *Prows v. Pinpoint Retail Sys., Inc.*, 868 P.2d 809, 812 (Utah 1993).

In this case the trial court made its decision on Appellee’s Motion to Dismiss based on documentary evidence only. When the trial court makes a pre-trial jurisdictional decision based solely on documentary evidence, an appeal from that decision presents only legal issues which are reviewed for correctness. *Arguello v. Industrial Woodworking Mach. Co.*, 838 P.2d 1120, 1121 (Utah 1992).



**B. Is there a Rational Nexus Between the Parties or the Dispute and the Forum Selected in the Contract?**

The second issue presented on appeal is, assuming the Forum Selection Clause is enforceable, is there a rational nexus between the parties to the contract and the forum selected in the contract? If so, jurisdiction is properly exercised over the parties in the selected forum. *Jacobsen Const. Co. v. Teton Builders*, 2005 UT 4, ¶43, 106 P.3d 719.

In this case the trial court made its decision on Appellee's Motion to Dismiss based on documentary evidence only. When the trial court makes a pre-trial jurisdictional decision based solely on documentary evidence, an appeal from that decision presents only legal issues which are reviewed for correctness. *Arguello v. Industrial Woodworking Mach. Co.*, 838 P.2d 1120, 1121 (Utah 1992).

**C. Does Utah Code Ann. §13-8-3 Invalidate the Forum Selection Clause in this Case?**

The third issue on appeal is whether Utah Code Ann. §13-8-3 makes enforcement of the forum selection clause unjust to Appellee.

When reviewing a trial court's interpretation of a statute, the standard of review is for correctness. *H.U.F. v. W.P.W.*, 2009 UT 10, ¶ 19, 203 P.3d 943, 949 (citations omitted).



### **III. THE ISSUES PRESENTED FOR APPEAL WERE PRESERVED IN THE TRIAL COURT.**

#### **A. Is the Forum Selection Clause Enforceable?**

This issue was preserved in the trial court as demonstrated by Appellant's Opposition Brief to Appellee's Motion to Dismiss (See Record on Appeal pgs. 38-41; see also the transcript from the oral argument in the trial court. (See Record on Appeal, pgs. 125-130)

#### **B. Is there a Rational Nexus Between the Parties or the Dispute and the Forum Selected in the Contract?**

This issue was preserved in the trial court as demonstrated by Appellant's Opposition Brief (See Record on Appeal pgs. 38-41) and during oral argument. (Record on Appeal, pgs. 125-130).

#### **C. Does Utah Code Ann. §13-8-3 Render the Enforcement of the Forum Selection Clause Unjust?**

This issue was preserved in the trial court during oral argument on Appellee's Motion to Dismiss Appellant's Complaint. (Record on Appeal, pgs. 124-127).



#### **IV. STATUTE WHOSE INTERPRETATION IS DETERMINATIVE OF THIS APPEAL.**

Utah Code Ann. §13-8-3. Construction contracts and purchase orders --  
Venue. (See text of this statute set forth in Addendum A hereto pursuant to Rule of Appellate Procedure 24(a)(6) and (a)(11)).

#### **V. STATEMENT OF THE CASE**

**A. Nature of the Case.** This case arises out of a contractual dispute between Appellant and Appellee. Appellant is a roofing contractor who installed roofs on a shed and two gazebos at Appellee's residence in Montana pursuant to a contract between the parties (hereinafter, the "Contract"). When Appellant did not receive payment from Appellee for the roofing work done pursuant to the Contract, it filed a breach of contract action against Appellee in the Fourth District Court of Utah in Provo, Utah pursuant to a forum selection clause in the Contract.

#### **B. Course of the Proceedings and Disposition in the Trial Court.**

In response to Appellant's Complaint, Appellee filed a Motion to Dismiss the Complaint on the basis that: 1) Montana law should apply to the dispute between the parties; and 2) that the Utah District Court did not have personal



jurisdiction over the Appellee notwithstanding the forum selection clause in the contract.

After oral argument on Appellee's Motion to Dismiss, the trial court determined that Utah law applies to the action but that the Forum Selection Clause was unenforceable to exercise jurisdiction over the Appellee in Utah. As a result the trial court dismissed Appellant's Complaint without prejudice.

**C. Statement of Facts.**

1. Appellant is a roofing contractor with its principal place of business in Pleasant Grove, Utah. (Record on Appeal, pg.1)
2. Appellee is a resident of Billings, Montana. (Record on Appeal, pgs.7-9)
3. On or about November 19, 2013, in Billings, Montana, Appellant and Appellee entered into a written contract (hereinafter, the "Contract") whereby Appellant agreed to install roofs on two gazebos and a shed at Appellee's residence in Billings, Montana in exchange for payment of \$14,000. (Record on Appeal, pgs. 7-9).



4. Appellee made a down payment on the price of the Contract in the amount of \$2,800 leaving a total amount owing to Appellant under the Contract of \$11,200. (Record on Appeal, pgs.3 and 7-9).

5. Appellant completed the installation of the roofs on the two gazebos and the shed on Appellee's property. (Record on Appeal, pg.3).

6. Despite Appellant's completion of the installation of the roofs at Appellee's residence in accordance with the Contract, Appellee has refused to pay Appellant the remaining balance on the Contract of \$11,200 plus interest and attorney fees and costs. (Record on Appeal, pgs.4-6).

7. The Contract contains the following forum selection clause:

Governing Law: This contract and each change order shall be governed by and interpreted in accordance with the laws of the State of Utah, without giving effect to its principles governing conflicts of law and shall be brought in the courts of the State of Utah. Any action, suit or proceeding to enforce any provision of, or based on any matter arising out of or in connection with this contract or the transactions contemplated hereby shall be brought in the state courts in the Fourth District Court, Utah County, sitting in Provo, Utah. Any federal action, suit or proceeding to enforce any provision of, or based on any matter arising out of or in connection with this contract or the transactions contemplated hereby shall be brought in the federal courts located in Salt Lake City, Utah. The parties agree to the exclusive jurisdiction of such courts (and the appropriate appellate courts therefrom) and each party hereto waives (to the full extent permitted by law) any objection it may have to the laying of venue of



any such suit, action or proceeding in any such court or that any such suit, action or proceeding has been brought in an inconvenient forum.

(Record on Appeal, pg. 8)

8. At the top of the Contract is listed Appellant's principal address in Pleasant Grove, Utah as well as a satellite office address for Appellant in Havre, Montana. (Record on Appeal, pg.7).

9. Also at the top of the Contract are listed telephone numbers for Appellant's president, Chad Kirkham in both Utah and Montana as well as a Utah telephone number for Appellant's "Finance", Robyn Kirkam. (Record on Appeal, pg.7).

10. The top of the Contract also has an email address for Appellant listed as: ckbuilder.utah@gmail.com. (Record on Appeal, pg.7).

11. The top of the Contract lists Appellant's contractor's license numbers for the states of Utah, Montana, Oregon and Idaho. (Record on Appeal, pg. 7).

12. Finally, the top of the Contract lists four telephone numbers for Appellant's Estimating Manager. One each in Utah, Montana, Idaho and Wyoming. (Record on Appeal, pg.7).



13. On January 21, 2014, Appellant filed a civil complaint against Appellee in the Fourth District Court of Utah, Provo Department for breach of contract and breach of the covenant of good faith and fair dealing. (Record on Appeal, pgs. 1-6).

14. On January 23, 2015, Appellee filed a Motion to Dismiss Appellant's Complaint on the grounds that the forum selection clause in the Contract was unenforceable and that the Utah Court lacked personal jurisdiction over Appellee. (Record on Appeal, pgs. 16-17).

15. On May 13, 2015, the trial court issued its Ruling and Order granting Appellees' Motion to Dismiss and dismissed Appellant's Complaint without prejudice on the grounds that: 1) the forum selection clause was unenforceable to assert personal jurisdiction over Appellee in Utah; 2) that enforcing the forum selection clause against Appellee would be so inconvenient as to be unfair or unreasonable; and 3) that in consideration of Utah Code Ann. §13-8-3 it would be unjust to enforce the forum selection clause against Appellee. (Record on Appeal, pgs. 93-97).

16. On June 2, 2015, Appellant filed its Notice of Appeal of the trial court's dismissal of its Complaint. (Record on Appeal, pgs. 98-99).



## **VI. SUMMARY OF ARGUMENTS**

### **A. The Forum Selection Clause in the Contract is Enforceable.**

“The parties' agreement as to the place of the action will be given effect unless it is unfair or unreasonable.” Restatement (Second) of Conflict of Laws § 80 (Supp.1988). *Prows v. Pinpoint Retail Sys., Inc.*, 868 P.2d 809, 812 (Utah 1993). The party challenging the enforceability of the forum selection clause has the burden of demonstrating that litigating the case in the chosen state would be so seriously inconvenient that it would be unjust and for all practical purposes deprive the party of its day in court. *Prows v. Pinpoint Retail Sys., Inc.*, 868 P.2d at 812. (See also, *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513, 525 (1972)).

In this case, Appellee cannot carry his burden of showing that forcing him to litigate the instant action in Utah would be unfair or unreasonable because doing so would be so seriously inconvenient as to deprive him of his day in court. Accordingly, the forum selection clause in this case is enforceable.

### **B. The Forum Selection Clause is Sufficient for Utah to Exercise Jurisdiction Over the Appellee Because there is a Rational Nexus between Utah and Appellant.**



When an enforceable forum selection clause exists, [Utah courts] require only a “rational nexus” between Utah and the underlying dispute. This nexus need not meet the more rigorous minimum contacts standard utilized in those cases where a forum selection clause is not present.

*Jacobsen Const. Co. v. Teton Builders*, 2005 UT 4, ¶ 32, 106 P.3d 719.

(citations omitted). In accordance with *Jacobson*, a connection between one of the parties to the dispute and Utah is sufficient to satisfy the “rational nexus” test articulated in *Phone Directories Co. v. Henderson*, 2000 UT 64, 8 P.3d 256. As in *Jacobson*, that connection is the fact that Appellant’s principal place of business is located in Utah. Accordingly, the rational nexus test is satisfied and jurisdiction in Utah should be exercised over Appellee in this case.

**C. Utah Code Ann. §13-8-3 is Not Applicable in This Case and Does Not Render the Forum Selection Clause Unjust.**

The trial court held that in light of Utah Code Ann. §13-8-3, “it seems unjust” to enforce the forum selection clause involving real estate in another state. (Record on Appeal, pg. 96). However, §13-8-3 is inapplicable in this case because it only applies to “construction contracts” between contractors, sub-contractors, suppliers and construction managers. (See §13-8-3(1)).



Appellee is an owner of the property where Appellant did construction work. As such, by definition, he cannot be a party to a “construction contract” covered by this statute and it is inapplicable.

Additionally, the *Jacobson* case rejected a similar argument that the statute represents a Utah public policy which is violated by the forum selection clause in that case. *Jacobson Const.*, 106 P.3d 719 at ¶¶27-28. Accordingly, §13-8-3 cannot be grounds for invalidating the forum selection clause.

## **VII. ARGUMENT.**

### **A. The Court’s Decision Should Be Guided by the Two Part Analysis Articulated in *Jacobson*.**

In November, 2013, the parties to this action entered into the Contract for Appellant to install roofs on two gazebos and a shed at Appellee’s personal residence in Billings, Montana. The Contract contains the Forum Selection Clause which states in pertinent part:

Any action, suit or proceeding to enforce any provision of, or based on any matter arising out of or in connection with this contract or the transactions contemplated hereby shall be brought in the state courts in the Fourth District Court, Utah County, sitting in Provo, Utah.... The parties agree to the exclusive jurisdiction of such courts (and the appropriate appellate courts therefrom) and each party hereto waives (to the full extent permitted by law) any objection it may have to the laying of venue of any such suit, action or



proceeding in any such court or that any such suit, action or proceeding has been brought in an inconvenient forum.

When a dispute arose between the parties regarding payment by Appellee under the Contract, Appellant filed the instant action in the Fourth District Court of Utah pursuant to the Forum Selection Clause. As noted above, Appellee filed a Motion to Dismiss with the trial court arguing that the Forum Selection Clause is unenforceable and that the Utah courts cannot exercise personal jurisdiction over him for an action arising out of the Contract. The trial court agreed with Appellee ruling that the Forum Selection Clause is unenforceable, that there is not a rational nexus between the parties or dispute and the selected forum and that in any event, in light of U.C.A. §13-8-3, enforcing the Forum Selection Clause would be unjust in the circumstances.

*Jacobson* is substantially similar to this case and should guide this court's analysis of the instant matter. The only differences between the instant case and *Jacobson* are: 1) that pursuant to the choice of law provision in the contract in *Jacobson*, the court applied Wyoming law in its analysis of the enforceability of the forum selection clause<sup>1</sup>; and 2) the parties to the contract in *Jacobson* were a

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<sup>1</sup> *Jacobson* at ¶12.



contractor and a subcontractor rather than a contractor and a property owner as is the case here. *Jacobson* at ¶3.

Nonetheless, Wyoming law “has adopted the modern approach to forum selection clauses” which is essentially the same as Utah’s approach to forum selection clauses<sup>2</sup>. *Jacobson* at ¶13. Therefore, the analysis in *Jacobson* on the enforceability of forum selection clauses should be controlling in this instance.

As noted in *Jacobson*, the determination of whether a forum selection clause can be enforced to exercise jurisdiction in Utah over an out of state party is a two part analysis. First, the court should determine if the forum selection clause is enforceable. Second, the court must determine if the instant case has a sufficiently rational nexus to Utah to exercise personal jurisdiction over the party challenging the forum selection clause. *Id.* at ¶11.

**1. The Forum Selection Clause in the Contract is Enforceable.**

The seminal case in Utah regarding the enforceability of forum selection clauses is *Prows v. Pinpoint Retail Sys., Inc.*, 868 P.2d 809 (Utah 1993). In *Prows*, the Court adopted the modern approach to forum selection clauses and adopted

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<sup>2</sup> Compare *Durdahl v. National Safety Associates, Inc.*, 988 P.2d 525 (Wyo.1999) and *Prows v. Pinpoint Retail Sys., Inc.*, 868 P.2d 809, 812 (Utah 1993).



Restatement (Second) of Conflict of Laws § 80 (Supp.1988) which states, “The parties' agreement as to the place of the action will be given effect unless it is unfair or unreasonable.” *Prows*, 868 P.2d at 812. The party challenging the enforcement of the forum selection clause has the burden of proving that the enforcement of the clause is unfair or unjust. *Id.*

To meet this burden, a plaintiff must demonstrate that the “chosen state would be so seriously an inconvenient forum that to require the plaintiff to bring suit there would be unjust.” On this point, the United States Supreme Court stated, “[I]t should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be [so] gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court.” *Bremen*, 407 U.S. at 18, 92 S.Ct. at 1917, 32 L.Ed.2d at 525.

*Id.*

In *Prows* the Court determined that the forum selection clause was unfair and unreasonable and therefore, unenforceable. But its facts are clearly distinguishable from the instant case.

*Prows* involved a contractual dispute between Prows and Pinpoint Retail Systems, Inc. (hereinafter, “Pinpoint”). Prows was a Utah resident and Pinpoint was a Canadian company. Prows also alleged that Flying J, a Utah company,



conspired with Pinpoint to breach his agreement with Pinpoint, thereby causing him damages. *Prows* at 809-810.

The contract between Prows and Pinpoint contained a forum selection clause identifying New York as the only venue in which a dispute arising out the contract could be brought. *Id.*

In *Prows*, the court held that the forum selection clause was unfair and unreasonable primarily because enforcing the forum selection clause would require Prows to litigate two different cases on the same claims arising out of the same operative facts against the two defendants in different jurisdictions. If enforced, the forum selection clause would have forced Prows to litigate the case against Pinpoint in New York while at the same time litigating a second case against Flying J in Utah.<sup>3</sup>

Increased costs and policy considerations aside, however, requiring Prows to litigate against Pinpoint in New York and Flying J in Utah would twice impose on him the onerous burden of proving a “conspiracy” between two defendants, only one of whom is present at each trial. Forcing Prows to shoulder this heavy burden of proof, standing alone, is unjust and for all practical purposes denies him his day in court.

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<sup>3</sup> Flying J could not be forced to litigate in New York because it was not a party to the contract containing the forum selection clause.



*Prows* at 813.

There are no such considerations in this case. Appellant and Appellee are the only two parties to the action so there is no danger that by enforcing the Forum Selection Clause the parties would be forced to litigate claims arising out the same contract and facts in two separate forums. (*See also Coombs v. Juice Works Dev. Inc.*, 81 P.3d 769 at ¶16 where the court made the same factual distinction when deciding to enforce a forum selection clause; and *Jacobson* at ¶¶ 29-30, same analysis and conclusion).

Appellee's arguments against enforcing the Forum Selection Clause are that 1) That Appellee was in the weaker position when signing the Contract; and 2) that litigating the case in Utah would be overly burdensome because it would increase the costs of litigation to Appellee. (Record on Appeal, pgs. 26-27).

In the trial court's order granting Appellee's Motion to Dismiss, it determined that forcing Appellee to litigate the case in Utah would so greatly increase the costs to Appellee that enforcing the Forum Selection Clause would be unjust. (Record on Appeal, pgs. 96-97).

None of these reasons are sufficient grounds to invalidate the Forum Selection Clause based on the test laid out in *Prows*. Furthermore, Utah courts and



others have consistently rejected the foregoing grounds as insufficient to invalidate forum selection clauses.

First, it should be noted that the Utah Court of Appeals has stated:

A primary reason for forum selection clauses is to protect a party...from having to litigate in distant forums all over the nation.... [S]uch provisions should be enforced when invoked by the party for whose benefit they are intended.

*Coombs v. Juice Works Dev. Inc.*, 2003 UT App 388, ¶ 15, 81 P.3d 769.

Appellant is the party invoking the Forum Selection Clause in this case and for whose benefit it is intended.

In an unreported Utah Federal District Court case, the court determined that the increased cost of litigating cases based on the same operative facts in two separate forums because of a forum selection clause still did not make the forum selection clause unjust or unreasonable. It stated:

Enforcing the forum selection clause in this matter will require Ventura to shoulder the burden of litigating its claims against two defendants in separate forums. The court, however, does not find the burden to be unjust or unreasonable. Additionally, because none of the claims are alleged against both defendants, bifurcation of this case should be more easily manageable than in *Prows*.

*Ventura & Associates, L.L.C. v. HBH Franchise Co., LLC*, No. 2:11CV631, 2012 WL 777270, at \*4 (D. Utah Mar. 7, 2012).



In the *Coombs* case, the court held that the fact that the party challenging the forum selection clause did not read it and that it was not freely negotiated, did not make it unreasonable or unjust. *Coombs v. Juice Works Dev., Inc.*, 81 P.3d 769 at ¶12.<sup>4</sup>

Coming to the conclusion that forcing Appellee to litigate this case in Utah is so seriously inconvenient that he would “for all practical purposes be deprived of his day in court,” flies in the face of all precedent, both in and outside of Utah.

The only witnesses identified by Appellee that would be forced to travel to Utah for a trial would be Appellee and a roofing contractor expert on behalf of Appellee. (Record on Appeal, pgs. 120-121). However, if the forum selection clause were not enforced, Appellant would have to pay for the cost of having at least that many witnesses travel to Montana for trial-- the owner of the company, and the workers who installed the roofs. The fact that Appellee would be forced to retain a Utah attorney rather than a Montana attorney would not mean any

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<sup>4</sup> The United States Supreme Court has noted that a forum selection clause in a non-negotiated form contract is valid, so long as it is not fundamentally unfair. *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595, 111 S.Ct. 1522, 1528, 113 L.Ed.2d 622 (1991) (upholding forum selection clause included in three page form attached to cruise ship ticket); accord *M.B. Rests., Inc. v. CKE Rests., Inc.*, 183 F.3d 750, 753 (8th Cir.1999) (enforcing forum selection clause in franchise agreements).



significant increased costs to Appellee. Most communication between attorneys and clients occur over the telephone or by email in any event.

Additionally, the fact that the work was done on a house in Montana contributes little to the analysis of whether enforcing the Forum Selection Clause would place a crippling financial burden or inconvenience upon Appellee. In fact, the cost of any inspection of the work done by Appellant in Montana by experts, witnesses etc., will be the same whether the case is litigated in Utah or Montana. Photographs of the property and the roofing work will likely be used in trial whether the case is held in Montana or Utah.

These types of additional costs will always be present when an out of state party is forced to litigate in Utah pursuant to a forum selection clause. If the facts of this case are grounds for invalidating the Forum Selection Clause, it is difficult to think of any case where a forum selection clause would be enforceable in Utah. As a result, the exception would literally swallow the rule that forum selection clauses are enforceable *unless* they are unjust or unreasonable. Such a ruling should not survive especially in light of the particularly heavy burden placed on the party challenging a forum selection clause. Therefore, based on the foregoing law,



facts and argument, the Appellant respectfully requests that the court reverse the trial court and find that the Forum Selection Clause is enforceable.

**2. There is a Sufficiently Rational Nexus to Utah to Justify the Exercise of Personal Jurisdiction Over Appellee.**

The second part of the analysis in *Jacobson* is whether there is a sufficiently rational nexus to Utah to justify the exercise of personal jurisdiction over the Appellee. *Jacobson* at ¶11.

In *Jacobson*, the specific issue addressed by the Court in determining whether jurisdiction should be asserted over the party challenging the forum selection clause, was whether one party's connection to Utah is sufficient to satisfy the rational nexus test articulated in *Phone Directories Co. v. Henderson*, 2000 UT 64, 8 P.3d 256. *Id.* ¶43. The Court answered this question in the affirmative; one party's connection to Utah is sufficient to satisfy the rational nexus test. In *Jacobson*, like the present case, that one connection was the fact that Jacobson's principal place of business was in Utah. *Id.*

The instant case is practically identical to *Jacobson*. Like *Jacobson*, the contract at issue was performed completely outside Utah and all post contract formation communication between the parties was outside Utah. In *Jacobson* it



was Wyoming<sup>5</sup>, here it was Montana<sup>6</sup>. Therefore the only connection to Utah and either of the parties in both cases is the fact that the principal place of business of the party seeking to enforce the forum selection clause is in Utah.

Despite the striking similarities between the two cases, the trial court inexplicably found that the instant case differed from *Jacobson* because apparently Appellant's principal place of business in Utah has less of a rational nexus to Utah than Jacobson's principal place of business in Utah. (Record on Appeal, pg. 95). The language out of *Jacobson* cited by the trial court in its Order to justify its ruling states the following:

We do note, however, that the nexus between the underlying dispute and the State of Utah must be truly "rational." Consequently, the mere presence of a post office box maintained in Utah by a litigant, for example, or the fact that parties wholly unconnected to Utah reasonably viewed Utah as providing a fair forum for a potential future dispute, would not provide a sufficiently rational nexus to justify the exercise of personal jurisdiction.

*Id.* at ¶43 and Record on Appeal, pg. 95.

The problem with the trial court's reasoning is that the two examples given by the Court in *Jacobson* have no application here. Appellant did not merely have a post office box maintained in Utah; its principal place of business is in Utah. As

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<sup>5</sup> *Jacobson* at ¶¶4-5

<sup>6</sup> (Record on Appeal, pgs. 2-3).



a result, neither can it be seriously argued that the parties in the instant matter are “wholly unconnected to Utah.”

Furthermore, the trial court’s and Appellee’s reliance on *Phone Directories* as a comparison to the instant case is unpersuasive and inappropriate. Clearly there were more connections between the party challenging the forum selection clause and Utah in *Phone Directories* than either *Jacobson* or the instant case. For example, *Phone Directories* mentions that the defendant in that case called the Phone Directories’ office looking for a job and followed up on multiple occasions and even visited the Phone Directories’ office in Utah for a job interview. *Phone Directories*, 8 P.3d 256 at ¶¶3-7.

But the *Jacobson* Court recognized this fact and specifically stated that it was tasked with the issue of whether a connection between only one party to the contract and Utah is sufficient to satisfy the rational nexus test since that issue was not addressed in *Phone Directories*. *Jacobson* at ¶43. As noted earlier, *Jacobson* answered this question in the affirmative. *Id.*

In the end, there really is no meaningful way to distinguish the *Jacobson* Court’s holding on the rational nexus test and the instant case. The fact that Appellant’s principal place of business is in Utah is sufficient to satisfy the rational



nexus test between Utah and the parties to this dispute. Concluding otherwise would require overturning the holding in *Jacobson* on this issue.

As a result, Appellant respectfully requests that the court reverse the trial court's order on Appellee's Motion to Dismiss and hold that the parties have a sufficient connection to Utah to satisfy the rational nexus test and exercise personal jurisdiction over the Appellee in this case.

**B. Utah Code Ann. §13-8-3 Does Not Render the Enforcement of the Forum Selection Clause Unjust.**

At the end of its Order, the trial court cites Utah Code Ann. §13-8-3 for the proposition that since "Utah would not enforce a forum selection clause selecting another state in a case involving Utah real estate," it would be unjust to enforce the Forum Selection Clause in this case. (Record on Appeal, pg. 96).

There are two problems with the application of this statute by the trial court. First, §13-8-3(1) defines the type of "construction agreement" which is governed thereunder which is limited to a:

construction contract, contract, subcontract, or purchase order for the design, construction, installation, or repair of an improvement to real property between a:

(a) construction manager;



- (b) general contractor;
- (c) subcontractor;
- (d) sub-subcontractor;
- (e) supplier; or
- (f) any combination of the persons described under Subsections (1)(a) through (e).

The facts in this case clearly show that while Appellant is a contractor, Appellee is a property owner (Record on Appeal, pgs. 1-3 and 7-9), and cannot be included in any of the parties to a construction agreement defined in §13-8-3(1). As a result the Contract in this case is not a “construction agreement” under §13-8-3 and therefore, this section is inapplicable here.

The second problem with the trial court’s application of §13-8-3 to the instant case is that the same argument was rejected by the *Jacobson* Court which stated:

Teton's argument is not persuasive. The primary purpose of section 13–8–3 is to prohibit out-of-state contractors, construction managers, or suppliers from haling a Utah resident into a foreign state's court when the work by the Utah resident is performed within the State of Utah. The statute furthers Utah's policy interest in providing its residents with a forum in which they can pursue their legal claims. See Utah Code Ann. § 78–27–22 (2002); *Trillium*, 2001 UT 101 at ¶ 20, 37 P.3d 1093. Therefore, contrary to Teton's assertions, the policy expressed by section 13–8–3 would be best served by



enforcing the forum selection clause at issue in this case and allowing Jacobsen to litigate its claims in its home state.

*Jacobson* at ¶28.

Based on *Jacobson*'s reasoning, even if §13-8-3 were applicable to the instant case, the public policy behind the statute actually favors enforcing the Forum Selection Clause and allowing Appellant to litigate its claims against Appellee in its home state.

Accordingly, the court should reverse the trial court's ruling that §13-8-3 would make the enforcement of the Forum Selection Clause here unjust to Appellee. Furthermore, the Court should hold that personal jurisdiction in Utah should be exercised over Appellee in this matter.

### **VIII. CONCLUSION**

Based on the foregoing facts, law and argument, Appellant requests the following relief from the court:

1. That the court reverse the trial court's ruling that the Forum Selection Clause is unenforceable;



2. That the court reverse the trial court's ruling that there is not a sufficiently rational nexus to Utah to justify the exercise of personal jurisdiction over appellee;

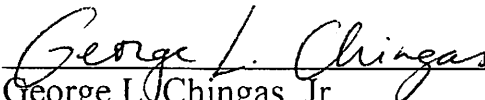
3. That the court reverse the trial court's ruling that the application of §13-8-3 makes enforcement of the Forum Selection Clause unjust;

4. That the court reverse the Trial Court's Order dismissing Appellant's Complaint without prejudice;

5. That the court enter a ruling instructing the trial court that the Forum Selection Clause should be enforced in this case to exercise personal jurisdiction over Appellee in this matter.

DATED and SIGNED this 21 day of October, 2015.

MACARTHUR, HEDER & METLER


  
George L. Chingas, Jr.  
*Attorneys for Appellant, Rocky Mountain  
Builders Supply, Inc. dba CK Builders*



## MAILING CERTIFICATE

I hereby certify that on the 21 day of October, 2015, I caused to be mailed two (2) true and correct copies of the foregoing *Brief of the Plaintiff/Appellant*, to the following, by U.S. First Class Mail, postage prepaid and addressed as follows:

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*Attorneys for Defendant/Appellee Steve Marks*

A handwritten signature in cursive script, reading "George L. Chingas", written over a horizontal line.



Certificate of Compliance With Rule 24(f)(1)

- 1) This brief complies with the type-volume limitation of Utah App. P.24(f)(1) because this brief contains 5,255 words, excluding the parts of the brief exempted by Utah R. App. P.24(f)(1)(B).
- 2) This brief complies with the typeface requirements of Utah R. App. P.27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 pt. Times New Roman style.



# ADDENDUM



## ADDENDUM TABLE OF CONTENTS

Attached to Appellant's Brief is Addendum No. 1 which contains:

1. A copy of Utah Code Ann. §13-8-3.....add. 1
2. *Ventura & Associates, L.L.C. v. HBH Franchise Co., LLC*,  
No. 2:11CV631, 2012 WL 777270,  
(D. Utah Mar. 7, 2012).....add. 2-6



**13-8-3 Construction contracts and purchase orders -- Venue.**

- (1) As used in this section, "construction agreement" means a construction contract, subcontract, or purchase order for the design, construction, installation, or repair of an improvement to real property between a:
  - (a) construction manager;
  - (b) general contractor;
  - (c) subcontractor;
  - (d) sub-subcontractor;
  - (e) supplier; or
  - (f) any combination of the persons described under Subsections (1)(a) through (e).
- (2) A provision in a construction agreement requiring a dispute arising under the agreement to be resolved in a forum outside of this state is void and unenforceable as against the public policy of this state if:
  - (a) one of the parties to the agreement is domiciled in this state; and
  - (b) work to be done and the equipment and materials to be supplied under the agreement involves a construction project in this state.
- (3) This section applies to a construction agreement executed, renewed, or materially modified on or after May 5, 1997.

Enacted by Chapter 60, 1997 General Session



2012 WL 777270

Only the Westlaw citation is currently available.

United States District Court,  
D. Utah,  
Central Division.

VENTURA & ASSOCIATES, L.L.C., a  
Utah limited liability company, Plaintiff,

v.

HBH FRANCHISE COMPANY, LLC, a  
Georgia limited liability company; and  
Dolphin Winder LLC d/b/a Winder Farms,  
a Utah limited liability company, Defendant.

No. 2:11cv631. | March 7, 2012.

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#### MEMORANDUM DECISION AND ORDER

PAUL M. WARNER, United States Magistrate Judge.

\*1 All parties in this case have consented to having United States Magistrate Judge Paul M. Warner conduct all proceedings in the case, including entry of final judgment, with appeal to the United States Court of Appeals for the Tenth Circuit.<sup>1</sup> See 28 U.S.C. § 636(c); Fed.R.Civ.P. 73. Before the court is HBH Franchise Company, LLC's ("HBH") motion to dismiss for improper venue.<sup>2</sup> On September 27, 2011, the court held a hearing on the motion. At the hearing, Ventura & Associates, L.L.C. ("Ventura") was represented by Blake T. Ostler and C. Christian Thompson, and HBH was represented by Robert Clark. Before the hearing, the court carefully considered the motion, memoranda, and other materials submitted by the parties. At the hearing, the court took the motion under advisement and ordered additional briefing. After considering the arguments of counsel, as well as the additional materials submitted by the parties, the court renders the following memorandum decision and order.

#### BACKGROUND

In August 2003, Ventura entered into a franchise agreement ("Agreement") with HBH to own and operate a HoneyBaked Ham and Cafe franchise. The Agreement provided Ventura a protected territory that encompassed all of Washington County, Utah ("Exclusive Territory"). Under the Agreement, HBH was entitled to sell HoneyBaked Ham products only to (1) existing customers of HBH or its affiliates located within the Exclusive Territory as of the effective date of the Agreement and (2) new customers developed by HBH or its affiliates' sales department within the Exclusive Territory after the effective date.

Ventura alleges, inter alia, that HBH breached the Agreement by allowing others to encroach on the Exclusive Territory. Specifically, Ventura contends that in 2008, HBH contracted with Dolphin Winder LLC d/b/a Winder Farms ("Winder") to sell HoneyBaked Ham products within Ventura's Exclusive Territory.

On June 6, 2011, Ventura filed this lawsuit in Third District Court, State of Utah, against HBH. Ventura alleges the following five causes of action against HBH: breach of contract, breach of the covenant of good faith and fair dealing, fraud, negligent misrepresentation, and tortious interference with contractual relations and prospective economic benefits. Specifically, Ventura asserts that HBH exploits its franchisees by (1) "charging exorbitant fees and markups on required purchases, and forcing franchisees to accept coupons from customers for free or highly discounted food items for which franchisees receive no reimbursement from HBH and which therefore benefit HBH by increasing its sales"; (2) "deliberately poaching the franchisee's customers through direct sales"; and (3) "selling products within the franchisee's protected territory through alternative channels of distribution and alternative distributors."<sup>3</sup>

On July 6, 2011, HBH removed this case to the United States District Court for the District of Utah pursuant to 28 U.S.C. § 1441(a). On July 29, 2011, Ventura amended its complaint to add Winder as a party, as well as a claim for tortious interference against Winder. On August 12, 2011, HBH filed the instant motion to dismiss.

#### DISCUSSION



\*2 HBH moves this court to dismiss this action for improper venue. Specifically, HBH argues that the Agreement contains a mandatory forum selection clause that requires Ventura to litigate any claims against HBH in Georgia. Section 20.7 of the Agreement provides, in relevant part:

[Ventura] may bring an action only in state court for the county where HBH's principal place of business is located at the time the action is brought or in any federal court of the district where HBH's principal place of business is located at the time the action is brought. [Ventura] submits and irrevocably consents to the exclusive jurisdiction of such courts and irrevocably waives, to the fullest extent permitted by law, any objection that it may now or hereafter have to such jurisdiction or venue.<sup>4</sup>

HBH contends that because its principal place of business is in Norcross, Georgia, Ventura was required to file this case in Georgia as set forth in the Agreement.

"A motion to dismiss based on a forum selection clause frequently is analyzed as a motion to dismiss for improper venue" under rule 12(b)(3) of the Federal Rules of Civil Procedure. *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 956 (10th Cir.1992). "Mandatory forum selection clauses are 'prima facie valid and should be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances.'" *Brahma Group, Inc. v. Benham Constructors, LLC*, No. 2:08-CV-970TS, 2009 WL 1065419, at \*3 (D. Utah April 20, 2009) (quoting *Milk 'N' More, Inc. v. Beavert*, 963 F.2d 1342, 1346 (10th Cir.1992)). "A forum selection clause may be unreasonable if it contravenes a strong public policy of the forum, 'whether declared by statute or by judicial decision.'" *Id.* (quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972)). The United States Supreme Court has held that "it should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be [so] gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court." *M/S Bremen*, 407 U.S. at 18. Furthermore, "[i]f [Ventura] seek[s] to avoid the choice of venue provision based upon fraud or overreaching [it] must show that the inclusion of 'that clause in the contract was the product of fraud or coercion.'" *See Wood v. World*

*Wide Ass'n of Specialty Programs and Sch., Inc.*, No. 2:06-CV-708 TS, 2008 WL 4328819, at \*1 (D.Utah Sept. 16, 2003) (quoting *Riley*, 969 F.2d at 956).

Ventura alleges that the forum selection clause is unreasonable and should not be enforced on the following grounds. First, Ventura asserts that because Winder is an indispensable party not subject to jurisdiction in Georgia, enforcement of the forum selection clause would require it to pursue the same claims against HBH and Winder in separate forums. Ventura explains that public policy discourages bifurcation of related claims and, wherever possible, requires analogous issues to be heard in the same forum. Second, Ventura argues that it would be cost prohibitive for it to pursue its claims against HBH in Georgia such that it would essentially deprive Ventura of its day in court. And finally, Ventura asserts that the forum selection clause was procured by fraud and is therefore invalid. The court will address each of Ventura's arguments in turn.

### (1) Public Policy

\*3 Ventura argues that enforcing the forum selection clause would contravene the strong public policy of litigating all claims in one action before the same tribunal. Specifically, Ventura asserts that because a Georgia court could not obtain personal jurisdiction over Winder, enforcing the forum selection clause would bifurcate this case, thereby violating the public policy of litigating related claims in one action. Ventura relies heavily on a Utah Supreme Court case for this proposition. *See Prows v. Pinpoint Retail Sys., Inc.*, 868 P.2d 809, 813 (Utah 1994).<sup>5</sup>

The plaintiff in *Prows* was the principal owner and president of a Utah-based company that brought claims against two companies, one a Utah corporation and the other a Canadian company. *See id.* at 812. The plaintiff filed suit in Utah against both defendants, and the Canadian company moved to dismiss on the grounds that a forum selection clause contained in a contract between it and the plaintiff required all claims arising from that contract to be litigated in New York. *See id.* The plaintiff argued that if the forum selection clause was enforced, he would have to try the case in two forums: once in Utah against the Utah corporation and once in New York against the Canadian company. *See id.* The Utah Supreme Court held that "[r]equiring a bifurcated trial on the same issues contravenes the objective of modern procedure, which is to litigate all claims in one action if that is possible."



*Id.* at 813 (quotations and citation omitted). Ultimately, the *Prows* court held that requiring the plaintiff to litigate a claim of conspiracy against both defendants in separate trials was unjust and would essentially deny him his day in court. *See id.*

Ventura argues that the instant case is nearly identical to *Prows*. Ventura urges this court to follow *Prows* and conclude that judicial economy necessitates a trial of all claims against HBH and Winder in the same forum. While at first glance this case and *Prows* appear to be analogous, there are some critical differences. The State of New York, the chosen forum in *Prows*, had no interest in the outcome of the case. *See id.* at 811. None of the parties were citizens of New York, the contract at issue was to be performed in Utah, the contract was executed in Utah, and the alleged breach and tortious activity all occurred in Utah. *See id.* In fact, the court noted, "Utah is the only state with an interest in the action." *Id.*; *see also Phone Directories Co., Inc. v. Henderson*, 8 P.3d 256, 262 (Utah 2000) ("We held [in *Prows*] that [the forum selection clause] was unfair and unreasonable because none of the parties had any connection with New York." (Howe, C.J., concurring)). Conversely, in the instant case, Utah is not the only state with an interest in the outcome of the lawsuit; Georgia has a considerable interest in this case. That is, HBH is a Georgia corporation, the parties agreed that Georgia law would govern their disputes, the Agreement was executed in Georgia, and HBH's alleged wrongful conduct took place in Georgia.

\*4 Furthermore, while the court appreciates the public policy against piecemeal litigation, it cannot conclude that judicial economy trumps the mandatory forum selection clause in this case. Although Ventura's claims against HBH and its claim against Winder are based on the same set of facts, none of the causes of action are alleged against *both* HBH and Winder. In *Prows*, the plaintiff asserted a claim for conspiracy against both defendants, and the court held that requiring him to twice prove a conspiracy between two defendants in two different forums was an unjustly onerous burden. *See Prows*, 868 P.2d at 813. Enforcing the forum selection clause in this matter will require Ventura to shoulder the burden of litigating its claims against two defendants in separate forums. The court, however, does not find the burden to be unjust or unreasonable. Additionally, because none of the claims are alleged against both defendants, bifurcation of this case should be more easily manageable than in *Prows*.

Lastly, Ventura argues that Winder is an indispensable party. Ventura asserts that if it is required to pursue its claims

against HBH in Georgia, HBH will likely move to dismiss the Georgia case on the grounds that Ventura failed to join an indispensable party. The court does not find this argument to be persuasive. It does not appear that Winder is an indispensable party as Ventura has not demonstrated that it cannot get complete relief in the absence of Winder. *See, e.g., Salt Lake Tribune Publ'g Co., LLC v. AT & T Corp.*, 320 F.3d 1081, 1097 (10th Cir.2003). Furthermore, it is likely that HBH would be estopped from making that argument before a Georgia court in light of the arguments it has made before this court.

Ventura has not demonstrated that judicial economy considerations should prevail over the mandatory forum selection clause agreed to by the parties. As such, the court concludes that Ventura's public policy argument fails.

## (2) Due Process

Second, Ventura argues that like the plaintiff in *Prows*, enforcement of the forum selection clause would deprive Ventura of its day in court. In particular, Ventura asserts that the forum selection clause is unfair and unreasonable because Ventura cannot afford to litigate its claims in Georgia. Ventura states that nearly all of its witnesses reside in Utah and contends that it would be cost prohibitive to pay the expenses for these witnesses to testify in Georgia.

The court is not persuaded that enforcing the forum selection clause is so unfair and unjust that it would deprive Ventura of its day in court. Ventura has put forth no facts to support its contention that litigation in Georgia would be significantly more expensive such that it would essentially deprive Ventura of its opportunity to pursue its claims against HBH. *See Wood*, 2008 WL 4328819, at \*4 (rejecting the plaintiffs' argument that litigation in the chosen forum would be too expensive when there was "no actual information, as opposed to argument, that it would be so prohibitively expensive ... that it would effectively deny [the plaintiffs] their day in court"); *see also Daley v. Gulf Stream Coach, Inc.*, No. 2:99CV534C, 2000 WL 33710836, at \*3 (D.Utah March 3, 2000) (holding that the plaintiffs' "conclusory statements" that it would be more expensive to litigate out of state were insufficient to invalidate a forum selection clause). Although Ventura claims to have contacted lawyers in Georgia, it has not provided names, rates, or estimated costs. Furthermore, a Georgia venue would not change the place of depositions, as they would be taken where the deponents are, nor would it



alter the place for document production. In addition, federal courts utilize e-filing, which reduces the role and, therefore, cost of local counsel. Likely, the only significant cost difference would be the trial, assuming the case is resolved through a trial. However, because Ventura has provided only conclusory statements regarding the cost difference, it has not demonstrated that enforcing the forum selection clause would effectively deny it its day in court. As such, the court concludes that this argument is likewise unpersuasive.

### (3) Fraud

\*5 Third, Ventura asserts that the forum selection clause is overreaching and fraudulent and should not be enforced. Specifically, Ventura contends that the forum selection clause is a contract of adhesion because it obligates only Ventura to sue in a limited area; the same restrictions are not placed on HBH. Ventura further argues that the forum selection clause is fraudulent because HBH knew that its unfair business practices would drive Ventura out of business leaving it financially unable to pursue its claims against HBH in Georgia.

The court is not persuaded by this argument for the following reasons. There is no evidence that Ventura was forced into the Agreement or that it had no other alternatives. "[S]imply because the terms of a contract are embodied in written form developed by one of the parties does not automatically render it either a contract of adhesion or unenforceable." *Wade v. Meridias Capital, Inc.*, No. 2:10CV998 DS, 2001 WL 997161, at \*2 (D. Utah March 17, 2011) (quoting *Russ v. Woodside Homes, Inc.*, 905 P.2d 901, 906 n. 1 (Utah Ct.App.1995) (other quotations and citation omitted)); see also *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991) (holding that a forum selection clause in the fine print contained on a cruise ticket, a non-negotiated form contract, is valid so long that it is not fundamentally unfair).

Furthermore, Ventura was on notice of the existence of the forum selection clause. In the Uniform Franchise Offering Circular that HBH provided to Ventura prior to executing the Agreement, HBH disclosed the following on the first page:

THE FRANCHISE AGREEMENT  
AND THE AREA DEVELOPMENT  
AGREEMENT PERMIT YOU TO  
SUE ONLY IN THE STATE  
WHERE HBH'S PRINCIPAL PLACE

OF BUSINESS IS LOCATED  
(CURRENTLY GEORGIA) AT THE  
TIME YOU FILE SUIT. OUT-  
OF-STATE LITIGATION MAY  
FORCE YOU TO ACCEPT A LESS  
FAVORABLE SETTLEMENT FOR  
DISPUTES. IT MAY ALSO COST  
MORE TO SUE IN GEORGIA THAN  
IN YOUR HOME STATE.<sup>6</sup>

Notice of the forum selection clause also appears in the provision regarding litigation issues, along with a cross-reference to the actual contract provision. Thus, HBH expressly disclosed the existence of the forum selection clause and the potential risks of entering into the Agreement should a dispute arise. Moreover, George G. Ventura, a member of Ventura, is an attorney experienced in corporate matters. As such, Mr. Ventura should have understood that by executing the Agreement, Ventura was committing to litigate any claims against HBH in Georgia. Based on the foregoing, Ventura has failed to demonstrate that the Agreement or its forum selection clause was either overreaching or procured by fraud.

### CONCLUSION

Because Ventura has failed to demonstrate that the forum selection clause is fundamentally unreasonable under the circumstances or that it deprives Ventura of its day in court, the court concludes that the forum selection clause is valid and enforceable. "A primary reason for forum selection clauses is to protect a party ... from having to litigate in distant forums all over the nation.... [S]uch provisions should be enforced when invoked by the party for whose benefit they are intended." *Coombs v. Juice Works Dev. Inc.*, 81 P.3d 769, 774 (Utah Ct.App.2003) (quotations and citation omitted) (second alteration in original). HBH is "entitled to the benefit of its bargain which includes the forum selection clause." *Id.* (quotations and citation omitted).

\*6 Based on the foregoing, HBH's motion to dismiss<sup>7</sup> for improper venue is **GRANTED**. The clerk of court is instructed to dismiss HBH from this case.

**IT IS SO ORDERED.**



## All Citations

Not Reported in F.Supp.2d, 2012 WL 777270

## Footnotes

- 1 See docket no. 12 & 33.
- 2 See docket no. 19.
- 3 Docket no. 13 at 3–4.
- 4 Docket no. 14 at 17.
- 5 As noted by Ventura, some courts have held that the parties' choice of law governs the determination of whether the forum selection clause is valid. See, e.g., *Yavuz v. 61 MM. Ltd.*, 465 F.3d 418, 421 (10th Cir.2006) (holding that a forum selection clause in an international agreement is interpreted under the law chosen by the parties); *Brahma Group, Inc.*, 2009 WL 1065419, at \*6 (applying the law chosen by the parties to determine the validity of a forum selection clause). However, other courts have held that the validity of the forum selection clause is a question of venue, which is procedural in nature, and therefore is governed by the law of the forum. See, e.g., *Wong v. Partygaming Ltd.*, 589 F.3d 821, 827–28 (6th Cir.2009) (noting that a majority of circuits apply the law of the forum to determine the validity of a forum selection clause); *Wood*, 2008 WL 4328819 at \*2 (applying federal law of the forum to determine the validity of a forum selection clause although South Carolina law was the law chosen by the parties). The laws are similar because they all are derived directly from the United States Supreme Court's decision in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). Furthermore, the parties apparently do not dispute the governing choice of law as both have relied upon Tenth Circuit and Utah cases and neither have cited to the Eleventh Circuit or Georgia cases. As such, the court applies the law in accordance with the parties' briefs.
- 6 Docket no. 23 at 6.
- 7 See docket no. 19.







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**IN THE UTAH COURT OF APPEALS**

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ROCKY MOUNTAIN BUILDERS  
SUPPLY, INC. d/b/a CK BUILDERS,

Plaintiff-Appellant,

vs.

STEVE MARKS, an individual,

Defendant-Appellee.

Appellate Case No. 20150456-CA  
District Ct. No. 140500095

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**BRIEF OF DEFENDANT-APPELLEE**

---

Appeal from Order of Dismissal of the Fourth District Court, Utah County  
Honorable Samuel McVey, District Court Judge, Presiding

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FILED  
UTAH APPELLATE COURTS

NOV 30 2015







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**IN THE UTAH COURT OF APPEALS**

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## **JURISDICTIONAL STATEMENT**

This Court has jurisdiction under Utah Code § 78A-4-103(2)(j),<sup>1</sup> but only to determine whether the District Court has jurisdiction to hear the merits of the case, which Marks denies. “Only if [the Court of Appeals] first determine[s] that [it has] appropriate jurisdiction will [it] address the merits of a case.”<sup>2</sup>

## **STATEMENT OF ISSUE PRESENTED AND STANDARD OF REVIEW**

The matter before this Court arises out of a small residential construction contract that was created in Montana and that relates exclusively to work performed at a Montana residence. The court below correctly determined that it did not have jurisdiction over the merits of the dispute because the Fourth District “would be ‘so seriously an inconvenient forum that to require [Marks to defend] suit there would be unjust.’”<sup>3</sup>

**ISSUE NO. 1:** Did the Fourth District Court correctly determine that it does not have jurisdiction to hear the merits of an \$11,200 dispute arising out of a residential construction project located in Montana when the only connections between the state of Utah and the dispute are a forum selection clause in a form contract and the location of the general contractor’s principal place of business?

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<sup>1</sup> Record, at 105-106.

<sup>2</sup> See Am. W. Bank Members, L.C. v. State, 2014 UT 49, ¶ 9, 342 P.3d 224.

<sup>3</sup> Record, at 93.



**Standard of Review:** The trial court decided the jurisdictional issue based on documentary evidence only. The trial court's decision is therefore reviewed for correctness.<sup>4</sup>

**Preservation:** Marks raised this issue in his Motion to Dismiss and Memorandum in Support of Motion to Dismiss.<sup>5</sup> The issue was further addressed in CK's Builder's Opposition to Marks' Motion to Dismiss,<sup>6</sup> in Marks's Reply to CK Builders' Opposition to the Motion to Dismiss,<sup>7</sup> and at oral argument before the district court.<sup>8</sup>

### **DETERMINATIVE STATUTORY PROVISIONS**

Utah Code § 78B-3-205,<sup>9</sup> which reads as follows:

Notwithstanding Section 16-10a-1501, any person or personal representative of the person, whether or not a citizen or resident of this state, who, in person or through an agent, does any of the following enumerated acts is subject to the jurisdiction of the courts of this state as to any claim arising out of or related to:

- (1) the transaction of any business within this state;
- (2) contracting to supply services or goods in this state;
- (3) the causing of any injury within this state whether tortious or by breach of warranty;
- (4) the ownership, use, or possession of any real estate situated in this state;
- (5) contracting to insure any person, property, or risk located within this state at the time of contracting;

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<sup>4</sup> Arguello v. Indus. Woodworking Mach. Co., 838 P.2d 1120, 1121 (Utah 1992).

<sup>5</sup> Record, at 18-28.

<sup>6</sup> Id., at 31-53.

<sup>7</sup> Id., at 55-65.

<sup>8</sup> Id., at 115-141.

<sup>9</sup> Arguello, 838 P.2d at 1122 ("Generally, whether a state can exercise specific personal jurisdiction over a nonresident defendant is determined by two factors: the breadth of the forum state's jurisdictional statute and the due process limitations on jurisdiction imposed by the Fourteenth Amendment to the United States Constitution. If the relevant state statute does not permit jurisdiction, then the inquiry is ended . . .")



(6) with respect to actions of divorce, separate maintenance, or child support, having resided, in the marital relationship, within this state notwithstanding subsequent departure from the state; or the commission in this state of the act giving rise to the claim, so long as that act is not a mere omission, failure to act, or occurrence over which the defendant had no control; or  
(7) the commission of sexual intercourse within this state which gives rise to a paternity suit under Title 78B, Chapter 15, Utah Uniform Parentage Act, to determine paternity for the purpose of establishing responsibility for child support.

## **STATEMENT OF THE CASE**

### **A. Nature of the Case and Proceedings Below**

This case consists of a residential construction dispute between Steve Marks, a resident of Montana, and Plaintiff Rocky Mountain Builders Supply, Inc. d/b/a CK Builders, a general contractor with a Montana contractor's license and an office in Montana out of which it conducts its Montana operations.<sup>10</sup> The contract between the parties was created in Montana and relates solely to residential property owned by Marks and located in Montana.<sup>11</sup> After reviewing the work done by CK Builders under the contract, Marks requested the opportunity to inspect the work with CK Builders in order to address alleged deficiencies in the work.<sup>12</sup> CK Builders refused this opportunity, demanded payment in full, and filed a complaint in the Fourth District Court in Utah

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<sup>10</sup> Record, at 7, 18-19.

<sup>11</sup> Id., at 18-19.

<sup>12</sup> Id., at 19-20.



County, Utah.<sup>13</sup> Marks responded to CK Builders' complaint by filing a motion to dismiss for lack of personal jurisdiction.<sup>14</sup> The trial court granted Marks' motion.<sup>15</sup>

### **B. Statement of Facts**

Marks is a resident of Yellowstone County, Montana.<sup>16</sup> CK Builders has an office in Havre, Montana, and operates in Montana under a Montana contractor's license.<sup>17</sup> On or about November, 19, 2013, Marks signed a CK Builders form contract for the installation of two roofs on two gazebos and for the placement of a shed on Marks' Montana property (the "Construction Contract").<sup>18</sup> Prior to the commencement of work by CK Builders, Marks provided CK Builders with a deposit.<sup>19</sup> Throughout the construction process, there were disputes between Marks and CK Builders about the work.<sup>20</sup> After CK Builders ceased work at Marks' property, Marks requested the opportunity to inspect the work with CK Builders in order to address alleged deficiencies in the work.<sup>21</sup> CK Builders refused, demanded payment in full, and filed a complaint against Marks in the Fourth District of Utah.<sup>22</sup>

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<sup>13</sup> Id., at 20, 93.

<sup>14</sup> Id., at 93.

<sup>15</sup> Id., at 96.

<sup>16</sup> Id., at 18.

<sup>17</sup> Id., at 7, 19.

<sup>18</sup> Id., at 7.

<sup>19</sup> Id., at 19.

<sup>20</sup> Id., at 93.

<sup>21</sup> Id.

<sup>22</sup> Id.



## SUMMARY OF THE ARGUMENT

Without an enforceable forum selection clause, there is no basis for the Utah courts to exercise personal jurisdiction over Marks in this case, and if the forum selection clause were enforced here, the Fourth District Court would be for Marks so seriously an inconvenient forum that to require him to defend suit there would be unjust. The principal amount at stake in this case is small, only \$11,200, and the contract here was based on a CK Builders form; is between a Montana resident and a general contractor with offices and operations in Montana; includes a forum selection clause that was buried in small boilerplate print; and relates solely to residential property owned by a Montana resident and located in Montana.

## ARGUMENT

### **I. THE TRIAL COURT'S RULING THAT IT LACKED JURISDICTION TO DECIDE THE MERITS OF AN \$11,200 DISPUTE ARISING OUT OF A RESIDENTIAL CONSTRUCTION PROJECT IN MONTANA SHOULD BE AFFIRMED**

If the forum selection clause at issue in this case is not enforceable, there is no basis for the Utah courts to exercise personal jurisdiction over Marks.<sup>23</sup> In general, a

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<sup>23</sup> See Phone Directories Co. v. Henderson, 2000 UT 64, ¶ 11, 8 P.3d 256 (“[P]ersonal jurisdiction can be broken down into two categories. *General* personal jurisdiction permits a court to exercise power over a defendant without regard to the subject of the claim asserted. For such jurisdiction to exist, the defendant must be conducting substantial and continuous local activity in the forum state. In contrast, *specific* personal jurisdiction gives a court power over a defendant only with respect to claims arising out of the particular activities of the defendant in the forum state. For such jurisdiction to exist, the defendant must have certain minimum local contacts.”). CK Builders has not



forum selection clause is not enforceable if it is unjust or unreasonable in light of all the facts and circumstances of the case.<sup>24</sup> In this case, if the forum selection clause were enforced the Fourth District Court would be for Marks “so seriously an inconvenient forum that to require” him to defend “suit there would be unjust.”<sup>25</sup> This is because enforcing the forum selection clause here would be unfair and unreasonable for multiple reasons. First, and as the District Court corrected held, trying this case in Utah’s Fourth District would, in light of the amount at stake, impose unfair financial and practical burdens on the party being haled into court—Marks.<sup>26</sup>

Moreover, enforcing the forum selection clause in this case could affect future litigants by incentivizing Utah companies with offices, personnel and ongoing operations in foreign jurisdictions to do incomplete work on small residential projects in those jurisdictions; to unjustly refuse to complete their work in those jurisdictions; and then, in spite of their contractual obligations to complete their work, to leverage boilerplate contractual provisions and threats of lawsuits in a distant forum to unfairly extract payments or other concessions from foreign residents.

Finally, and as the District Court also correctly held, if the shoe in this case were on the other foot (i.e., a Montana company had done work for a Utah resident on real property in Utah and was attempting to litigate the case in Montana), Utah Code § 13-8-3

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argued, and there is no basis for arguing, that jurisdiction would lie in this case absent an enforceable forum selection clause.

<sup>24</sup> Prows v. Pinpoint Retail Sys. Inc., 868 P.2d 809, 812 (Utah 1993).

<sup>25</sup> Id.

<sup>26</sup> Record, at 95-96.



could be used by a Montana court as part of its justification for dismissing an action brought in Montana.<sup>27</sup>

More specifically, “a forum selection . . . clause by itself is not sufficient to confer personal jurisdiction over a defendant” and should be disregarded unless there is “a rational nexus between the forum selected . . . and either the parties to the contract or the transactions that are the subject matter of the contract.”<sup>28</sup> In this case, there is no connection between the state of Utah and the “transactions that are the subject matter” of the Construction Contract. The contract was created and performed entirely in Montana and relates solely to residential property owned by Marks and located in Montana.<sup>29</sup>

Because CK Builders has its principal place of business in Utah, there is a connection between CK Builders and the state of Utah. In some cases this fact would be sufficient to create a rational nexus with Utah.<sup>30</sup> Under the specific facts of this case, however, the location of CK Builders’ principal place of business is not sufficient. These specific facts include: CK Builders has an office in Havre, Montana and a Montana contractor’s license.<sup>31</sup> All of the negotiations between CK Builders and Marks which led to the formation of the Construction Contract, and the entirety of the performance of the

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<sup>27</sup> *Id.*, at 96; Utah Code § 13-8-3; see also *Jacobsen Const. Co. v. Teton Builders*, 2005 UT 4, ¶ 28, 106 P.3d 719 (“The primary purpose of section 13–8–3 is to prohibit out-of-state contractors, construction managers, or suppliers from haling a Utah resident into a foreign state’s court when the work by the Utah resident is performed within the State of Utah.”).

<sup>28</sup> *Phone Directories*, 2000 UT 64, ¶ 14.

<sup>29</sup> *Record*, at 18-19.

<sup>30</sup> *Jacobsen Const.*, 2005 UT 4, ¶ 43.

<sup>31</sup> *Record*, at 7.



Construction Contract itself, took place in Montana.<sup>32</sup> Marks never called a Utah office, never visited a Utah office, and never mailed anything to Utah. These facts show clearly that Montana has a far stronger connection to, and a far greater interest in, this dispute than Utah.

That said, the Utah Supreme Court held in Jacobsen Construction that the rational nexus test was satisfied because one of the parties in that case had its principal place of business in Utah.<sup>33</sup> Nevertheless, the Jacobsen court also suggested that the presence of a principal place of business in Utah may not be enough where additional relevant facts, such as those found in this case, can support a conclusion that “the nexus between the underlying dispute and the State of Utah” is not “truly rational.”<sup>34</sup>

Among the most important of the additional facts in this case is that the contract here is not between two commercial entities, as it was in Jacobsen, but between a Utah contractor and a private resident of Montana.<sup>35</sup> Commercial actors, like those in Jacobsen, will typically be far more sophisticated with respect to contractual provisions such as choice of law and forum selection clauses. They should therefore be held to a higher general standard than private individuals. Thus, it is less rational to require private individuals to litigate residential construction disputes in distant forums when their contracts have been negotiated, created and performed entirely in the state of their own

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<sup>32</sup> Id., at 2-3, 18-20.

<sup>33</sup> Jacobsen Const., 2005 UT 4, ¶ 43.

<sup>34</sup> See Id. (internal quotation marks omitted).

<sup>35</sup> Record, at 7, 18.



residence. This is especially true where, as here, the forum selection clause is found buried in the boilerplate language of an unmodified form contract.<sup>36</sup>

Another significant additional fact in this case is the principal amount at stake, which is only \$11,200. In a larger matter, the distance between Marks' residence in Montana and the Fourth District Court in Utah would make less difference. In a case of this size, however, Marks would be faced with an unjust dilemma: either (1) hire Montana lawyers and expert witnesses who will charge prohibitively large sums to travel to Utah for court appearances, or (2) spend similarly prohibitive amounts of time, money and other resources working with Utah lawyers and expert witnesses to prepare for and attend trial. Either way, Marks would be unfairly forced to spend disproportionate amounts of time and money litigating this case in Utah even though the contract at issue here has almost nothing to do with Utah. Imposing such a burden on Marks would be consistent neither with basic principles of fairness nor with Utah's demonstrated interest in keeping the costs of litigation in proportion with the amount at stake in the controversy.<sup>37</sup>

Marks' arguments draw additional strength from Utah Code § 13-8-3, which was intended primarily "to prohibit out-of-state contractors [such as Montana contractors] . . . from haling a Utah resident into a foreign state's court [such as a Montana court] when the work by the Utah resident is performed within the State of Utah."<sup>38</sup> That is, if Utah

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<sup>36</sup> *Id.*, at 7.

<sup>37</sup> Utah R. Civ. P. 26.

<sup>38</sup> Jacobsen Const., 2005 UT 4, ¶ 28.



law works to prevent Montana contractors from suing Utah residents in Montana courts when the work done under the relevant construction work has been performed in Utah, then principles of comity and reciprocity counsel in favor of preventing Utah contractors from suing Montana residents in the Utah courts when the work done under the relevant contract has been performed in Montana. Marks' request is further supported by the law of numerous other states which have statutes that are similar to Utah Code § 13-8-3 and that render forum selection clauses in residential construction agreements unenforceable.<sup>39</sup>

CK Builders argues that Jacobsen is essentially indistinguishable from the case at hand. As set forth above, however, there are at least two significant facts which set this case apart from Jacobsen, namely that the case involves a residential construction contract that has a tenuous connection to Utah and a principal amount in controversy that is only \$11,200.

CK Builders also contends that its position is supported by Prows v. Pinpoint, Prows v. Pinpoint Retail Sys. Inc., 868 P.2d 809 (Utah 1993), Coombs v. Juice Works Dev. Inc., 2003 UT App 388, 81 P.3d 769, and Ventura & Associates, L.L.C. v. HBH

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<sup>39</sup> Cal. Civ. Code § 2782.05(c); Cal. Civ. Proc. Code § 410.42(a); Colo. Rev. Stat. § 13-21-111.5(6)(g); Conn. Gen. Stat. § 42-158m; Fla. Stat. Ann. ch. 47.025; 815 Ill. Comp. Stat. Ann. 665/10; Ind. Code § 32-28-3-17; Kan. Stat. Ann. § 16-121(e); La. Rev. Stat. Ann. § 9:2779(B)(1); Minn. Stat. § 337.10(1); Mont. Code Ann. § 28-2-2116 (1); Neb. Rev. Stat. § 45-1209; Nev. Rev. Stat. Ann. 108.2453(2); N. M. Stat. Ann. § 57-28A-1; N.Y. Gen. Bus. Law § 757; N.C. Gen. Stat. § 22B-2; Ohio Rev. Code Ann. § 4113.62(D); Ok. Stat. Ann. tit. 15, § 15-821; Or. Rev. Stat. § 701.640; 73 Pa. Stat. Ann. § 514; R.I. Gen. Laws § 6-34.1-1(a); S.C Code Ann. § 15-7-120.A; Tenn. Code § 66-11-208 (a); Tex. Bus. & Com. Code Ann. § 272.001; Va. Code Ann. § 8.01-262.1; Wis. Stat. Ann. § 779.135(2).



Franchise Co., LLC, No. 2:11CV631, 2012 WL 777270, (D. Utah Mar. 7, 2012). CK Builders reliance on these cases is misplaced, however, because none of these cases involved a residential construction contract that had almost nothing to do with Utah or a principal amount in controversy of only \$11,200.

CK Builders further argues that if the forum selection clause in this case is not enforced, then it is unlikely that any future forum selection clause could be considered fair or reasonable. In so doing, however, CK Builders fails to recognize that Marks is asking this Court only for a narrow ruling that applies to residential construction disputes where the connection between the dispute and Utah is tenuous and where the principal amount in controversy is \$11,200 or less. Such a narrow rule would not change the result in any of the precedents discussed by CK Builders or by Marks. Nor is it likely to have a large impact on Utah's forum selection clause jurisprudence generally.

Next, CK Builders criticizes the trial court for invoking Phone Directories Co. v. Henderson, 2000 UT 64, 8 P.3d 256, and argues that Phone Directories is inapposite.<sup>40</sup> However, Phone Directories is relevant to the analysis here because it highlights an important point, which is that the contract in this case has only a tenuous connection to Utah and that if the connection were stronger, subjecting Marks to jurisdiction in Utah might be appropriate.

Finally, CK Builders also criticizes the trial court for its reliance on Utah Code § 13-8-3.<sup>41</sup> As set forth above, however, Utah Code § 13-8-3 bolsters Marks' argument

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<sup>40</sup> Brief of the Plaintiff/Appellant, at 22-23.

<sup>41</sup> Id., at 23-25.



because if Utah law works to prevent Montana contractors from suing Utah residents in Montana courts when the work done under the relevant construction contract has been performed in Utah, basic principles of reciprocity and fairness counsel in favor of preventing Utah contractors from suing Montana residents in the Utah courts when the work done under the relevant contract has been performed in Montana.

### CONCLUSION

CK Builders has not argued, and there is no basis for arguing, that the Utah courts would have jurisdiction to decide the merits of this case without an enforceable forum selection clause.<sup>42</sup> As set forth in detail above, the forum selection clause in this case should not be enforced because the dispute at issue here involves a residential construction project in Montana with a tenuous connection to Utah and a principal amount in controversy of only \$11,200. As a result, under the facts of this case the Fourth District Court in Utah County would be “so seriously an inconvenient forum” for Marks that to require him to defend suit there “would be unjust.”<sup>43</sup> There is therefore no basis for the Utah courts to exercise personal jurisdiction over Marks in this case, and the trial court’s dismissal of this action for lack of personal jurisdiction should be affirmed.

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<sup>42</sup> See Phone Directories, 2000 UT 64, ¶ 11.

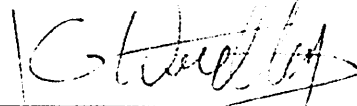
<sup>43</sup> Record, at 93.



In addition, because the contract here includes an attorney fee clause,<sup>44</sup> Marks is entitled to reimbursement for his attorney fees incurred on appeal.<sup>45</sup>

Respectfully submitted this 30th day of November, 2015.

SUMSION BUSINESS LAW, LLC



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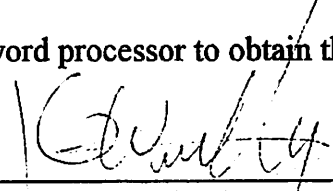
<sup>44</sup> Record, at 8.

<sup>45</sup> Hooban v. Unicity Int'l, Inc., 2009 UT App 287, ¶ 9, 220 P.3d 485, 488 aff'd, 2012 UT 40, ¶ 9, 285 P.3d 766 ("A court may award ... attorney fees to either party that prevails in a civil action based upon any ... written contract ... when the provisions of the ... written contract ... allow at least one party to recover attorney fees.").



### **CERTIFICATE OF COMPLIANCE**

As required by Utah. R. App. P. 24(f)(1), I certify that this brief is proportionally spaced and contains 3,945 words. I relied on my word processor to obtain this count.

  
\_\_\_\_\_  
Kevin R. Worthy

### **CERTIFICATE OF SERVICE**

I hereby certify that on this 30th day of November, 2015, I caused to be mailed, first class, postage prepaid, two true and correct copies of the foregoing BRIEF OF DEFENDANT-APPELLEE to:

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\_\_\_\_\_  
Of Sumsion Business Law











IN THE UTAH COURT OF APPEALS

---oo0oo---

ROCKY MOUNTAIN BUILDERS )  
SUPPLY, INC., dba CK BUILDERS )

Plaintiff/Appellant, )

v. )

STEVE MARKS, )

Defendant/Appellee. )

**REPLY BRIEF OF THE  
PLAINTIFF/APPELLANT**

Appellate Case No. 20150456-CA

---oo0oo---

Appeal from Order of Dismissal of the Fourth District Court,  
Utah County

The Honorable Samuel McVey, District Court Judge, Presiding District Court Case  
No. 140500095

---oo0oo---

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**FILED  
UTAH APPELLATE COURTS**

**DEC 30 2015**



IN THE UTAH COURT OF APPEALS

---oo0oo---

ROCKY MOUNTAIN BUILDERS )  
SUPPLY, INC., dba CK BUILDERS )

Plaintiff/Appellant, )

v. )

STEVE MARKS, )

Defendant/Appellee. )

**REPLY BRIEF OF THE  
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## I. INTRODUCTION

Appellee's argument that the forum selection is the subject forum selection clause is unjust and unreasonable should be rejected. Appellee does not even argue that litigating the case in Utah would be "so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court." *Prows v. Pinpoint Retail Sys., Inc.*, 868 P.2d 809, 812 (Utah 1993). He simply argues that litigating the case in Utah would significantly increase his costs especially considering the small amount at issue in the case. However, he cites no case law which supports and argument that increased costs of litigation make a forum selection clause unenforceable and in fact, fails to distinguish case law cited by Appellant holding mere increased costs of litigation is insufficient.

Furthermore, Appellees efforts at distinguishing the instant case from *Jacobsen Const. Co. v. Teton Builders*, 2005 UT 4, ¶43, 106 P.3d 719 ring hollow. There is no indication from *Jacobson*, that the result should be any different where one of the parties is a property owner rather than a contractor or subcontractor. The simple analysis in *Jacobson* is that if one of the parties has a principal place of business in Utah, that is sufficient to satisfy the rational nexus test articulated in *Phone Directories Co. v. Henderson*, 2000 UT 64, 8 P.3d 256.



Accordingly, Appellant respectfully requests that the court reverse the trial court's decision and hold that the forum selection clause in this case is enforceable to exercise personal jurisdiction over Appellee before Utah courts.

## **II. ARGUMENT.**

### **A. Enforcing the Forum Selection Clause Would Not be Unfair or Unjust.**

It is sometimes difficult to decipher where Appellee's argument on the enforceability of the forum selection clause begins and ends. It appears that Appellee makes the same argument basic arguments whether he is talking about the enforceability of the forum selection clause or the rational nexus test set for the in *Jacobson*. Nonetheless, Appellee seems to argue that the forum selection clause unjust and unfair and therefore, unenforceable because forcing Appellee to litigate the case in Utah would significantly increase his costs especially *vis a vis* the small amount at issue in this case (Appellee's Brief, pg. 6). However, significant by its absence in Appellee's argument is any authority which supports the argument that 1) increased cost of litigation alone is sufficient to make a forum selection clause unenforceable; and 2) that the amount at issue in the case plays any part in the



analysis of whether the forum selection clause is so prejudicial that the out of state party would essentially be deprived of his day in court.

In reality, none of the cases analyzing forum selection clauses have found that increased costs of litigation alone is sufficient to hold a forum selection clause unjust or unreasonable. *See Prows*, 868 P.2d 809; *Coombs v. Juice Works Dev. Inc.*, 2003 UT App 388, 81 P. 3d; *Ventura & Assoc., LLC v. HBH Franchise Co., LLC*, No. 2:11CV631, 2012 WL 777270 (D. Utah 2012).

Under Appellee's reasoning, any forum selection clause could be invalidated because costs of litigation will always be increased for the out of state party when a forum selection clause is enforced. This is likely why no authority located by Appellant (or Appellee) support this argument. Accordingly, the Court should hold that the forum selection clause is enforceable.

Appellee's argument that enforcing the forum selection clause in this case would incentivize other Utah companies to do incomplete and incompetent work is unpersuasive (Appellee's Brief, pg. 6). The free market and good business practices should dissuade such companies from performing shoddy work. Furthermore, there is no factual basis for Appellee's argument. Appellant did finish the work under the contract *to Appellee's satisfaction*, however, Appellee



has refused to pay the contract amount because he has had to retain an attorney (as has Appellant) as a result of the dispute.

Appellee's argument regarding Utah Code §13-8-3 is confusing. Appellee has ignored the argument in Appellant's Brief regarding the fact that §13-8-3 does not apply because both parties to the contract are not contractors, subcontractors, suppliers etc.

Appellee also conveniently ignores the fact that *Jacobson* actually held that §13-8-3 *supports the enforcement* of a Utah forum selection clause because:

[T]he policy expressed by section 13-8-3 would be best served by enforcing the forum selection clause at issue in this case and allowing Jacobson to litigate its claims in its home state.

*Jacobson* at ¶28. Likewise, the enforcement of the forum selection clause in this case would uphold the policy expressed in section 13-8-3 because it would allow Appellant to litigate its claim in its home state.

In the end, Appellee's argument for finding the forum selection clause in this case unenforceable are unpersuasive, unsupported by authority and worse, contradict clear authority to the contrary. Accordingly, the Court should reverse the trial court and hold that the forum selection clause in this case is enforceable.



**B. Like *Jacobson*, Appellant's Principal Place of Business in Utah is Sufficient to Satisfy the Rational Nexus Test.**

In his Brief, Appellee acknowledges that the fact that Appellant's principal place of business is in Utah is sufficient to satisfy the rational nexus test, "in some cases." (Appellee's Brief pg. 7). Of course, there is no authority cited by Appellee holding that in some instances, the principal place of business of one of the litigants in the forum state is an insufficient nexus.

The rational nexus test set forth in *Phone Directories* states that there must be "a rational nexus between the forum selected and/or consented to, and *either* the parties to the contract or the transactions that are the subject matter of the contract." *Phone Directories Co. v. Henderson*, 2000 UT 64, ¶ 14, 8 P.3d 256 (emphasis added).

The primary issue in *Jacobson* was to determine whether, absent any significant contacts between the transaction at issue and Utah, is the connection between Utah and one of the parties alone sufficient to satisfy the rational nexus test. The court answered this question in the affirmative. *Jacobson* at ¶43.

Therefore, Appellee's citation of facts showing that the *transaction* between the parties had no connection is irrelevant to the issue before the court here.



Appellant has not argued that there is a connection between the transaction between the parties and Utah is a sufficient connection to satisfy the rational nexus test. But Appellant does not need to do so give the holding in *Jacobson*.

Appellee contends that this case is distinguishable from *Jacobson* because this contract involved a private resident of Montana and not two businesses like in *Jacobson*. (Appellee's Brief pgs. 8-9). Again, however, Appellees cites no case law which supports his argument that this makes a difference when analyzing forum selection clauses.

This is likely an argument which should be made in relation to the enforceability of the forum selection clause, not the rational nexus analysis. Nonetheless, other courts have failed to distinguish the analysis when a private party is involved as opposed to two businesses. (See for example, *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595, 111 S.Ct. 1522, 113 L.Ed. 2d. 622 (1991) (holding a forum selection clause in a non-negotiated form contract between the cruise line and a passenger is valid, so long as it is not fundamentally unfair)).

The fact that Appellant's principal place of business is in Utah is sufficient to satisfy the rational nexus test based on the holding in *Jacobson*. Accordingly, Appellant respectfully requests that the court reverse the trial court in this case and



hold that the forum selection clause is enforceable for the court to exercise personal jurisdiction over the Appellee in this case.

### III. CONCLUSION

In sum, Appellee's attempts at distinguishing this case from *Jacobson* are unpersuasive. Had Appellee located some case law, somewhere which supports his argument that the amount in controversy is a significant factor in the analysis or that that fact that both parties to the contract were not businesses merits some weight, he would at least have something to talk about. Without such authority, his arguments should be rejected.

The fact remains that many Utah businesses which do business out of state rely on forum selection clauses to limit their liability and the costs which would be associated with litigation if they were forced to litigate throughout the nation where they conduct business. Invalidating the forum selection clause in this case calls into serious question forum selection clauses used by Utah businesses which rely on the holding from *Jacobson*. Appellee's argument that the holding here can be narrowly tailored to only involve contracts for residential construction under \$11,200 is not persuasive and would cause Utah trial courts to have to analyze



these cases solely on a case by case basis without any firm direction from Utah Appellate Courts.

The holding in *Jacobson* is clear. One party's connection to Utah, based on the location of its principal place of business, is sufficient to satisfy the rational nexus test.

Based on the foregoing facts, law and argument, Appellant requests the following relief from the court:

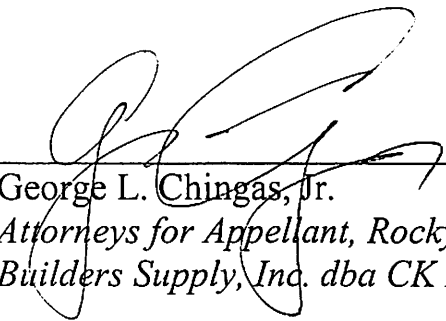
1. That the court reverse the trial court's ruling that the Forum Selection Clause is unenforceable;
2. That the court reverse the trial court's ruling that there is not a sufficiently rational nexus to Utah to justify the exercise of personal jurisdiction over appellee;
3. That the court reverse the trial court's ruling that the application of §13-8-3 makes enforcement of the Forum Selection Clause unjust;
4. That the court reverse the Trial Court's Order dismissing Appellant's Complaint without prejudice;



5. That the court enter a ruling instructing the trial court that the Forum Selection Clause should be enforced in this case to exercise personal jurisdiction over Appellee in this matter.

DATED and SIGNED this 29<sup>th</sup> day of December, 2015.

MACARTHUR, HEDER & METLER



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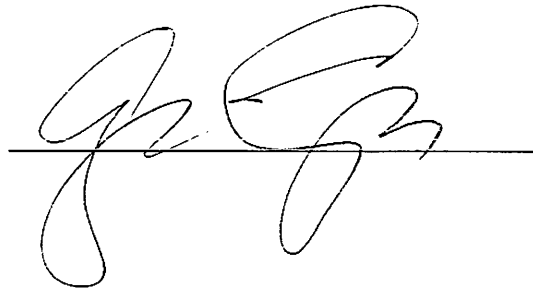
George L. Chingas, Jr.  
*Attorneys for Appellant, Rocky Mountain  
Builders Supply, Inc. dba CK Builders*



## MAILING CERTIFICATE

I hereby certify that on the 29<sup>th</sup> day of December, 2015, I caused to be mailed two (2) true and correct copies of the foregoing *Reply Brief of the Plaintiff/Appellant*, to the following, by U.S. First Class Mail, postage prepaid and addressed as follows:

Steve Sumsion  
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3651 N. 100 E., Suite 300  
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### Certificate of Compliance With Rule 24(f)(1)

- 1) This brief complies with the type-volume limitation of Utah App. P.24(f)(1) because this brief contains 2,097 words, excluding the parts of the brief exempted by Utah R. App. P.24(f)(1)(B).
  
- 2) This brief complies with the typeface requirements of Utah R. App. P.27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 pt. Times New Roman style.



