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IN THE UTAH COURT OF APPEALS

CROWN ASPHALT PRODUCTS COMPANY, a Utah corporation,

Plaintiff and Respondent,

vs.

FREHNER CONSTRUCTION CO., INC., a Nevada corporation and SAFECO INSURANCE COMPANY OF AMERICA, a Washington corporation,

Defendants and Petitioners.

District Court No. 030922467

Case No. 20040235-CA

BRIEF OF PETITIONERS

Appeal from the Third Judicial District Court,
Salt Lake County, State of Utah
Judge Joseph C. Fratto

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JURISDICTION

This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(j).

GOVERNING LAW

The following statutory provisions are involved in the outcome of this appeal: Nevada Revised Statutes Section 339.055.

STATEMENT OF THE CASE

A. *Course of Proceedings and Disposition Below.*

In response to the Complaint filed by Crown Asphalt Products Company ("Crown") in the Third District Court, State of Utah against defendants Frehner Construction Co., Inc. ("Frehner") and its bond surety Safeco Insurance Company of America ("Safeco"), Frehner and Safeco filed a Motion to Dismiss for Improper Venue and Memorandum in Support thereof asserting that Nevada Statutes require that the action between the parties be filed in Clark County, Nevada. (R. 21-23) The Memorandum in Support of Motion to Dismiss for Improper Venue included documents not attached to the Complaint, including: (1) Affidavit of Michael Pack (R. 36-39); (2) Revised Price Quotation (R. 41); (3) Asphalt Sales Contract (R. 43-44); (4) Bulk Purchase Order (R. 47-48); and (5) Contractor's Bond (R. 50-54).

A hearing was held regarding the Motion to Dismiss on February 23, 2004 and the matter was taken under advisement. On March 3, 2004, Judge Fratto issued a Minute Entry in which he stated that although "Nevada's bonding statute, in similar fashion as Utah, dictates the appropriate county where an action on the bond is to be prosecuted... the statute ... neither preempts Utah's jurisdiction nor mandates Clark County, Nevada as the exclusive

court with 'jurisdiction.'" Based upon this finding, Judge Fratto denied Frehner and Safeco's Motion to Dismiss the Complaint. (R. 108-109)

B. *Statement of Facts.*

1. Frehner has been doing business with Crown or its predecessors for approximately 20 years. Throughout that relationship, all Frehner purchases of product from Crown have been under terms of Frehner's purchase order contracts, in form and content substantially the same as the Bulk Purchase Order involved in this litigation. See Affidavit of Michael C. Pack (R. 36-39).

2. On January 24, 2002, Crown offered a Revised Price Quotation to Frehner under which Crown was to provide asphalt to Frehner for the Boulder Highway Project in Clark County, Nevada. See Revised Price Quotation (R.41).

3. The Boulder Highway Project was a roadway construction project located in Clark County, Nevada, which was commissioned by and under contract with the Nevada Department of Transportation. (R. 25).

4. On February 2, 2002, defendant Safeco, as Frehner's surety, issued payment and performance bonds to the Nevada Department of Transportation to secure performance of the contract and payment of amounts properly due to suppliers and subcontractors for that project. See Contractor's Bond. (R.50-54).

5. In addition to the bid, Crown provided to Frehner a proposed Asphalt Sales Contract. See Asphalt Sales Contract (R. 43-44).

6. Frehner rejected the terms of the Asphalt Sales Contract. See Affidavit of Michael C. Pack. (R. 36-39).

7. Specifically, Michael C. Pack, Frehner's president, informed Crown that Frehner would not sign Crown's proposed Asphalt Sales Contract. Mr. Pack informed Crown that Crown was welcome to furnish products to Frehner, but that any Frehner purchase would be under the terms of Frehner's standard purchase order agreement, or not at all. See Affidavit of Michael C. Pack (R. 36-39).

8. On or about March 8, 2002, Frehner provided a Bulk Purchase Order to Crown, ordering the asphalt for the Boulder Highway Project. See, Bulk Purchase Order (R. 47-48); Affidavit of Michael C. Pack (R. 36-39).

9. Crown ultimately did furnish product for the Boulder Highway Project, some of which was rejected by the Nevada Department of Transportation for failure to comply with contract specifications. See Affidavit of Michael C. Pack. (R. 36-39).

10. The Bulk Purchase Order provides that "venue [for any dispute under the purchase order] will be set in Clark County, Nevada" and that the parties "expressly waive any objection to jurisdiction and venue in such courts." See Bulk Purchase Order, paragraph 20. (R. 48).

11. Crown's form of Asphalt Sales Contract, providing for venue of any dispute in Salt Lake County, Utah, was never accepted or signed by Frehner. See Affidavit of Michael C. Pack. (R. 36-39).

12. Crown delivered the asphalt to the Boulder Highway Project during 2002, without a signed Asphalt Sales Contract, after notice from Frehner that it would not purchase product from Crown under such a contract, and after having received Frehner's Bulk Purchase Order. See Affidavit of Michael C. Pack. (R. 36-39).

13. During the course of construction of the Boulder Highway Project, the parties did not adhere to the terms of the Asphalt Sales Contract payment terms. Payment was made consistent with the terms of Frehner's Bulk Purchase Order with no objection from Crown. See Affidavit of Michael C. Pack. (R. 36-39).

14. During the course of construction of the Boulder Highway Project, Frehner did not provide to Crown scheduling information and "contacts in writing" as required by the Asphalt Sales Contract, with no objection from Crown. See Affidavit of Michael C. Pack. (R. 36-39).

15. After delivery of the asphalt by Crown a dispute arose between Crown and Frehner regarding the Boulder Highway Project. On or about October 9, 2003, Crown filed this action against Frehner in the Third District Court, Salt Lake County, State of Utah. (R.1-14)

SUMMARY OF THE ARGUMENT

The dispute in the underlying action between the Crown, Frehner and Frehner's bond surety, Safeco, revolves solely around work done on a public works project, i.e., the Boulder Highway Project, in Clark County, Nevada. Venue is expressly controlled by Nevada statute, which dictates that actions for recovery against a bond on a public works project "shall" be

brought in the political subdivision in which the work was performed. Further, the contract under which Crown and Frehner conducted business has a forum selection clause which lists Clark County, Nevada, as the forum in which suit must be filed. Crown has asserted that it tried to change contract terms and that this is a classic case of "battle of the forms." Regardless of these assertions, it is clear that this matter is controlled expressly by statute and that the district court erred when it denied Frehner and Safeco's Motion to Dismiss the action.

ARGUMENT

Plaintiff commenced the subject action in the Third District Court, State of Utah, relying on general venue provisions and on the terms of an alleged contract with Frehner Construction permitting enforcement suits in the courts of this state i.e., the Proposed Asphalt Sales Contract. However, the Proposed Asphalt Sales Contract was never signed by Frehner. In fact, the operative agreement governing the parties' dealings over the past twenty years has always been Frehner's "Bulk Sales Purchase Order" form–which includes a forum selection clause designating Nevada courts as the venue for any dispute or disagreement. The parties disagree over which forum selection clause applies - that under Frehner's Bulk Sales Order or the clause under Crown's Asphalt Sales Contract. However, what might be viewed as a "battle of the form case" is resolved more simply by governing statutes. Crown's action, which joins Safeco as the surety on Frehner's payment bond for the Nevada project, is governed by Nevada statutes, N.R.S. Section 339.055.

Under the applicable statute, Crown's action properly lies only in the courts of Clark County, Nevada. The Nevada statutes (which are substantially similar to Utah statutes governing Utah public improvement projects) require that an action filed against a payment bond be filed in the county in which the project is located. In this case, that venue is Clark County, Nevada.

I. THE TRIAL COURT ERRED IN DETERMINING THAT THE CROWN ACTION WAS PROPERLY FILED IN THE UTAH DISTRICT COURT.

A. *Standard of Review.*

The question of whether a trial court erred in a ruling regarding a Motion to Dismiss is a question of law and is reviewed for correctness with no deference given to the trial court's findings. Trillium USA v. Board of County Commissioners, 37 P.3d 1093, 1098 (Utah 2001).

B. *Rights and Actions on Payment Bonds are Governed by Statute and Jurisdiction in this Action Is Proper Only in Clark County, Nevada.*

Nevada Revised Statutes Section 339.055 provides that actions on a payment bond furnished for a public improvement project must be filed in the political subdivision in which the contract work was to be performed:

> Every action on a payment bond as provided in N.R.S. 339.035 shall be brought in the appropriate court of the political subdivision where the contract for which the bond was given was to be performed. (emphasis added)

The Nevada statute is modeled after the federal Miller Act, which similarly provides that actions on payment bonds must be filed in any district in which the contract was to be performed and executed, and not elsewhere. See, 40 U.S.C. 270b(b).

The Nevada Supreme Court has held that in all actions against statutory bonds the requirements of Nevada's bond statutes apply and may not be waived by contract. See Capriotti, Lemon and Associates, Inc. v. Johnson Service Company, 84 Nev. 318, 440 P.2d 386 (1968).

The contract in this case is for a public improvement project, i.e., construction of the Boulder Highway Project, which was commissioned by the Nevada Department of Transportation. The payment bond at issue is a statutory bond, subject to the venue provisions found in Nevada's Revised Statutes. Under Nevada statutes this action, to the extent it includes enforcement of claims on Frehner's payment bond, may properly be filed only in Clark County, Nevada.

Frehner and Safeco assert that the district court erred when it refused to dismiss this action. In his Minute Entry issued on March 3, 2004, Judge Fratto made a statement which Frehner views as irreconcilable. Judge Fratto stated:

> Nevada's bonding statute, in similar fashion as Utah, dictates the appropriate county where an action on the bond is to be prosecuted. The statute, however, neither preempts Utah's jurisdiction nor mandates Clark County, Nevada as the exclusive court with "jurisdiction".

See, Minute Entry dated March 3, 2004. (R. 109) (emphasis added)

Judge Fratto held that Nevada Statute "dictates the appropriate county" in which the action should be filed, but does not, however, give the Clark County Court exclusive jurisdiction over the matter. Frehner disagrees with this conclusion, especially in light of the fact that Nevada Revised Statutes Section 339.055 states that every action on a payment bond "shall" be brought in the subdivision in which the bonded work was performed. Therefore, it is inconsistent for Judge Fratto to find that Nevada Revised Statutes "dictate" an appropriate venue but that the action may still be brought in other jurisdictions. The section clearly mandates that the jurisdiction in which the bonded work was performed is the exclusive jurisdiction in which the action may be filed.[1]

C. *The Bulk Sales Contract Dictates the Terms of the Contract Between the Parties and it Provides for Venue in Clark County, Nevada Only.*

The Bulk Purchase Order, paragraph 20, provides that "venue will be set in Clark County, Nevada" and that the parties "expressly waive any objection to jurisdiction and venue in such courts." See Bulk Purchase Order, paragraph 20. (R. 47-48). The Bulk Purchase Order was the document under which the parties were operating on the Boulder Highway Project. The Bulk Purchase Order governed payment and other practices of the parties and contained a forum selection clause. See Affidavit of Michael Pack. (R. 36-39).

The majority of courts have determined that forum selection clauses are *prima facie* valid. Adams v. Bay, Ltd., 60 P.3d 509, 511 (Okla. Ct. App. 2002). The Tenth Circuit has

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[1] An action between the parties regarding the issues in dispute in this action is, in fact, pending in Clark County, Nevada and Crown has appeared in that action through counsel. Frehner Construction Company vs. Crown Asphalt Product Company, et al. Case No. A476263

consistently held that forum selection clauses should be enforced unless unreasonable under the circumstances. Black & Veatch Construction, Inc. v. ABB Power Generation, Inc., 123 F. Supp.2d 569, 580 (D. Kan.2000); Double A Home Care, Inc. v. Epsilon Systems, Inc., 15 F. Supp.2d 1114, 1117 (D. Kan. 1998) (Unless a forum selection clause is clearly unreasonable or unjust or was obtained by fraud or overreaching it will be enforced); Jones v. Weibrecht, 901 F.2d 17, 19 (2d Cir. 1990).

Further, the forum selection clause contained in the Bulk Purchase Order is enforceable even though not signed by Crown. In Carnival Cruise Lines v. Shute, 499 U.S. 585, 111 S. Ct. 1522, 1527 (1991), the U.S. Supreme Court held that forum selection clauses are enforceable even where the clause is not a product of negotiation, but are contained in a form contract which is not signed by both parties. In Carnival, passengers of a cruise ship sued the cruise line, Carnival, for injury sustained on a cruise ship. Carnival filed a motion for summary judgment on the basis that a forum selection clause found in Carnival's passage contract ticket required that litigation be filed in Florida. Plaintiffs had filed their action in Washington. Plaintiffs argued that they were not bound by the forum selection clause because they were merely given the passage contract ticket, had no opportunity to negotiate it and did not agree to the forum selection clause. Carnival argued that plaintiff had accepted passage and therefore accepted the terms of the passage contract ticket. Carnival's motion was granted. The case was appealed and eventually heard by the Supreme Court of the United States. The United States Supreme Court held that the clause was enforceable

because it was not a result of fraud or overreaching and because the plaintiff had notice of the clause, which was found on the passage contract ticket. Id. at 1528.

The Bulk Purchase Order was provided to Crown and accepted after Frehner rejected Crown's Asphalt Sales Contract and after Michael Pack informed Crown that any dealings would be under the terms of the Frehner Bulk Purchase Order. See Affidavit of Michael C. Pack. (R. 36-39). Further, Crown supplied the asphalt on the Boulder Highway Project after the Bulk Purchase Order was provided by Frehner and the parties conducted business in accord with the terms of the Bulk Purchase Order. See Affidavit of Michael C. Pack. (R. 36-39).

The venue provisions of the Bulk Purchase Order should be enforced by this court and this court should acknowledge that venue in this court is improper.

D. *Judge Fratto's Opinion is Contrary to the Opinion of Third District Court Judge Boyden Regarding Virtually Identical Issues.*

It is important to note that the exact issues raised in this appeal and addressed by Third District Court Judge Fratto in this case were addressed by Third District Court Judge Boyden in Crown Asphalt Products Company v. Road & Highway Builders, LLC, et al., Case No. 030922469. The case before Judge Boyden was also filed by Crown against a subcontractor that worked on the Interstate Highway system in Elko, Nevada. The subcontractor was Road & Highway Builders, L.L.C. ("Road & Highway"). Their bond surety was Liberty Mutual Insurance Company ("Liberty"). Counsel for Road & Highway and Liberty filed a Motion to Dismiss for lack of Venue and Lack of Personal Jurisdiction and a Memorandum in

support thereof arguing the same thing that Frehner argued before Judge Fratto, i.e., that the matter involved construction on a public works project in Nevada (in that case, Elko County) and that Nevada Revised Statute Section 339.055 dictated that the action must be brought in the political subdivision where the work was to be performed. See Memorandum in Support of Defendants' Motion to Dismiss for Lack of Venue and Lack of Personal Jurisdiction, attached hereto as Exhibit 1. Crown opposed the motion making the same arguments as were made against Frehner before Judge Fratto. See Memorandum in Opposition to Defendants' Motion to Dismiss for Lack of Venue and Lack of Personal Jurisdiction attached hereto as Exhibit 2. Judge Boyden ruled on the motion finding that the reasons for dismissal asserted in Road & Highway and Liberty's briefs had merit. Judge Boyden granted the Motion to Dismiss. See Ruling on Defendants' Motion to Dismiss, attached hereto as Exhibit 3. Deference should be given to the state of Nevada to resolve disputes in its prescribed courts, over its own public works.

CONCLUSION

For the foregoing reasons, the decision of the trial court should be reversed.

DATED this 24th day of June, 2004.

SNOW, CHRISTENSEN & MARTINEAU

David W. Slaughter
Jill L. Dunyon
Attorneys for Defendants/Petitioners Frehner Construction Co., Inc. and Safe Co. Insurance Company America

CERTIFICATE OF SERVICE

I hereby certify that I am an attorney at the law offices of Snow, Christensen & Martineau, attorneys for defendants herein; that I served the attached **Brief of Petitioners** (Case Number 20040235, in the Utah Court of Appeals) upon the party listed below by placing two true and correct copies thereof in an envelope addressed to:

Jeffrey W. Shields
Jones Waldo Holbrook & McDonough, P.C.
170 South Main Street, Suite 1500
Salt Lake City, Utah 84101

and causing the same to be mailed, first class, postage prepaid, on the 24th day of June, 2004.

N:\20562\003\Pleadings\appeal.wpd

ADDENDUM

Tab 1

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

CROWN ASPHALT PRODUCTS COMPANY, a Utah Corporation, Plaintiff, vs. ROAD & HIGHWAY BUILDERS, L.L.C., a Nevada Limited Liability Corporation, and LIBERTY MUTUAL INSURANCE COMPANY, a Massachusetts Corporation, Defendants.	**MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOR LACK OF VENUE AND LACK OF PERSONAL JURISDICTION** **ORAL ARGUMENT REQUESTED** Civil No. 030922469 Judge Ann Boyden

Defendants, Road & Highway Builders, L.L.C., ("Road & Highway") and Liberty Mutual Insurance Company ("Liberty"), by and through their counsel of record, Barbara K. Berrett and Mark D. Taylor, BERRETT & ASSOCIATES, L.C., hereby submit their Memorandum in Support of Defendant's Motion to Dismiss for Lack of Venue and Lack of Personal Jurisdiction.

INTRODUCTION

This case concerns claims by Crown Asphalt Products Company ("CAPCO") that arise out of the alleged breach of a road construction agreement with Road & Highway. In 2002, Road & Highway was awarded a Nevada public road construction contract by the Nevada Department of Transportation ("NDOT") to construct a portion of the Interstate Highway System in Elko County, Nevada. After being awarded the contract, Liberty, as Road & Highway's surety, issued a payment bond to NDOT, to secure the payment of amounts properly due to suppliers and subcontractors for the Nevada road project. In October 2002, without any solicitation on the part of Road & Highway, CAPCO submitted a bid in Nevada offering to provide Road & Highway with road construction materials for the Nevada road project. Road & Highway and CAPCO subsequently reached an oral agreement in Nevada whereby CAPCO agreed to deliver project construction materials to the Elko County, Nevada construction site to be used on the project.

CAPCO now alleges that it was not paid for supplies it delivered to the Elko County, Nevada road project and has filed this action in Utah's Third District Court, asserting claims against both Road & Highway and Liberty. However, even if CAPCO's claims were true, which they are not, its Complaint must be dismissed for lack of venue and lack of personal jurisdiction. Venue in Utah is improper as both federal and state law requires that all actions to recover against a payment bond must be brought in the county where the contract was to be performed. In this case the undisputed location for the performance of the contract was Elko County, Nevada. Moreover, even if Utah was an appropriate venue for this action, which it is not, this case should be dismissed as Utah has no personal jurisdiction over Road & Highway under the

facts of this case.

STATEMENT OF FACTS

For purposes of this Motion to Dismiss, Road and Highway and Liberty submit the following relevant facts:

1. Plaintiff, CAPCO, is a Utah corporation with its principal place of business located in Davis County, Utah. Complaint at ¶ 1, attached hereto as Exhibit A.

2. Plaintiff has worked on other public road construction projects within the State of Nevada.

3. Defendant, Road and Highway, is a Nevada Limited Liability Corporation that provides road and highway construction services for public works construction projects in Nevada. Affidavit of Road & Highway President and Managing Member, Richard Howard Buenting ("Buenting Aff.") at ¶ 3, attached hereto as Exhibit B.

4. Plaintiff, CAPCO, claims that this Court has jurisdiction over Road & Highway "pursuant to Utah Code Ann. § 78-3-4 (2002) and Utah Code Ann. § 78-27-22 through § 78-27-24 (2002)" which are provisions of Utah's long-arm statute. Complaint at ¶ 4.

5. Despite Plaintiff's reliance upon Utah's long arm statue to purportedly establish personal jurisdiction over Road and Highway, Plaintiff's Complaint never alleges that any of its claims actually arise out of or relate to any business that Road and Highway actually conducted within the State of Utah. *See generally*, Complaint.

6. In fact, all of Plaintiff's claims essentially arise out of the alleged breach of a road

construction agreement that was entered into in Nevada and involved work that was to be performed in Nevada. Buenting Aff. at ¶ 16, 17.

7. Road & Highway's only office is located in Reno, Nevada. Buenting Aff. at ¶ 4.

8. Road & Highway does not own, lease, or control any property in the State of Utah, whether real or personal. Buenting Aff. at ¶ 5.

9. Road & Highway does not have any bank accounts in the State of Utah. Buenting Aff. at ¶ 6.

10. Road & Highway does not maintain any offices, phone numbers or facsimile listings in Utah. Buenting Aff. at ¶ 7.

11. Road & Highway does not maintain any employees in the State of Utah. Buenting Aff. at ¶ 8.

12. Road & Highway does not specifically recruit employees from the State of Utah. Buenting Aff. at ¶ 9.

13. Road & Highway does not advertise in Utah publications and does not send salespersons into Utah for the purpose of soliciting Utah business. Buenting Aff. at ¶ 10.

14. Road & Highway does not maintain a website. Buenting Aff. at ¶ 11.

15. Road & Highway does not have any construction jobs in Utah and has never worked on a construction site located within the State of Utah. Buenting Aff. at ¶ 12.

16. In 2002 Road & Highway was awarded a Nevada public road construction contract by NDOT to construct a portion of the Interstate Highway System in Elko County, Nevada. Buenting Aff. at ¶ 13.

17. After being awarded the contract, Liberty, as Road & Highway's surety, issued a payment bond to NDOT to secure the payment of amounts properly due to suppliers and subcontractors for the Nevada road project. Buenting Aff. at ¶ 17.

18. In October 2002, without any solicitation on the part of Road & Highway, CAPCO submitted a bid in Nevada, offering to provide Road & Highway with road construction materials for the Nevada road construction project. Buenting Aff. at ¶ 14, 15.

19. Road & Highway and CAPCO subsequently reached an agreement in Nevada whereby CAPCO agreed to deliver project construction materials to the Elko County, Nevada construction site to be used on the project. Buenting Aff., at ¶ 16.

20. The Payment Bond provided by Liberty for the Elko County, Nevada road construction project involved construction work that was to be performed in Elko County, Nevada. Buenting Aff. at ¶ 17, Copy of the payment bond attached to Buenting Aff. as Exhibit 1.

ARGUMENT

I. VENUE IN UTAH IS IMPROPER AS ACTIONS ON PAYMENT BONDS MUST BE BROUGHT IN THE COUNTY WHERE THE CONTRACT WAS TO BE PERFORMED.

Venue in Utah is improper as both federal and state law require that all actions to recover against a payment bond must be brought in the county where the contract was to be performed. Plaintiff incorrectly relies upon Utah Code Ann. § 78-3-4 to assert jurisdiction against the defendants in this case. Complaint ¶ 4. Utah Code Ann. § 78-3-4 states that "[t]he district court has original jurisdiction in all matters civil and criminal . . . *not prohibited by* law." Utah Code

Ann. § 78-3-4 (emphasis added). However, Utah law specifically states that "[a]n action upon a payment bond shall be brought in a court of competent jurisdiction in any county where the construction contract was to be performed *and not elsewhere*." Utah Code Ann. § 63-56-38 (2003) (emphasis added). Similarly, Nevada law provides that actions on payment bonds must be filed in the political subdivision in which the contract work was to be performed. Nevada Revised Statute § 339.055 states that:

> Every action on a payment bond as provided in NRS 339.035 shall be brought in the appropriate court of the political subdivision where the contract for which the bond was given was to be performed.

Nev. Rev. Stat. § 339.055.

Both the Utah and Nevada bond statues are modeled after the Federal Miller Act, which provides that actions on payment bonds must be filed in any federal district in which the contract was to be performed and executed. 40 U.S.C. 270b(b).

In addition, the Nevada Supreme Court has held that in all actions against statutory bonds the requirements of Nevada's bond statute apply even when absent from the terms of the bond itself. *See, Capriotti Lemon and Assoc, Inc. v. Johnson Service Co.,* 84 Nev. 318, 440 P.2d 386 (1968) (holding that when a bond required by a statute contains language inconsistent with the purpose of the statute, the language of the statute will be "read into" the bond so as to accomplish the purpose of the statute.)

The contract that is the subject of this lawsuit involves a public improvement project, i.e., construction of a portion of the Interstate Highway in Elko County, Nevada. As indicated above, the undisputed location for the performance of this contract is Elko County, Nevada. Buenting

Affidavit At ¶ 13. Accordingly, venue is only proper in Elko County, Nevada pursuant to Utah, Nevada and Federal law. Thus, Liberty, as the surety, and Road and Highway, as the bond principal and indemnitor, request that plaintiff's complaint be dismissed for lack of venue.

II. EVEN IF UTAH WAS AN APPROPRIATE VENUE FOR THIS ACTION, WHICH IT IS NOT, THIS CASE SHOULD BE DISMISSED AS UTAH HAS NO PERSONAL JURISDICTION OVER ROAD & HIGHWAY.

Under Utah law, Plaintiff has the burden of showing both that a Utah statute and due process considerations permit this Court to exercise personal jurisdiction over Road & Highway, a nonresident, Reno-based Nevada Corporation. Plaintiff cannot meet this burden because the long arm statute upon which plaintiff relies to establish jurisdiction and Utah due process case law require, at a minimum, that plaintiff show a relationship between its claim against Road & Highway and Road & Highway's contacts within the State of Utah. Here, there is no such relationship.

Plaintiff has sued Road and Highway to recover for damages resulting from the alleged breach of a road construction agreement which was entered into in Nevada and was to be performed in Nevada. Plaintiff can point to no Road & Highway conduct in Utah that is the bases for any of its claims in this case. Thus, under Utah law, there is no basis upon which this Court may assert personal jurisdiction over Road & Highway.

A. STANDARD OF REVIEW

Under Utah law, Plaintiff has the burden to show that this Court may properly assert personal jurisdiction over Road & Highway.[1] The standard of review applicable to judge whether Plaintiff has met this burden varies slightly, depending on whether an evidentiary hearing is held. If this Court decides this issue based upon documentary evidence alone, the standard is as follows:

> [The Complaint's allegations are] taken as true to the extent they are uncontroverted by the defendant's affidavits. If the parties present conflicting affidavits, all factual disputes must be resolved in the plaintiff's favor, and the plaintiff's prima facie showing is sufficient notwithstanding the contrary presentation by the moving party. However, only the well-pled facts of plaintiff's complaint, as distinguished from mere conclusory allegations must be accepted as true.[2]

Thus, if this Court decides the jurisdiction issue on the basis of the documentary evidence, it may reject any conclusory allegations in Plaintiff's Complaint, and may adopt the facts in Road & Highway's supportive affidavit. Further, if the Court holds a hearing, it need not resolve disputes between competing affidavits in Plaintiff's favor, but may weigh the competing

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[1] *Anderson v. American Society of Plastic and Reconstr. Surgeons*, 807 P.2d 825, 826 (Utah 1990) (J. Durham) (reh'g den., Feb. 6, 1991) (discussing contours of plaintiff's "burden" here).

[2] *PurCo Fleet Serv., Inc. v. Towers*, 38 F. Supp.2d 1320 1320, 1322-23 (D. Utah 1999) (quoting *Wenz v. Memery Crystal*, 55 F.3d 1503, 1505 (10th Cir. 1995) (citations omitted)); *see Newways v. McAusland*, 950 P.2d 420, 422 (Utah 1997):

> [If the Court] proceeds on documentary evidence alone (i.e., the first two methods), the plaintiff is only required to make a prima facie showing of personal jurisdiction. In addition, the plaintiff's factual allegations are accepted as true unless specifically controverted by the defendant's affidavits or by depositions, but any disputes in the documentary evidence are resolved in the plaintiff's favor.

(citations and emphasis omitted). The Utah Supreme Court had relies upon Tenth Circuit standards of review for 12(b)(2) motions. *Anderson*, 807 P.2d at 827.

evidence.[3]

B. UNDER SETTLED UTAH LAW AND THE FACTS OF THIS CASE, THERE IS NO PERSONAL JURISDICTION IN UTAH OVER ROAD & HIGHWAY.

Until recently, Utah courts have analyzed whether personal jurisdiction exists over nonresident defendants using phrases such as "specific jurisdiction," "general jurisdiction" and "nexus test." Last year, however, the Utah Supreme Court reviewed the "various tests" that have been "applied . . . in determining whether personal jurisdiction exists over a nonresident defendant," seeing a need to "clarify the law regarding this issue." *State ex rel. W.A.*, 2002 UT 127 ¶¶ 11-14. The court explained that "the proper test to be applied in determining whether personal jurisdiction exists over a nonresident," like Road & Highway, requires analysis of two considerations:

> First, the court must assess whether *Utah law* confers personal jurisdiction over the nonresident defendant. This means that a court may rely on *any* Utah statute affording it personal jurisdiction, not just Utah's long-arm statute. Second, assuming Utah law confers personal jurisdiction over the nonresident defendant, the court must assess whether an assertion of jurisdiction comports with the due process requirements of the Fourteenth Amendment.

Id at ¶ 14 (emphasis in original).

Under this "new test," a Utah court may assert personal jurisdiction over Road & Highway only if (1) a Utah statute initially affords such; and (2) if such jurisdiction does not compromise Road & Highway's due process rights. Id at ¶¶ 15-16 (noting that the court's "new test . . . recognizes the legislature's authority to provide for the extension of personal jurisdiction as limited by established constitutional due process requirements.") Here, however, neither

[3] *Anderson*, 807 P.2d at 826.

element is met because Plaintiff's claims against Road & Highway arise from events that occurred only in Nevada, and because Road & Highway does not conduct any business within the state of Utah.

1. NO UTAH STATUTE CONFERS UTAH WITH PERSONAL JURISDICTION OVER ROAD & HIGHWAY.

Under the first prong of the Utah Supreme Court's test in *W.A.*, for Road & Highway to be subject to Utah personal jurisdiction, a Utah statute must initially confer such jurisdiction. Here, Plaintiff relies upon Utah's long arm statute, Utah Code Ann. § 78-27-22, *et. seq.*, to establish jurisdiction over Road & Highway. Utah Code Ann. § 78-27-24 states:

> Any 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, submits himself, and if an individual, his personal representative, 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* . . . .

Utah Code Ann § 78-27-24 (emphasis added).[4] The terms of this statute do not provide this Court with a basis upon which to assert personal jurisdiction over Road & Highway because none of plaintiff's claims "arise from or are related to" any Road & Highway business transacted within Utah, nor do they arise from any contracting on Road & Highway's part to supply goods or services "in this state." Indeed, none of plaintiff's allegations link Road and Highway to any

[4] *See* Complaint at ¶ 4. Plaintiff also cites § 78-27-22, the long arm statute's "purpose" statement, which provides that the statute should be applied to the "fullest extent permitted by the due process clause of the Fourteenth Amendment to the United States Constitution." The Utah Supreme Court incorporates this principle into its two-step jurisdictional analysis, thus, additional analysis of this statutory provision is unnecessary.

conduct within the State of Utah. The contract that is the subject of this lawsuit involves a public improvement project for a portion of the Interstate Highway located in Elko County, Nevada. Buenting Aff. at ¶ 16, 17. Without any solicitation on the part of Road & Highway, plaintiff submitted a bid in Nevada offering to provide Road & Highway with road construction materials for the Nevada road project. *Id.* As part of the Nevada contract, Plaintiff agreed to deliver construction materials to Elko County, Nevada. *Id.* Moreover, Road & Highway has no other contact with the State of Utah. Road & Highway's only office is located in Reno, Nevada and it does not own, lease, or control any property in the State of Utah, whether real or personal. Buenting Aff. at ¶¶ 4-5. Road & Highway does not have any bank accounts in the State of Utah and does not maintain any offices, phone numbers or facsimile listings in Utah. Buenting Aff. at ¶¶ 6-7. Road & Highway does not maintain any employees in the State of Utah and does not specifically recruit employees from the State of Utah. Buenting Aff. at ¶¶ 8-9. Road & Highway does not maintain a website, does not advertise in Utah publications and does not send salespersons into Utah for the purpose of soliciting Utah business. Buenting Aff. at ¶¶ 10-11. Moreover, Road & Highway has never worked on a construction site located within the State of Utah. Buenting Aff. at ¶ 12.

Clearly, Plaintiff's claims do not arise out of, and are not related to, any Road & Highway contacts within Utah, whether the "transaction of business," "contracting to supply goods or services," or otherwise. Thus, this Court should find that the plain language of the long arm statute does not provide jurisdiction in Utah over Road & Highway and that the conclusory jurisdictional allegation in Plaintiff's Complaint is insufficient to satisfy Plaintiff's burden of

proof. Therefore, Plaintiff's Complaint against Road & Highway should be dismissed without prejudice.

2. DUE PROCESS CONSIDERATIONS DO NOT PERMIT UTAH COURTS TO EXERCISE PERSONAL JURISDICTION OVER ROAD & HIGHWAY.

Even if Road & Highway's conduct somehow implicated Utah's long arm statue, due process notions would still prohibit personal jurisdiction in Utah. Utah state courts may exercise jurisdiction over nonresident defendants, like Road & Highway, only if such comports with the due process requirements of the Fourteenth Amendment to the United States Constitution upon an analysis of two factors. *W.A.*, 2002 UT 127 ¶ 14. First, Road & Highway must have, through "minimum contacts," purposefully availed itself of Utah laws and privileges such that it should "reasonably anticipate being haled into court there." *First Mort. Corp. v. State Street Bank and Trust Co.*, 173 F. Supp.2d 1167, 1173 (D. Utah 2001) (applying Utah law) (citations omitted). Second, jurisdiction over Road & Highway must be fair and just. *Id.* Under these factors, this Court should find that personal jurisdiction over Road & Highway in Utah violates due process.

First. under Utah Supreme Court case law, Road & Highway clearly does not have the sort of "minimum contacts" with Utah that would permit a Utah court to assert long-arm based jurisdiction because Plaintiff's claims are unrelated to any Road & Highway contact with Utah. The Utah Supreme Court has emphatically held that in cases where the plaintiff seeks to establish personal jurisdiction "pursuant to the long-arm statute," as Plaintiff seeks to do here, Utah courts "do not have the power to take jurisdiction over non-resident defendants unless the litigation is related to acts of the defendant by which it 'purposefully avails itself of the privilege of

conducting activities within the forum state.'" *Roskelly & Co. v. Lerco Inc.,* 610 P.2d 1307, 1311 (Utah 1980) (quoting *Hanson v. Denckla*, 357 U.S. 235, n. 5 (1977)); *see also Mallory Eng., Inc. v. Ted R. Brown & Assoc., Inc.,* 618 P.2d 1004, 1007 (Utah 1980) (noting that nonresident defendant must have such minimum "contacts with [Utah] as make it reasonable, in the context of our federal system of government, to require [it] *to defend the particular suit which is brought* . . . .); *First Mortgage Corp.*, 173 F. Supp.2d at 1173 (noting that Plaintiff's claims must arise from "actions by [the defendant] that create a substantial connection with [Utah]").

Under these principles, Road & Highway clearly does not have the required minimum contacts with Utah such that personal jurisdiction would comport with its due process rights. As discussed above, Road & Highway does not conduct business in Utah and has no other contact with the State of Utah. *See* Buenting Aff. generally. Therefore, this Court should find that any exercise of personal jurisdiction over Road & Highway in Utah is improper.

Further, personal jurisdiction in Utah over Road & Highway would offend notions of fair play and substantial justice. "Reduced to more practical terms," the Utah Supreme Court has instructed that this fairness inquiry "concerns: (1) whether the cause of action arises out of or has a substantial connection with [the defendant's in-state] activity; and (2) the balancing of the convenience of the parties and the interests of the state in assuming jurisdiction." *Mallory Eng.*, 618 P.2d at 1008 (citations omitted).

These fairness considerations weigh heavily in favor of this Court declining to assert personal jurisdiction over Road & Highway. First, as has been discussed, Plaintiff's claims against Road & Highway have no connection to any Road & Highway contact with Utah.

Second, a balancing of the convenience of the parties and Utah's interest in hosting this litigation leads to the conclusion that Plaintiff's Complaint against Road & Highway should be dismissed. Conducting this litigation in Utah creates a significant burden for all of the parties involved as the public road project at issue in this case took place in Nevada. Thus, the vast majority of the witnesses will be located in Nevada. In addition, all of the parties will need to conduct significant discovery regarding the construction of the road in Nevada where it is located, rather than Utah. Moreover, the construction at issue in this case involves a Nevada public road project and, therefore, involves significant Nevada state interests. Simply put, Utah has very little interest in hosting this litigation. As such, this Court should find that forcing Road & Highway to travel to Utah to defend this action would violate due process notions of fairness and substantial justice.

CONCLUSION

Plaintiff's Complaint must be dismissed for lack of venue and lack of personal jurisdiction. Venue in Utah is improper as both federal and state law requires that all actions to recover against a payment bond must be brought in the county where the contract was to be performed, i.e., Elko County, Nevada. Moreover, even if Utah was an appropriate venue for this action, which it is not, this case should be dismissed as Utah has no personal jurisdiction over Road & Highway. Therefore, Defendants, Road & Highway and Liberty, respectfully request that Plaintiff's Complaint be dismissed.

DATED this _____ day of November, 2003.

BERRETT & ASSOCIATES, L.C.

_____

BARBARA K. BERRETT
MARK D. TAYLOR
Attorneys for Defendants Road & Highway Builders, L.L.C., and Liberty Mutual Insurance Company

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of November, 2003, I caused to be mailed, postage prepaid, a true and correct copy of the foregoing to the following:

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Angela W. Adams
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Tab 2

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IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

CROWN ASPHALT PRODUCTS COMPANY, a Utah Corporation, **Plaintiff,** **vs.** **ROAD & HIGHWAY BUILDERS, L.L.C., a Nevada Limited Liability Corporation, and LIBERTY MUTUAL INSURANCE COMPANY, a Massachusetts Corporation,** **Defendant.**	**MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FOR LACK OF VENUE AND LACK OF PERSONAL JURISDICTION** **Civil No. 030922469** **Honorable Ann Boyden**

Plaintiff Crown Asphalt Products Co. ("**CAPCO**") a Utah corporation, by and through its counsel, Ballard Spahr Andrews & Ingersoll, LLP, hereby submits this Memorandum in Opposition to Defendants' Motion to Dismiss for Lack of Venue and Lack of Personal Jurisdiction. For the reasons stated below, Defendants' motion should be denied.

INTRODUCTION

Defendants Road and Highway Builders, LLC ("**RHB**"), and Liberty Mutual Insurance Co. ("**Liberty**") have moved to dismiss the Complaint in this action on two basic grounds. First, Defendants assert that this Court is an improper venue for the adjudication of this dispute because both Nevada and Utah have enacted statutes patterned after the federal Miller

Act which provides that an action on a performance bond must be brought in the county in which the contract bonded was to be completed. There are two simple problems with this argument. First, the courts have been clear in unanimously holding that the venue requirements of the Miller Act, and therefore, the Utah and Nevada statutes, can be waived. Secondly, even if this Court finds that this venue requirement was not waived, it only applies to the causes of action against Liberty for payment on the bond. It does not apply, or even attempt to apply, to the causes of action against RHB for breach of contract, breach of the covenant of good faith and fair dealing, unjust enrichment, fraud and for dishonored instrument under Utah Code Ann. § 7-15-1. Because the Miller Act requirements can be waived and because, in any event, these venue requirements do not reach the claims against RHB, this venue argument does not mandate dismissal of the Complaint.

Defendants second argument for dismissal is that this Court lacks jurisdiction over RHB. This assertion is without weight. RHB signed a contract with CAPCO in which it expressly, explicitly consented to the jurisdiction of this Court. Because RHB unequivocally consented to the jurisdiction of this Court, RHB is not entitled to dismissal for lack of personal jurisdiction.

STATEMENT OF MATERIAL FACTS

1. Plaintiff CAPCO is a Utah corporation with its principal place of business in Davis County, Utah. CAPCO supplies asphalt to companies that, in turn, use the asphalt for road and highway construction.

2. Defendant RHB is a Nevada limited liability corporation with its principal place of business in Reno, Nevada. RHB is a road paving company. Defendant Liberty is a

Massachusetts corporation that, among other things, provides bonds to construction and/or paving companies bidding on state government projects.

3. On October 31, 2002, CAPCO submitted a Confidential Price Quotation, ("Bid"), to RHB under which CAPCO offered and agreed to supply RHB with approximately 15,000 Short Tons of AC 20P Asphalt Oil at $194.75 per Short Ton, and approximately 1093 Short Tons of CSS-1H Asphalt Emulsion at either $112.00 or $127.00 per Short Ton, depending on the concentration of the CSS-1H, F.O.B. Woods Cross, UT, (the "**Asphalt**"). The sales terms of the Bid were expressly based on several conditions. Among other things, the Bid was given "expressly subject to the terms and conditions of CAPCO's Asphalt Sales Contract." (A true and correct copy of the Confidential Price Quotation is attached to the Affidavit of Jeffery W. Shields ("**Shields Aff.**"), filed concurrently, as Exhibit A).

4. RHB accepted the terms of CAPCO's Bid, including the condition that it be subject to **all** the terms of the Asphalt Sales Contract, ("**Contract**") by accepting CAPCO's offer and ordering the Asphalt. Additionally, RHB signed the Contract expressly consenting to its provisions. (A true and correct copy of the Contract is attached to the Shields Aff. as Exhibit B).

5. The Contract explicitly incorporated into the Bid, and signed by RHB, provides, among other things, the following condition:

> 12. **Governing Law**: This Agreement shall be governed by, and construed in accordance with, the laws of the State of Utah (exclusive of the conflict of laws provisions thereof). Seller and Purchaser **hereby consent to the jurisdiction of the courts of that state.** The proper venue for any legal dispute hereunder shall be the state district court or federal court in Salt Lake City, Utah.

(Shields Aff., Exhibit B, p. 2, ¶ 12 (emphasis added)).

6. It should be noted that RHB amended several of the provisions of the Contract before signing. Although it is CAPCO's position that the unaltered Contract is the operative agreement between the parties, it is notable that even though RHB altered several of the provisions of the Contract before signing, it did not even attempt to alter or change in any way paragraph 12, cited above, which provides that the buyer, RHB, expressly consents to the jurisdiction of this Court. *Id.*

7. Beginning in June 2003, RHB began failing and refusing to tender timely payment for Asphalt delivered pursuant to the Contract.

8. Accordingly, CAPCO contacted RHB on July 8, 2003, and demanded payment of past due amounts and pre-payment of all future deliveries, stating that failure to pay these amounts would force CAPCO to cancel the Contract and refuse to deliver any more Asphalt. Richard Buenting, RHB's president, indicated that although RHB did not have the ability to pre-pay for future deliveries of the Asphalt, RHB would bring its account with CAPCO current.

9. Pursuant to this representation, on July 8, 2003, RHB issued a check to CAPCO for $84,519.84, for eleven outstanding invoices.

10. In reliance upon these facts and representations, CAPCO began to again deliver Asphalt to RHB. CAPCO relied on RHB's representations that future payments would be made in a timely manner and on RHB's payment of the outstanding invoices in delivering Asphalt to RHB after July 8, 2003.

11. On July 15, 2003, CAPCO's bank notified CAPCO that RHB's check was being returned unpaid. The bank stated that RHB had stopped payment of the check.

12. Pursuant to the terms of the Contract, CAPCO immediately notified RHB that it was in breach of the Contract. CAPCO demanded full, immediate payment of all outstanding amounts, which, including the $84,519.84, totaled $195,768.19.

13. RHB has failed and refused to pay CAPCO for this Asphalt pursuant to the Contract. To date, RHB owes CAPCO $195,768.19 for Asphalt delivered to RHB during June and July 2003 plus interest on that amount.

14. CAPCO has, on numerous occasions, demanded payment for the Asphalt delivered to RHB. RHB has refused to pay the money due under the Contract.

15. On August 4, 2003, CAPCO notified Liberty, through the Nevada Department of Transportation ("**NDOT**"), that RHB had failed and refused to tender payment for Asphalt delivered, which payment was secured by a performance bond ("**Bond**") issued to RHB by Liberty. Liberty has failed to pay CAPCO pursuant to the Bond.

16. Accordingly, CAPCO filed this action on October 9, 2003. On November 24, 2003, Defendants moved to dismiss.

ARGUMENT

Paragraph 12 of the contract provides that the parties agree to the propriety of both venue and jurisdiction with this Court. Accordingly, Defendants' Motion to Dismiss should be denied.

I. Venue is Proper in This Court Pursuant to the Terms of the Contract.

Defendants argue that "[b]oth the Utah and Nevada bond statutes are modeled after the Federal Miller Act, which provides that actions on payment bonds must be filed in any federal district in which the contract was to be performed and executed. 40 U.S.C. 270b(b)." (Memorandum in Support of Motion to Dismiss ("**Defendants' Mem.**"), at 6). Defendants'

assertion that the Miller Act so provides and that the Utah and Nevada statutes are substantively identical, mandating the same requirements, is absolutely correct.[1] However, courts that have considered circumstances such as those present in this case have unanimously held that "a valid forum selection clause supersedes the Miller Act's venue provision." *United States ex rel B&D Mechanical Contractors, Inc. v. St. Paul Mercury Ins. Co.*, 70 F.3d 1115, 1117 (10th Cir. 1995).

In *B&D*, the court addressed the concern raised by Defendants regarding the provision in both the Miller Act and in Utah Code Ann. § 63-56-38 that dictates that an action on a payment bond must be brought in a court in the county in which the contract was to be performed "*and not elsewhere.*" *See* 40 U.S.C. § 270b(b); Utah Code Ann. § 63-56-38. "Although the language of the Miller Act, 20 U.S.C. § 270b(b), requiring that suits be brought in the judicial district where the contract was performed 'and not elsewhere' seems to mandate strict conformance, judicial interpretation holds otherwise. While dealing with the merits of another issue, the Supreme Court characterized § 270b(b) as being 'merely a venue requirement.'" *B&D*, 70 F.3d at 1117. Because the Supreme Court held that § 270b(b) is a venue requirement and because "[i]t is well settled that venue provisions are subject to contractual waiver" the *B&D* Court held that "a valid forum selection clause supersedes the Miller Act's venue provision." *Id.* In so holding, the *B&D* Court held as follows:

> Three circuits have addressed forum selection clauses that conflict with the Miller Act's venue provisions. All three have held that as

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[1] Defendants' cite Nevada Revised Statutes ("NRS") 339.055 as the applicable statute. However, the operative statute in this case is NRS 408.363. The Nevada Department of Transportation confirmed this on July 28, 2003, by letter to CAPCO. The letter, a true and correct copy of which is attached as Exhibit C, provides, "If upon completion and acceptance of the project you find that monies are due your organization, you should file a claim as provided by NRS 408.363, a copy of which is attached." (*Id.*) The NRS section provided does not demand venue in any particular court. (*Id.* at Exhibit C). As provided by NDOT, this is the Nevada statute applicable to the current case. It clearly provides for the adjudication of this dispute by setting forth the appropriate procedure and applicable time periods. *Id.* Noticeably, however, this statute does not provide a particular venue for the hearing of such disputes. *Id.* Therefore, any court of proper jurisdiction is a proper venue for this case.

> a mere venue requirement, § 270b(b) is subject to contractual waiver by a valid forum selection clause.

Id. (citing *FGS Constructors, Inc. v. Carlow*, 64 F.3d 1230, 1233 (8th Cir. 1995) (holding the Miller Act's venue requirement could be waived by defendants); *United States ex rel Pittsburgh Tank & Tower, Inc. v. G&C Enterprises, Inc.*, 62 F.3d 35, 36 (1st Cir. 1995) (same); *In re Fireman's Fund Ins. Cos.*, 588 F.2d 93, 95 (5th Cir. 1979) (same)).

The cases cited by the *B&D* Court concur in holding that a forum selection clause trumps the Miller Act venue provision on which both the Utah and Nevada statutes are based. For example, the *Fireman's Fund* Court, in holding that venue may be varied by contract, stated that "[w]hile the phrase 'and not elsewhere' would initially appear to foreclose further discussion, it must be remembered that this subsection is not jurisdictional but only a venue provision." 588 F.2d at 95. There, the Fifth Circuit held that the contractual venue provision superceded the Miller Act. *Id.* Likewise, the *G&C Enterprises* Court held that the forum selection clause in the parties' agreement was binding and enforceable over the Miller Act's venue provision. 62 F.3d at 36-37. *See also United States of America ex rel Giannola Masonry Co. v. P.J. Dick Inc.*, 79 F.Supp.2d 803, 807 (E.D.Mich. 2000) ("The Court finds that plaintiff has waived its Miller Act venue argument in light of the existence of the clear and unambiguous forum-selection clause present in the case at bar. It is well-settled that venue provisions have long been subject to contractual waiver through a valid forum selection agreement. Moreover, courts have held that a valid forum selection clause supersedes the Miller Act's venue provision.") (citations omitted); *United States of America ex rel Tech Coatings v. Miller-Stauch Construction Co., Inc.*, 904 F.Supp. 1209, 1213 (D. Kan. 1995) ("The venue requirement under

the Miller Act...is like any other conventional venue provision; it can be contractually waived by a valid forum selection clause.")[2]

"It is well settled that venue provisions are subject to contractual waiver." *B&D*, 70 F.3d at 1117 (citing *National Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315, 84 S.Ct. 411, 414, 11 L.Ed.2d 354 (1964)). Because RHB waived the venue requirements of both state and federal law by agreeing to venue and jurisdiction in this Court, Defendants' Motion to Dismiss should be denied.[3]

II. Jurisdiction in This Court is Proper Pursuant to Utah Code Ann. § 78-27-24.

Defendants next argue that this Court does not have jurisdiction over RHB. They attack the jurisdiction of this Court on two bases: (1) the long-arm statute does not apply, and (2) RHB's due process rights would be compromised if this Court retained jurisdiction over this matter. (Defendants' Mem. at 8-9). Since neither of these points warrants dismissal of the Complaint, Defendants' Motion should be denied.

A. Utah's Long Arm Statute Properly Confers Jurisdiction on this Court.

Defendants argue that Utah's long-arm statute does not reach RHB because RHB does not transact business within this state. (Defendants' Mem. at 10). However, Utah Code Ann. § 78-27-23 defines the "transaction of business within this state" to "mean activities of a nonresident person, his agents, or representatives in this state **which affect persons or**

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[2] Although neither Utah nor Nevada has ever had the opportunity to address this waiver of venue, Defendants correctly point out that "[b]oth the Utah and Nevada bond statutes are modeled after the Federal Miller Act..." (Defendants' Mem. at 6). Accordingly, the Court should look to the interpretation of the substantively identical federal statute for guidance on this issue.

[3] Even if this Court chooses not to adopt the unanimous opinion of courts that the venue provisions of the state and federal laws governing claims on bonds can be waived, RHB is still not entitled to dismissal because the action on the bond is only against Liberty. CAPCO's claims against RHB are entirely distinct from the claim against the bond and, therefore, RHB is not entitled to dismissal either way.

businesses within the state of Utah." *Id.* (emphasis added). Utah courts have interpreted this definition as including the transmission of mail and wire communications to persons or businesses in this state regardless of the defendants physical presence in this state. *SII MegaDiamond, Inc. v. American Superabrasives Corp.*, 969 P.2d 430, 434-35 (Utah 1998); *Synergetics v. Marathon Ranching Co.*, 701 P.2d 1106 (Utah 1985). Further "jurisdiction 'may not be avoided merely because the defendant did not physically enter the forum State' if other contacts are sufficient." *SII*, 969 P.2d at 433-434 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462. 476 (1985).

RHB contacted CAPCO many times during the course of conducting business with CAPCO by both mail and wire communications to, among, other things, agree on a suitable method to proceed with the Contract after RHB failed and refused to pay CAPCO for Asphalt. Further, RHB sent payment for goods to CAPCO in Utah. In fact, RHB stopped payment on one of these checks that was sent to CAPCO in Utah after using the promise of the payment to induce CAPCO to deliver more Asphalt to RHB. These contacts satisfy the test set forth in *Burger King* and reiterated by the Utah Supreme Court in *SII*.

In *SII* the Utah Supreme Court, recognizing that persons living outside of Utah often transact business in Utah without physically being in Utah held:

> It is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. So long as a commercial actor's efforts are "purposefully directed" toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.
>
> This is more true today than it was in 1985 when **Burger King** was decided. Expanding business opportunities unfortunately give rise to expanding opportunities for breach of contract, injury, and

> fraud. More than ever, "**the public interest demands that the state provide its citizens with an effective means of redress against nonresident persons, who, through certain significant minimal contacts with this state, incur obligations to citizens entitled to the state's protection.**"

SII, 969 P.2d 434-435 (citing *Burger King*, 471 U.S. 476) (emphasis added).

The rationale given in *SII* was adopted to avoid the type of motion filed by Defendants. In *SII*:

> The orders were received in Utah, filled in Utah, and invoiced in Utah, and the products were shipped from Utah. [Defendant] mailed its payments to Utah, and its default on the payments injured a corporation. All of these activities "affected persons or businesses within the State of Utah."

Id. (quoting *Synergetics*, 701 P.2d at 1110).

The facts are identical in this case, with the exception of the fact that RHB did not place orders to CAPCO for the product exchanged. Otherwise, however, the elements are the same here. RHB and CAPCO entered into a Contract whereby CAPCO was to deliver Asphalt to RHB. The Asphalt was prepared in Utah, invoiced in Utah, and shipped from Utah. RHB mailed its payments to Utah, and its default of the Contract as well as the stop payment of one of the checks injured a Utah corporation. These activities "affected persons or businesses within the State of Utah," as described by the *SII* Court. And just as in *SII*, this Court has jurisdiction over the defendant based on these factors. 969 P.2d at 435. RHB has transacted business in this state under the test followed in *SII*. Accordingly, this Court should deny Defendants' Motion.

B. Jurisdiction in this Court Does not Violate RHB's Right to Due Process.

In *SII*, the court held that defendants' conduct, as enumerated in the last section, amounted to "minimum contacts" for the purpose of giving the Utah court jurisdiction. *Id.* Likewise, in the current dispute, this Court's assertion of jurisdiction over RHB does not violate

RHB's right to due process because RHB has established "minimum contacts" by purchasing goods produced in Utah, shipped from Utah, invoiced in Utah, and by sending payment to Utah. In *SII*, the court found that the defendant "purposefully availed itself of the benefits and protections of Utah law" by signing a contract with a Utah corporation and commencing a regular course of business purchasing goods from that Utah corporation. *Id.* The same is true in the current case. RHB purposefully availed itself of the benefits and protections of Utah law when it entered into a contract to purchase goods from Utah and received goods shipped from Utah. Where, as here, "'a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.'" *Id.* (quoting *Burger King*, 471 U.S. 477). RHB has presented no such evidence. Accordingly, Defendants' Motion should be denied.

C. RHB Has Expressly Consented to the Jurisdiction of this Court.

The single most important fact surrounding any question of jurisdiction in this case is the fact that RHB **signed a contract expressly consenting to the jurisdiction of this Court**. RHB carefully reviewed the Contract and made certain changes before signing it. (Exhibit B, p. 2, ¶¶ 4-11). Significantly, it did not alter, amend, cross-out, or otherwise attempt to change the consent to the personal jurisdiction of this Court. RHB signed the Contract consenting to jurisdiction, and thereby, waived any objections to the jurisdiction of this Court.

Utah courts have upheld the principle set forth in the Restatement (Second) of Conflict of Laws § 80 (1989) that "[t]he parties agreement as to the place of the action will be given effect unless it is unfair or unreasonable." *Phone Directories Co. Inc. v. Henderson*, 2000 UT 64, n. 7, 8 P.3d 256. In *Henderson*, the court held that:

> [W]hile a forum selection/consent-to-jurisdiction clause by itself is not sufficient to confer personal jurisdiction over a defendant as a matter of law, such clauses do create a presumption in favor of jurisdiction and will be upheld as fair and reasonable so long as there is 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. Although the rational nexus element does require some connection between Utah and either the parties to or actions contemplated by the contract, it need not rise to the level required under section 78-27-24.

Id. at ¶ 14.[4]

As explained above, there is a clear rationale nexus to this state in this dispute. RHB purchased products from Utah, made payment for those products in Utah, breached the Contract by refusing to tender timely payment in Utah, and communicated through mail and wire communications to Utah regarding the particulars of the conduct of business between the parties. Beyond that, it consented and agreed to adjudicate any disputes between the parties in Salt Lake City. (Exhibit B, p. 2, ¶ 12).

As the *Henderson* Court explained, "people are free to waive the requirement that a court must have personal jurisdiction over them before that court can adjudicate a case involving them." *Id.* at ¶ 15 (citing *National Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315-16 (1964) (stating that "it is settled...that parties to a contract may agree in advance to submit to the jurisdiction of a given court"); *Petrowski v. Hawkeye-Sec. Ins. Co.*, 350 U.S. 495, 495-96 (1956) (holding that parties who stipulated to personal jurisdiction waived any right to assert a lack of personal jurisdiction); *Curtis v. Curtis*, 789 P.2d 717, 726 (Utah Ct. App. 1990) (stating that "defects in personal jurisdiction can be waived")). Additionally, "people are

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[4] Defendants cite *State ex rel W.A.*, 2002 UT 127, as authority setting forth the standard to be followed in deciding jurisdictional questions. Because that case did not involve an explicit consent to jurisdiction, as in the present case, it is inapplicable to a determination of the current dispute.

generally free to bind themselves pursuant to any contract, barring such things as illegality of subject matter or legal incapacity." *Id.* (citing *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U.S. 353, 356 (1931) ("The general rule is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts.")). "When combined, these two concepts support the conclusion that people can contractually agree to submit to the jurisdiction of a particular court, even if that court might not have independent personal jurisdiction over them" under the general tests for determining personal jurisdiction. *Id.*

In so holding, the *Henderson* Court held that it had jurisdiction over a California resident who was sued by a Utah corporation with its principle place of business in Utah where the California resident telephoned the plaintiff's Utah offices to discuss the arrangement between the parties and where he mailed the contract between the parties to the plaintiff's Utah offices. *Id.* at ¶16. Likewise, in the present case, this Court has jurisdiction over RHB for the same reasons.

RHB consented to this Court's jurisdiction and, therefore, Defendants' Motion to Dismiss should be denied.

III. RHB Accepted the Venue and Jurisdiction Provision of the Contract Both by Signing the Contract and by Accepting CAPCO's Offer for the Sale of Goods Under Utah Code Ann. § 70A-2-207.

As set forth above, the venue requirements of state and federal law were contractually altered by the Contract between CAPCO and RHB. Additionally, RHB contractually consented to the personal jurisdiction of this Court. Both of these were accomplished by (1) RHB's signing of the Contract, and (2) RHB's acceptance of CAPCO's offer to sell goods to RHB.

It is clear from examination of the amended Contract attached as Exhibit B that RHB intended, and did in fact, agree to the forum selection clause contained in the Contract. As is evidenced by Exhibit B, RHB went to some lengths to amend the portions of the Contract. RHB made substantial, substantive revisions to paragraphs 4 and 11. However, even though RHB took the time and made the effort to carefully review and alter the Contract, RHB did not in any way attempt to amend paragraph 12. By signing this Contract, RHB agreed, at least, to the unaltered provisions, including the forum selection clause that places jurisdiction and venue of the claims brought in the Complaint with this Court. RHB has not, and indeed cannot, rationally object to its previous concession to this term of the signed Contract.

Further, even without RHB's signature on the altered Contract, the forum selection clause in the Contract is valid and enforceable. This dispute is governed by the Uniform Commercial Code because it involves the sale of goods.[5] Section 2-207 of the Uniform Commercial Code has been adopted by both Utah and Nevada. It provides:

> (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

Under this provision, CAPCO's Bid and Contract constituted the offer because they contained a "manifestation of willingness to enter into a bargain" that was "definite in its terms" so as to reasonably set forth the promises and performances of both parties. *Weyburn-Bartel, Inc. v. Zagar, Inc.*, 1996 U.s. Dist. LEXIS 16988, *8 (W.D.Mich. October 21, 1996). The *Zagar* Court specifically held that "a price quotation can amount to an offer giving rise to a

[5] Both Utah and Nevada have adopted, verbatim, the sections of the Uniform Commercial Code applicable to this dispute. Because the laws of the two states do not differ, neither state's laws will be cited, but rather, all citations will be to the Uniform Commercial Code.

power of acceptance if it incorporates the material terms and invites acceptance." *Id.* at *8. In so holding, the court found that the price quotation given by the seller constituted the offer because it contained all the material terms of the contract.

In the current dispute, just as in *Zagar*, the seller's price quotation, CAPCO's Bid and Contract, set forth all of the material terms of the offer. *Id.* The Bid and Contract state the responsibilities and performance requirements for both of the parties in explicit terms. The Bid and Contract are, therefore, the offer. And, just as in *Zagar*, the buyer's (RHB's) subsequent purchases are simply a manifestation of acceptance of that offer. *Id.* at *13. In accepting CAPCO's conditional offer, RHB impliedly manifested assent to the forum selection and jurisdictional clause in the Contract. *Id.*

Accordingly, since RHB both explicitly and impliedly agreed to jurisdiction in this Court, Defendants' Motion should be denied.

CONCLUSION

Based on the foregoing, Defendants' Motion to Dismiss should be denied.

DATED: December 19, 2003.

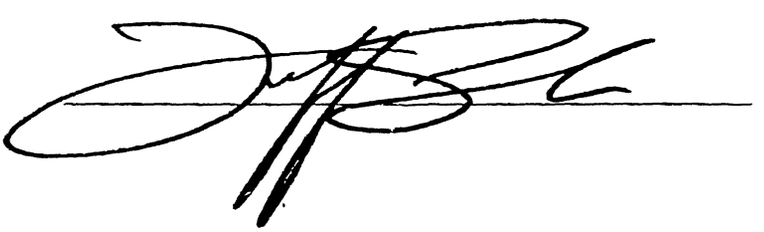
BALLARD SPAHR ANDREWS & INGERSOLL, LLP

Jeffrey W. Shields, Esq.
Angela W. Adams, Esq.
Attorneys for Plaintiff Crown Asphalt Products Co.

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of December 2003, I caused a true and correct copy of the foregoing **MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FOR LACK OF VENUE AND LACK OF PERSONAL JURISDICTION** to be mailed, postage prepaid, to:

Barbara K. Berrett
Mark D. Taylor
Berrett & Associates, L.C.
Attorneys for Defendants
Kay Bank Tower, Suite 530
50 South Main Street
Salt Lake City, Utah 84101



Tab 3

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

CROWN ASPHALT PRODUCTS COMPANY, a Utah Corporation,	RULING ON DEFENDANTS' MOTION TO DISMISS
Plaintiff,	CASE NO. 030922469
vs.	Judge Ann Boyden
ROAD & HIGHWAY BUILDERS, L.L.C., a Nevada Limited Liability Corporation, and LIBERTY MUTUAL INSURANCE COMPANY, a Massachusetts Corporation,	
Defendants.	

This Court has received and fully reviewed defendants' Motion to Dismiss for Lack of Venue and Lack of Personal Jurisdiction; plaintiff's opposing Memorandum; defendants' Reply; and all accompanying Memoranda and Affidavits. All issues are well and fully argued within these documents, and no oral argument is necessary to assist the Court.

The Court finds that the issues involved in this suit are so tightly connected to the State of Nevada, that due process requirements and the interests of justice cannot be met by retaining the suit in this jurisdiction. For these reasons, and the specific arguments set forth more fully in defendants' Motion

and Reply, defendants' Motion to Dismiss is GRANTED. Defendants to prepare the Order.

Dated this 1 day of ~~February~~ March, 2004.

/s/
ANN BOYDEN
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Ruling on Defendants' Motion to Dismiss, to the following, this_____ day of February, 2004:

Jeffrey W. Shields
Angela W. Adams
Attorneys for Plaintiff
201 S. Main, Suite 600
Salt Lake City, Utah 84111-2215

Barbara K. Berrett
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