

FILED

MAY 08 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 307115

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

ABW TECHNOLOGIES, INC.,

Appellant,

v.

ENERGYSOLUTIONS, LLC,

Respondent.

REPLY BRIEF OF APPELLANT
ABW TECHNOLOGIES, INC.

John Theiss, WSBA #24488
Rebecca Francis, WSBA #41196
Davis Wright Tremaine LLP
Attorneys for Petitioner

Suite 2200
1201 Third Avenue
Seattle, WA 98101-3045
(206) 622-3150 Phone
(206) 757-7700 Fax

TABLE OF CONTENTS

I.	Introduction and Summary of Reply	1
II.	Argument	2
A.	The Superior Court Erred in Applying a Practical or Logical Place Test to the Forum-Selection Clause.	2
1.	The Superior Court Failed to Require <i>EnergySolutions</i> to Show That Enforcement Would Deprive It of Its Day in Court.	3
2.	<i>EnergySolutions</i> Has Not Met Its Heavy Burden of Establishing Enforcement Would Deprive It of Its Day in Court.	4
B.	The Court Should Remand with Instructions to Dismiss this Action.....	6
C.	The Superior Court Correctly Concluded the Forum-Selection Clause Applies to ABW and <i>EnergySolutions</i>	8
1.	<i>EnergySolutions</i> Incorporated into the Purchase Order the General Terms and Conditions Containing the Forum-Selection Clause.....	8
2.	<i>EnergySolutions</i> Used General and Unlimited Incorporation Language in the Purchase Order.....	11
3.	The Superior Court Correctly Concluded the Forum-Selection Clause Is the Specific Clause and the Clauses Do Not Conflict.	15
III.	Conclusion	17

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Cathco v. Valentiner Crane Brunjies Onyon Architects,</i> 944 P.2d 365 (Utah 1997).....	17
<i>Certain Underwriters at Lloyd’s London v. Travelers Prop. Cas.</i> <i>Co. of Am.,</i> 161 Wn. App. 265 (2011)	10
<i>Consol. Realty Grp. v. Sizzling Platter, Inc.,</i> 930 P.2d 268 (Utah Ct. App. 1996)	8
<i>Coombs v. Juice Works Dev. Inc.,</i> 81 P.3d 769 (Utah Ct. App. 2003)	4, 5
<i>Dix v. ICT Grp., Inc.,</i> 160 Wn.2d 826 (2007)	4
<i>In re Marriage of Strohmaier,</i> 34 Wn. App. 14 (1983)	7
<i>Keystone Masonry, Inc. v. Garco Constr., Inc.,</i> 135 Wn. App. 927 (2006)	7
<i>Moore v. Flateau,</i> 154 Wn. App. 210 (2010)	7
<i>Prows v. Pinpoint Retail Sys., Inc.,</i> 868 P.2d 809 (Utah 1994).....	3, 5, 6
<i>Roy v. City of Everett,</i> 48 Wn. App. 369 (1987)	7
<i>Sales Creators, Inc. v. Little Loan Shoppe, LLC,</i> 150 Wn. App. 527 (2009)	8
<i>Satomi Owners Ass’n v. Satomi, LLC,</i> 167 Wn.2d 781 (2009)	8

<i>Sime Constr. Co. v. Wash. Pub. Power Supply Sys.</i> , 28 Wn. App. 10 (1980)	12, 13
<i>Tellevik v. Real Prop. Known as 31641 W. Rutherford St.</i> , 120 Wn.2d 68 (1992)	8, 16
<i>Utah Transit Auth. v. Salt Lake City S. R.R. Co.</i> , 131 P.3d 288 (Utah Ct. App. 2006)	10
<i>Voicelink Data Servs., Inc. v. Datapulse, Inc.</i> , 86 Wn. App. 613 (1997)	4, 6
<i>Wash. State Major League Baseball Stadium Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Constr. Co.</i> , 176 Wn.2d 502 (2013)	9, 11, 12, 14
<i>Zions First Nat'l Bank v. Allen</i> , 688 F. Supp. 1495 (D. Utah 1988)	5

I. INTRODUCTION AND SUMMARY OF REPLY

ABW demonstrated in its Brief of Appellant that the superior court failed to apply the correct (stringent) test to the South Carolina forum-selection clause that *EnergySolutions* drafted into its contract with ABW. In particular, ABW showed the superior court declined to enforce the forum-selection clause because it found Washington to be the more “practical” and “logical” forum. As ABW explained, the court did not hold *EnergySolutions* to its heavy burden on nonenforceability and even if it had, *EnergySolutions* could not meet that burden. Indeed, *EnergySolutions*’s primary reason for suing ABW in Washington State—to obtain an injunction and thereby custody of Gloveboxes then located in Washington—no longer exists, as the Gloveboxes have been in South Carolina (the project site and chosen venue) and out of ABW’s control for over a year. ABW also established that the superior court improperly shifted the burden on the forum-selection clause’s enforceability to ABW, the party seeking to enforce the clause.

In its Brief of Respondent, *EnergySolutions* fails to meaningfully respond to these dispositive issues, instead arguing the forum-selection clause does not apply to the parties in the first instance. But *EnergySolutions* drafted the provisions that expressly incorporated the

General Terms and Conditions containing the forum-selection clause into the Purchase Order, and it did so without limitation.

For the reasons stated in its Brief of Appellant, ABW respectfully requests that the Court reverse the superior court's enforceability rulings and remand with instructions to dismiss this lawsuit for improper venue.

II. ARGUMENT

A. The Superior Court Erred in Applying a Practical or Logical Place Test to the Forum-Selection Clause.

Although *EnergySolutions* concludes the superior court applied the correct standard to the forum-selection clause, *EnergySolutions*'s own statement of the law concedes otherwise. As *EnergySolutions* states in its Brief of Respondent, the test the superior court *should have applied* required the court: (1) to give effect to the forum-selection clause unless it found enforcement "unreasonable and unjust"; and (2) to hold *EnergySolutions* to the heavy burden of establishing that litigating in the chosen forum would essentially *deprive it of its day in court*. See ES Br. at 6-7; see also *id.* at 4 (citing *Prows v. Pinpoint Retail Sys., Inc.*, 868 P.2d 809, 812-13 (Utah 1994) (court must enforce forum-selection clause unless party opposing it meets burden of proving enforcement would be "unfair or unreasonable") (quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972))). While the superior court acknowledged this test,

it neither applied it nor held *EnergySolutions* to its heightened burden, requiring reversal here. *See, e.g.*, RP 33:17-35:5.

1. The Superior Court Failed to Require *EnergySolutions* to Show That Enforcement Would Deprive It of Its Day in Court.

The superior court could not set aside the forum-selection clause in this case unless it found that it would be “[*so*] *gravely difficult and inconvenient*” for *EnergySolutions* to litigate this matter in South Carolina that “for all practical purposes [*EnergySolutions* would] be *deprived* of its day in court.” *Prows*, 868 P.2d at 812 (emphasis added). The superior court did not find (and could not have found on the record before it) that *EnergySolutions* could not bring this lawsuit in South Carolina, where the actual project is located, where *EnergySolutions* has offices, *and* where the Gloveboxes are now located. Instead, the superior court simply found that litigating in South Carolina would “not make any practical sense and . . . would likely substantially increase the cost of this litigation.” RP 34:19-20. And the court stated “I think the facts in this case suggest to this Court that the only logical place to hold these proceedings would be here in the State of Washington.” RP 35:1-4.

But a trial court *cannot* invalidate an otherwise enforceable forum-selection clause simply because another venue is more “practical,” “logical,” or (in this case) less expensive. Even assuming that Washington

is a more “practical” or “logical” forum—a contention ABW disputes— “[u]nreasonableness requires *more* than a conclusion that trial in the forum would be *more* convenient than the chosen state.” *Voicelink Data Servs., Inc. v. Datapulse, Inc.*, 86 Wn. App. 613, 619 n.3 (1997) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 cmt. c (rev. 1989)) (first emphasis added). And a court may not invalidate a forum-selection clause because the chosen forum would be more expensive. *See Coombs v. Juice Works Dev. Inc.*, 81 P.3d 769, 774 (Utah Ct. App. 2003).

Apparently ignoring the court’s logical place, practicality, and convenience findings, *EnergySolutions* concludes “[t]here is simply no evidence to substantiate ABW’s claim that the trial court applied the wrong standard.” ES Br. at 7. To the contrary, plenty of evidence of the court’s misapplication of the law exists. *See* RP 33:17-35:5. And when, as here, “the trial court’s ruling is based on an erroneous view of the law or involves application of an incorrect legal analysis [the trial court] necessarily abuses its discretion,” requiring reversal. *Dix v. ICT Grp., Inc.*, 160 Wn.2d 826, 833-34 (2007).

2. EnergySolutions Has Not Met Its Heavy Burden of Establishing Enforcement Would Deprive It of Its Day in Court.

EnergySolutions argues ABW “bears the heavy burden to show that the trial court’s decision constituted an abuse of discretion,” but it is

EnergySolutions alone, not ABW, that bears the burden on nonenforcement. *See Prows*, 868 P.2d at 812 (party opposing enforcement of forum-selection clause bears “heavy burden” of proving enforcement would be so unjust as to deprive it of its day in court). *EnergySolutions* has not shown that litigating in South Carolina would deprive it of its day in court.

EnergySolutions cannot, for instance, avoid the forum-selection clause based on its belief it will be easier to prosecute the action in Washington because the parties, some of the witnesses, and some of the documents might be located in Washington. *See ES Br.* at 8; *Zions First Nat'l Bank v. Allen*, 688 F. Supp. 1495, 1499 (D. Utah 1988) (rejecting witness location as basis for invalidating forum-selection clause). “Inconvenience to a party is an insufficient basis to defeat an otherwise enforceable forum selection clause.” *Coombs*, 81 P.3d at 775 n.5. (citation omitted)). In addition, *EnergySolutions* has acknowledged that the Gloveboxes—the basis for this action—are now in South Carolina (the chosen forum) and outside the custody or control of ABW.

Moreover, the facts confirm that *EnergySolutions* would not be deprived of its day in court were it required to adhere to its forum-selection clause. *EnergySolutions* has several offices and facilities in South Carolina, the three-tier contract out of which this dispute arises

originated in South Carolina, EnergySolutions's customer is in South Carolina, the underlying project is in South Carolina, and the Gloveboxes have been delivered to South Carolina. CP 206; Hanley Decl. ¶ 2.

Sound policy reasons support this result. Enforcing the forum-selection clause that EnergySolutions chose to incorporate into its Purchase Order with ABW protects the parties' bargained-for expectations and promotes "contractual predictability." *Voicelink*, 86 Wn. App. at 617; *see also Prows*, 868 P.2d at 811 n.4.

B. The Court Should Remand with Instructions to Dismiss this Action.

EnergySolutions claims this Court should reverse and remand for a do-over, rather than reverse and remand with instructions to dismiss. *See* ES Br. at 8-9. But the cases EnergySolutions cites for this proposition merely state this Court "may" remand for correct application of the law, not that it must. *See id.* (citing *Cedell v. Farmers Ins. Co. of Wash.*, 176 Wn.2d 686, 295 P.3d 239, 244 (2013); *Dreiling v. Jain*, 151 Wn.2d 900, 907 (2004)).

In addition, neither of EnergySolutions's cases involved reversal of an erroneous forum-selection clause decision. Instead, those cases involved determinations regarding the applicability, scope, discoverability, and/or waiver of certain evidentiary privileges. *See id.* (citing *Cedell*, 295

P.3d at 247 (reversing and remanding for trial court to apply two-step process to determine discoverability of claimed privileged documents); *Dreiling*, 151 Wn.2d at 918-19 (remanding for determination whether party waived attorney-client and work-product privileges and whether to redact certain information before releasing it)).

But unlike discretionary decisions regarding evidentiary privileges, an erroneous forum decision taints every subsequent order or proceeding with the same fundamental error—the action is proceeding in the wrong forum. Washington courts therefore regularly remand erroneous venue decisions with instructions to transfer or change venue. *See, e.g., Moore v. Flateau*, 154 Wn. App. 210, 220 (2010) (reversing and remanding with directions to change venue); *Roy v. City of Everett*, 48 Wn. App. 369, 372-73 (1987) (vacating and remanding with instructions to transfer venue); *Keystone Masonry, Inc. v. Garco Constr., Inc.*, 135 Wn. App. 927, 938 (2006) (reversing and remanding with directions to transfer venue). *See also In re Marriage of Strohmaier*, 34 Wn. App. 14, 18-19 (1983) (reversing order denying motion for change of venue; “Mr. Strohmaier has an absolute right to have venue moved to Adams County.”). Because *EnergySolutions* filed this lawsuit in the wrong venue, this Court should likewise reverse and remand with instructions to dismiss.

C. The Superior Court Correctly Concluded the Forum-Selection Clause Applies to ABW and EnergySolutions.

EnergySolutions asks this Court to affirm the superior court's orders on the alternative ground that the court erred in concluding the forum-selection clause applies to ABW and EnergySolutions. As a threshold matter, EnergySolutions waived this argument by failing to file a cross appeal. *See, e.g., Tellevik v. Real Prop. Known as 31641 W. Rutherford St.*, 120 Wn.2d 68, 89 (1992).

1. EnergySolutions Incorporated into the Purchase Order the General Terms and Conditions Containing the Forum-Selection Clause.

In any event, the superior court correctly concluded the South Carolina forum-selection clause applies because EnergySolutions expressly incorporated the clause into the Purchase Order it drafted and ABW had to accept.¹ "If the parties to a contract clearly and unequivocally incorporate by reference into their contract some other document, that document becomes part of their contract." *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 801 (2009). *See also Consol. Realty Grp. v. Sizzling Platter, Inc.*, 930 P.2d 268, 273 (Utah Ct. App. 1996) (same under Utah law). "Incorporation by reference and flow-down

¹ This Court reviews "de novo a trial court's interpretation of a contract." *Sales Creators, Inc. v. Little Loan Shoppe, LLC*, 150 Wn. App. 527, 530 (2009).

provisions in prime contracts that bind subcontractors are enforced by courts ‘in a wide variety of contexts.’” *Wash. State Major League Baseball Stadium Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Constr. Co.*, 176 Wn.2d 502, 518 (2013) (quoting 1 G. Christian Roux, *Construction Contracts Deskbook* § 20:2 (2012)).

In its Purchase Order, EnergySolutions clarified that the “rights and obligations of the Parties to the Purchase Order **shall be subject to and governed by** the General Provisions and other documents or specifications **attached hereto**, or referenced herein, which consist of ... **Part III – General Provisions.**” CP 165-66 (emphasis added); *see also* CP 139 (same). “Part III – General Provisions” of the Purchase Order provides: “EnergySolutions Purchase Order provisions, forms, documents and attachments listed below are **hereby incorporated herein by this reference and made an integral part hereof.**” CP 152 (emphasis added). Among the provisions, forms, documents, and attachments “listed below” are the “General Terms and Conditions for Commercial Purchases, BMS-PMM-2001-00005, Rev. 6.” *Id.* These General Terms and Conditions contain the South Carolina forum-selection clause. CP 190. Thus, EnergySolutions explicitly incorporated the forum-selection clause into its Purchase Order with ABW.

Attempting to avoid to avoid this result, *EnergySolutions* argues that “Part III – General Provisions” of the Purchase Order does not include the General Terms and Conditions because those appear under the subheading “Flowdown Provisions.” ES Br. at 11. But on its face, the Purchase Order includes the “Flowdown Provisions” in “Part III – General Provisions,” explicitly specifying that the “End of Part III – General Provisions” comes after and includes the “Flowdown Provisions” subheading and section. CP 152. The Court should reject *EnergySolutions*’s strained reading of the Purchase Order. *See Utah Transit Auth. v. Salt Lake City S. R.R. Co.*, 131 P.3d 288, 291 (Utah Ct. App. 2006) (courts avoid strained interpretations of contracts); *Certain Underwriters at Lloyd’s London v. Travelers Prop. Cas. Co. of Am.*, 161 Wn. App. 265, 278 (2011) (“[A] court reads a contract as an average person would, giving it a practical and reasonable meaning, not a strained or forced meaning that leads to absurd results.”).

EnergySolutions also suggests the General Terms and Conditions it incorporated into the Purchase Order exist only on DOE’s website and therefore, are not part of the Purchase Order. *See* ES Br. at 10. But *EnergySolutions*’s own documents show otherwise. According to those documents, *EnergySolutions* **attached** these General Terms and Conditions, which include the forum-selection clause, to the Purchase

Order that it drafted and sent to ABW. CP 165-66; *see also* CP 139. By expressly incorporating into *and* attaching the General Terms and Conditions to the Purchase Order, EnergySolutions made the General Terms and Conditions—and thus the forum-selection clause—part of the Purchase Order between it and ABW.

2. EnergySolutions Used General and Unlimited Incorporation Language in the Purchase Order.

Seeking to limit the effect of its incorporation provisions, EnergySolutions argues its incorporation clauses restrict incorporation to the work performed. For support, it cites a provision in the General Terms and Conditions that states “[i]f any part of the Work is subcontracted, Supplier is responsible for having that subcontracted Work comply with the terms of this Order.” ES Br. at 11-12 (quoting CP 191). But this provision’s reference to “Work” simply limits the provision’s application to claims arising from ABW’s portion of the project, not to ABW’s performance of the work. As the Washington Supreme Court recently held, such “references to the subcontractor’s work do not mean that the clauses incorporate only those provisions in the prime contract that pertain to *performance* of the work.” *Wash. State Major League Baseball Stadium*, 176 Wn.2d at 519. Rather, references to the subcontractor’s

work simply mean the prime contract applies to “the subcontractor’s portion of the total construction project.” *Id.*

Procedural provisions in a prime contract—like the forum-selection clause at issue here—apply to the subcontract when, as here, the subcontract contains unlimited incorporation provisions. *See id.* at 518, 520-22 (subcontract incorporated procedural limitations and accrual provision of prime contract where subcontract stated subcontractor “assume[d] toward the Contractor all the obligations and responsibilities that the Contractor assume[d] the Owner ... insofar as applicable, generally or specifically, to the Subcontractor’s Work”); *see also Sime Constr. Co. v. Wash. Pub. Power Supply Sys.*, 28 Wn. App. 10, 14 (1980) (sub-subcontract incorporated prime contract’s notice procedure where sub-subcontract stated “[s]ubcontract documents include all the below listed items, all of which are incorporated herein and made part hereof by reference thereto,” which included the prime contract).

Here, *EnergySolutions* did *not* limit incorporation of the General Terms and Conditions to ABW’s performance, or even to the scope of ABW’s work. *See, e.g.*, CP 139, 165-66, 152. To the contrary, *EnergySolutions* expressly and unequivocally incorporated the General Terms and Conditions containing the forum-selection clause into the Purchase Order, and made those Terms and Conditions an “integral part”

of the Purchase Order. *See* CP 139, 165-66, 152.

EnergySolutions's general and unlimited incorporation provisions render this case unlike those EnergySolutions cites, in which the subcontracts expressly limited incorporation to the work performed by the subcontractor. *Compare Sime Constr.*, 28 Wn. App. at 15-16 (distinguishing sub-subcontract that incorporated prime contract by "incorporat[ing] herein and [making] part hereof by reference thereto," from subcontracts that expressly limited incorporation to the scope of the subcontractors' work), *with* ES Br. at 11 (citing *Brown v. Boyer-Washington Blvd. Assocs.*, 865 P.2d 352, 354-55 (Utah 1993) (subcontract stated it incorporated "all obligations of the prime contract as they may apply to the work herein described"); *John W. Johnson, Inc. v. Basic Constr. Co.*, 429 F.2d 764, 774-75 (D.C. Cir. 1970) (subcontract stated "subcontractor ... agrees ... to perform all work required by the [prime contract] ... for furnishing and performing painting ... in accordance with the requirements of the prime contract documents")), *and* ES Br. at 13 (citing *U.S. Steel Corp. v. Turner Constr. Co.*, 560 F. Supp. 871, 873 (S.D.N.Y. 1983) (subcontract stated "[w]ith respect to the Work to be performed and furnished by the Subcontractor ..., the Subcontractor agrees to be bound to the Owner ... by each and all of the terms and conditions of the General Contract"); *MPACT Constr. Grp., LLC v. Super.*

Concrete Constrs., Inc., 802 N.E.2d 901, 907 (Ind. 2004) (subcontract provided that prime contract was “made a part of this subcontract, as applicable to the work stated therein”); *A.F. Lusi Constr., Inc. v. Peerless Ins. Co.*, 847 A.2d 254, 260 (R.I. 2004) (prime contract’s flow down provision stated “the Contractor shall require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to the Contractor by terms of the Contract”).

Further unlike these cases, EnergySolutions incorporated only *some* of the prime contract’s provisions. See CP 139, 165-66, 152. Rather than incorporating the prime contract wholesale, EnergySolutions *chose* to incorporate only the General Terms and Conditions containing the forum-selection clause, as well as the “Special Terms and Conditions for Commercial Purchases,” the “Statement of Work Clauses,” the “Revised Special/General Provisions (WSRC/SRNS),” and the “Packaging, Shipping, and Receiving Instructions.” CP 152. EnergySolutions did not incorporate the entire prime contract into the Purchase Order with ABW. EnergySolutions’s cases involving wholesale incorporation clauses have no bearing here. See *Wash. State Major League Baseball Stadium*, 176 Wn.2d at 522 (subcontract that incorporated “only [the] provisions in the prime contract that can be applied to the subcontractors’ work” “avoid[ed] the pitfalls” of provisions that limit flow down provisions “to include only

the ‘performance’ of the subcontractor’s work,” as well as provisions that “purport[] to bind the subcontracts to ‘all’ the same obligations of the general contractor to the owner”); ES Br. at 11 (citing *Brown*, 865 P.2d at 354-55 (subcontract stated it incorporated “all obligations of the prime contract”); *John W. Johnson*, 429 F.2d at 774-75 (subcontract stated “subcontractor ... agrees ... to perform all work ... in accordance with the requirements of the prime contract documents”)); ES Br. at 13 (citing *U.S. Steel Corp.*, 560 F. Supp. at 873 (subcontract provided that “Subcontractor agrees to be bound to the Owner ... by each and all of the terms and conditions of the General Contract”); *MPACT Constr. Grp.*, 802 N.E.2d at 907 (subcontract provided that prime contract was “made a part of this subcontract”); *A.F. Lusi Constr.*, 847 A.2d at 260 (subcontractor “to be bound to the Contractor by terms of the [prime] Contract”)).

3. The Superior Court Correctly Concluded the Forum-Selection Clause Is the Specific Clause and the Clauses Do Not Conflict.

In yet another effort to avoid the effect of its own incorporation clauses, *EnergySolutions* argues a general disputes clause in another provision of the Purchase Order applies, not the South Carolina forum-selection clause. ES Br. at 3, 13-14. *EnergySolutions* contends that because the general disputes clause applies only to ABW and *EnergySolutions*, whereas the forum-selection clause applies to the prime

contract, as well as to EnergySolutions's up and downstream contracts, the general disputes clause must be specific and the forum-selection clause general. *Id.* at 13-14. Again, by failing to seek a timely cross-appeal of this issue, EnergySolutions has waived it. *See Tellevik*, 120 Wn.2d at 89.

Regardless, the superior court correctly concluded the South Carolina forum-selection clause, not the general disputes clause, is the more specific and thus controlling clause and in any event, no conflict exists. RP 31:4-32:22. The South Carolina forum-selection clause selects a forum: "Any litigation shall be brought and prosecuted exclusively in Federal District Court, with venue in the United States District Court for the District of South Carolina, Aiken Division," unless no federal jurisdiction exists, in which case "such litigation shall be brought in State Court in Aiken County, South Carolina." CP 190. Meanwhile, the general disputes clause on which EnergySolutions relies does not select a forum. It merely allows parties to bring disputes in court: "All disputes under this Contract that are not disposed of by mutual agreement may be decided by recourse to an action at law or in equity." CP 169. Under the general disputes clause, then, parties may pursue actions in any court, rather than having to submit their claims to internal or nondispute resolution mechanisms.

As the superior court correctly reasoned, the forum-selection clause is the more specific of the two clauses because it actually selects a forum: South Carolina. *See* RP 31:4-32:33. And the superior court correctly recognized that the South Carolina forum-selection clause does not conflict with the general disputes clause in any event: a party could comply with both by deciding to pursue a dispute in an action at law in the United States District Court for the District of South Carolina. *See id.* Thus, the specificity of the clauses lacks relevance. *See Cathco v. Valentiner Crane Brunjies Onyon Architects*, 944 P.2d 365, 369 (Utah 1997) (principle that more specific provision controls over general one “applies only where two ... provisions actually conflict”). *EnergySolutions* offers no authority supporting its arguments otherwise. *See* ES Br. at 13-14.

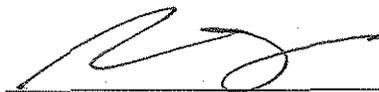
III. CONCLUSION

For the foregoing reasons, and for the reasons stated in its Brief of Appellant, ABW respectfully requests that the Court reverse the superior court’s Order denying its motion to dismiss for improper venue and its motion for reconsideration, and remand with instructions to dismiss this action for improper venue.

RESPECTFULLY SUBMITTED this 6th day of May, 2013.

Davis Wright Tremaine LLP
Attorneys for ABW Technologies, Inc.

By



John Theiss, WSBA #24488
Rebecca Francis, WSBA #41196
Suite 2200
1201 Third Avenue
Seattle, WA 98101-3045
Telephone: (206) 622-3150
Fax: (206) 757-7700
E-mail: johntheiss@dwt.com
rebeccafrancis@dwt.com