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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

THE UNITED STATES OF AMERICA for )  
the use and benefit of HAJOCA )  
CORPORATION, a Maine corporation )  
d.b.a. Kelly's Pipe & Supply and )  
d.b.a. Kennan Supply, )  
Plaintiff, )  
vs. )  
ASSOCIATED MECHANICAL, INC., a )  
Nevada corporation; AMERIND )  
BUILDERS, LLC, an Arizona )  
corporation; E. C. SCARBOROUGH, an )  
individual surety, )  
Defendants. )

2:09-cv-02087-ECR-PAL

Order

This case involves a supplier to a public project alleging breach of contract, unjust enrichment, and claims on a payment bond for materials supplied and not paid-for in full. Now pending are a motion for summary judgment (#25) filed by Plaintiff and a cross-motion for summary judgment (#29) filed by Defendants Amerind Builders, LLC ("Amerind") and E. C. Scarborough ("Scarborough").

The motions are ripe, and we now rule on them.

I. Factual and Procedural Background

Plaintiff Hajoca Corporation d.b.a. Kelly's Pipe & Supply and d.b.a. Keenan Supply ("Hajoca") is a Maine corporation doing

1 business in Clark County, Nevada, selling plumbing goods and  
2 materials. (Am. Compl. ¶ 4 (#10).) Defendant Amerind Builders, LLC  
3 ("Amerind") is an Arizona corporation doing business in Clark  
4 County, Nevada as a licensed contractor and the prime contractor on  
5 the project known as Bldg. B718 and Bldg. B707/Contract No. FA4861-  
6 07-C-A027 located on Creech Air Force Base in Indiana Springs,  
7 Nevada ("the Project"). (Id. ¶ 5.) Defendant Associated  
8 Mechanical, Inc. ("Associated") is a Nevada corporation doing  
9 business in Clark County, Nevada as a licensed contractor and as a  
10 subcontractor to Amerind on the Project. (Id. ¶ 6.) Defendant E.  
11 C. Scarborough ("Scarborough") is an individual residing in Florida  
12 and conducting business in Clark County, Nevada as an individual  
13 surety at all times material to this case. (Id. ¶ 7.)

14 On or about September 30, 2007, the United States Air Force  
15 awarded a contract to Amerind to provide materials, labor, equipment  
16 and other work required to provide repairs and upgrades to buildings  
17 at Creech Air Force Base, herein known as "the Project". (Ds' Opp.  
18 to Mot. for Summary Judgment at 2 (#28).) Amerind subcontracted  
19 part of the work to Associated. (Id.)

20 On or about November 14, 2007, Scarborough, in exchange for a  
21 bond fee, issued payment and performance bonds for and in support of  
22 the government contract for the Project. (Id.) The only bond at  
23 issue here is the payment bond number AMERINDPP1114007 ("the Bond").  
24 The total penal sum of both bonds was \$1,028,422.00 and Scarborough  
25 pledged assets in the total amount of \$1,028,422.00 by means of a  
26 Certificate of Pledged Assets ("Certificate"). (Id.) The  
27 Certificate was incorporated into the Bond and stated an effective

1 date of November 14, 2007, until either completion of the Project or  
2 twelve (12) months, whichever occurred first. (Id.) No request to  
3 extend the Bond or Certificate was made. (Id. at 3.) The Project  
4 is still open and ongoing. (Id. at 9.)

5 On November 1, 2000, and again on January 27, 2009, Associated  
6 entered into a contract with Hajoca, wherein it was agreed that  
7 Associated would pay for materials provided by Hajoca for various  
8 projects. (P's Mot. for Summary Judgment at 2 (#25); Exhibit 1, P's  
9 Mot. for Summary Judgment (#25-1).) On January 21, 2009, Amerind,  
10 Associated, and Hajoca entered into a joint-check agreement wherein  
11 Amerind would issue joint checks to Associated and Hajoca. (Exhibit  
12 9, P's Mot. for Summary Judgment (#25-3).)

13 On February 3 and 6, 2009, Hajoca sent preliminary notices to  
14 Amerind on behalf of Kelly's and Keenan, respectively. (Exhibit 4,  
15 P's Mot. for Summary Judgment (#25-1).) Between January 30, 2009  
16 and February 16, 2009, Hajoca caused plumbing materials to be  
17 delivered to the Creech Air Force Base in Nevada for the Project.  
18 (Exhibits 5 and 6, P's Mot. for Summary Judgment (#25-2).) Between  
19 January 30, 2009 and February 16, 2009, Hajoca invoiced Associated  
20 \$28,673.68 for the plumbing materials delivered, \$25,363.80 as to  
21 Keenan and \$3,309.88 as to Kelly's, for which \$13,807.39 has been  
22 paid by Scarborough, of which \$13,004.60 went to Keenan and \$802.78  
23 to Kelly's, leaving a balance of \$14,866.29. (P's Mot. for Summary  
24 Judgment at 3 (#25), Exhibit 6, P's Mot. for Summary Judgment (#25-  
25 2).)

26 On May 12, 2009, Hajoca sent its 90-day notice of nonpayment  
27 for the \$14,866.29 past due and owing to Amerind and Scarborough.

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1 (Exhibit 7, P's Mot. for Summary Judgment (#25-3.)) Hajoca has not  
2 been paid the remaining balance on the invoices. (P's Mot. for  
3 Summary Judgment at 3 (#25).)

4 On October 29, 2009, Hajoca filed its original complaint (#1)  
5 in this court. On November 13, 2009, Hajoca filed an amended  
6 complaint (#10), alleging (1) breach of contract against Associated,  
7 (2) a payment bond claim against all defendants, (3) a cause of  
8 action for materials furnished against Associated, (4) a cause of  
9 action on account stated against Associated, and (5) an unjust  
10 enrichment claim against Associated and Amerind. On December 14,  
11 2009, Amerind and Scarborough filed their answer (#13) to the  
12 amended complaint (#10). On December 21, 2009, Hajoca filed a  
13 motion for default (#14) against Associated. On December 22, 2009,  
14 the Clerk entered a default (#15) against Associated.

15 On June 7, 2010, Hajoca filed a motion for summary judgment  
16 (#25) against Amerind and Scarborough for Hajoca's second and fifth  
17 causes of action. Amerind and Scarborough opposed (#28), and Hajoca  
18 replied (#30). Amerind and Scarborough filed a cross-motion for  
19 summary judgment (#29), Hajoca opposed (#31), and Amerind and  
20 Scarborough replied (#32).

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## **II. Summary Judgment Standard**

23 Summary judgment allows courts to avoid unnecessary trials  
24 where no material factual dispute exists. N.W. Motorcycle Ass'n v.  
25 U.S. Dep't of Agric., 18 F.3d 1468, 1471 (9th Cir. 1994). The court  
26 must view the evidence and the inferences arising therefrom in the  
27 light most favorable to the nonmoving party, Bagdadi v. Nazar, 84

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1 F.3d 1194, 1197 (9th Cir. 1996), and should award summary judgment  
2 where no genuine issues of material fact remain in dispute and the  
3 moving party is entitled to judgment as a matter of law. FED. R.  
4 CIV. P. 56(c). Judgment as a matter of law is appropriate where  
5 there is no legally sufficient evidentiary basis for a reasonable  
6 jury to find for the nonmoving party. FED. R. CIV. P. 50(a). Where  
7 reasonable minds could differ on the material facts at issue,  
8 however, summary judgment should not be granted. Warren v. City of  
9 Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995), cert. denied, 116 S.Ct.  
10 1261 (1996).

11 The moving party bears the burden of informing the court of the  
12 basis for its motion, together with evidence demonstrating the  
13 absence of any genuine issue of material fact. Celotex Corp. v.  
14 Catrett, 477 U.S. 317, 323 (1986). Once the moving party has met  
15 its burden, the party opposing the motion may not rest upon mere  
16 allegations or denials in the pleadings, but must set forth specific  
17 facts showing that there exists a genuine issue for trial. Anderson  
18 v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Although the  
19 parties may submit evidence in an inadmissible form – namely,  
20 depositions, admissions, interrogatory answers, and affidavits –  
21 only evidence which might be admissible at trial may be considered  
22 by a trial court in ruling on a motion for summary judgment. FED.  
23 R. CIV. P. 56(c); Beyene v. Coleman Sec. Servs., Inc., 854 F.2d  
24 1179, 1181 (9th Cir. 1988).

25 In deciding whether to grant summary judgment, a court must  
26 take three necessary steps: (1) it must determine whether a fact is  
27 material; (2) it must determine whether there exists a genuine issue  
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1 for the trier of fact, as determined by the documents submitted to  
2 the court; and (3) it must consider that evidence in light of the  
3 appropriate standard of proof. Anderson, 477 U.S. at 248. Summary  
4 judgment is not proper if material factual issues exist for trial.  
5 B.C. v. Plumas Unified Sch. Dist., 192 F.3d 1260, 1264 (9th Cir.  
6 1999). "As to materiality, only disputes over facts that might  
7 affect the outcome of the suit under the governing law will properly  
8 preclude the entry of summary judgment." Anderson, 477 U.S. at 248.  
9 Disputes over irrelevant or unnecessary facts should not be  
10 considered. Id. Where there is a complete failure of proof on an  
11 essential element of the nonmoving party's case, all other facts  
12 become immaterial, and the moving party is entitled to judgment as a  
13 matter of law. Celotex, 477 U.S. at 323. Summary judgment is not a  
14 disfavored procedural shortcut, but rather an integral part of the  
15 federal rules as a whole. Id.

### 17 III. Discussion

18 Hajoca seeks partial summary judgment on its claims, alleging  
19 that there are no genuine issues of material fact with respect to  
20 its payment bond claim and unjust enrichment claim. In response,  
21 Amerind and Scarborough oppose Hajoca's motion for summary judgment,  
22 and seek summary judgment against Hajoca on the payment bond and  
23 unjust enrichment claims.

#### 24 **A. Payment Bond**

25 Suppliers for federal projects are protected by the Miller Act.  
26 40 U.S.C. § 3133. The Miller Act "requires a prime contractor of a  
27 federal project to furnish a payment bond to insure payments to  
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1 individuals who supply labor and/or materials for federal projects.”  
2 United States ex rel. Conveyor Rental & Sales Co. v. Aetna Cas. &  
3 Surety Co., 981 F.2d 448, 450 (9th Cir. 1992). A payment bond  
4 protects “those persons who have a contractual agreement with a  
5 prime contractor or subcontractor engaged in a federal project.”  
6 Id. The Miller Act “is entitled to a liberal construction and  
7 application in order properly to effectuate the Congressional intent  
8 to protect those whose labor and materials go into public projects.”  
9 United States ex rel. Sherman v. Carter, 353 U.S. 210, 216 (U.S.  
10 1957).

11 The Miller Act provides that “[b]efore any contract of more  
12 than \$100,000 is awarded for the construction, alteration, or repair  
13 of any public building or public work of the Federal Government, a  
14 person must furnish to the Government [payment and performance]  
15 bonds, which become binding when the contract is awarded . . . .”  
16 40 U.S.C. § 3131(b). It further provides that “[a] person having a  
17 direct contractual relationship with a subcontractor but no  
18 contractual relationship, express or implied, with the contractor  
19 furnishing the payment bond may bring a civil action on the payment  
20 bond on giving written notice to the contractor within 90 days from  
21 the date on which the person did or performed the last of the labor  
22 or furnished or supplied the last of the material for which the  
23 claim is made.” 40 U.S.C. § 3133(b)(2). The Miller Act requires  
24 that the civil action “must state with substantial accuracy the  
25 amount claimed and the name of the party to whom the material was  
26 furnished or supplied or for whom the labor was done or performed.”  
27 40 U.S.C. § 3133(b)(2).

1 In this case, Hajoca has satisfied the requirements for  
2 bringing a civil action on the payment bond by providing timely  
3 written notice to Amerind, and by stating the amount due and  
4 providing documentation thereof. Defendants, however, have not  
5 complied with the requirements of the Miller Act with regards to the  
6 necessary payment bond.

7 The Bond was issued on its effective date of November 14, 2007.  
8 The terms of the Bond read that the "Bond is not valid without  
9 Certificate of Pledged Assets." (Payment Bond, P's Mot. for Summary  
10 Judgment, Exhibit 3 (#25-1).) The Certificate of Pledged Assets  
11 pledged certain assets, and referenced the Project, contract number,  
12 and Principal (Amerind). The Certificate of Pledged Assets provided  
13 that the pledge agreement shall be terminated "[u]pon completion of  
14 the Project but not to exceed twelve (12) months . . . ." (Id.)  
15 The Project was not completed within twelve months from the  
16 effective date of the Bond, and is in fact still open and ongoing.  
17 Amerind alleges that the United States Air Force is responsible for  
18 the majority of the delays and disruptions experienced on the  
19 Project. Neither Amerind nor the obligee of the bond, the United  
20 States Air Force, procured an extension of the Bond beyond the  
21 twelve-month period beginning on November 14, 2007. Therefore,  
22 according to the terms of the Bond, the Bond and the Certificate of  
23 Pledged Assets expired on November 14, 2008. Hajoca furnished  
24 supplies to the Project in 2009, outside of the projected period  
25 that the Bond purports to cover.

26 The Miller Act requires that a contractor furnish a payment  
27 bond to the Government. Scarborough issued a year-long bond in  
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1 exchange for a bond fee, and the bond was never extended, nor was  
2 any additional payment made.

3       The District Court for the District of Columbia addressed a  
4 similar issue. United States ex rel. Modern Electric, Inc. v. Ideal  
5 Elec. Sec. Co., Inc., 868 F.Supp. 10, 14 (D.D.C. 1994). In Modern  
6 Electric, the payment bond and the underlying contract both  
7 indicated that the payment bond only covered the first year of the  
8 public project, and that a new payment bond would be required if the  
9 government extended the contract. Id. The Modern Electric court  
10 held that the claim against the payment bond must be dismissed  
11 because the payment bond expired after the first year, and  
12 plaintiff's claims related to work performed after the first year.  
13 Id. at 15. The court noted that the prime contractor or the  
14 government may have breached obligations under the Miller Act by  
15 failing to provide a bond in the subsequent years of the project,  
16 but that was not a reason to "impose an obligation on [the surety]  
17 that it did not undertake to bear and for which it apparently  
18 collected no premiums." Id. at 14.

19       We agree with the Modern Electric court that regardless of any  
20 fault on the part of Amerind or the government in this case to  
21 extend the payment bond, we cannot hold Scarborough to an obligation  
22 it did not undertake or receive compensation for. Therefore,  
23 Hajoca's motion for summary judgment on its payment bond claim must  
24 be denied, and Defendants' cross-motion as to the payment bond must  
25 be granted.

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1 **B. Unjust Enrichment**

2 Hajoca also seeks summary judgment on its claim of unjust  
3 enrichment against Amerind. The doctrine of unjust enrichment or  
4 recovery in quasi contract applies in situations "where there is no  
5 legal contract but where the person sought to be charged is in  
6 possession of money or property which in good conscience and justice  
7 he should not retain but should deliver to another [or should pay  
8 for]." Leasepartners Corp. v. Robert L. Brooks Trust, 942 P.2d 182,  
9 187 (Nev. 1997). "The essential elements of quasi contract are a  
10 benefit conferred on the defendant by the plaintiff, appreciation by  
11 the defendant of such benefit, and acceptance and retention by the  
12 defendant of such benefit under circumstances such that it would be  
13 inequitable for him to retain the benefit without payment of the  
14 value thereof." Unionamerica Mortgage and Equity Trust v. McDonald,  
15 626 P.2d 1272, 1273 (Nev. 1981) (quoting Dass v. Epplen, 424 P.2d  
16 779, 780 (Colo. 1967)).

17 In this case, Amerind acknowledges that there is no express  
18 contract between Amerind and Hajoca, but contends that unjust  
19 enrichment does not apply because (1) there is a contract between  
20 Hajoca and Associated from which Hajoca should, according to  
21 Amerind, recover any damages, (2) Amerind is an incidental  
22 beneficiary of the contract between Hajoca and Associated, (3) the  
23 transaction here falls under the allegedly exclusive remedies of the  
24 Nevada Uniform Commercial Code, and (4) there are disputes as to the  
25 value of the materials provided and Amerind was not benefitted in  
26 any case.

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1           1. Contract Between Hajoca and Associated

2           We do not agree with Amerind that the contract between Hajoca  
3 and Associated bars Hajoca from bringing an unjust enrichment claim  
4 against Amerind, with whom it has no contractual relationship. In  
5 Leasepartners, plaintiff provided signs pursuant to a lease to  
6 defendant lessee, who leased property from defendant lessor for  
7 which the signs were used. 942 P.2d at 183-84. The Nevada Supreme  
8 Court held that the contract between plaintiff and the lessee did  
9 not prevent an unjust enrichment claim by plaintiff against the  
10 lessor.

11           Amerind's argument that it is an incidental beneficiary of the  
12 contract between Hajoca and Associated, and therefore cannot be sued  
13 on a theory of unjust enrichment, is also unpersuasive. In  
14 Leasepartners, plaintiff argued that it conferred a benefit on  
15 defendant lessor by providing newer, more attractive signs than the  
16 old signs previously displayed on the property. While the Nevada  
17 Supreme Court did not expressly consider any arguments relating to  
18 incidental beneficiaries, the holding in that case that the  
19 defendant lessor could be sued on a theory of unjust enrichment is  
20 nevertheless relevant and applicable to Amerind's argument. The  
21 defendant lessor is no less of an incidental beneficiary to the  
22 plaintiff and lessee's contract than Amerind was here.

23           Nor does Washington law, which does not control in this case,  
24 require a different result. Amerind cites Bort v. Parker for the  
25 contention that unjust enrichment cannot apply to a "mere incidental  
26 beneficiary of the transaction." 42 P.3d 980, 991 (Wash. Ct. App.  
27 2002) (citing Farwest Steel Corp. v. Mainline Medal Works, Inc., 741  
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1 P.2d 58, 64-65 (Wash. Ct. App. 1987). Farsteel is favorable to  
2 Amerind's position in holding that a supplier does not unjustly  
3 enrich a contractor from whom it is one step removed because the  
4 contractor "did not mislead [the supplier] in any fashion" despite  
5 being enriched by receiving but not paying fully for goods supplied  
6 by the supplier. Id. at 65. The reasoning in Farsteel does not,  
7 however, persuade us that Hajoca's unjust enrichment claim must be  
8 dismissed. The court in Farsteel was dealing with Washington  
9 State's mechanic's lien statutes, and not with the Miller Act. Id.  
10 at 63. The Farsteel court noted that "a materialman of a  
11 materialman of a contractor has too remote a relationship to fall  
12 within the [Washington] lien statutes." Id. Under the Miller Act,  
13 a supplier to a federal project is entitled to protection in the  
14 form of a payment bond that a prime contractor is required to  
15 provide. We conclude, for the purposes of this order, that Amerind  
16 may have breached its obligation under the Miller Act to provide  
17 that bond. In doing so, Amerind may have misled Hajoca, and may be  
18 liable for unjust enrichment. Nor is a breach of the Miller Act  
19 required for a finding of unjust enrichment. If Amerind retains  
20 materials supplied by Hajoca and is enriched thereby, without  
21 furnishing payment, either to Hajoca or Associated, Amerind may have  
22 been unjustly enriched by Hajoca.

## 23 2. Nevada's Uniform Commercial Code

24 Nor do we find Amerind's arguments that Article 2 of Nevada's  
25 Uniform Commercial Code ("UCC") provides the exclusive remedy in  
26 this case persuasive. Nevada's UCC provides that Article 2 "applies  
27 to transactions in goods." NEV. REV. STAT. § 104.2102. Amerind does  
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1 not provide any authority that an unjust enrichment claim by a  
2 supplier to a contractor is barred by the Uniform Commercial Code,  
3 nor have we found any such authority. Therefore, Amerind's argument  
4 that Hajoca's claim of unjust enrichment must be dismissed on this  
5 basis fails.

6 3. Dispute Over Value of Materials

7 Amerind claims that not all the materials provided by Hajoca  
8 were used in the Project, and that the materials were not worth  
9 \$14,866.29. Amerind has not provided any evidence, however, aside  
10 from vague statements made in an affidavit that Hajoca has "failed  
11 to provide evidence to Amerind that the items claimed for were  
12 actually delivered to the Project." (Rashleger Decl. Ds' Opp. to  
13 Mot. for Summary Judgment (#28).) Hajoca, on the other hand, has  
14 provided detailed invoices and shipping notices.

15 We cannot, however, find that Hajoca is entitled to summary  
16 judgment on its unjust enrichment claim. If we were considering a  
17 breach of contract claim against Associated or the bond claim  
18 against Scarborough, the invoiced amount may have appropriately been  
19 awarded. In an unjust enrichment case, however, the measure of  
20 damages is the benefit conferred upon Amerind, which may or may not  
21 coincide with the invoiced amount. Nor has there been sufficient  
22 evidence presented that the materials were used on the Project and  
23 thereby benefitted Amerind. Therefore, we find that there is a  
24 material dispute regarding the benefit conferred on Amerind and  
25 summary judgment on the unjust enrichment claim shall be denied.

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**IV. Conclusion**

Hajoca's claim against the payment bond must be dismissed because the payment bond expired twelve months after its effective date, and before Hajoca provided Defendants with supplies for which payment is being sought. Hajoca's unjust enrichment claim, however, is not barred by the existence of a contract between Hajoca and Associated, or the Uniform Commercial Code. Summary judgment in favor of Hajoca on the unjust enrichment claim is not warranted because there is a material dispute over the amount, if any, of the benefit conferred on Amerind.

**IT IS, THEREFORE, HEREBY ORDERED** that Hajoca's motion for summary judgment (#25) is **DENIED**.

**IT IS FURTHER ORDERED** that Amerind and Scarborough's cross-motion for summary judgment (#29) is **GRANTED IN PART and DENIED IN PART** on the following basis: **GRANTED** as to the payment bond claim, and **DENIED** as to the unjust enrichment claim.

The action having been dismissed as to E. C. Scarborough with respect to the payment bond claim, which is the only claim made by Plaintiff against Scarborough, the action has been concluded as to Defendant Scarborough.

DATED: February 7, 2011.

  
UNITED STATES DISTRICT JUDGE