THE HONORABLE SUSAN I. CRAIGHEAD
Trial Date: October 18, 2010

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

AERO CONSTRUCTION COMPANY, INC., a Washington corporation, Plaintiff, vs. LEDCOR CONSTRUCTION, INC. et al., Defendants. AND RELATED CROSS ACTIONS	NO. 09-2-16775-3 SEA INTERVENOR PLAINTIFF 3922 SW ALASKA LLC'S POST CLOSING MEMORANDUM AND AUTHORITIES IN SUPPORT OF CLOSING ARGUMENT

COMES NOW Intervenor Plaintiff 3922 SW Alaska, LLC ("Alaska") and hereby submits through counsel the following post-closing memorandum and authorities regarding the claims in this lien foreclosure priority trial.

I. AERO WAS NOT LEDCOR'S SUBCONTRACTOR PRIOR TO JUNE 25, 2008; THE WORK PERFORMED BY AERO PRIOR TO THE ALASKA DEED OF TRUST WAS DONE AT THE DIRECTION OF THE OWNER, THROUGH AGENT BLUESTAR MANAGEMENT, INC.

Under the lien statutes, RCW 60.04 et seq., Ledcor has the burden of proof that they have: (1) a valid lien, (2) when the lien attached to the property through the first day of **their work at the instance of the owner**; and (3) the amount of their lien. In this case, Aero's

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Operations Manager, Verne Wolley, in his deposition testified that when he and Aero were contacted shortly before April 30, June 11, and June 20, 2008; that on each of those occasions he was contacted through BlueStar Management by Dan McTaggart, who represented himself to be employed by BlueStar Management on behalf of the owner. Furthermore, Mr. Wolley testified at his deposition that at the time, in Spring 2008 "I don't know what relation behind the scenes BlueStar had at that time. I have no way of knowing." (See, Verne Wolley Deposition p.81:5-24.) At trial, Ledcor's Project Manager, Rick Delcoure, attempted to testify regarding a "handshake deal" in an April 2008 meeting involving Dan McTaggart, himself and Verne Wolley to have Ledcor direct and order the work of Aero on April 30, June 11 and June 20, 2008, and that Aero would later bill the time and materials work as a change order under the later to be signed Prime Contract of Ledcor with the owner and subsequent subcontract between Ledcor and Aero. However, when Mr. McTaggart was asked about this specific "hand shake deal" from the April 2008 meeting involving the three gentlemen, Mr. McTaggart did not recall any discussion about a change order, Mr. McTaggart simply recalled that it was **his idea** to dig test holes, which he ran by Ledcor, and then Dan McTaggart directly contacted Aero, Mr. Verne Wolley, and asked him to come out to dig test holes. The overwhelming weight of the evidence shows that Aero and Verne Wolley were directed by BlueStar Management through Dan McTaggart, as Construction Manager, to perform the three time and material jobs involving test holes on April 30 and June 20, 2008, and the ceremonial sandbox on June 11, 2008.

The fact that Ledcor's Superintendent, Bob Dumais, or Project Manager, Rick Delcoure, happened to wander by and take a look at what was going on April 30, June 11 or

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June 20, 2008, does not change the facts that Dan McTaggart testified that he called out Aero and directed their work on each of these three dates.

Under the holding in ***Pacific Industries, Inc. v. Singh***, 120 Wn.App. 1, 86 P.3d 778 (2003), the coordination, negotiation and management in certain situations by a general contractor does not meet the definition of "labor" under RCW 60.04. The ***Singh*** court stated as follows:

> The lien statute defines "furnishing labor" as "the performance of any labor . . . for the improvement of real property." It defines labor as "exertion of the powers of body or mind performed at the site for compensation. "Site" is defined as the real property that is being improved. Finally, "improvement" means "[c]onstructing, altering, repairing, remodeling, demolishing, clearing, grading, or filling in, of, to, or upon any real property or street or road in front of or adjoining the same."
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> ***Pac. Indus., Inc. v. Singh***, 120 Wn. App. 1, 7 (2003).

In ***Singh***, supra, the Court of Appeals considered the function of Mr. Singh in negotiating contracts, planning work, coordinating contractors, managing construction and periodically visiting the site to check on the construction progress. The Court concluded that these activities did not constitute labor because they were administrative tasks that did not improve the Property and are not directly performed at the site to improve the property. Similarly, the incidental activities of Ledcor employees Rick Delcoure and Bob Dumais stopping by to observe the digging of test holes that Dan McTaggart was directing and supervising on behalf of the owner, Fauntleroy Place, through BlueStar Management, Inc. in the pre-construction phase of the Fauntleroy Place project does not rise to the level of lienable labor as defined under RCW 60.04 et seq. and as interpreted in the ***Singh*** case.

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It is also important to remember during this same time frame, Ledcor had a separate and independent Pre-Construction Services Agreement which included its role as consultant to determine budget and other issues involving the Fauntleroy Place project. Witnesses at trial including John Thistlewood and Mr. Spicer testified that the functions contained in the Pre-Construction Services Agreement are all office and administrative tasks to plan, budget, and design a future construction project and were not construction activities themselves or considered improvements to the property. Thus, Ledcor's arguments regarding their lien dating back to April 30, 2008 is based solely and exclusively on Aero's work on April 30, June 11 and June 20, 2008. Before June 25, 2008, all Ledcor had testified to doing at the site was setting up an off-site construction office across the street with furniture and fax equipment, and conducting administrative functions that clearly under the ***Singh*** case do not qualify as lienable labor since it is not devoted to improving the property through construction efforts. These administrative activities of Ledcor are all tasks performed as part of "getting ready for construction" and not the actual construction itself.

Furthermore, under the Subcontract signed between Ledcor and Aero, (Trial Exhibit 5), Section 2.2 of that Subcontract contains an integration clause that states: "That this Subcontract represents the entire agreement between the parties and supersedes all prior negotiations, representations or agreement, either written or oral." Furthermore, Ledcor's Prime Contract (Trial Exhibit 3), is an AIA Form Contract that under Section 7.1.1 of the Contract General Conditions (contained in the A201 document attached to the Contract) that: "Changes in work may be accomplished after execution of the Contract ... by change order." Thus, Ledcor's Prime Contract with the owner, Fauntleroy Place LLC would only allow for changes in work to be performed for changes that arise **after the Contract is entered**.

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Further facts came out at trial that support the conclusion that Aero was not a subcontractor of Ledcor prior to June 25, 2008. First, Aero's bid proposal to Ledcor (part of Trial Exhibit 5 - Ledcor/Aero Subcontract) that was revised and sent to Ledcor on April 25, 2008, was still in the negotiation phase of the Subcontract at that point and Verne Wolley testified that there was no way of knowing at that point "if there would be a real contract at that time." Second, Ledcor did not even send out a Letter of Intent to Aero to be its subcontractor on the Fauntleroy Place project until June 23, 2008 (Trial Exhibit 4). Finally, Aero's scope of work as part of their bid proposal submitted on April 25, 2008, did not even mention or contain any reference to the test hole work performed April 30 and June 20, 2008, nor the ceremonial sandbox work performed on June 11, 2008. These tasks could have easily been added to Aero's bid proposal before the Aero Subcontract was negotiated with Ledcor at the end of June 2008, but they were not. It is pretty clear that the "change order explanation" was developed well after the fact by both Ledcor and Aero in the Fall of 2008 in an attempt to further bolster Ledcor's lien position on the project in light of the worsening economic conditions that were occurring in the Fall of 2008.

In summary, the evidence presented at trial points to Aero not becoming a subcontractor of Ledcor until July 2008. This is further supported by the additional evidence of Ledcor's internal documents that all point to a July 2008 construction start date as well as the start of Aero's work in late July 2008 to demolish the Hancock Fabrics building as first task under Aero's Subcontract.

Aero was clearly not a subcontractor of Ledcor before July 2008. Thus, Ledcor cannot claim Aero's work to advance its lien date to April 30, 2008 when Aero was in fact directed at the instance of the owner through BlueStar Management, Inc. and Dan McTaggart. Any work

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performed by Ledcor prior to June 25, 2008 was purely administrative in nature in setting up their off-site office across the street from the construction site and did not involve any work towards improving the Fauntleroy Place property as defined under the lien statutes RCW 60.04 et seq. ***See, Pacific Industries, Inc. v. Singh, Supra.***

Under this scenario, Aero has its lien rights, under the Court's prior Summary Judgment Order in favor of Aero, for the entire scope of work it performed. Thus, Aero applied labor to the property in the April and June 2008 time period; but Ledcor did not as it was not directing Aero's work. Ledcor was only performing administrative office functions across the street from the site from April to June 2008. Ledcor did not perform work consisting of labor to improve real property as defined under RCW 60.04.021, either directly or via its subcontractors, until July 2008. This was confirmed by many internal documents of Ledcor in evidence and testimony as well.

II. THE CREDIBILITY/LACK OF CREDIBILITY OF WITNESSES TESTIFYING ABOUT LEDCOR'S "NO WORK" LETTER SUPPORTS A FINDING OF EQUITABLE ESTOPPEL IN FAVOR OF ALASKA'S LIEN RIGHTS BEING AHEAD OF LEDCOR.

The Court commented in closing arguments to suggest a conclusion that "everybody may be lying about the truthfulness of the "No Work" Letter at the time it was written." In response to this possible conclusion it is important to note the following points based on the evidence at trial.

First, C.B. Spicer wrote the No Work Letter and testified it was "true" when written. He also testified that he was aware of the test hole work, but was not directly involved in how or why the work was done. Furthermore, C.B. Spicer did not ask Rick Delcoure, the Project Manager, for the property status or what work had actually been performed when writing the

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"No Work" Letter. Second, Mr. Thistlewood, the Regional Vice President of Ledcor that signed the letter had no personal knowledge of the site at the time he signed the letter. Mr. Thistlewood also failed to contact or discuss the status of the site with his Operation Manager, Mason Gorda, or with Project Manager, Rick Delcoure, at the site in Seattle. Third, both Mr. Spicer and Mr. Thistlewood were aware the request for the No Work Letter had something to do with financing since Ledcor had just asked for verification of financing on the Fauntleroy Place project, consistent with its normal corporate policy. Finally, Dan McTaggart, as owner's representative for BlueStar Management who received the "No Work" Letter on June 25, 2008, did not correct Ledcor's statement, which he knew says now he knew to be false, because as he put it, "it was none of his business why Seattle Capital Corporation wanted the letter" and because "everybody already knew about the test hole work".

However, what Mr. McTaggart did not testify to was whether or not the people in charge at Ledcor, Mr. McTaggart's personal friend John Thistlewood and Chief Estimator, C.B. Spicer, were aware of the previous test hole work by Aero. A simple phone call and a minor modification of the "No Work" Letter would have avoided this entire lawsuit. For example, the No Work Letter could have additionally stated: **"Except for test holes dug by Aero Construction on April 30 and June 20, 2008 and the digging of a ceremonial sandbox by Aero on June 11, 2008."**

As testified to at trial both Dan McTaggart at BlueStar Management, Inc. and Ledcor were motivated to keep this project moving forward as quickly as possible so that BlueStar could realize an additional $2,000,000 in development fees under the pending UDR deal and so that Ledcor could eventually obtain profits from a potential construction contract with a gross value of approximately $60,000,000.

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Under these facts and circumstances, the reliance of Seattle Capital Corporation and now Alaska was reasonable on the contents of the No Work Letter. First, Chicago Title sent an inspector from Cramer Inspection Services on June 10, 2008, who saw no evidence of construction. This inspection was just one day before Aero showed up to dig the ceremonial sandbox. Second, Daryl Savidis, Commercial Title Unit Manager at Chicago Title showed up at the site on June 22 or June 23, 2008 and did not see any evidence of construction work, only 2 or 3 days after Aero had dug a test hole next to the bowling alley wall and filled it back in level with the pavement and did not fence that area. Third, Hancock Fabrics through their Regional Manager, Rose Moon and Senior Real Estate Manager, Ricky Richardson, did not report any construction activity on the site that they noticed before July 2008, other than Mr. Richardson objecting to the placement of an excavator in late April which he found out was removed within a few days from the site. Hancock Fabrics was very concerned about maintaining the integrity and exclusive use of the parking lot throughout the termination date of their lease, which was July 7, 2008. Fourth, Nick Chase of Affordable Abatement was present at the site on July 1, 2008 and shopped at the "going out of business" sale for Hancock Fabrics and saw no evidence of construction other than one excavator parked in the parking lot. When Mr. Chase and his crew showed up on July 7, 2008 to perform their asbestos demolition work, they believed they were the first construction work on the site for the beginning of the demolition of the Hancock Fabric building.

The Seattle Capital witnesses, Bryan Cartwright and Rob Story, Jr. both first visited the site on June 12, 2008 at the official ground breaking party/ceremony. While it is true that Seattle Capital Corporation's focus was on financial and not construction matters, neither one saw evidence of construction on that date, such as materials, equipment, open holes or piles of

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debris. Similarly, C.B. Spicer of Ledcor visited the site for the ground breaking ceremony and reported no evidence of construction and he testified that the previously dug test holes were filled in and were not obvious. Mr. Huddleston of Seattle Capital reports that his first site visit did not occur until August 2008. None of the individuals at Seattle Capital recall receiving any phone calls from Dan McTaggart of BlueStar Management about the digging of the test holes and the changing of the budget at the time test holes were actually dug.

When these facts are considered in their totality, they add up to the reasonable reliance by Seattle Capital and now Alaska, on the contents of the No Work Letter written by Ledcor in June 2008. Only if you were at the Fauntleroy Place site on the right day at the right time would you have observed the small amount of activity occurring at the site prior to June 25, 2008. Within the two month time period between April 30 and June 30, 2008, Aero was at the site on three separate occasions for a total of amount of approximately 18 hours of work. Clearcreek Contractors, hired directly by BlueStar Management, Inc. was at the site one day on May 30, 2008. The rest of the 56 days in those two month time span did not involve any physical work at the site by anybody. The standard under the law of Equitable Estoppel is reasonable reliance; not absolute certainty or guaranty that nothing has occurred at the site. This is why Seattle Capital asked for the No Work Letter in the first place. While the development of the project had been going on for some time, Seattle Capital Corporation was unaware of what work, if any, had taken place, what type of work may have taken place, and for whom any work had been undertaken. As these matters were unclear, Seattle Capital Corporation directly asked Ledcor if, in fact, it had started work at the site and Ledcor certified that neither Ledcor or its subcontractors had performed work. Whether Ledcor's certification was true, or whether Ledcor chose to so certify in order that Ledcor would have the

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opportunity to work on a $60 million project makes no difference. In both cases, Seattle Capital is entitled to rely on Ledcor's statement, and thus Alaska's first position lien rights should be preserved.

III. THE CONSTRUCTION LOAN BY SEATTLE CAPITAL WAS PROPER, FOR CONSIDERATION, AND OVER $19,000,000 IN LOAN PROCEEDS WERE DISBURSED.

Finally, the loan made by Seattle Capital Corporation to Fauntleroy Place LLC was not a sham. Real dollars were disbursed by Seattle Capital Corporation to Fauntleroy Place LLC to fund the Fauntleroy Place development project. In fact, approximately $11,000,000 was disbursed prior to June 2008 for property acquisition and entitlement work. After the loan closed in late June 2008, an additional approximately $7,000,000 was disbursed to pay contractors including Ledcor and other consultants, with total disbursements on the loan of $19,046,000 as of June 30, 2009, as shown by Trial Exhibit 82. Of this $19,046,000 amount, $1,250,000 represents the amount paid to buy out Steven Hartley's interest held by BlueStar Real Estate Capital Group, Inc. in Fauntleroy Place LLC and another $734,000 represents pre-closing interest allowed to be charged under the provisions of the Fauntleroy Place LLC agreement, Trial Exhibit 67. Alaska, through its Assignment of the Note and Deed of Trust of the construction loan from Seattle Capital Corporation should be entitled to enforce the loan against the Fauntleroy Place property and enforce it in first lien position ahead of Ledcor based on equitable estoppel and/or the fact that Aero was not Ledcor's subcontractor until July 2008,

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and Ledcor had performed no lienable construction work prior to June 25, 2008 on the property.

DATED this 9 day of November, 2010.

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