HONORABLE JUDGE CRAIGHEAD

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR KING COUNTY

AERO CONSTRUCTION COMPANY, INC., a Washington corporation, Plaintiff, v. LEDCOR CONSTRUCTION INC., et al., Defendants.	NO. 09-2-16775-3 SEA LEDCOR CONSTRUCTION INC.'S MEMORANDUM OF AUTHORITIES IN SUPPORT OF CLOSING ARGUMENTS
3922 SW ALASKA LLC, a Washington limited liability company, Intervenor Plaintiff, v. FAUNTLEROY PLACE, LLC, a Washington limited liability company, et al. Intervenor Defendants.	

Ledcor Construction Inc. ("Ledcor") submits the following memorandum of authorities in support of its closing arguments:

I. Washington Statute of Frauds requires any oral contract to be in writing within one year.

3922 SW Alaska, LLC has asserted the argument that Ledcor was not the general contractor for the work performed by Aero on April 30, June 11, and June 20, 2008, by

SCHEER & ZEHNDER LLP
701 PIKE STREET, SUITE 2200
SEATTLE, WA 98101
P: (206) 262-1200 F: (206) 223-4065

asserting (a) Aero had an oral contract with BlueStar Management Inc. to perform the work; and (b) Aero did not enter into a subcontract with Ledcor until after this work was performed.

Despite the evidence that clearly shows BlueStar, Ledcor, and Aero agreed that Ledcor would be general contractor and Aero would be subcontractor on the relevant dates, the Washington Statute of Frauds does not allow Alaska to make either of its arguments. The Washington Statute of Frauds provides that any agreement not performed in one year shall be void, unless such agreement is in writing and signed by some person thereunto by him lawfully authorized. See RCW 19.36.010(1) (emphasis added). Accordingly, if Aero and BlueStar had an oral agreement as alleged by Alaska, then BlueStar was required by law to either pay Aero by April 30, 2009 (in order to perform its part of the oral agreement) or enter into a written contract with Aero by April 30, 2009. BlueStar made no such direct payments to Aero within one year and did not enter into a written contract with Aero within one year. In strong contrast, Ledcor entered into a written contract with Aero within several months of the work performed. Indeed, Ledcor even reduced to writing the fact that BlueStar (as managing member of Fauntleroy Place, LLC) agreed that Ledcor would be the general contractor and Aero would be the subcontractor on the relevant dates when it entered into a written contract with Fauntleroy Place, LLC and incorporated Aero's bid proposal as a part of the contract.

II. Washington law recognizes the lien date of a general contractor to be the date of its subcontractor.

In *Willett v. Davis*, 30 Wn.2d 622, 626-628, 193 P.2d 321 (1948), the Washington Supreme Court ruled that the definition of "lienable" work also includes labor and services performed by a general contractor's superintendent and foreman under a labor and materials contract, even when the superintendent and foreman "sawed no boards, hammered no nails, and handled no tools." The Supreme Court further held "that the employment of these

SCHEER & ZEHNDER LLP
701 PIKE STREET, SUITE 2200
SEATTLE, WA 98101
P: (206) 262-1200 F: (206) 223-4065

foremen was a labor item within the contemplation of the parties to the contract and that, regardless of whether their services fell within the very narrow definition of labor…it was a part of the contract price for which the contractors had a lien." *Id.*, 30 Wn.2d at 630 Disallowance of this work would be error. *Id.* Moreover, RCW 60.04.181 recognizes liens for labor performed by both "subcontractors" and "prime contractors." RCW 60.04.181(1).

Accordingly, under Washington law, if Aero has a priority date of April 30, 2008, so too does Ledcor.

III. Under Washington law, knowledge is imputed to another member of a limited liability corporation and imputed from an agent to a principal.

Despite the evidence that clearly shows Seattle Capital received actual notice that work was being performed on the Project site (i.e. calls from Dan McTaggart, Development Fee Invoices, Seattle Capital sign at the groundbreaking, etc.), Title 25 of the Revised Code of Washington controls partnerships and limited liability companies in the State of Washington. Under this Act, "a partner's knowledge, notice, or receipt of a notification of a fact relating to the partnership is effective immediately as knowledge by, notice to, or receipt of a notification by the partnership, except in the case of a fraud on the partnership committed by or with the consent of that partner." RCW 25.05.010. Further, a member or manager shall not be liable, responsible, or accountable in damages or otherwise to the limited liability company or to the members of the limited liability company for any action taken or failure to act on behalf of the limited liability company unless such act or omission constitutes gross negligence, intentional misconduct, or a knowing violation of law. RCW 25.15.155.

In the present matter, it is undisputed that BlueStar was the managing member of Fauntleroy Place, LLC until June 2, 2008. It is also undisputed that Dan McTaggart, a principal of BlueStar was present at the work performed by Aero and Ledcor on April 30, 2008 (Photograph, Ex. 116). It is further undisputed that the work performed on April 30,

SCHEER & ZEHNDER LLP
701 PIKE STREET, SUITE 2200
SEATTLE, WA 98101
P: (206) 262-1200 F: (206) 223-4065

2008 directly relates to the activities of Fauntleroy Place, LLC. Under Washington law (specifically, RCW 25.05.010), the knowledge of BlueStar regarding the April 30, 2008 was imputed to Seattle Capital and BAJ Capital, Inc.

Under the Washington Agency Rule, an agency relationship arises when two parties (BlueStar and FP LLC/SCC) expressly or impliedly consent that one (BlueStar) shall act under the control of the other (SCC). *Rho Co., Inc. v. Department of Revenue*, 113 Wash.2d 561, 570, 782 P.2d 986 (1989). The principal of an agency relationship (FP LLC/SCC) is liable for the acts of his or her agent (BlueStar) that are committed while the agent is acting within the scope of the agency (Development Coordination Agreement). *Niece v. Elmview Group Home*, 131 Wash.2d 39, 48, 929 P.2d 420 (1997). Knowledge acquired by an agent (BlueStar) is imputed to the principal (FP LLC/SCC) as a matter of law. *Hurlbert v. Gordon*, 64 Wash.App. 386, 396, 824 P.2d 1238 (1992). *See also Goodman v. Boeing Co.*, 75 Wash.App. 60, 85, 877 P.2d 703 (1994) (agent's knowledge will be imputed to principal "only where it is relevant to the agency and the matters entrusted to the agent"), aff'd, 127 Wash.2d 401, 899 P.2d 1265 (1995). *See also Peck v. Siau*, 65 Wash.App. 285, 291, 827 P.2d 1108 (1992) (same).

Alaska argues that FP LLC was the principal rather than SCC. But SCC was 75% shareholder and Managing Member at the time the Deed of Trust was recorded. Further, the Deed of Trust involved three parties: Seattle Capital, Chicago Title, and Fauntleroy Place, LLC. Thus, any argument that knowledge could not have been imputed because the principal was Fauntleroy Place, LLC fails as it relates to the recording of the Deed of Trust because without Fauntleroy Place, LLC as the grantor, the Deed could not have been transferred.

Alaska cannot have it both ways. That is knowledge was either imputed to Seattle Capital by its PARTNER BlueStar pursuant to the LLC agreement under Title 25 OR

SCHEER & ZEHNDER LLP
701 PIKE STREET, SUITE 2200
SEATTLE, WA 98101
P: (206) 262-1200 F: (206) 223-4065

knowledge was imputed to Fauntleroy Place, LLC and/or Seattle Capital from its AGENT BlueStar pursuant to the Development Coordination Agreement and the Agency Rule.

IV. The elements of equitable estoppel must be proven with clear, cogent and convincing evidence.

Washington courts do not favor equitable estoppel, and a party asserting it must prove each of its elements by clear, cogent, and convincing evidence. *Peterson v. Groves*, 111 Wn. App. 306, 310, 44 P.3d 894 (2002). The elements are: (1) an admission, statement, or act inconsistent with a claim afterward asserted; (2) an action by another in **reasonable reliance on that act, statement, or admission**; and (3) injury to the party who relied if the court allows the first party to contradict or repudiate the prior act, statement, or admission. *Id.* (Emphasis added).

Alaska has not satisfied the second element with clear, cogent, and convincing evidence. First, estoppel commonly is raised in the context of a statute of limitations defense, where it may be appropriate to prohibit a defendant from raising a statute of limitations defense when a defendant has "fraudulently or inequitably invited a plaintiff to delay commencing suit until the applicable statute of limitations has expired." *Groves*, 111 Wash.App. at 310-11 *citing Del Guzzi Constr. Co. v. Global N.W. Ltd.*, 105 Wn.2d 878, 885, 719 P.2d 120 (1986) (en banc). "The gravamen of equitable estoppel with respect to the statute of limitations is that the defendant made representations or promises to perform which lulled the plaintiff into delaying timely action." *Groves*, 111 Wash.App. at 311, 44 P.3d 894. Here, the "statute of limitations" expired for Seattle Capital to record a Deed of Trust on April 30, 2008, and Ledcor did nothing to "lull" Seattle Capital into delaying the filing of its Deed two months later on June 25, 2008.

Second, Seattle Capital on two separate occasions (June 3 email and June 18, 2008 affidavit) informed Chicago Title that no work had been performed on the construction site. Seattle Capital did not receive the "no work" letter until after these two occasions.

SCHEER & ZEHNDER LLP
701 PIKE STREET, SUITE 2200
SEATTLE, WA 98101
P: (206) 262-1200 F: (206) 223-4065

Third, Seattle Capital actually knew construction took place on April 30, June 11, and June 20, 2008, before it recorded the Deed of Trust. Dan McTaggart called Seattle Capital in "real time" to inform them about the "good news" (April 30, 2008) regarding the budget and the "bad news" (June 20, 2008) regarding the budget. In defense, Seattle Capital provides the unclear, non-cogent, and unconvincing response that they "do not recall" or "do not remember." BlueStar informed them through budget meetings (May 6, 2008). BlueStar began charging Development Fees in April 2008, which BlueStar and **Rob Story of Seattle Capital** testified was for the start of construction. Then there is the ground breaking ceremony, where Rob Story dug into a sandbox the size of a courtroom table and a Seattle Capital sign was hung on a construction fence. Lastly, there are the photographs of the work on April 30, 2008 and May 30, 2008, which illustrate clear signs of construction through fencing, tarp, bales of hay, sandbags, and holes.

V. The doctrine of "unclean hands" precludes claims of equitable estoppel.

Unclean hands defense applies when the alleged misconduct of one party relates directly to the transaction concerning which the complaint is made. *Dollar Systems, Inc. v. Avcar Leasing Systems, Inc.*, 890 F.2d 165 (9th Cir.1989), *quoting Arthur v. Davis*, 126 Cal.App.3d 684, 693-94, 178 Cal.Rptr. 920, 925 (1981).

First, Seattle Capital promised Ledcor $4.5 million in exchange for a "no work" letter. Yet, Seattle Capital did not have the $4.5 **m**illion and essentially made a promise which it could not and did not fulfill. Second, Seattle Capital made not effort to explain to Ledcor **or BlueStar** that it wanted a "no work" letter from Ledcor to procure "priority" title insurance and subordinate Ledcor's lien rights. John Huddleston could have easily forwarded the **e**mail from David Campbell of Chicago Title wherein Mr. Campbell explains he needs a "no work" letter or a full indemnity from Ledcor in order to record a priority Deed of Trust and issue a priority title policy. Instead, Seattle Capital lured Ledcor with a promise to fund $4.5

SCHEER & ZEHNDER LLP
701 PIKE STREET, SUITE 2200
SEATTLE, WA 98101
P: (206) 262-1200 F: (206) 223-4065

million, used Dan McTaggart of BlueStar to communicate with Ledcor so as to possibly avoid any questions, and fabricated an urgent deadline ("before noon") so that BlueStar and Ledcor could be further misled. Third, Ledcor and BlueStar both believed Seattle Capital's request for a "no work" letter was for financing purposes. Dan McTaggart of BlueStar received a letter that clearly stated Ledcor would be able to draw against a $4.5 million loan. C.B. Spicer and John Thistlewood felt the customer is asking for a letter that would help the financing, so they provided what the customer wanted. Fourth, Ledcor and BlueStar assumed the "no work" as referred to in the $4.5 million Letter did not refer to the work performed in April and June 2008 and was not a request for Ledcor to state it did not perform the work in April and June 2008 because Seattle Capital knew "in real time" that work had been performed by Ledcor.

Lastly, Seattle Capital knew Ledcor's priority position cannot legally be changed without a subordination agreement from Ledcor. See *A.A.R. Testing Laboratory, Inc. v. New Hope Baptist Church*, 112 Wn.App. 442, 449-450, 50 P.3d 650 (Div. 1, 2002)[1] This is made evident by the fact that Seattle Capital knows how to prepare formal, very detailed, contractually binding subordination agreements (see Whole Foods subordination agreement) and the importance of them. The Ledcor Letter clearly cannot be mistaken for a subordination agreement. Indeed, even BlueStar did not believe the Ledcor Letter was a

[1] (The priority of a lien may be changed by agreement between the possessor of the lien and the owner of the property, which often occurs when a third-party construction lender requires the priority of its lien to be first as a condition of providing a construction loan. However, a waiver and release of a lien claim for work done through a certain date does not extinguish a mechanics' lien and cannot elevate to the level of a subordination agreement. If a construction lender intends a mechanics' and materialmen's lien rights possessed by a contractor to be legally subordinate to the deeds of the lender, then a subordination agreement is required.) *See also Holm v. Chicago, M. & P. S. Ry. Co.*, 59 Wash. 293, 109 P. 799, 801 (1910.) ("It is true the [contractor] could waive his right to a lien. If it was desired that he should do so, the language employed should have been clear, certain, and unequivocal. The waiver could have been expressed in a few words so clear in meaning that no one could have misunderstood them."); see also *Seattle Lumber Co. v. Cutler*, 63 Wash. 662, 665, 116 Pac. 1 (1911). Further, a release given by a lien claimant without consideration to enable the owners to transfer property is void as between the parties.

SCHEER & ZEHNDER LLP
701 PIKE STREET, SUITE 2200
SEATTLE, WA 98101
P: (206) 262-1200 F: (206) 223-4065

subordination letter when it forwarded the letter to Seattle Capital. Yet, Seattle Capital did not request Ledcor to enter into a formal subordination agreement.

Accordingly, Seattle Capital is barred from making an estoppel claim against Ledcor because it has "unclean hands," and Ledcor's lien keeps its priority position.

VI. A claim of estoppel can be waived by conduct

"A 'waiver' is the intentional and voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right." *Edmonson v. Popchoi*, 155 Wash.App. 376, 390, 228 P.3d 780 (Div. 1, 2010) citing *Birkeland v. Corbett*, 51 Wash.2d 554, 565, 320 P.2d 635 (1958). If a waiver is not found by express agreement, "[a] waiver by conduct occurs if the actions of the person against whom waiver is claimed are inconsistent with any intention other than waiver." *Edmonson v. Popchoi*, 155 Wash.App. at 390 citing *Shinn v. Thrust IV, Inc.*, 56 Wash.App. 827, 843-44, 786 P.2d 285 (1990) (citing Birkeland, 51 Wash.2d at 565, 320 P.2d 635).

On November 11, 2008, FP LLC, specifically Seattle Capital, signed and approved Change Order Number 004, which incorporated the work performed by Ledcor (and Aero) on April 30, June 11, and June 20, 2008 as part of the written contract between FP LLC and Ledcor.

Alaska argues (albeit incorrectly) Ledcor is estopped from claiming its lien has a priority date of April 30, 2008 because Ledcor stated – in a letter two months later – that it had not performed work. If this argument was valid, it stands to also be true that Seattle Capital waived its estoppel claim or is in turn estopped from claiming its Deed of Trust has priority when it signed a contract – five months after it recorded its Deed of Trust – that acknowledged that Ledcor performed work on April 30, June 11, and June 20, 2008. Indeed, if Alaska is permitted to allege Seattle Capital relied on a letter that can be misinterpreted and was prepared under false promises and fabricated urgency, then Ledcor certainly has the right to rely on a formally signed and accepted contract change. There is no other interpretation of

SCHEER & ZEHNDER LLP
701 PIKE STREET, SUITE 2200
SEATTLE, WA 98101
P: (206) 262-1200 F: (206) 223-4065

Seattle Capital's inconsistent action of signing and authorizing a formal change to the Prime Contract that incorporates the work performed on April 30, June 11, and June 20, 2008, than a waiver and acceptance of the work.

DATED this 3rd day of November, 2010.

SCHEER & ZEHNDER LLP

By _____

Anthony R. Scisciani III, WSBA No. 32342
ascisciani@scheerlaw.com
Masaki James Yamada, WSBA No. 36425
myamada@scheerlaw.com
Attorneys for Defendant/Cross-Claimant Ledcor Construction, Inc.

SCHEER & ZEHNDER LLP
701 PIKE STREET, SUITE 2200
SEATTLE, WA 98101
P: (206) 262-1200 F: (206) 223-4065

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that the following is true and correct:

I am employed by the law firm of Scheer & Zehnder LLP.

At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On the date set forth below I served the document(s) to which this is attached, in the manner noted on the following person(s):

PARTY/COUNSEL	DELIVERY INSTRUCTIONS
Counsel for Consalves & Santucci, Inc. dba Conco Tymon Berger John Stephen Riper Christopher Wright Stanislaw Ashbaugh LLP 701 5th Ave Ste 4400 Seattle, WA 98104-7031	( ) **Via U.S. Mail** (X) **Via E-Service/ Email** ( ) **Via Legal Messenger** ( ) **Via Facsimile** ( ) **Via Overnight Mail**
Counsel for Defendant Malcolm Drilling Company, Inc. Jason R. Wandler Hillary A. Madsen Oles Morrison Rinker & Baker LLP 701 Pike Street, Suite 1700 Seattle, WA 98101	( ) **Via U.S. Mail** (X) **Via E-Service/ Email** ( ) **Via Legal Messenger** ( ) **Via Facsimile** ( ) **Via Overnight Mail**
Counsel for Hancock Fabrics Zachary Tomlinson Davis Wright Tremaine LLP 1201 3rd Ave Ste 2200 Seattle, WA 98101-3045	( ) **Via U.S. Mail** (X) **Via E-Service/ Email** ( ) **Via Legal Messenger** ( ) **Via Facsimile** ( ) **Via Overnight Mail**

SCHEER & ZEHNDER LLP
701 PIKE STREET, SUITE 2200
SEATTLE, WA 98101
P: (206) 262-1200 F: (206) 223-4065

PARTY/COUNSEL	DELIVERY INSTRUCTIONS
Counsel for Merit Electric Ronald G. Housh Ronald G. Housh, PS 800 Fifth Avenue, Suite #4000 Seattle, WA 98104	( ) Via U.S. Mail (X) Via E-Service/ Email ( ) Via Legal Messenger ( ) Via Facsimile ( ) Via Overnight Mail
Counsel for Seattle Capital Michael A. Barrett Perkins Coie 1201 Third Avenue Suite 4800 Seattle, Washington 98101-3099	( ) Via U.S. Mail (X) Via E-Service/ Email ( ) Via Legal Messenger ( ) Via Facsimile ( ) Via Overnight Mail
Counsel for Defendants Seattle Capital Corp and Fauntleroy Place and Whole Foods Market Pacific Northwest, Inc. Joseph A.G. Sakay Michael Scott Alexander Martin Wu Amit D. Ranade Hillis Clark Martin & Peterson 1221 2nd Ave Ste 500 Seattle, WA 98101-2925	( ) Via U.S. Mail (X) Via E-Service/ Email ( ) Via Legal Messenger ( ) Via Facsimile ( ) Via Overnight Mail
Additional Attorney for Intervenor Plaintiff 3922 SW Alaska LLC Jon G. Hongladarom Bradley P. Thoreson Greg Clark Samuel T. Bull Foster Pepper PLLC 1111 Third Avenue, Suite 3400 Seattle, WA 98101-3299	( ) Via U.S. Mail (X) Via E-Service/ Email ( ) Via Legal Messenger ( ) Via Facsimile ( ) Via Overnight Mail
Attorney for Kleinfelder West, Inc. David Eckberg Skellenger Bender PS 1301 Fifth Avenue, Suite 3401 Seattle, WA 98101-2605	( ) Via U.S. Mail (X) Via E-Service/ Email ( ) Via Legal Messenger ( ) Via Facsimile ( ) Via Overnight Mail

SCHEER & ZEHNDER LLP
701 PIKE STREET, SUITE 2200
SEATTLE, WA 98101
P: (206) 262-1200 F: (206) 223-4065

PARTY/COUNSEL	DELIVERY INSTRUCTIONS
Attorney for Intervenor Plaintiff 3922 SW Alaska LLC Gregory Ursich Mark S. Leen Anneliese E. Johnson Inslee Best Doezie & Ryder PS 777 108th Ave NE Ste 1900 Bellevue, WA 98004-5144	( ) Via U.S. Mail (X) Via E-Service/ Email ( ) Via Legal Messenger ( ) Via Facsimile ( ) Via Overnight Mail
Counsel for Waste Managment Disposal Services of Oregon, Inc. John P. Plovie Plovie Law Firm, P.S. 8118 165th Avenue NE PO BOX 878 Redmond, WA 98073	( ) Via U.S. Mail (X) Via E-Service/Email ( ) Via Legal Messenger ( ) Via Facsimile ( ) Via Overnight Mail
Counsel for Bluestar Management Inc. Justin Elsner Elsner Law Firm PLLC 14803 15th Avenue NE, Suite 201 Shoreline, WA 98155	( ) Via U.S. Mail (X) Via E-Service/Email ( ) Via Legal Messenger ( ) Via Facsimile ( ) Via Overnight Mail
Counsel for BAJ Capital Susan Rae Fox Ryan, Swanson & Cleveland, PLLC 1201 Third Avenue, Suite 3400 Seattle, WA 98101-3034	( ) Via U.S. Mail (X) Via E-Service/Email ( ) Via Legal Messenger ( ) Via Facsimile ( ) Via Overnight Mail

DATED this 1st day of November, 2010, at Seattle, Washington.

Alison Buck

SCHEER & ZEHNDER LLP
701 PIKE STREET, SUITE 2200
SEATTLE, WA 98101
P: (206) 262-1200 F: (206) 223-4065