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. 3922 SW ALASKA LLC, a Washington limited liability company, Intervenor Plaintiff, v. FAUNTLEROY PLACE, LLC, a Washington limited liability company, et al. Intervenor Defendants.	NO. 09-2-16775-3 SEA FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINDINGS REGARDING CR 54(b) CERTIFICATION

This matter came on for trial of the lien priority claims October 18 - November 3, 2010. Plaintiff Aero Construction, Defendant Ledcor Construction Inc., and Intervenor 3922 SW Alaska LLC participated in the trial. After considering all of the testimony, exhibits, and arguments of counsel, the Court enters the following Findings of Fact and Conclusions of Law.

Findings of Fact

1. This action seeks foreclosure of lien rights on real property located on the north side of SW Alaska Street between 40th Avenue SW and 39th Avenue SW, in Seattle, King County, Washington (the "Property"). The legal description for the Property is:

> Parcel #0952007175 (also known as Parcel A):
> Lots 17 through 24, inclusive, Block 55, BOSTON CO.'S PLAT OF WEST SEATTLE, according to the plat thereof recorded in Volume 3 of Plats, Page(s) 19, records of King County, Washington;
>
> Except that portion of said Lot 24 condemned in King County Superior Court Cause Number 70682, as provided for by Ordinance Number 21302 of the City of Seattle.
>
> Parcel #0952007265 (also known as Parcel B):
> Lots 10 through 24, inclusive, Block 56, BOSTON CO.'S PLAT OF WEST SEATTLE, according to the plat thereof recorded in Volume 3 of Plats, Page(s) 19, records of King County, Washington;
>
> Except those portions of said Lots 23 and 24 condemned in King County Superior Court Cause Number 70682 and 93059, as provided for by Ordinance Numbers 21302 and 29063, respectively, of the City of Seattle.
>
> Parcel C:
> All that portion of the alley between blocks 55 and 56, BOSTON CO.'S PLAT OF WEST SEATTLE, according to the plat thereof recorded in Volume 3 of Plats, Page 19, lying Northerly of the Northerly right-of-way line of S.W. Alaska Street and Southerly of the Easterly production of the Northerly line of Lot 17, Block 55, in said Plat of BOSTON CO.'S PLAT OF WEST SEATTLE, in King County, Washington.

2. The claims of lien at issue in this case arise out of a construction project known as the Fauntleroy Place Project ("Project"). The Project was to demolish existing parking lots and structures on the Property, dig a large excavation for four levels of underground parking, and build a mixed-use development with a Whole Foods market and approximately 170 apartment units.

3. The plaintiff is Aero Construction Company, Inc. Aero is a Washington construction contractor. Aero was the excavation subcontractor on the Project. Aero initiated this foreclosure action by filing suit in April 2009 on its mechanic's lien against the Property. In addition to Aero, the following parties also presented evidence in support of their claims seeking foreclosure of their own mechanic's liens against the Property:

a. **Ledcor Construction, Inc.** Ledcor is a general contractor doing business in King County, Washington, and was the prime contractor for the Project. Findings of Fact specific to Ledcor's claim of lien are below.

b. **Kleinfelder West, Inc.** Kleinfelder is a professional services firm doing business in King County, Washington, and furnished professional services to the Owner for the Project. Findings of Fact specific to Kleinfelder's claim of lien are below.

4. In it's Complaint Aero alleged that the following additional parties had recorded claims of lien against the Property:

a. **D'Amato, Conversano, Inc.** By Stipulated Order dated October 21, 2009, the Court dismissed claims by and against D'Amato, Conversano, Inc. To the extent D'Amato recorded any claim of lien against the Property, that claim has been dismissed.

b. **Core Design, Inc.** By stipulated Order dated October 21, 2009, Core Design, Inc. stipulated it would not pursue its claim of lien against the Property, and was dismissed.

c. **Systech Environmental Corporation.** Systech Environmental appeared but did not answer, nor assert any claim to foreclose on any claim of lien. To the extent Systech recorded any claim of lien against the Property, that claim was not timely perfected by way of claim seeking foreclosure.

d. **Gonsalves & Santucci, Inc., dba Conco.** Gonsalves & Santucci, Inc., dba Conco, appeared and answered, but did not assert any claim to foreclose on any claim of lien. To the extent Gonsalves/Conco recorded any claim of lien against the Property, that claim was not established.

e. **Malcolm Drilling Company, Inc.** At all relevant times, Malcolm was duly licensed and registered as a Washington construction contractor. Malcolm was the shoring subcontractor on the Project and installed a temporary shoring system to

facilitate the planned construction. Malcolm answered the complaint filed by Aero, but did not pursue at the lien foreclosure trial the priority of its own lien. Malcolm recorded a claim of lien against the Property, but the priority of that claim was not established at trial. The unpaid work performed by Malcolm is included within Ledcor's claim of lien, and Malcolm and Ledcor introduced evidence in support of that claim.

f. **Clearcreek Contractors, Inc.** Clearcreek is a Washington construction contractor. Clearcreek answered, but did not pursue at the lien foreclosure trial any claim of lien. To the extent Clearcreek recorded any claim of lien against the Property, that claim was not established.

g. **Merit Electric, Inc..** Merit, appeared and answered, but did not establish any claim to foreclose on any claim of lien. To the extent Merit recorded any claim of lien against the Property, that claim was not established.

5. The Complaint in Intervention by 3922 SW Alaska LLC (hereinafter "Alaska") dated August 27, 2009, alleged that the following additional parties asserted recorded claims of interest against the Property:

a. **Voka, Inc.** Voka, Inc. did not appear, and did not assert any claim to foreclose on any claim of lien against the Property. To the extent Voka recorded any claim of lien against the Property, that claim was not timely perfected by way of claim seeking foreclosure.

b. **Abossein Engineering, LLC.** Abossein Engineering, LLC appeared but did not answer, nor assert any claim to foreclose on any claim of lien. To the extent Abossein recorded any claim of lien against the Property, that claim was not timely perfected by way of claim seeking foreclosure.

c. **Waste Management Disposal Services of Oregon, Inc.** Waste Management is a judgment creditor of Fauntleroy Place, LLC, having obtained a Stipulated Judgment in King County Superior Court Cause No. 09-2-22313-1SEA dated July 15, 2010, in the principal amount of $222,648.33. That Judgment encumbers the Owner's interest in the Property, which for purposes of priority of interest attached on July 15, 2010. Waste Management's priority position in relation to other claimants is addressed in Findings below.

6. The Owner of the Property is and was, at the time work was performed on the Project, defendant Fauntleroy Place, LLC. One of its principals is and was defendant Seattle Capital Corporation. Both Bluestar Management, Inc. and Defendant BAJ Capital, Inc. once

were – but are no longer – members of Fauntleroy Place, LLC. Seattle Capital Corporation's original share in Fauntleroy Place LLC was 50% and its share increased (a) to 75% on June 2, 2008 when it acquired Bluestar Real Estate Capital Group, Inc.'s 25% interest and (b) to 100% in 2009 when it acquired BAJ Capital, Inc.'s 25% interest.

7. Defendant BlueStar Management LLC is a Washington limited liability company in the business of real estate development, doing business in King County, Washington. BlueStar is an affiliate of BlueStar Real Estate Capital Group, Inc., which was a principal in Fauntleroy Place, LLC. BlueStar was the managing member of Fauntleroy Place LLC until its interest in Fauntleroy Place was transferred to Seattle Capital on June 2, 2008. Also on June 2, 2008, Faunlteroy Place, LLC entered in a Development Coordination Agreement with BlueStar, whereby BlueStar was given the authority to serve as the Development agent of Fauntleroy Place, LLC until December of 2008.

8. The general agreement among the principals of Fauntleroy Place (i.e., Seattle Capital, BlueStar and BAJ Capital) from approximately Fall 2007 until June of 2008 was that BAJ Capital would contribute to Fauntleroy Place its ownership interest in the Property; that BlueStar would contribute to Fauntleroy Place previous development work on the Project, and that BlueStar would manage construction development of the Project; and that Seattle Capital would arrange financing for the Project.

9. By Preconstruction Services Agreement dated September 26, 2007 (Ex. 1), the Owner entered into a contract with Ledcor for Ledcor to provide construction services for the Project, including but not limited to design and schedule work, schematic work, estimates and scheduling. Its services included obtaining subcontractor pricing from subcontractors

suitable to construct the Project. As part of that Preconstruction Services Agreement, BlueStar was designated as the Owner's representative, with Dan McTaggart designated on the signature page as a principal and authorized signator for BlueStar.

10. In January of 2008, Fauntleroy Place LLC executed an amendment to a lease with keystone tenant Whole Foods, Inc. The lease required that the project be completed by June 30, 2010. In light of this requirement in the Whole Foods lease, Fauntleroy Place LLC and Ledcor (who had been chosen as the likely general contractor in mid-to-late 2007) agreed to utilize a form AIA A111-1997 contract known as a Guaranteed Maximum. By §5.2.7 of this contract, the parties agreed that Fauntleroy Place LLC may request that Ledcor proceed with the Work prior to establishment of the Guaranteed Maximum Price (i.e., before the contract setting the guaranteed maximum price was executed).

11. A Guaranteed Maximum Price contract is utilized when an owner wants to get a project started quickly, before the final designs are complete. A contractor participates actively in determining the budget of a project, attempting to bring down costs or flag problems early, and ultimately sets a price when 50 percent of the drawings being complete. Because the drawings are not complete, a typical bidding process does not occur, but rather general and sub-contractors are selected to participate.

12. In the beginning of 2008, Seattle Capital and BlueStar began negotiations with United Dominion Realty, Inc. BlueStar expected UDR to become a new equity partner with the current members of Fauntleroy Place, LLC. Seattle Capital expected UDR to replace Seattle Capital as the equity member of Fauntleroy Place, LLC and make a profit on the front and back end from the deal.

13. As part of the construction services furnished by Ledcor to the Owner in late 2007 and early 2008, Ledcor assisted in preparation of design and construction documents for the excavation phase of the Project, known as Phase I. Using those documents, Ledcor solicited and obtained from Aero a bid for the excavation scope of work, which bid Aero submitted on April 4, 2008, and by amended bid to Ledcor on April 25, 2008 (included as part of Ledcor's prime contract, Ex. 3, 25th page). Using those documents, Ledcor also solicited and obtained from Malcolm a bid for the shoring scope of work, which bid Malcolm submitted on April 3, 2008 (included as part of Ledcor's prime contract, Ex. 3, 28th page).

14. In April and early May 2008, BlueStar advised Ledcor that the Owner intended to proceed with construction of the Project, using the pricing obtained by Ledcor for construction of Phase I (the excavation and shoring phase of the Project), with Aero as the excavation subcontractor and Malcolm as the shoring subcontractor. The Owner issued a Letter of Intent to Ledcor dated May 14, 2008 (Ex. 2) confirming that intention. That letter also confirms ongoing efforts by the Owner and Ledcor to perform value engineering work to clarify the scope and costs of the Project, and to identify ways to save costs in building the Project.

15. At this point in planning the project, BlueStar had obtained a geotechnical report that anticipated that the four story parking garage would have to be dug into the water table, which would have meant designing a dewatering system to channel rushing water away from the foundation. This could have cost $500,000, a significant impact on the budget. Dan McTaggert was not convinced that the geotechnical report was accurate and proposed to

Seattle Capital, Ledcor and Aero that test holes of the approximate depth of the garage be dug to determine the level of the water table.

16. As part of the value engineering effort being undertaken by Ledcor and the Owner, Ledcor agreed to enlist Aero to excavate two deep trenches on the Property to determine the level of groundwater and nature of the soils, to learn whether conditions would permit a savings on dewatering for the excavation and shoring work on the Project. Aero did not agree in writing or orally to do the work for BlueStar. Aero (as subcontractor for Ledcor) performed that work on April 30, 2008, using its own manpower and heavy equipment. Aero demolished two sections of the existing asphalt parking lot, and excavated trenches nearly 30 feet deep. Once conditions had been observed, Aero backfilled the trenches and graded the soils nearly to the pre-existing level of the parking lot. The trenches were not re-paved and the soils and pavement were eventually removed from the parcels on June 20, 2008. The work revealed (to Dan McTaggart, Rick Delcoure and two representatives for Kleinfelder, among others) favorable conditions, which reduced anticipated costs by hundreds of thousands of dollars. It should be noted that David Cotton, the Kleinfelder engineer who observed the digging of the test holes, testified that the observations were not completely definitive because the excavator was unable to dig quite as deep as the bottom of the planned garage. However, the others involved operated on the assumption that no expensive dewatering system would be needed. When the work on April 30 was finished, the locations of the work remained visually apparent because the backfilled excavations were covered by plastic tarps, held down by sandbags, with hay bales to the North of them to protect against silt runoff, with the excavated areas protected by construction fencing, in the middle of the

existing asphalt parking lot. (Ex. 116, 5th photo from the end (taken 4/30/08), and Ex. 57, 12th photo from the end (taken 5/30/08).) Aero's on-site work on April 30 included demolition of existing asphalt, clearing in the area of the trenches, filling in and grading its areas of work once the trenches had been examined, and altering the property.

17. There is conflicting testimony as to whether Seattle Capital was informed that the test holes were dug at the time it happened. Dan McTaggert testified that on the day the holes were dug or a few days later, he called Bryan Cartwright to inform Seattle Capital of the "good news" in real time regarding the money saved on the budget as a result of the test holes dug on April 30, 2008. Bryan Cartwright testified he received no such phone call. There is no contemporaneous written communication. On this point, the court finds McTaggert to be the more credible witness. Cartwright acknowledged that budgetary concerns were primary for him, and McTaggert testified that he kept Cartwright and Rob Story, President of Seattle Financial Group, informed of developments that had an impact on budget. Story testified to a remarkable degree of ignorance regarding the basic factors that go into determining a budget for digging a large foundation hole such as this one, even though Seattle Financial Group had financed many such projects in the Seattle area. The court finds that this degree of ignorance is inconsistent with the Story's lifetime of experience in banking and real estate development.

18. John Huddleston testified that he knew nothing of the test holes until August 2008, when he saw invoices from Aero. He previously testified in his CR 30(b)(6) deposition that he did not know when he learned of the test holes. Easton Craft testified that Huddleston was very interested in the subject of dewatering because of problems he

encountered personally in the past and followed the developments related to water on the site closely. The Court does not find Huddleston to be credible on this issue.

19. By written contract dated May 5, 2008 (Ex. 314), BlueStar on behalf of the Owner hired Clearcreek Contractors to excavate and dispose of three petroleum tanks buried on the Property. The work involved demolition of portions of the Property's parking lot, excavation, removal and export of the tanks.

20. Less than a week after the holes were dug on April 30, 2008, (specifically, on May 6, 2008) Easton Craft, John Huddleston, Don Pethick, and Patrick Turner held a meeting to discuss, among other items, the budget for the Project (Ex. 80).

21. By the end of April and beginning of May 2008, BlueStar began charging Seattle Capital a Development Fee in addition to a Project Management Fee to signify that construction work has begun on the Property. Seattle Capital objected to the increased development fee charged by BlueStar for April 2008. During the negotiation over the fee, BlueStar (McTaggert and Hartley) explained to Cartwright what was happening at the site that justified increasing the fees. Eventually Seattle Capital agreed to pay BlueStar and increased development fee beginning in May 2008. Seattle Capital also received from BlueStar invoices from Kleinfelder West Inc. for services performed in April and May and paid for those invoices.

22. Clearcreek removed the underground storage tanks on May 30, 2008 (Ex. 57). When the work performed on May 30 was finished the locations of the work remained visually apparent because the surface was bare dirt, protected by fencing, in the middle of the existing asphalt parking lot.

23. By Prime Contract dated May 30, 2008, the Owner and Ledcor established the Guaranteed Maximum Price. (Ex. 3.) The prime contract between Fauntleroy Place and Ledcor includes and incorporates the April 4, 2008 bid of Aero for the excavation subcontract (as revised April 25, 2008), and the April 3, 2008 bid of Malcolm Drilling for the shoring subcontract, confirming the agreement of the Owner and Ledcor that Aero was the excavation subcontractor for the Project and Malcolm was the shoring subcontractor.

24. The prime contract between Fauntleroy Place and Ledcor provides in Section 14.4 that Dan McTaggart (of BlueStar) is the Owner's Representative for the Project. Fauntleroy Place did not remove McTaggart from that position until December 2008, pursuant to Seattle Capital's letter to Ledcor dated December 19, 2008 (Ex. 20).

25. On June 2, 2008, Seattle Capital initiated a series of transactions with respect to Bluestar's role in Fauntleroy Place LLC. First, Seattle Capital entered an agreement with BlueStar to exchange the $1.25 million BlueStar owed Seattle Capital on other project loans for BlueStar's 25% interest in Fauntleroy Place, LLC. Second, Seattle Capital issued Amendment 2 to the Limited Liability Company Agreement for the minority members to sign whereby Seattle Capital became Managing Member of Fauntleroy Place LLC (Ex. 90). As a result, Steve Hartley was divested of an ownership interest in the project. During the spring and early summer of 2008, Seattle Capital, BlueStar and UDR were engaging in negotiations regarding the potential purchase of the project by UDR. The testimony was in conflict regarding the terms of the Purchase and Sale Agreement eventually signed in July 2008, but the agreement contemplated reimbursing Seattle Capital for its costs. It apparently did not contemplate distributing profits until the conclusion of the project. The Purchase and

Sale Agreement (Ex. 135) appears to have contemplated UDR paying off a construction loan, although this point is in dispute. A final, signed copy of the Purchase and Sale Agreement was not offered as an exhibit. In light of the language in the Agreement related to paying off a construction loan, Seattle Capital began the process of converting its equity contributions to debt.

26. Also on June 2, 2008, Seattle Capital as the new Managing Member of Fauntleroy Place, LLC issued Amendment 3 to the Limited Liability Company Agreement, which memorialized Seattle Capital's conversion of its $10,587,588.33 capital contribution into a construction loan with a preferred return of 14% as of the date of the cash contribution, and established that Seattle Capital was now 75% owner of the LLC. (Ex. 91) Next, Seattle Capital as the new Managing Member of Fauntleroy Place, LLC and "Borrower" issueds a Promissory Note to pay Seattle Capital as "Lender" whereby Fauntleroy Place, LLC promises to pay Seattle Capital $18,984,594.33 (Ex. 93). Concomitantly, , as "Borrower," managing member of Fauntleroy Place LLC Seattle Capital entered into a Construction Loan agreement with "Lender," Seattle Capital for a three-month $18,984,594.33 loan "as evidenced by the Note" (Ex. 94) that terminated on September 1, 2008. Finally, Seattle Capital entered into a Development Coordination Agreement with BlueStar, which allowed BlueStar to continue working as the Development Coordinator of the Project and agent of Fauntleroy Place, LLC.

27. On June 3, 2008, Seattle Capital sought a title commitment from Chicago Title. Chicago Title asked whether (a) the commitment was for construction financing and (b) whether any work had been performed on the Property. Seattle Capital responded that the

request is for "a construction loan and no work has started and it is estimated that a late June start date is in the works" (Ex. 70).

28. Chicago Title paid Cramer Inspection services $75.00 to conduct a site inspection on June 10, 2008. Cramer Inspection services reported that it saw no signs of construction activity on the site, despite the fact that photographic exhibits admitted at trial demonstrate obvious fenced off areas on the site.

29. On or about June 10, 2010, Dan McTaggart instructed Ledcor to prepare the site for a groundbreaking ceremony. Specifically, Ledcor was instructed to remove a light pole (including concrete base to light pole and electrical connection) and asphalt from a section of the parking lot. Ledcor contacted Aero and arranged for the work to be done.

30. On June 11, 2008, Aero returned to the Property at the request of Ledcor to perform additional demolition and excavation work, using its own manpower and heavy equipment. Under Ledcor's direction, electricity to a light pole in the parking lot was terminated, and Aero demolished the light pole and the large concrete base anchoring the pole in the parking lot. Aero demolished a section of the asphalt parking lot and excavated a shallow pit about 1-foot in depth, 13-feet long and 6-feet wide. Aero exported the asphalt and soil spoils from that excavation, and imported sand and placed it in the pit it had excavated, for use by the Owner at a groundbreaking ceremony that took place on June 12. Aero's on-site work on June 11 included demolition of existing asphalt, demolition of an existing light pole and concrete base, clearing in the area of the shallow pit, filling in and grading its excavation with sand, and altering the property.

31. On the afternoon of June 12, 2008, the Owner held a groundbreaking ceremony (Ex. 60). Sixty or more people attended, including representatives of Ledcor (Rick Delcoure), BlueStar (Dan McTaggart and Steve Hartley), Seattle Capital (Rob Story and Bryan Cartwright), and Fauntleroy Place (McTaggart, Hartley, Story and Cartwright). By that point, construction fencing had been erected on the Project site for over a month to protect areas of the parking lot previously excavated on April 30 and May 20, 2008. Both Bluestar and Seattle Capital Corporation hung marketing/advertising signs on the construction fencing for viewing during the groundbreaking ceremony. As part of the groundbreaking ceremony, Rob Story and others broke ground by digging the sand from the 1-foot x 13-feet long x 6-feet wide excavated pit with ceremonial golden shovels, to inaugurate groundbreaking for the Project. When the groundbreaking ceremony was over, the work performed by Ledcor and Aero on June 11 remained visually apparent because the surface was bare sand, protected by fencing (in the middle of the existing asphalt parking lot).

32. On June 13, 2008, Chicago Title requested an Owner's affidavit to be filled out by Seattle Capital that, among other things, confirmed no work had been performed on the Property.

33. On or about June 18, 2008, Dan McTaggart as developing agent for Fauntleroy Place, LLC contacted Ledcor to arrange for the excavation near the foundation of a neighboring bowling alley at the North boundary of the Property. The purpose of the excavation was to determine if the bowling alley foundation encroached on the Property. The Owner sought this information for use as part of its then-ongoing negotiations with the

owner of the bowling alley to obtain its permission to soil-nail beneath the bowling alley as part of construction of the Project. Ledcor contacted Aero and arranged for the excavation.

34. Also on June 18, 2008, John Huddleston of Seattle Capital filled out and Rob Story of Seattle Capital signed an affidavit for Chicago Title Insurance Company whereby Rob Story deposed and said no work had been performed on the Fauntleroy property and agreed to indemnify Chicago Title for the representations made (Ex. 75). The affidavit indicated that a contract exists between the Owner and Ledcor and an architect (Ex. 75). The affidavit did not list contracts with Kleinfelder (engineer), Clearcreek (contractor), or BlueStar (Developer of Construction) or that work had been performed on the site. Neitehr Huddleston nor Story inquired of McTaggert whether any work had been done by contractors.

35. On June 20, 2008, at Ledcor's request and under Ledcor's supervision, Aero performed additional demolition and excavation work on the Project, using its own manpower and heavy equipment. Aero demolished a section of the asphalt parking lot and excavated a pit on the North boundary of the Property to identify the exact location of footings for the bowling alley structure immediately North of the Property. When the work performed on June 20 was finished, the location of the work remained visually apparent because the surface was bare dirt at the North end of the existing asphalt parking lot. The site work by Ledcor and Aero on June 20 included demolition of existing asphalt, clearing in the area of the trench Aero excavated, filling in and grading that area once the trench had been examined, removing the asphalt from the parcels, and altering the property.

36. Dan McTaggart called Bryan Cartwright within a couple of days regarding the "bad news" discovered by the test holes dug on June 20, 2008. McTaggert testified that the results of this excavation would add substantially to the costs of shoring.

37. By letter of June 23, 2008, Ledcor confirmed its intention that Aero be the excavation subcontractor for the Project, and submitted to Aero a draft written Subcontract for review, to formalize Aero's role as the excavation subcontractor and reduce to writing the terms of that subcontract. (Ex. 4)

38. Also on June 23, 2008, Chicago Title informed Seattle Capital that as a result of listing a contract with Ledcor on the affidavit for title insurance, it needed either a list of items including a signed indemnity re: mechanic's lien or an affirmative statement that no work had commenced from Ledcor. Chicago Title employee Daryl Savidis drove by the construction site on June 23 or 24, 2008, to confirm that no construction activity has taken place on the site. Ms. Savidis had recently undergone knee surgery and did not get out of her car. She reported her observations to her co-worker David Campbell (Ex. 127 and 128).

39. On June 24, 2008, John Huddleston sent Dan McTaggert an e-mail requesting that McTaggert obtain a "no work" letter from Ledcor. He did not forward the email chain from David Campbell of Chicago Title requesting either an indemnity agreement or a no work letter from Ledcor. Huddleston attached a letter dated June 24, 2008 (Ex. 50), wherein Seattle Capital confirms to Ledcor allocation of a loan to finance the excavation/shoring phase of the Project (Phase I). The letter states in pertinent part:

> Seattle Capital Corporation has agreed to fund a construction loan to Fauntleroy Place, LLC for the purpose of starting construction on the above mentioned project.

> Included in this loan is Four Million, Five Hundred Thousand Dollars ($4,500,000.00) for construction of phase one. This represents allocated funds to cover your contract amount of Four Million, Three Hundred Ninety-Six Thousand, Four Hundred Ninety-Two Dollars ($4,396,492.00) which includes state sales tax. Additional amounts are for any contingency that may arise.
>
> Subject to receipt of a no activity letter from Ledcor, this loan will be available to draw against beginning July 1, 2008.

No other context was provided to Dan McTaggart, except that John Huddleston needed it "by noon" (Ex. 326). McTaggert claimed at trial not to have understood what Huddleston was looking for, chalking up the request to arranging financing.

40. On the same day, Dan McTaggart requests a "no work" letter from C.B. Spicer of Ledcor. C.B. Spicer testified that he did not know what a "no work" letter was. He testified that he only had knowledge that the letter had been requested by a customer and owner representative, Dan McTaggart, who had direct knowledge of the work being performed on the site. Spicer drafted the following letter and forwarded it to John Thistlewood for signature:

> Neither Ledcor Construction Inc. nor its subcontractors have performed actual work at the above-referenced project site as of today's date noted above. We intend to start construction after the July 4th holidays and receipt of the required permits.
>
> If you have any questions or concerns about this statement, please do not hesitate to contact me.

(Ex. 51 or 111). Thistlewood testified that he signed the "no work" letter, trusting the Spicer was providing accurate information about the condition of the site and the urgent need for the letter. Both Thistleood and Spicer testified they had never been asked to provide or prepare a "no work" letter before this request. The Court has considered this testimony carefully in light of all of the other testimony in the case, the language of the letter, and the subject line in

C.B. Spicer's e-mail transmitting the letter to McTaggert (Ex. 263), in which he referred to the letter as a "No Work Certification." Spicer has been in the construction industry since he was 12 years old, probably more than 40 years, and he must have been familiar with the requirements of lenders and title insurers for first lien position. Spicer knew what to write, and he knew to include sub-contractors in the letter. The Court questions the testimony of Spicer and Thistlewood that they did not know what a "no work" letter was or what it was for. Spicer was aware that Ledcor was performing pre-construction services, and as director of Pre-Construction Services and Chief Estimator for Ledcor's Western operations, he visited the site monthly and was aware of the impact of the proposed dewatering system on the budget. He attended the groundbreaking ceremony June 12. This may have been why he used the phrase "no actual work" in the letter, as the mass excavation had not yet begun. The Court does, however, find credible Spicer's testimony that he trusted Dan McTaggert, with whom he had worked in the past, that he sensed a certain degree of "panic" from McTaggert, and that he believed the client needed the letter. This is consistent with the language in Huddleston's letter making the $4.5 million in Phase I financing contingent on receipt of a "no activity" letter.

41. McTaggart knew the "no work" letter was not accurate but nonetheless forwarded that email to John Huddleston of Seattle Capital without expressing any concern about its contents a few minutes later. (*Id.*) McTaggert testified that everyone he dealt with at Seattle Capital knew the letter was false and it was not his place to speak up and say so. It was his understanding that the letter was needed for financing. John Huddleston then forwarded the letter via the same email chain to David Campbell of Chicago Title. (*Id.*)

42. Aero had no knowledge of Ledcor's June 24 letter, was not consulted regarding it, and did not learn about it until many months later.

43. On June 25, 2008, Seattle Capital recorded its Deed of Trust showing indebtedness of approximately $19 million with Seattle Capital as managing member of Fauntleroy Place, LLC as "Grantor," Seattle Capital as "Beneficiary," and Chicago Title Insurance as "Trustee." (Ex. 32). Seattle Capital had not previously recorded any encumbrance or claim of interest on the Property.

44. When a contractor has begun work on a property, a standard practice in the construction industry is to condition the furnishing of financing upon the execution by the prime contractor and subcontractors of Subordination Agreements that recite that the executing party's mechanic's lien rights are subordinate to the financing party's secured interest in the property. This practice was familiar to all of the contractors and bankers who testified.

45. Neither the Owner, Seattle Capital, Seattle Capital's title insurer, nor anyone else requested that Ledcor, Aero, or any other subcontractor execute a Subordination Agreement.

46. As of June 25, 2008, when Seattle Capital recorded its Deed of Trust, it was visibly apparent to anyone looking at the Property that construction work had been underway, even if the observer had not been present for the demolition and excavation work that had taken place on April 30, May 30, June 11, and June 20, or who had not been present at the groundbreaking ceremony on June 12. Demolished portions of the asphalt parking lot were visibly apparent. The backfilled excavations from April 30 remained covered with

black plastic tarps, held down by sandbags, bordered to the North by hay bales. The backfilled excavations from May 30 and June 20 were bare dirt, and the excavated pit from June 11 was filled with sand. Construction fencing had been erected and in place on the Property for several months to protect areas in the parking lot that had been excavated.

47. Under the terms of the loan from Seattle Capital secured by the Deed of Trust, Seattle Capital loaned more than $18 million to Fauntleroy Place LLC until the loan came due on September 1, 2008. This timing was determined by the closing date of the UDR deal, August 31st. Included in the loan were retroactive interest fees of $1.2 million and loan fees, document review fees, and so on of $1.2 million, and an amount for "not acquisition" that represented the $1.25 million Seattle Capital spent to purchase Blue Star's 25% interest in Fauntleroy Place LLC. Yet Seattle Capital's actual equity contributions to mid-June 2008 were in the neighborhood of $11 million.

48. Aero and Ledcor executed a Standard Form Subcontract dated June 28, 2008, reducing to writing the terms of Aero's subcontract for excavation work on the Project (Ex. 5.) Aero and BlueStar never entered into a written contract.

49. In the Summer and Fall of 2008 Aero performed excavation and related subcontract work on the Project, using its own labor and equipment.

50. Both Ledcor's written prime contract and Aero's written subcontract provided for approval and payment of work beyond the original scope of work defined in those written contracts. Those written contracts provide for approval and payment of changed work and extra work by Change Order. In actual practice over the course of the Project, Fauntleroy Place and Ledcor executed Change Order Proposals approving the payment of various

changed work and extra work, and thereafter they bundled previously-approved Change Order Proposals into Change Orders that Fauntleroy Place and Ledcor then executed as formal amendments to their prime contract. Ledcor contemporaneously issued change orders to Aero for its subcontract, to reflect approved Change Order Proposals and Change Orders from the Owner, to the extent they included Aero work.

51. By Change Order No. 1 to Ledcor's prime contract (Ex. 6), the Owner confirmed in writing its agreement to an increase of Malcolm's scope of work under the prime contract, increasing the prime contract price by $355,088.50.

52. By Change Order No. 2 to Ledcor's prime contract (Ex. 7), the Owner confirmed in writing its agreement to an increase of Aero's and Malcolm's scopes of work, and adding work for a design subcontractor, increasing the prime contract price by $180,326.25.

53. By Change Order No. 3 to Ledcor's prime contract (Ex. 8), the Owner confirmed in writing its agreement to incorporate Ledcor's preconstruction services into its prime contract, increasing the prime contract price by $115,315.28.

54. By Change Order No. 4 to Ledcor's prime contract (Ex. 9), the Owner confirmed in writing its agreement to an increase of Aero's scope of work, increasing the contract price by $381,259.37. Change Order No. 4 incorporated Change Order Proposals 3, 6 and 9, which had previously been approved and executed by the Owner and Ledcor, approving payment of changed work and extra work by Aero as part of Ledcor's prime contract for the Project. In Change Order Proposal No. 3 (Ex. 9, 2nd page & Ex. 26) the Owner confirmed in writing the parties' agreement that Aero's work on April 30, June 11, and

June 20 was part of Ledcor's prime contract for the Project, and that the Owner would pay for it.

55. Upon the Owner's execution of Change Order Proposal No. 3 to the prime contract, Ledcor executed Subcontract Change Order No. 3 to Aero's subcontract (Ex. 27), memorializing and approving payment for Aero's work on April 30, June 11, and June 20 as part of Aero's subcontract for the Project.

56. The Court finds that Aero performed work on the Project that included furnishing labor and equipment on April 30, June 11, and June 20. Aero performed that work as a subcontractor to prime contractor Ledcor. The terms of Aero's subcontract with Ledcor had not yet been made part of a written, executed subcontract at the time of the work, and the terms of payment for that work by the Owner to Ledcor had not yet been reduced to writing. But the parties (Aero, Ledcor, and the Owner) had already agreed orally and by their conduct within the context of their activities and their course of dealing that Ledcor was prime contractor under the terms that were reduced to writing in Ledcor's prime contract, and that Aero was the excavation subcontractor under the terms that were reduced to writing in Aero's subcontract. All of those terms were then promptly reduced to writing and signed by the parties (Aero, Ledcor and the Owner) in the ordinary course of administration of the Project, confirming that Aero's work was performed as part of its subcontract with Ledcor, and that the Owner would pay for it as part of Ledcor's prime contract.

57. Late in 2007 Kleinfelder entered into a contract denominated Master Services Agreement, with Dan McTaggart acting as agent for the Owner. (Ex. 153 and Kleinfelder stipulation ¶2.) The contract provided for Kleinfelder to provide professional engineering

services to the Project, which Kleinfelder did, commencing in December 2007. Kleinfelder and the Owner entered into a number of supplemental written and oral agreements for additional professional services on the Project, which Kleinfelder provided as part of its contract. (Kleinfelder stipulation ¶3.) Kleinfelder's services included on-site observation and analysis of the excavations performed by Aero on April 30, 2008 and June 20, 2008, as well as providing professional services and on-site observation of Clearcreek Contractors' excavation and removal of three underground storage tanks buried on the Property, which work occurred on May 30, 2008.

58. Ledcor's prime contract called for it to submit monthly billings for its work, and for the Owner to issue payment within 30 days. (Ex. 3, § 12.1.3.) Aero's subcontract provides for payment to Aero promptly upon each of the Owner's periodic payments to Ledcor for Aero's work. (Ex. 5, § 5.6.)

59. On July 31, 2008, Ledcor submitted monthly payment applications beginning with Pay Application No. 1 (Ex. 10). The Owner paid that Application in full. Ex. 11.

60. In July 2008, BlueStar, Seattle Capital, and UDR, Inc. entered a Purchase and Sale Agreement (Ex. 135) whereby UDR agreed to become an equity partner.

61. On August 31, 2008, Ledcor submitted Pay Application No. 2 (Ex. 12), requesting payment for work predominantly done during the month of August. The Owner paid that Application in full. Ex. 13.

62. The UDR deal was scheduled to close August 31, 2008. On August 20, 2008 a representative of UDR e-mailed Steve Hartley, informing him of its displeasure with the amount that Seattle Capital appeared to believe was due at closing – namely payoff of the

$18 million loan. There was conflicting testimony regarding the terms of the UDR deal and Seattle Capital's understanding of it. All witnesses agreed that Steve Hartley negotiated the deal on behalf of Faunterloy Place LLC, even though he was divested of his interest in Faunterloy Place while the negotiations were ongoing. Hartley stood to earn about $2 million in development fees under the UDR deal. Hartley testified that when the Purchase and Sale Agreement was negotiated, UDR was willing to reimburse Seattle Capital for its equity contributions to date ($11-12 million), but that any profit on the project would be earned after the project was complete. He testified that there was no construction loan during most of the negotiations and the Deed of Trust was recorded a little more than two weeks before the Purshase and Sale Agreement was signed. It was the testimony of Hartley and Easton Craft that UDR largely dictated the terms of the deal. None of the Seattle Capital witnesses were able to testify as to the amount UDR agreed to pay Seattle Capital at closing when the parties signed the Purchase and Sale Agreement. Cartwright, Huddleston and Story testified that they assumed UDR was agreeable to paying off a construction loan because language referring to a construction loan was included in the Purchase and Sale Agreement. The final, signed version of this agreement was not offered as an exhibit at trial. Storey testified that Hartley had been told to clear the construction loan amount with UDR, but neither he nor any other witness testified that they in fact did so, and there is not documentary evidence on this point. Cartwright and Huddleston testified that Seattle Capital was interested in making a profit on the deal up front, which is why the construction loan included retroactive interest, loan fees, and the $1.25 million BlueStar "note acquisition." Seattle Capital appears to have been under the impression that because UDR was under a

strict deadline to purchase the project by August 31st due to the 1031 Tax Exchange rules, Seattle Capital could demand a pay off at closing as it saw fit. As Story testified, Seattle Captial's big mistake was failing to anticipate that UDR would have alternative deals pending at the same time. When UDR because aware of the amount Seattle Capital was demanding, it abandoned the deal. Seattle Capital had not alternative buyer for the project at this point.

63. By September 5, Seattle Capital had "no available funds to disburse for construction and development costs." (Ex. 78), although it had some access to lines of credit.. Seattle Capital did not inform BlueStar or Ledcor regarding its inability to fund the Project. Instead, Seattle Capital gave BlueStar personal assurances that it would fund the Project, while reaching out to its minority shareholder (BAJ Capital) for equity contribution (Ex. 97). Seattle Capital kept Ledcor working on the Project despite its inability to pay Ledcor because Seattle Capital did not "have the option of putting this project 'ON HOLD.'" (Ex. 77). On September 30, 2008, Ledcor submitted Pay Application No. 3 (Ex. 14), requesting payment for work predominantly done during the month of September. The Owner tendered payment in the full amount of that Application, by check jointly payable to Ledcor and BlueStar. (Ex. 15.)

64. On October 21, 2008, Change Order No. 4 to the May 30, 2008 Prime Contract was submitted to Seattle Capital for approval. Included in the Change Order No. 4 was Change Order Proposal No. 982003, which was signed by Dan McTaggart, and Aero's invoice for the work performed on April 30, June 11, and June 20, 2008. The Change Order

was approved and signed by Rob Story of Seattle Capital as Managing Member of Fauntleroy Place, LLC.

65. On October 31, 2008, Ledcor submitted Pay Application No. 4 (Ex. 16), requesting payment for work predominantly done during the month of October, in the amount of $1,848,033.41. The work billed in Pay Application No. 4 had been performed, was properly billed, and was due and owing as of November 30, 2008 (the end of the month following billing, per prime contract § 12.1.3 (Ex. 3)). The Owner, however, did not have funds to pay that Application, and failed to pay it. The only reason for nonpayment was the Owner's lack of funds. Nonpayment by November 30 was a material breach of the prime contract by the Owner.

66. On November 30, 2008, Ledcor submitted Pay Application No. 5 (Ex. 17), requesting payment for work predominantly done during the month of November, in the amount of $324,153.62. The work billed in Pay Application No. 5 had been performed, was properly billed, and was due and owing as of December 31, 2008. The Owner, however, did not have funds to pay that Application, and failed to pay it. The only reason for nonpayment was the Owner's lack of funds. Nonpayment was a material breach of the prime contract by the Owner.

67. On December 31, 2008, Ledcor submitted Pay Application No. 7 (Ex. 100), in the amount of $299,517.68 for the remaining work performed by Ledcor and its subcontractors on Phase I. The work billed in Pay Application No. 7 had been performed, was properly billed, and was due and owing as of January 30, 2009. The Owner, however, did not have funds to pay that Application, and failed to pay it. The only reason for

nonpayment was the Owner's lack of funds. Nonpayment was a material breach of the prime contract by the Owner.

68. Also in December 2008, the Owner and Ledcor executed prime contract Change Order No. 13, providing for payment of costs to maintain the site during its suspension, from December 15, 2008 to March 15, 2009. Ledcor and its subcontractors performed that maintenance work. For some period after March 15, Ledcor and its subcontractors continued to perform that maintenance work. Ledcor submitted Pay Application No. 6 and 8-13 for the maintenance work, and the Owner paid for it. At some point in 2009 the Owner replaced Ledcor and its subcontractors with an unrelated contractor, who took over performance of the site maintenance work.

69. By letter dated December 19, 2008 (Ex. 20), Seattle Capital notified Ledcor that BlueStar (and by implication, Dan McTaggart) was being removed and replaced as the Owner's representative, effective January 1, 2009. As described in previous Findings, McTaggart and BlueStar had been identified as the Owner's representative in both Ledcor's Preconstruction Services Agreement and its Prime Contract. Seattle Capital's December 19 letter was the first notice to Ledcor that McTaggart's authority as Owner's representative was being terminated.

70. The unpaid, principal prime contract balance owing to Ledcor is $3,808,678.31. That amount is liquidated. The prime contract provides for interest to accrue at the rate of 1 1/2 % per month on all amounts unpaid by the Owner. (Ex. 3, § 14.2.) Interest commenced accruing on December 1, 2008, when the Owner materially breached the

contract by nonpayment. All of the work that remains unpaid had by that point been performed.

71. Ledcor's principal contract balance of $3,808,678.31 includes Aero's principal subcontract balance of $810,661.82.

72. Aero performed its work on the Project as a subcontractor to Ledcor. Aero's original subcontract amount was $1,782,512.00 (Ex. 5, p. 3, §3.1). Together with approved change orders (through Change Order 12 (Ex. 28)), Aero's total subcontract amount was $2,358,942.00. The subcontract price for the portion of Aero's work that it did not perform due to the Project's suspension was $194,260.00. (Ex. 29.) Aero received payment for its subcontract work totaling $1,354,019.78. (Ex. 30.) The unpaid principal subcontract balance owed to Aero for work it performed is a liquidated amount, and is $810,661.82:

Original Subcontract	$1,782,511.60
Total change orders (through CO 12):	$ 576,430.00
Subtotal	$2,358,941.60
Less unperformed work:	$ 194,260.00
Subtotal	$2,164,681.60
Less total paid	$1,354,019.78
Contract balance owed	**$ 810,661.82**

73. All of the work for which Aero was not paid was completed before the end of November, 2008. The only reason for nonpayment to Aero for the work it performed was the Owner's nonpayment to Ledcor for that work, which was in turn due solely to the Owner's lack of funds. Aero's subcontract (Ex. 5, § 5.12) provides that where nonpayment results from the Owner's nonpayment, Aero is entitled to its proportionate share of interest recoverable from the Owner (which, under the prime contract, accrues at the rate of 18 percent). Because interest on the Owner's unpaid principal amount commenced to accrue on

December 1, 2008, interest on Aero's proportionate share of that amount (namely, the principal amount of $810,661.82) commenced to accrue on December 1, 2008. Interest on Aero's principal amount from December 1, 2008 to October 31, 2010 (a period of 699 days) at 18% equals $279,445.12, with additional interest accruing at the rate of $399.78 per day thereafter.

74. Ledcor's principal unpaid contract balance is $3,808,678.31, which is the principal amount of its claim of lien. That amount includes subcontractor Aero's principal claim of lien of $810,661.82.

75. For purposes of distribution of proceeds from the foreclosure sale of the Property, the Conclusions of Law *infra* provide for distribution of Aero's claim of lien ahead of Ledcor's claim of lien. The principal amount of Ledcor's claim of lien is therefore reduced by the amount of Aero's claim of lien, leaving a Ledcor net claim of lien in the principal amount of $2,998,016.49. Interest on Ledcor's net principal claim of lien from December 1, 2008 to October 31, 2010 at 18% equals $1,033,453.25, with additional interest accruing at the rate of $1,478.47 per day thereafter.

76. On December 23, 2008, Aero recorded a Claim of Lien against the Property, in the principal amount of $1,236,009.00. (Ex. 33.) On April 23, 2009, Aero recorded a revised claim of lien to reflect receipt of payment reducing its principal subcontract balance to the principal subcontract balance that remains due and owing, namely $810,662. (Ex. 34.) Aero recorded its Claim of Lien within 90 days of the last work for which it was not paid, and both its Claim of Lien and its April 23, 2009 amendment to its Claim of Lien were

recorded while Aero continued to provide maintenance work on the Project (for which it and Ledcor were paid).

77. As the prime contractor to subcontractor Aero, Ledcor commenced furnishing labor and equipment to the Project via Aero's work prior to June 25, 2008. In addition, Ledcor furnished professional services to the Project prior to June 25, 2008, and such work was a part of Ledcor's prime contract. On December 17, 2008, Ledcor recorded a Claim of Lien against the Property. (Ex. 88.) Ledcor recorded its Claim of Lien within 90 days of the last work for which it was not paid, and its Claim of Lien was recorded while Ledcor continued to provide maintenance work on the Project (for which it was paid).

78. Kleinfelder furnished professional services to the project, commencing prior to June 25, 2008. (Kleinfelder stipulation ¶4.) On February 19, 2009, Kleinfelder recorded its Claim of Lien against the Property for the unpaid professional services it had provided to the Owner in connection with the Project. (Kleinfelder stipulation ¶14.) The principal unpaid amount of Kleinfelder's contract with the Owner, and therefore the principal amount of its lien, is $237,013.54. *Id.* Kleinfelder's contract includes the right to interest on unpaid amounts at 1.5% per month. (Kleinfelder stipulation ¶13.) The interest on its unpaid principal contract amount is $95,096.90 as of October 1, 2010, and $116.88 per day thereafter.

79. Waste Management is a judgment creditor against the Owner, with a claim of interest against the Property. Waste Management's claim attached to the Property on July 21, 2009, when it recorded a Writ of Attachment against the Property. (Ex. 38.) On July 15, 2010, the Superior Court for King County entered Judgment in favor of Waste Management

and against Fauntleroy Place LLC (the Owner) in the principal sum of $222,648.33, plus costs and interest for a total of $256,687.98 (Ex. 37).

80. The prime contract between Ledcor and the Owner includes a provision that in the event of dispute, the prevailing party is entitled to its attorney fees. (Ex. 3, § 14.6.) That provision includes a condition that the claimant state in writing the amount of its claim, exclusive of attorney's fees and expert witness fees.

81. Aero's subcontract with Ledcor includes a provision that incorporates the terms of Ledcor's prime contract. (Ex. 4, § 2.2.)

82. The claims of lien recorded by Ledcor and Aero stated with particularity the amounts owing to and claimed by each of them, exclusive of attorney's fees and expert witness fees. Those recorded claims of lien satisfied the condition of prime contract section 14.6 that the claimant stated its claim prior to filing a Complaint. Ledcor and Aero are each prevailing parties against the Owner in this case, within the meaning of section 14.6 of Ledcor's prime contract, incorporated into Aero's subcontract via subcontract section 2.2.

83. At the end of its Trial Brief, filed October 11, 2010 (the Monday before trial), Alaska raised as an objection to Aero's claim of lien the defense that Aero was not the real party in interest. The Court makes the following Findings regarding that objection.

84. Plaintiff Aero Construction Company, Inc., is and has for many years been the construction arm of Pacific Commercial Equipment, Inc. Aero holds itself out as a division of Pacific Commercial. It is an integral part of the business of Pacific Commercial. Aero is known by the name "Aero Construction" in the construction community for its construction

work, and conducts its construction operations under that name to take advantage of the reputation attached to that name.

85. Plaintiff uses "Aero Construction," "Aero Construction Company" and "Aero Construction Company, Inc." interchangeably as names for the construction arm of Pacific Commercial.

86. As the construction arm of Pacific Commercial, plaintiff has at all relevant times maintained a contractor's license with the Washington State Department of Licensing. That license is in the name of Aero Construction Company, number is AEROCC*121NW. Aero's subcontract in this case (Ex. 5, p 2) explicitly recites that its work is being performed under that registered license.

87. Plaintiff has maintained a corporate registration for Aero Construction Company, Inc., to assure itself of ownership of the name "Aero Construction".

88. 3922 SW Alaska LLC is the assignee of a Seattle Capital deed of trust recorded on the Property at issue in this case. Alaska is the primary party contesting the enforceability and priority of the mechanic's liens at issue in this case.

89. In its Trial Brief, filed on October 11, 2010, Alaska asserted an objection to plaintiff's lien, on grounds that plaintiff was not the real party in interest. Neither Alaska nor any other party had made any such objection by way of affirmative defense, nor had Alaska or any other party raised the objection in any other fashion prior to October 11, 2010.

90. The gist of Alaska's objection is that "Aero Construction Company, Inc." (the name shown for plaintiff in both its claim of lien and its Complaint) is of an entity unrelated to Aero Construction Company, and that Aero Construction Company (as the operating

division of Pacific Commercial) or Pacific Commercial itself should be the real party in interest.

91. Plaintiff has responded by legally merging the corporate entity registered as "Aero Construction Company, Inc." into Pacific Commercial Equipment, Inc., thereby eliminating any distinction between the two. Aero Construction Company remains the name under which the construction arm of Pacific Commercial conducts business, under its contractor's license.

92. Plaintiff (specifically, Pacific Commercial's general manager) further represents that Pacific Commercial stands ready, willing and able to intervene in the name of Pacific Commercial, to the extent any uncertainty exists over whether plaintiff's claim of lien and lawsuit are ratified by, or are indeed the actions of, Pacific Commercial.

93. The Court finds that no confusion exists over the fact that Aero Construction Company contracted to perform work on the Project, performed work, and was not paid for a substantial portion of it. All parties to the Project understood that. Aero Construction Company recorded a lien against the property for its unpaid work, and initiated a foreclosure suit to enforce its lien. The Court finds no evidence that anyone misunderstood that plaintiff in both its lien and in this suit was the same party who performed the work.

94. Moreover, to the extent there could be any conceivable chance that judgment in this case would not have *res judicata* effect on the real party in interest for Aero Construction's lien, that chance is eliminated by the corporate merger, and by the ratification of Pacific Commercial to plaintiff's initiation and prosecution of its lien.

95. Although unnecessary, the Court finds no reason not to reflect Pacific Commercial's ratification of plaintiff's lien and lawsuit by its appearing (in the name of Pacific Commercial) herein, and expressly restating its ratification and acknowledgment of the *res judicata* effect of judgment herein. Moreover, so that the name of plaintiff in the case caption and in its claim of lien match exactly its name on its contractor license, the Court finds it appropriate that plaintiff's claim of lien and its Complaint be amended to describe plaintiff by the name "Aero Construction Company, a division of Pacific Commercial Equipment, Inc." That amendment of lien is authorized by RCW 60.04.091(2) ("notice of claim of lien may be amended as pleadings may be by order of the court"), and the amendment of plaintiff's pleading is authorized by CR 17(a). No prejudice to any party results from that amendment. That amendment of lien and of plaintiff's Complaint relates back to their respective date of recording/filing. RCW 60.04.091(2); CR 17(a).

96. Plaintiff has adequately established itself as the real party in interest, sufficiently for denial of Alaska's objection.

97. Alaska's objection on real party in interest grounds was not raised in any fashion until Alaska's Trial Brief, filed and served just one week before the start of trial. The information identified in Alaska's Trial Brief as supporting its objection (corporate registration and contractor license information) was at all times public information available on the internet. Moreover, plaintiff's general manager testified to the relationship of Aero Construction as the construction division of Pacific Commercial in the deposition taken by Alaska more than a year ago. Alaska has shown no good cause for delaying until the eve of trial to raise a real party in interest defense.

98. The Court finds an element of timeliness inherent in any real party in interest defense. Alaska's objection was untimely, and that untimeliness is an independent justification for denial of its objection.

99. At the conclusion of Ledcor's case,Alaska moved to dismiss Ledcor's claim for attorney's fees because no evidence was presented to show that notice of the lien has been properly delivered to Alaska's assignor. This defense was never raised in the pleadings orat any time prior to the end of Ledcor's ase. Had it been raised in a timely fashion, Ledcor could have had an opportunity to bring forth evidence to defeat it. The Court finds that this defense has been waived.

Conclusions of Law

1. This is an action to foreclose Aero's (and others') mechanic's liens on real property located in King County, Washington. This court has jurisdiction over the subject matter of this suit, and venue rests in King County. *See* RCW 60.04.171 (A mechanic's lien "may be foreclosed and enforced by a civil action in the court having jurisdiction in the manner prescribed for the judicial foreclosure of a mortgage."), and RCW 61.12.040 (judicial foreclosure of a mortgage in real property "may proceed in the superior court of the county where the land, or some part thereof, lies[.]"). A mechanic's lien foreclosure is an *in rem* proceeding, and the Court has jurisdiction over the Property. *See Brace & Hergert Mill Co. v. Burbank*, 87 Wash. 356, 364 (1915) (Lien foreclosure against real estate is a proceeding in rem.). Moreover, all parties participated in doing business on the Project, giving the Court personal jurisdiction even over parties who may be from out of State. *See* RCW

4.28.185(1)(a) & (c) (Long Arm statute). Lastly, no party is contesting personal jurisdiction. *See* CR 12(h)(1) (waiver of defense of personal jurisdiction).

2. Trial of this case commenced October 18, 2010, on the parties' claims for foreclosure on the Property. Fauntleroy Place is the Owner of the Property. The following parties have established claims of foreclosure by way of lien or other encumbrance against the Property for which the Court (*infra*) establishes an order of foreclosure priority: Aero, Ledcor, Kleinfelder, Alaska (as assignee of Seattle Capital's Deed of Trust), and Waste Management. As part of stipulated dismissals, D'Amato, Conversano, Inc., and Core Design, Inc. stipulated they were not pursuing any lien or claim of interest in the Property. They did not establish any lien or other encumbrance, and the Court finds that to the extent they have any lien, encumbrance or claim of interest in the Property it is subordinate to the liens and encumbrances of Aero, Ledcor, Kleinfelder, Alaska, and Waste Management. In addition, Clearcreek Contractors, Inc., Systech Environmental Corporation, Gonsalves & Santucci, Inc. dba Conco, Voka, Inc., Malcolm, Merit, and Abossein Engineering, LLC have not established any lien, encumbrance or claim of interest in the Property for purposes of establishing priority, and the Court therefore finds that to the extent any of them holds any lien, encumbrance or claim of interest in the Property, that lien, encumbrance or claim of interest is subordinate to the liens and encumbrances of Aero, Ledcor, Kleinfelder, Alaska, and Waste Management. In the case of Malcolm, this disposition of its recorded claim of lien has no effect on its rights to recover to the extent its rights arise under Ledcor's claim of lien.

3. In connection with the Project, Ledcor is a prime contractor; Aero and Malcolm are subcontractors; and Kleinfelder is a professional service provider, within the meaning of Washington's Mechanic's Lien statutes. *See* RCW 60.04.011(12), (13) & (16).

4. Aero's Claim of Lien was timely recorded, and complies with all requirements of RCW 60.04.091. Aero timely commenced this action to foreclose on its lien within 8 months of recording, as required by RCW 60.04.141.

5. The Claims of Lien recorded by Ledcor and Kleinfelder were each timely recorded, and comply with all requirements of RCW 60.04.091. Ledcor and Kleinfelder each timely proceeded with claims to foreclose on their liens within this lawsuit, in compliance with RCW 60.04.141.

6. RCW 60.04.021 grants a mechanic's lien to any contractor performing work on real property:

> Except as provided in RCW 60.04.031, **any person furnishing labor, professional services**, materials, or **equipment for the improvement of real property** shall have a lien upon the improvement for the contract price of labor, professional services, materials, or equipment furnished at the instance of the owner, or the agent or construction agent of the owner.

7. RCW 60.04.061 governs the priority of a mechanic's lien as against a recorded interest such as a deed of trust:

> The claim of lien created by this chapter upon any lot or parcel of land shall be prior to any lien, mortgage, deed of trust, or other encumbrance which attached to the land after or was unrecorded **at the time of commencement of labor or professional services or first delivery of materials or equipment** by the lien claimant.

8. RCW 60.04.011 provides definitions for the relevant terms in the mechanic's lien statutes:

> Unless the context requires otherwise, the definitions in this section apply throughout this chapter. . . .

(4) "**Furnishing labor, professional services, materials, or equipment**" means the performance of **any labor** or professional services, the contribution owed to any employee benefit plan on account of any labor, the provision of any supplies or materials, and the renting, leasing, or otherwise supplying of equipment **for the improvement of real property**.

(5) "**Improvement**" means: (a) Constructing, **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; (b) planting of trees, vines, shrubs, plants, hedges, or lawns, or providing other landscaping materials on any real property; and (c) providing professional services upon real property or in preparation for or in conjunction with the intended activities in (a) or (b) of this subsection. . . .

(7) "**Labor**" means exertion of the powers of body or mind **performed at the site** for compensation. . . .

(15) "Site" means the real property which is or is to be improved.

9. When read together, these statutory provisions state that a subcontractor's lien priority is based upon the furnishing of "any labor" "performed at the site" for "altering, . . . demolishing, clearing, grading, or filling in" the real property there. Aero's work as a subcontractor to Ledcor on April 30, June 11, and June 20 all qualify as meeting the statutory definitions for work performed at the site for the improvement of the property. Aero's work on each of those days triggered the accrual of its mechanic's lien rights on the Project. Because that work was as a subcontractor to Ledcor, Aero's work on April 30, June 11, and June 20 was likewise sufficient to trigger the accrual of Ledcor's mechanic's lien rights on the Project.

10. As subcontractor to Ledcor, Aero commenced the furnishing of labor and equipment, and performed work on the Project, prior to June 25, 2008, when Seattle Capital first recorded its Deed of Trust. Pursuant to RCW 60.04.061, Aero's mechanic's lien is superior to Seattle Capital's Deed of Trust.

11. As the prime contractor to subcontractor Aero, Ledcor commenced furnishing labor and equipment to the Project via Aero's work prior to June 25, 2008. In addition,

Ledcor furnished professional services to the Project prior to June 25, 2008, and such work was a part of Ledcor's prime contract. See *Willett v. Davis*, 30 Wn.2d 622, 626-628, 193 P.2d 321 (1948). The Court rejects Alaska's reliance on *Pacific Industries v. Singh*, 120 Wn. App. 1 (2003) because Ledcor's services here are the modern analogs of the supervisor and foreman in *Willett*. The work performed by Singh, by contrast, was analogous to BlueStar's work in this case.

12. Kleinfelder furnished professional services to the project, commencing prior to June 25, 2008.

13. With regard to their claims of lien based upon the furnishing of professional services, neither Kleinfelder nor Ledcor recorded any notice of professional services as permitted by RCW 60.04.031(5). However, improvement of the property as defined by RCW 60.04.011(5) (in the form of work by Aero and work by Clearcreek) had commenced prior to June 25, 2008, so the failure to record a notice of professional services does not subordinate Kleinfelder's lien to Seattle Capital's Deed of Trust, nor does it subordinate Ledcor's lien to the extent its attachment is based upon its furnishing of professional services.

14. RCW 60.04.900 provides that the mechanics lien statutes "are to be liberally construed to provide security for all parties intended to be protected by their provisions." RCW 60.04.061 provides that lien claimants' security has priority over against a deed of trust "which attached to the land after or was unrecorded at the time of commencement of labor or professional services or first delivery of materials or equipment by the lien claimant." A party financing a construction project can create a security right in the property by recording a deed of trust. If that party's deed of trust is subordinate to a contractor's mechanic's lien

rights because the contractor has commenced work before the deed of trust is recorded, the financing party can seek to obtain a Subordination Agreement by which the contractor agrees to subordinate its lien priority to the deed of trust. Because contractors' lien security rights must be liberally construed, the Court will not infer a subordination agreement by a mechanic's lien claimant where the claimant has not actually agreed to subordinate its security rights. *See A.A.R. Testing Laboratory, Inc. v. New Hope Church,* 112 Wn. App. 442, 500 (2002) ("If the construction lenders intended the mechanics' and materialmen's lien rights possessed by [a contractor] to be legally subordinate to their mortgage deeds, then a subordination agreement was required.").

15. Neither Aero, Ledcor, nor Kleinfelder ever entered into any agreement to subordinate their lien rights to Seattle Capital, its Deed of Trust, or any other claimant or encumbrance. The Court finds no basis in law to subordinate any of their liens to the Deed of Trust. Alaska nevertheless argues for subordination on equitable grounds, on the basis of Ledcor's 'no work' letter (Ex. 111). Because neither Aero nor Kleinfelder participated in that letter or knew of its existence, the Court finds no basis to equitably subordinate either of their liens to the Deed of Trust.

16. Alaska did not establish the elements of equitable estoppel by clear, cogent, and convincing evidence as required by law. *Peterson v. Groves*, 111 Wn. App. 306, 310, 44 P.3d 894 (2002). Alaska did not meet the element of reasonable reliance on that act, statement, or admission because (a) Seattle Capital had the opportunity to record its interests prior to work commencing and Ledcor did nothing to prevent Seattle Capital from doing so

and (b) Seattle Capital had knowledge (actual and imputed) of the work performed in April and June 2008 before deciding to record its Deed of Trust. *Id.* (Emphasis added).

17. A member of an LLC'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 25.02.010. Further, 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). Under both circumstances, knowledge is imputed to Seattle Capital because (a) before June 2, 2008, BlueStar was the managing member of the LLC of which Seattle Capital was a partner and (b) after June 2, 2008, BlueStar was the expressed agent of Fauntleroy Place, LLC. Fauntleroy Place, LLC was the grantor of the Deed of Trust recorded on June 25, 2008.

18. Ledcor contends that Seattle Capital had "unclean hands" with respect to obtaining the "no work" letter. *Sollar System, Inc. v. Avcar Leasing Systems, Inc.*, 890 F.2d 165 (9th Cir. 1989), *quoting Arthur v. Davis*, 126 Cal. App. 3d 684, 693094, 178 Cal. Rptr. 920, 925 (1981). The court has not found Ledcor completely innocent with respect to the generation of the "no work" letter; rather, Ledcor provided the letter to assist with obtaining financing for the project. Seattle Capital knew that the information in the letter was false.

Ledcor provided the letter after receiving an assurance from Seattle Capital that $4.5 million would be allocated to paying Ledcor for its work in Phase 1 of the project. Seattle Capital never allocated the money and did not consider how it would pay Ledcor if not purchaser was found for the project. On balance, Seattle Capital's hands were significantly less clean than Ledcor's.

19. Seattle Capital can also be considered to have has waived its right to claim estoppel when it signed Change Order No. 4, incorporating the work performed on April 30, June 11, and June 20, 2008 by Ledcor and Aero into the Prime Contract.

20. Based upon these Conclusions, the Court finds Alaska has not established an equitable basis to subordinate Ledcor's lien to Alaska's Deed of Trust. Because Ledcor commenced the furnishing of labor, professional services, and delivery of materials and equipment prior to June 25, 2008, Alaska's Deed of Trust is subordinate to Ledcor's lien.

21. As set forth in the Findings, *supra*, Waste Management is a judgment creditor against the Owner. Its interest against the Property attached on July 21, 2009. Because the lien claims of Aero, Ledcor, and Kleinfelder each attached substantially earlier than July 21, 2009, for purposes of distribution of proceeds from the foreclosure sale of the property, Waste Management's encumbrance of the property is subordinate to those lien claims, as well as to the Seattle Capital Deed of Trust recorded June 25, 2008.

22. Ledcor is a prevailing party under prime contract section 14.6. Aero is a prevailing party under the same provision, incorporated into Aero's subcontract via subcontract section 2.2. Aero and Ledcor are each entitled to award of their reasonable attorney fees and other litigation expenses as authorized by prime contract section 14.6.

Each of those parties is directed to file with the Court and note on the Court's regular motion calendar a petition for award of reasonable attorney fees and other expenses, together with proposed Findings and Conclusions regarding their requested award. Those papers shall be filed within 14 days of entry of these Findings & Conclusions.

23. In addition, the Court has independent authority under RCW 60.04.181(3) to award attorney fees and other litigation expenses to a party prevailing in suit seeking foreclosure on a mechanic's lien:

> The court may allow the prevailing party in the action, whether plaintiff or defendant, as part of the costs of the action, the moneys paid for recording the claim of lien, costs of title report, bond costs, and attorneys' fees and necessary expenses incurred by the attorney in the superior court, court of appeals, supreme court, or arbitration, as the court or arbitrator deems reasonable.

Aero, Ledcor, and Kleinfelder are each prevailing parties in this lien foreclosure action. The Court finds it is appropriate to allow to each of them, in addition to statutory costs, their reasonable attorney fees and other litigation expenses as authorized by RCW 60.04.181(3). Each of those parties is directed to file with the Court and note on the Court's motion calendar a petition for award of reasonable attorney fees and other expenses, as set forth in the preceding paragraph.

24. Aero, Ledcor and Kleinfelder each assert claims to foreclose against the Property on their respective claims of lien. Alaska asserts claim to foreclose against the Property as assignee of Seattle Capital's Deed of Trust. Waste Management asserts claim to foreclose against the Property on Judgment. Fauntleroy Place, the owner of the Property, is in default on its obligations to each of those claimants, and has not established any defense

against those claims seeking foreclosure. The Court finds that foreclosure of all those claims against the Property is appropriate.

25. The claims of lien of Aero, Ledcor, and Kleinfelder are all established in the following amounts:

A. Aero's Claim of lien:

Principal: $810,661.82.

Prejudgment interest: $279,445.12 from December 1, 2008 to October 31, 2010, with additional interest accruing at the rate of $399.78 per day thereafter.

Attorney fees and other litigation expenses: To be determined by post-judgment petition and Order.

B. Ledcor's Claim of lien (after deducting Aero's portion of Ledcor's lien):

Principal: $2,998,016.49.

Prejudgment interest: $1,033,453.25 from December 1, 2008 to October 31, 2010, with additional interest accruing at the rate of $1,478.47 per day thereafter.

Attorney fees and other litigation expenses: To be determined by post-judgment petition and Order.

C. Kleinfelder's Claim of lien:

Principal: $237,013.54.

Prejudgment interest: $95,096.90 as of October 1, 2010, and $116.88 per day thereafter.

D. Alaska's Claim:

Principal: $18,984,594.33.

Prejudgment interest: At 9% per annum on the Principal from June 25, 2008 per Ex. 93, ¶2.

E. Waste Management's Claim:

Principal, costs and interest: $256,687.98.

26. RCW 60.04.181 provides for the Court to establish competing claims of lien in the following classes for purposes of foreclosure priority:

(a) Liens for the performance of labor;

(b) Liens for contributions owed to employee benefit plans;

(c) Liens for furnishing material, supplies, or equipment;

(d) Liens for subcontractors, including but not limited to their labor and materials; and

(e) Liens for prime contractors, or for professional services.

Because the liens of some claimants attached prior to the recording of Seattle Capital's Deed of Trust, while other liens attached thereafter, in order to subordinate the Deed of Trust only to those liens attaching prior to its recording, the Court establishes the following order of priority for purposes of foreclosure and disbursement of the proceeds from the sale of the Property:

First, subcontractor Aero's claim of lien.

Second, the priority class consisting of prime contractor Ledcor and professional service provider Kleinfelder.

Third, Alaska as assignee of the June 25, 2008 Deed of Trust.

Fourth, Waste Management's Attachment against the Property (and Judgment thereon).

27. Pursuant to RCW 60.04.071 the Court concludes that foreclosure of the claims of Aero, Ledcor, Kleinfelder and Alaska, and of the attachment of Waste Management, is required. The Property is as follows:

> Parcel #0952007175 (also known as Parcel A):
> Lots 17 through 24, inclusive, Block 55, BOSTON CO.'S PLAT OF WEST SEATTLE, according to the plat thereof recorded in Volume 3 of Plats, Page(s) 19, records of King County, Washington;
>
> Except that portion of said Lot 24 condemned in King County Superior Court Cause Number 70682, as provided for by Ordinance Number 21302 of the City of Seattle.

Parcel #0952007265 (also known as Parcel B):
Lots 10 through 24, inclusive, Block 56, BOSTON CO.'S PLAT OF WEST SEATTLE, according to the plat thereof recorded in Volume 3 of Plats, Page(s) 19, records of King County, Washington;

Except those portions of said Lots 23 and 24 condemned in King County Superior Court Cause Number 70682 and 93059, as provided for by Ordinance Numbers 21302 and 29063, respectively, of the City of Seattle.

Parcel C:

That portion of the alley adjoining described as follows which, upon vacation, would attach by operation of law:

All that portion of the alley between blocks 55 and 56, BOSTON CO.'S PLAT OF WEST SEATTLE, according to the plat thereof recorded in Volume 3 of Plats, Page 19, lying Northerly of the Northerly right-of-way line of S.W. Alaska Street and Southerly of the Easterly production of the Northerly line of Lot 17, Block 55, in said Plat of BOSTON CO.'S PLAT OF WEST SEATTLE, in King County, Washington.

28. At the start of the Project the Property did not include the alleyway bisecting the Property (Parcel C), which became part of the Property when it was vacated by the City during demolition and excavation of the Project. See Ex. 123, Schedule A (Parcel C attaches to the Property by operation of law upon vacation). The liens of Aero, Ledcor and Kleinfelder did not include Parcel C in their legal description; it was included in the legal description for Seattle Capital's Deed of Trust. An orderly foreclosure sale should encompass the entire Property, including Parcel C. Accordingly, the liens and lien claims of Aero, Ledcor and Kleinfelder are amended to include Parcel C in their legal description. No party is prejudiced by this amendment; all parties knew and understood all along that the improvements being undertaken on the Project included excavation of the entire Property, including the portion that had been the alleyway.

29. Pursuant to RCW 60.04.181(4), the Court is directing that the proceeds of the foreclosure sale be deposited into the registry of the Court. The Court will issue an order specifying the distribution payment amounts and payees, pursuant to the lien amounts and priorities established in these Findings and Conclusions, once the foreclosure proceeds are deposited with the Court.

Findings Regarding CR 54(b) Certification

1. The claims in this case were bifurcated by Order of July 14, 2010. The bifurcation was between all claims seeking lien foreclosure against the Property (resolved by the trial commencing October 18, 2010, and by these Findings and Conclusions), and all other contractual and extra-contractual claims in this case, which are set for trial June 6, 2011.

2. Bifurcation was necessary and appropriate. Those different groups of claims were factually and legally separate and distinct because:

A. The foreclosure claims were by law required to be tried to the Court, whereas the bifurcated claims are required (because of demand for a jury) to be tried to a jury; and

B. A need for additional time was shown by the parties to prepare for trial on the bifurcated claims, whereas delaying the right of lien claimants such as Aero to foreclose on their lien rights would have created an undue and unnecessary hardship on those lien claimants.

Those factors remain equally applicable to the appropriateness of entering judgment on the lien foreclosure claims without delaying entry of that judgment for trial of the bifurcated claims.

3. The case of *Schiffman v. Hanson Evacuating Co.*, 82 Wn.2d 681, 687, 513 P.2d 29 (1970), suggests five factors for a trial court to consider in addressing CR 54(b) certification:

1. The relationship between the adjudicated and the unadjudicated claims.
2. Whether questions that would be reviewed on appeal are still before the trial court for determination in the unadjudicated portion of the case.
3. Whether the need for review may be mooted by future developments in the trial court;
4. Whether an immediate appeal will delay the trial of the unadjudicated matters without gaining any offsetting advantage in terms of the simplification and facilitation of that trial; and
5. The practical effects of allowing an immediate appeal.

Each of these factors is addressed, in order, below.

4. The adjudicated claims are separate and distinct from the unadjudicated claims. All, or nearly all, of the bifurcated claims relate to contractual and extra-contractual claims of Ledcor seeking to impose liability on individuals and entities related to, but legally separate from, the Owner. Whether Ledcor prevails on those claims will affect the degree to which it may succeed in collecting the amounts owed to it, beyond whatever payment it will realize from foreclosure sale of the Property. But the bifurcated claims will not represent any additional security for payment to Aero, Kleinfelder, or Waste Management. The adjudicated claims determined the entitlement of lien claimants to foreclose against the Property, and the order of priority for distribution of foreclosure sale proceeds. There is no contest over the fact that the Property must be foreclosed upon. The fact that the owner defaulted on paying millions of dollars for construction is uncontested. The fact that the

owner is in default, and has no prospect of curing its default, is not disputed. The dispute in the adjudicated claims has been over the order in which parties receive payment from the foreclosure proceeds, not over whether those parties, individually or collectively, are entitled to foreclose. By contrast, the bifurcated claims involve Ledcor's entitlement to collect amounts owed to it from individuals and entities other than the Owner. Moreover, as previously mentioned the adjudicated claims were triable only to the Court, whereas the unadjudicated claims must be tried to a jury. *See Ducolon Mechanical Inc. v. Shinstine/Forness, Inc.*, 77 Wn. App. 707, 714 (1995) ("Actions to foreclose liens are equitable proceedings."); *Willapa Trading Co. v. Muscanto, Inc.*, 45 Wn. App. 779, 787, 727 P.2d 687 (1986) ("In a civil action, the right to a jury trial exists where the issues are purely legal in nature, but there is no right to a jury where the action is purely equitable."). That the lien claims are separate and distinct from the bifurcated claims is further reflected in the fact that it was unnecessary for third-party defendants to Ledcor's claims (Fauntleroy Place LLC, Seattle Capital, BlueStar, Baj Capital and Seattle Financial Group) to present evidence in the lien foreclosure trial, whereas those parties will be central participants at the bifurcated trial.

5. The issues resolved in the lien foreclosure trial involved the entitlement of claimants to foreclose on their claims of lien; the legal priority of their claims of lien, especially regarding the Seattle Capital Deed of Trust (which hinged on when the claims of lien attached); and whether Ledcor's claim of lien should be equitably subordinated to the Deed of Trust. None of those issues remains before the court for adjudication in trial of the bifurcated claims.

6. To the extent there exists a need for appellate review of the Court's adjudication of the lien foreclosure claims, there is literally no possibility that further proceedings and trial of the bifurcated claims could moot that appellate review. The remaining proceedings offer no prospect of judgment in favor of Aero or Kleinfelder. Further proceedings likewise offer no prospect of payment to Alaska or Waste Management. To the extent appellate review would relate to improvement of Alaska's priority in foreclosure, further proceedings in the bifurcated claims offer little or no prospect of mooting the need for that review.

7. In the event of appeal from an immediate entry of judgment on the lien foreclosure claims, that appeal should not delay trial of the bifurcated claims. For the reasons addressed *supra*, trial of the bifurcated claims can and should proceed as currently scheduled, regardless of what appeal may be taken from judgment on the foreclosure claims.

8. At least as compelling as the foregoing reasons, the practical effects of immediate entry of judgment on the foreclosure claims (permitting any appeal from that judgment to proceed immediately) weigh on the side of securing the interests of the lien claimants. Our Legislature, in enacting the Mechanic's Lien statutes, declared the importance of ensuring the security to lien claimants provided by their mechanic's lien rights. RCW 60.04.900 provides that the mechanics lien statutes "are to be liberally construed *to provide security for all parties intended to be protected by their provisions.*" (Emphasis added.)

9. The rights conferred by Washington's Mechanic's Lien statutes represent security for payment of the contractors, subcontractors and professional service providers who perform work on construction projects. Often, those lien rights are the only security the

lien holders have for payment for their work. That is true in this case, where lien claimants Aero, Ledcor, and Kleinfelder have no security for payment of their unpaid contract amounts other than their lien rights. Indeed, Aero's subcontract (Ex. 5, § 5.6) states that Aero has no right to recover subcontract amounts owed to it until Ledcor recovers those amounts from the Owner.

10. The Owner in this case, Fauntleroy Place LLC, is defunct, and without assets to pay what is owed to the lien claimants here. Their security for payment rests entirely on their rights in the Property.

11. The lien claimants who have prevailed in this foreclosure action (Aero, Ledcor, and Kleinfelder) will recover what they are owed to the extent the Property can be sold at foreclosure at an amount sufficient to pay them, in the order of priority that the Court has determined. A substantial portion of the current value of the Property consists of the deep, shored excavation constructed by Aero and Ledcor (including subcontractor Malcolm), with professional services furnished by Kleinfelder. Their work substantially exceeded $5 million, some of which was paid by the Owner, and the rest of which was not. If the existing shored excavation needs to be decommissioned and filled in, the value in the Property represented by that work will be lost forever.

12. The ongoing viability of that excavation is in doubt. The shoring system that supports the excavation is by design a temporary system. It was neither designed nor intended to be in place for long term suspension of the Project, and it has already been in place two years, well beyond its intended life span. The City of Seattle is the governing jurisdiction, and can at any time order that it be decommissioned and the excavation filled in,

and if the Owner fails to perform such an Order, the City holds a $1 million cash deposit to pay for that work to be performed.

13. In the meantime, the shored excavation is subject to potential failure. Even a minor failure, where one of the shored walls shifted inward by just a matter of inches, would result in substantial displacement and settlement of soils supporting adjacent streets, houses and other structures. Any such failure would likely result in the emergency decommissioning of the entire excavation, destroying the value in the Property represented by the work of Aero, Ledcor, and Kleinfelder.

14. In addition, the value of the security represented by the Property is subject to market declines. The Court takes judicial notice of the general decline of real estate property values both locally and nationally from the height of the "real estate bubble" to the present. *See* ER 201(b). The parties appear to agree that the general decline in real estate values was a major reason for the failure of this Project. Additional, dramatic declines in real estate, impacting the value of the Property, are a risk that is currently resting on the financial shoulders of lien claimants Aero, Ledcor, and Kleinfelder.

15. Those lien claimants currently have no security against the risk that the excavation and shoring system will need to be decommissioned, either by directive from the City or by a failure or other event that makes emergency decommissioning necessary. Those lien claimants also currently have no security against any further market declines in the value of the Property. Prompt foreclosure, so that the current foreclosure value of the Property is reduced to cash and available to pay the lien claimants, removes those risks. Postponing entry of judgment until after trial resolving the bifurcated claims leaves the lien claimants

vulnerable to those risks, which would be prejudicial to their rights and unfair to them. In the event of an appeal from judgment on these lien foreclosure claims, entry of that judgment now will require commencement of that appeal approximately 9 months earlier than would occur if entry of judgment were delayed until after trial of the bifurcated claims. In the event of appeal from immediate entry of judgment, this Court could determine whether to stay foreclosure against the Property pending the outcome of that appeal, and what security to require for the protection of lien claimants Aero, Ledcor, and Kleinfelder to protect their judgment pending the outcome of any such appeal. The Court's decision could be reviewed immediately by the Court of Appeals. Delay in entry of judgment on the Court's determination of foreclosure would deprive those lien claimants of that security, to which they are entitled.

Based upon the foregoing Findings, the Court finds that there is no just reason for delay in entry of judgment on the adjudicated claims as a Judgment pursuant to CR 54(b). The Order determining the foreclosure claims will be denominated "Order, CR 54(b) Certification, and Judgment"; will recite this Court's determination that there is no just reason for delay in its entry as a judgment; and will direct that it be entered as a judgment.

DATED this 15th day of November, 2010.

Judge Susan J. Craighead