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bjh IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

W.G. CLARK CONSTRUCTION CO.,
a Washington corporation,

Respondent,

vs.

CARPENTERS HEALTH & SECURITY TRUST OF WESTERN
WASHINGTON; CARPENTERS RETIREMENT TRUST;
CARPENTERS-EMPLOYERS VACATION TRUST; CARPENTERS-
EMPLOYERS APPRENTICESHIP & TRAINING TRUST, Appellants,

and

PACIFIC NORTHWEST REGIONAL COUNCIL OF CARPENTERS,
a Local Union, Appellant; PARAMOUNT SCAFFOLD, INC.,
a Washington corporation, Respondent.

**RESPONDENT W.G. CLARK CONSTRUCTION'S BRIEF IN
RESPONSE TO APPELLANT TRUST FUNDS' BRIEF**

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TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ASSIGNMENTS OF ERROR.....	2
III.	STATEMENT OF THE CASE	3
	A. Background Facts.....	3
	B. Procedural History.....	5
IV.	ARGUMENT AND AUTHORITY.....	7
	A. The Trusts Can No Longer File an Action to Foreclose Their Lien Against W.G. Clark’s Retainage and, Therefore, That Claim is Now Moot.....	7
	B. The “Substantial Burden” Required to Trigger <i>Stare Decisis</i> is Not Met by the Trusts.....	8
	C. Nothing in Substantive ERISA Law or Washington’s Bond and Retention Statutes Has Changed.....	10
	D. This Court Correctly Decided ERISA Preempts the Public Works Lien Statutes.....	13
	1. This Court decided ERISA preemption based on the “alternative enforcement mechanism,” while the 9th-Circuit’s analysis on the mechanism is simply absent.....	13
	2. Washington Public Works Lien Statutes have a direct “connection with” ERISA plans.....	18
	E. The Federal Cases Do Not Make This Court’s Decision in <i>Trig Electric</i> Somehow Incorrect.....	20
	1. This Court and the 9 th -Circuit Analyzed the Same Cases, but Simply Come to A Different Conclusion.....	20

2.	The California State Supreme Court is aligned with Washington Supreme Court on ERISA preemption.....	22
F.	Public Policy and Alleged Constitutional Concerns Equally Apply to the General Contractors of Washington State.....	26
V.	CONCLUSION.....	28

TABLE OF AUTHORITIES

Cases

Bd. of Trustees of Cement Masons & Plasterers Health & Welfare Trust v. GBC Nw. LLC, No. C06-1715-C, 2007 WL 1306545 (W.D.Wash. May 3, 2007).....1, 2

Betancourt v. Storke Housing Investors, 31 Cal.4th 1157, 82 P.3d 286, 8 Cal.Rptr.3d 259 (2003).....24, 25

California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc., 519 U.S. 316,---, 117 S.Ct. 832, 838, 136 L.Ed.2d 791 (1997).....14, 24

Carpenters Retirement Trust of Western Washington v. Healthy Homes NW, LLC, 2008 WL 2230754 (W.D. Wash. May 29, 2008).....12

Carpenters So. Cal. Admin. Corp. v. El Capitan Development Co., 53 Cal.ed 1041, 1049, 282 Cal.Rptr. 277, 811 P.2d 296 (1991).....18, 22, 23, 24, 25

Citizens for Financially Responsible Government v. City of Spokane, 99 Wn.2d 339, 350 (1983).....8

City of Fed. Way v. Koenig, 167 Wn.2d 341, 347, 217 P.3d 1172, 1174 (2009).....8

Grays Harbor Paper Co. v. Grays Harbor County, 74 Wn.2d 70, 73 (1968).....8

Greenblatt v. Delta Plumbing & Heating Corp., 68 F.3d 561, 574 (2d Cir. 1995).....17

Health and Welfare Trust v. JWJ Contracting Co., 135 F.3d 671 (9th Cir. 1998).....21

In Re Stranger Creek, 77 Wn.2d 649, 652, 455 P.2d 508 (1970).....9

Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 142, 111 S.Ct. 478, 484-85, 112 L.Ed.2d 474 (1990).....17

Ironworkers Dist. Council of Pac. Nw. v. George Sollit Corp., No. C01-1668C, 2002 WL 31545972 (W.D.Wash. Sept. 4, 2002).....12, 16

International Brotherhood of Electric Workers, Local Union No. 46 v. Trig Electric Co., 142 Wn.2d 431, 13 P.3d 622 (2000) cert. den., 532 U.S. 1002 (2001).....1, 2, 3, 5, 9, 10, 11, 12, 13, 15, 16, 17, 18, 20, 21, 22, 26, 27, 28.

Leo Finnegan Const. Co., Inc. v. Northwest Plumbing & Industry Health Welfare and Vacation Trust, 146 Wash.App. 1006 (Div. 2, 2008).....1, 11, 12

New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co., 514 U.S. 645, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995).....1, 11, 13, 17, 21, 22, 24, 25

Payne v. Tennessee, 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991).....8, 9

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54, 107, S.Ct. 1549, 1556-57, 95 L.Ed.2d 39 (1987).....17

Plumbing Indus. Bd., Plumbing Local Union No. 1 v. E.W. Howell Co., 126 F.3d 61, 68 (2d Cir.N.Y.1997).....13, 14, 16, 17, 22

Puget Sound Electrical Workers Health and Welfare Trusts Fund v. Merit Company, 142 Wn.2d 431, 13 P.3d 622 (2000).....6, 9, 15, 17, 20, 21

Romney, Children's Wear and Allied Workers' Union, A Local 23-25, ILGWU v. Lin, 105 F.3d 806, 812 (2nd Cir. 1977), cert. den. 522 US 906 (1997).....19

Southern California IBEW-NECA Trust Funds v. Standard Industrial Electric Company, 247 F.3d 920 (9th Cir. 2001).....1, 11, 12, 13, 15, 16, 18, 20, 21, 22, 25, 26, 28

Sturgis v. Herman Miller, Inc., 943 F.2d 1127 (9th Cir. 1991).....20, 21

Trustees of Electrical Workers Health & Welfare Trust v. Marjo Corp., 988 F.2d 865 (9th Cir. 1993).....20, 21

I. INTRODUCTION

In 2008, a group of trust funds and a union filed a direct review and appeal to ask this Court to overrule its decision in *International Brotherhood of Electric Workers, Local Union No. 46 v. Trig Electric Co.*¹ (“*Trig Electric*”). The trust funds felt that this Court’s holding in *Trig Electric* was inconsistent with the decisions of federal courts regarding ERISA preemption on Washington’s retention and bond statutes in light of the United State Supreme Court’s reasoning in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*² (“*Travelers*”), and other federal and state court decisions.³ This Court denied direct review and transferred the appeal to the lower appellate court, where Division II upheld *Trig Electric*.⁴

Here, another group of trust funds and a union (the appellants, collectively hereinafter “the Trusts”) are again petitioning an appeal to this Court to overturn *Trig Electric* on the very same grounds the trust funds attempted in 2008. More specifically, the Trusts are asking this Court to overturn *Trig Electric* primarily based on the decision held by the 9th-Circuit Court of Appeals in *Southern California IBEW-NECA Trust Funds v. Standard Industrial Electric Company*⁵ (“*Standard Industrial*”), which

¹ 142 Wn.2d 431, 13 P.3d 622 (2000) cert. den., 532 U.S. 1002 (2001)

² 514 U.S. 645, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995)

³ See *Leo Finnegan Const. Co., Inc. v. Northwest Plumbing & Industry Health Welfare and Vacation Trust*, 146 Wash.App. 1006 (Div. 2, 2008). Per GR 14.1, this case is not cited as an authority but as a reference to facts and a benchmark in time.

⁴ *Id.*

⁵ 247 F.3d 920 (9th Cir. 2001)

the 9th-Circuit decided **seven years before this Court was last asked by trust funds to overturn *Trig Electric*** in 2008.

Nothing in substantive ERISA law or Washington's bond and retention statutes (RCW 39.08 and 60.28) has changed in the intervening years between the *Trig Electric* decision (or the last time a group of trusts attempted to overturn the *Trig Electric* decision in 2008) and the present. Moreover, the Trusts do not cite to any authority that would provide this Court with a proper basis to now suddenly overturn *Trig Electric* and modify well settled legal precedent. In fact, a U.S. 2nd Circuit New York case and a California Supreme Court case decided post-*Trig Electric* provide further corroboration that this Court's reasoning in *Trig Electric* remains sound today.

II. ASSIGNMENTS OF ERROR

The Trusts assign error to the trial court for its alleged failure to: (1) follow decisions on ERISA preemption made by the federal courts and other state courts; and (2) correctly apply the doctrine of *stare decisis*. No such errors can be assigned here. The trial court strictly interpreted this Court's holding in *Trig Electric*, in which this Court already contemplated both the federal court decisions cited by the Trusts and the doctrine of *stare decisis*.

Notwithstanding the lack of any error, it is well established that the use of Washington's public works lien laws to compel third parties to fund delinquent benefit plan contributions is preempted by ERISA. Cases in federal court and the state of California decided since the Washington

Supreme Court decided *Trig Electric* in 2001 have further confirmed Washington's proper interpretation of ERISA as it pertains to the State bond and retainage statutes.

III. STATEMENT OF THE CASE

A. **Background Facts**

On August 6, 2010, the University of Washington ("UW") entered into a contract ("Prime Contract") with W.G. Clark to construct the UW Student Housing Phase I, Site 32 Project (the "Project"). (CP 135-157). Under the Prime Contract, UW required W.G. Clark to post a public works bond for the Project in accordance with chapter 39.08 RCW. *Id.* Accordingly, W.G. Clark obtained a Payment Bond from Safeco Insurance Company of America ("Safeco"). (CP 66, 83).

The Project, among other scopes of work, required the erection and dismantling of scaffolding. Incident to its Prime Contract, on April 18, 2011, W.G. Clark entered into a subcontract (the "Subcontract") with Paramount Scaffold, Inc. ("Paramount") to provide all perimeter-scaffolding work for the Project. (CP 66, 89).

On December 15, 2008, some years prior to entering into the Subcontract, Paramount had entered into a collective bargaining agreement with a union (the "Union Agreement") for the work, conditions and wage rates provided for in the territory of Washington, Oregon, and Northern Idaho. (CP 66, 117). The Agreement covered all handling, building, erection, modification, and dismantling of all types of scaffolding for Paramount at its job sites, including the Project. *Id.*

Paramount performed and completed its scaffolding work. W.G. Clark paid Paramount for the work performed on the UW Project in full for all amounts due under its subcontract, \$221,549.39, but for retainage of \$24,616.61. (CP 78). The amounts paid to Paramount included all labor it expended on the job, including wages, fringe benefits, union dues, and taxes. *Id.*

On June 19, 2012, W.G. Clark received a “Notice of Claim of Lien Against Bond and Retained Percentage” (RCW 39.08.030, 39.12.050, 60.28, 19.28 as amended) from the Union’s attorney on behalf of the Union and the Trusts (collectively, the “Trusts”). (CP 78, 109). The principal amount claimed by the Trusts against W.G. Clark’s bond and retention was for \$64,905.48 plus alleged liquidated damages, interest, and fees and costs – amounts Paramount owes the Trusts and the Union in accordance with the Union Agreement. Neither W.G. Clark nor W.G. Clark’s bond insurer had any direct contact with the Union and/or the Trusts. (CP 78).

The Trusts allege that Paramount failed to pay certain union contributions for the period May 2011 through February 2012, for a total amount of \$761,881.79. (CP 167). The Trusts also allege that Paramount failed to pay contributions for the UW Project during the same period in the amount of \$64,905.48. (CP 109, 166). However, the first notice that W.G. Clark received that Paramount was allegedly not paying required union dues was when it received the Notice of Claim of Lien on June 19, 2012, after Paramount had completed its work and was fully paid

by W.G. Clark. (CP 78). On June 12, 2012, Paramount filed for Chapter 11 Bankruptcy.⁶ The Trusts negotiated with the bankruptcy trustee and received payment of \$127,590 for the post-petition period of January to March 2012, which directly overlaps three months of the period for which the Trusts are demanding payment from W.G. Clark. (CP 397, 400-401).

B. Procedural History

On July 2, 2012, W.G. Clark filed a declaratory action in King County Superior Court of the State of Washington based on the foregoing facts. (CP 1-8). The declaratory judgment action sought an order declaring the Trusts are precluded from enforcing, foreclosing, or collecting on the lien against W.G. Clark's bond and retention pursuant to *Trig Electric. Id.*

On July 18, 2012, counsel for the Union and the Trusts (located in California) requested an extension of time ostensibly to file an answer to the state action. (CP 279). W.G. Clark in keeping with professional comity granted out-of-state counsel the requested two-week extension. *Id.*

On July 30, 2012, instead of filing the answer (and any counterclaims) to the state declaratory action as indicated in the request for accommodation, the Trusts (through local counsel) filed a complaint in United States Western District Court of Washington based on facts that "arise out of the same transaction or occurrence" as the, at the time,

⁶ Appendix, Exhibit 1 (with only Exhibit C of the declaration attached).

pending State declaratory action. (CP 229-240, 279). The Trusts in the federal action sought to enforce ERISA and a breach of the collective bargaining agreement to collect \$761,881.79 from a bankrupt Paramount Scaffold and enforce, foreclose, and collect on the lien for \$64,905.48 against W.G. Clark's bond and retention. (CP 109, 166-167). W.G. Clark immediately filed a motion to dismiss the federal action on August 13, 2012, and the Trusts filed a motion for summary judgment on August 30, 2012. (CP 277-292, 357-386).

W.G. Clark also filed for summary judgment in the state action on August 31, 2012. (CP 64-72). On October 12, 2012, the Honorable John P. Erlick of King County Superior Court heard W.G. Clark's motion for summary judgment and ruled in favor of W.G. Clark. (CP 452-454). Judge Erlick granted W.G. Clark's motion for summary judgment and the transcript of his ruling was incorporated into the Order. (CP 452-468). In relevant part, Judge Erlick held as follows:

As a trial court, this court lacks the authority to change the law or the ability to explain our Supreme Court's adherence to its analysis in *Merit*.⁷ As a result, under our Supreme Court's controlling decision in *Trig Electric*, under state law, the Trusts cannot seek contributions from W.G. Clark in state court for employee benefits owed by its insolvent subcontractor, Paramount, under Washington's lien statute. This court declares that this is Washington state law in state court;

⁷ *Puget Sound Electrical Workers Health and Welfare Trust Fund v. Merit Company*, 142 Wn.2d 431, 13 P.3d 622 (2000).

grants summary judgment and dismisses this case.⁸
(CP 462).

In light of the superior court decision, the federal court requested supplemental briefing from the parties on their cross-motions for dismissal and summary judgment.⁹ After considering all briefing, the federal court dismissed the Trusts' state lien claims against W.G. Clark and the bond.¹⁰ The Trusts' federal ERISA and LMRA claims against subcontractor Paramount remains in the federal court action.

The order and dismissal of the superior court decision are now being appealed by the Trusts and direct review is being sought from this Court.

IV. ARGUMENT AND AUTHORITY

A. **The Trusts Can No Longer File an Action to Foreclose Their Lien Against W.G. Clark's Retainage and, Therefore, That Claim is Now Moot.**

Any rights claimed by the Trusts to pursue retainage claims have expired as a matter of law. RCW 60.28.030 requires:

Any person, firm, or corporation filing a claim against the reserve fund shall have **four months from the time of the filing** thereof in which to bring an action to foreclose the lien. The lien shall be enforced by action **in the superior court of the**

⁸ The Trusts cite (on page 13 of their brief) to partial quotes made by the superior court and undersigned counsel to imply the State's statute or this Court's decision is "broken." (CP 465, at 8:8-12) This misconstrues the Court and undersigned counsel's acknowledgment. The superior court recognized, as did undersigned counsel, that the contrasting position of this Court and that of the 9th Circuit promote a race between the parties causing the system to be "broken" for all those involved – not just the Trusts.

⁹ Appellant Appendix, Exhibit 1.

¹⁰ *Id.*

county where filed, and shall be governed by the laws regulating the proceedings in civil actions... (emphasis added).

The Trusts did not file a lawsuit in King County superior court within four months from the time of filing their Notice of Claim of Liens. Thus, the Trusts have relinquished their rights to foreclose their lien against the retainage.

“As a general rule, [this Court] will not review a question that has become moot.” *Citizens for Financially Responsible Government v. City of Spokane*, 99 Wn.2d 339, 350 (1983). Even if both appellants and respondents urged this Court to reach a decision on the merits it would not be determinative. *Grays Harbor Paper Co. v. Grays Harbor County*, 74 Wn.2d 70, 73 (1968). “Ordinarily if the question is purely academic, this court is not required to pass upon it and will not do so however much both parties desire such a determination.” *Id.* Because the Trusts will have no rights against the retainage on this project, it is purely academic to litigate whether ERISA prohibits those remedies, and this Court is not required to decide moot issues.

B. The “Substantial Burden” Required to Trigger *Stare Decisis* is Not Met by the Trusts

Respect for the principle of *stare decisis* and precedent “promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” *City of Fed. Way v. Koenig*, 167 Wn.2d 341, 347, 217 P.3d 1172, 1174 (2009) *citing Payne v.*

Tennessee, 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). Washington’s Supreme Court has long acknowledged the doctrine of *stare decisis* and the “importance of continuity in the law and the necessity of respect for precedent if we are to remain a society of laws and not of men.” *In Re Stranger Creek*, 77 Wn.2d 649, 652, 466 P.2d 508 (1970).

In deciding *Trig Electric*, and in light of new federal cases decided after *Merit*, this Court could not ignore the necessity to assess the application of *stare decisis*. Thus, this Court revisited the doctrine and held, in relevant part, the following:

Stare decisis “requires a clear showing that an established rule is incorrect and harmful before it is abandoned.” (Internal citations omitted). By failing to demonstrate a change in ERISA’s preemptive force over state statutes providing an alternative enforcement mechanism to 29 U.S.C. § 1132(a), [the trust funds] have not met this substantial burden. *Merit* remains good law.

Trig Electric, 142 Wn.2d 431, 13 P.3d at 627-628. This Court held that the “substantial burden” of *stare decisis* to “clearly show that an established rule is incorrect and harmful before it is abandoned” could not (and cannot) be met by citing or relying on the contrary federal court decisions on the ERISA preemption issue. Accordingly, the superior court could not have erred when applying the doctrine of *stare decisis* because this Court has already decided the issue under exactly the same circumstances. The superior court simply upheld what this Court already decided on the issue of *stare decisis*.

Even if the superior court did not consider the Trusts' constitutional arguments when applying the doctrine of *stare decisis*, it does not follow that the superior court erred. When the trust funds in *Trig Electric* petitioned the U.S. Supreme Court for a writ of *certiorari* contending that this Court's ruling in *Trig Electric* was incorrect and harmful to their constitutional rights, the U.S. Supreme Court denied the petition.¹¹ Consequently, if the U.S. Supreme Court did not commit an error for not considering the constitutional arguments, then this Court should not hold that the superior court erred for not considering the Trusts constitutional arguments in applying *stare decisis*.

Notwithstanding the application of *stare decisis*, nothing in substantive ERISA law or Washington's bond and retention statutes has changed since *Trig Electric*, as discussed next, that should cause this Court to even consider "the established rule" in *Trig Electric* may be "abandoned." This Court simply decided the issue of ERISA preemption correctly.

C. Nothing in Substantive ERISA Law or Washington's Bond and Retention Statutes Has Changed

On W.G. Clark's motion for summary judgment, the Honorable John P. Erlick of the King County Superior Court of Washington held, in relevant part, the following:

In *Trig Electric*, our Supreme Court held and made clear that ERISA preempts state union claims under

¹¹ See *International Brotherhood of Electric Workers, Local Union No. 46 v. Trig Electric Co.*, cert. den., 532 U.S. 1002 (2001).

state public work lien statutes, at 142 Wn.2d 437, 438. **Washington federal courts have criticized *Trig Electric* as inconsistent with federal preemption jurisprudence following the United States Supreme Court's decision in *New York State Conference of Blue Cross and Blue Shield Plans vs. Travelers Insurance Company*, 514 U.S. 645, a 1995 U.S. Supreme Court case. Moreover, there was a split of national authority on whether, after *Travelers*, ERISA does preempt liens such as those at issue here. Our supreme court in Washington has been asked to overrule its decision in *Trig Electric* in light of the United States Supreme Court's reasoning in *Travelers* and other recent federal and California state decisions. However, it has declined to do so. (CP 461-462).**

The same split of national authority and differing opinions in the federal court existed in 2008 when this Court last declined direct review on the same issues and transferred the appeal to Division II Court of Appeals.¹² Further, since the last request for direct review was made to this Court to overturn *Trig Electric* in 2008, there have been neither substantive changes in ERISA nor RCW 39.08 and 60.28, nor do the Trusts cite to any new authority dated after 2008.

The primary authority upon which the Trusts rely is the 9th-Circuit decision in *Standard Industrial*¹³, which was decided in 2000 and is not a substantive change to either the federal or state statutes. The Trusts also cite to three U.S. Western District Court Cases decided in 2002, 2007, and 2008; however, these later decisions are of no consequence. In all three

¹²See *Leo Finnegan Construction Co., Inc. v. Northwest Plumbing & Pipefitting Indus. Health and Welfare & Vacation Trust* 146 Wn. App. 1006 (2008, Div. 2)

¹³ 247 F.3d 920 (9th Cir. 2001).

cases, the Washington federal district court simply held: (1) it is the precedent of the 9th-Circuit Court of Appeals, rather than the precedent of the Washington Supreme Court, that is binding on the district court; and (2) *Standard Industrial* is the governing 9th-Circuit precedent. See *Ironworkers Dist. Council of Pac. Nw. v. George Sollit Corp.*, No. C01-1668C, 2002 WL 31545972 (W.D.Wash. Sept. 4, 2002); *Bd. of Trustees of Cement Masons & Plasterers Health & Welfare Trust v. GBC Nw. LLC*, No. C06-1715-C, 2007 WL 1306545 (W.D.Wash. May 3, 2007); and *Carpenters Retirement Trust of Western Washington v. Healthy Homes NW, LLC*, 2008 WL 2230754 (W.D. Wash. May 29, 2008). Further, *Standard Industrial* and the 2002 and 2007 U.S. Western Washington District Court cases were cited on appeal by the trust funds in 2008, yet this Court nevertheless denied direct review and assigned it to Division II Court of Appeals for decision (and Division II upheld *Trig Electric*).¹⁴

There have been no substantive changes in ERISA or RCW 39.08 and 60.28 since 2000, when this Court decided *Trig Electric*, or 2008, when this Court was last asked to accept direct review. Thus, not only do the Trusts fail to carry their burden to demonstrate a basis for this Court to overturn its decision in *Trig Electric*, they have provided no basis for this Court to even consider the issue.

¹⁴ See *Leo Finnegan Construction Co., Inc. v. Northwest Plumbing & Pipefitting Indus. Health and Welfare & Vacation Trust*, 146 Wn. App. 1006, fn 5 (2008, Div. 2).

D. This Court Correctly Decided ERISA Preempts the Public Works Lien Statutes

This Court's decision in *Trig Electric* is the correct decision on ERISA preemption and consistent with the ERISA statutory scheme.

1. This Court decided ERISA preemption based on the “alternative enforcement mechanism,” while the 9th-Circuit’s analysis on the mechanism is simply absent.

“ERISA preempts and supersedes any and all State laws insofar as they may now or hereafter “relate to” any employee benefit plan.” *Standard Industrial*, 247 F.3d at 925 citing 29 U.S.C. § 1144(a). “Since the Supreme Court narrowed the scope of ERISA preemption in *Travelers*, the “relates to” criterion has been analyzed by determining whether a state law (1) has a “connection with” or (2) a “reference to” employee benefit plans.” *Id.* The significant differences between the “reference to” test and “connection with” test was thoroughly explained by the Second Circuit of the U.S. Court of Appeals in *Plumbing Industry Board, Plumbing Local Union No. 1 v. E.W. Howell Co., Inc.*, 126 F.3d 61 (1997).

In *Plumbing Industry Board*, the court had to determine – from an identical set of circumstances as presented here – whether ERISA preempted New York’s bond claim (lien) statutes permitting laborers on public works projects, as well as “any trust fund to which benefits and wage supplements are due or payable for the benefit of such [laborers]” to file liens for the value of the labor performed against funds earmarked to pay for public improvement. In arriving at its conclusion, the court

first described the elements for both tests, as established by the U.S. Supreme Court, when determining whether ERISA preempts labor/trust lien statutes:

The Supreme Court has identified several ways in which the anti-preemption presumption can be overcome. First, preemption will apply where a state law clearly “refers to” ERISA plans in the sense that the measure “acts immediately and exclusively upon ERISA plans” or where “the existence of ERISA plans is essential to the law’s operation.” *Dillingham*, 117 S.Ct. at 838.¹⁵ Second, a state law is preempted **even though it does not refer to ERISA or ERISA plans** if it has a clear “connection with” a plan in the sense that it “mandate[s] employee benefit structures or their administration” **or “provid[es] alternative enforcement mechanisms.”** *Travelers*, 514 U.S. at 658, 115 S.Ct. at 1678.

Plumbing Industry Board, 126 F.3d at 67 (emphasis added).

The ERISA statute affords the Trusts broad collection rights, onerous liquidated damages, and favorable interest rates which Congress generously granted. Those broad ERISA rights come with the preemption doctrine which in turn limits the Trusts from also taking advantage of potentially favorable state statutes such as Washington’s bond and retention statute. This Court recognized the need to limit the advantage when it specifically held, as the 2nd Circuit Court of Appeals held, that the “enforcement and collection mechanisms [of the lien statutes] must yield to the extent they **supplement** those provided by

¹⁵ *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, —, 117 S.Ct. 832, 838, 136 L.Ed.2d 791 (1997)

ERISA.” *Trig Electric*, 142 Wn.2d at 437 citing *Merit*, 123 Wn.2d at 573 (emphasis added). In this regard, this Court further explained:

The civil enforcement mechanisms of ERISA are set forth at 29 U.S.C. § 1132 (1994) and specifically empower a participant, beneficiary, or fiduciary of a benefit plan to bring a civil action to enforce the terms of the plan. 29 U.S.C. § 1132(a)(3)(B)(ii) (1994). Furthermore 29 U.S.C. § 1145 governs delinquent contributions by employers to employee benefit plans as set forth in collective bargaining agreements. In a nonpreempted enforcement action, then, a party would use 29 U.S.C. § 1132(a) to enforce 29 U.S.C. § 1145 against the delinquent employer.

As we understood in *Merit*, to the extent the public works lien statutes provide an enforcement mechanism by imposing liabilities on general contractors’ bonds and retainage funds for the delinquent benefit plan payments of a subcontractor, they provide alternative enforcement mechanisms to those provided by Congress when it enacted ERISA. The state statutes, then, undeniably “relate to” and “connect with” ERISA for the purposes of ERISA’s preemption provision. 29 U.S.C. § 1144(a) (1994).

Trig Electric, 142 Wn.2d at 437-438. Thus, this Court decided the Washington public lien statutes “related to” ERISA because the lien statutes provided an alternative enforcement mechanism.

This is in strong contrast with the 9th-Circuit’s decision in *Standard Industrial* relied upon by the Trusts. The *Standard Industrial* court held the California state lien statute did not “relate to” or have a “connection with” ERISA because the California lien statute: (1) does not require the establishment of a new benefit pan, and imposes no new

reporting, disclosure, funding, or vesting requirements for ERISA; (2) does not tell employers how to write ERISA benefit plans or how to determine beneficiary status; (3) does not impermissibly refer to ERISA because it functions irrespective of ERISA; and (4) the relationship between ERISA trust fund and Surety companies is too “tenuous, remote, or peripheral.” *Standard Industrial*, 247 F.3d at 925-927; *see also George Sollit*, 2002 WL 31545972, at *5. Thus, the 9th-Circuit Court of Appeals discusses the two elements of the “refers to” test (reasons (3) and (4)), but clearly only discusses the “mandate employee benefit structures or their administration” element of the “connection with” test (reasons (1) and (2)). **However, an analysis of “the alternative enforcement mechanism” element is glaringly absent among the 9th Circuit’s reasons that ERISA does not preempt the California lien statute, which is crucial to the proper disposition of the ERISA preemption issue.** In deciding whether this Court’s decision was correct on ERISA preemption, an analysis of the “alternative enforcement mechanism element” must be made because without it the basis of this Court’s decision in *Trig Electric* has not been negated or even challenged.

Unlike the *Standard Industrial* court, the court in *Plumbing Industry Board* did discuss how the “alternative enforcement mechanism” applies to public works lien statutes and its analysis further supports this Court’s decision in *Trig Electric*. The court in *Plumbing Industry Board* held, in relevant part, the following:

Although not convinced that the [N.Y. lien statutes] language “refers to” ERISA plans in a manner sufficient to warrant automatic preemption, we nonetheless think the measure is preempted under § 514(a) because the challenged state law **provides an alternative mechanism**—filing a lien that attaches to improvement funds—**for enforcing the rights protected by ERISA § 502(a)**. See *Greenblatt*, 68 F.3d at 574¹⁶; *Travelers*, 514 U.S. at 656–57, 115 S.Ct. at 1677–78.

As the Supreme Court observed in *Ingersoll-Rand*¹⁷, § 502(a) was intended to be “the exclusive remedy for rights guaranteed under ERISA.” 498 U.S. at 144, 111 S.Ct. at 485. Simply put, § 502(a) sets forth a comprehensive civil enforcement scheme that reflects the legislature’s desire to include certain remedies and exclude others, and states are not free to add or subtract additional remedies to the mix, even if doing so would be helpful to the interests of plan beneficiaries or participants. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54, 107 S.Ct. 1549, 1556–57, 95 L.Ed.2d 39 (1987).

Plumbing Industry Board, 126 F.3d at 68 (emphasis added). This Court’s analysis of *Travelers* led to an identical conclusion in *Trig Electric*:

In *Travelers*, the Supreme Court expressly noted “state laws providing **alternative enforcement mechanisms** also relate to ERISA plans, triggering pre-emption.” *Travelers Ins. Co.*, 514 U.S. at 658, 115 S.Ct. 1671 (citing *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990)). *Travelers Ins. Co.*, the case on which IBEW would have us overrule *Merit*, actually

¹⁶ *Greenblatt v. Delta Plumbing & Heating Corp.*, 68 F.3d 561, 574 (2d Cir.1995)

¹⁷ *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142, 111 S.Ct. 478, 484–85, 112 L.Ed.2d 474 (1990)

reaffirms the appropriateness of ERISA preemption in this kind of case.

Trig Electric, 142 Wn.2d at 439 (emphasis added). Thus, the “error” made in this matter is the Trusts’ assertions that *Standard Industrial* and its progeny in Western Washington District Court provide this Court with the basis for overturning the *Trig Electric* decision. In fact, as discussed further below, the *Standard Industrial* court’s decision on California lien statutes did not even provide a basis for the California State Supreme Court to overturn its decision that trust funds cannot foreclose their liens under the California lien statutes because ERISA preempts the statute! See *Carpenters So. Cal. Admin. Corp. v. El Capitan Development Co.*, 53 Cal.3d 1041, 1049, 282 Cal.Rptr. 277, 811 P.2d 296 (1991).

Accordingly, the superior court did not err by upholding the decision of this Court in *Trig Electric* and deciding RCW 39.08 and 60.28 are preempted by ERISA under current federal ERISA preemption because this Court correctly decided and applied current federal ERISA preemption.

2. Washington Public Works Lien Statutes have a direct “connection with” ERISA plans

The Washington public works lien statutes have more than a “tenuous, remote or peripheral connection with ERISA plans.” The Trusts’ favorable ERISA remedies are exclusively against the employer (Paramount). Yet, the Trusts are seeking to make a third-party, non-signatory general contractor (W.G. Clark) liable for contributions owed

to an employee plan by a subcontractor (Paramount, the employer who actually owes the contributions) – a definite and substantial change to the ERISA statutory scheme, the substitution of a third-party payor for the ERISA employer payor. ERISA, by specifying who must fulfill the employer’s obligation to pay benefits, impliedly provides that parties not so specified need not do so. *See Romney, Children’s Wear and Allied Workers’ Union, A Local 23-25, ILGWU v. Lin*, 105 F.3d 806, 812 (2nd Cir. 1977), cert. den. 522 US 906 (1997). This substitution of Paramount with W.G. Clark as the payor to the Trusts is the very direct change which the preemption doctrine specifically precludes. Therefore, a state is not free to designate new obligors (general contractors) for an employer’s ERISA obligations.

Here, the state bond and retention statute conflicts with ERISA because, as the Trusts in this instance concede, the bond and retention statute requires the general contractor (W.G. Clark) – absent any ERISA requirement that it do so – to assume responsibility for the subcontractor-employer’s (Paramount’s) benefit obligations. Thus, Washington State’s bond and retention laws impermissibly add to the exclusive list of parties ERISA holds responsible for an ERISA employer’s benefit obligation. Hence, it cannot stand, even if the most liberal of preemption tests is applied. Washington state’s bond and retention statute which changes and designates a new obligor for the employer ERISA obligations (i.e. general contractor W.G. Clark, who is not party to the collective bargaining agreement) has neither a “tenuous, remote or peripheral

connection with ERISA plans,” but instead **directly** and **unequivocally** changes the ERISA architecture and, thus, is preempted. Changing the entity who must fulfill the employer’s obligation from the employer to a third party is significant and in contravention with Congress’s ERISA statutory blueprint.

E. Federal Cases Do Not Make This Court’s Decision in *Trig Electric* Somehow Wrong

Notwithstanding the fact that 9th-Circuit decision in *Standard Industrial* was decided seven years before the last request for direct review was made to this Court on the very same issues, *Standard Industrial* and its progeny in the U.S. District Court of Western Washington do not make this Court’s decision and reasoning in *Trig Electric* wrong.

1. This Court and the 9th-Circuit analyzed the same federal cases but simply come to different conclusions

The Trusts argue that federal cases decided by the 9th-Circuit, Washington federal courts, and other federal circuits post-*Trig Electric* provide the basis for this Court to not follow *Trig Electric*. In support of their argument, the Trusts erroneously contend the legal underpinnings of *Merit* have collapsed when the 9th-Circuit, in *Standard Industrial*¹⁸, explicitly overturned two other 9th-Circuit cases (*Marjo*¹⁹ and *Sturgis*²⁰) upon which the *Merit* decision depended. This argument is based on an incorrect premise.

¹⁸247 F.3d 920 (9th Cir. 2001).

¹⁹ *Trustees of Electrical Workers Health & Welfare Trust v. Marjo Corp.*, 988 F.2d 865 (9th Cir. 1993).

²⁰ *Sturgis v. Herman Miller, Inc.*, 943 F.2d 1127 (9th Cir. 1991).

In *Standard Industrial*, the 9th-Circuit overturned *Marjo* and *Sturgis* based on its analysis of *Travelers*²¹ and *JWJ*²², and labeled cases such as *Marjo* and *Sturgis* as “pre-*Travelers*.” See *Standard Industrial*, 247 F.3d at 929. (“Because the breadth of ERISA preemption is no longer indefinite, and pre-*Travelers* decisions must be re-evaluated in light of *Travelers* and *JWJ*, the decisions [pre-dating *Travelers*, i.e. *Marjo* and *Sturgis*] are unpersuasive.”). However, this Court in *Trig Electric* thoroughly evaluated and considered *Travelers* and *JWJ*. In so doing, this Court found that “the post-*Merit* and post-*Travelers* authority [the trust funds] cite simply do not take this case outside of the preemptive scope of ERISA as recognized explicitly even in *Travelers* itself.” See *Trig Electric*, 142 Wn.2d at 441-442. Thus, the “legal underpinnings” of *Merit* may have “collapsed,” but the reasons were thoroughly assessed and considered in *Trig Electric*, and this Court nevertheless declined to follow the 9th-Circuit court’s decision on ERISA preemption as it pertains to Washington State’s retention and bond statutes.

The 9th-Circuit (in *Standard Industrial*) and this Court (in *Trig Electric*) interpreted the very same authorities, *Travelers* and *JWJ*, however, reached different conclusions about ERISA preemption of the California’s public works bond statute (9th-Circuit in *Standard Industrial*) and Washington’s retention and bond statute (this Court in

²¹ 514 U.S. 645, 514 S.Ct. 645, 131 L.Ed.2d 695 (1995).

²² *Health and Welfare Trust v. JWJ Contracting Co.*, 135 F.3d 671 (9th Cir. 1998).

Trig Electric). Moreover, there is a split of national authority on whether, after *Travelers*, ERISA preempts liens such as those at issue here. See *Plumbing Indus. Bd., Plumbing Local Union No. 1 v. E.W. Howell Co.*, 126 F.3d 61, 68 (2d Cir.N.Y.1997) (holding that ERISA preempted New York's lien laws because it is an alternative enforcement mechanism for ERISA rights). Thus, there is no reasonable basis for the Trusts to argue that this Court's holding in *Trig Electric* is incorrect in deciding ERISA preemption based on *Standard Industrial*. This Court simply comes to a different conclusion than the 9th-Circuit after analyzing the very same federal cases – **not incorrect, simply different** based on Washington's retention and bond statutes.

2. The California State Supreme Court is aligned with Washington Supreme Court on ERISA preemption.

In *Carpenters So. Cal. Admin. Corp. v. El Capitan Development Co.*, 53 Cal.3d 1041, 1049, 282 Cal.Rptr. 277, 811 P.2d 296 (1991), union member employees were entitled to fringe benefit contributions under a collective bargaining agreement. After their employer failed to make contributions to the employees' trust funds in excess of \$121,000, the funds' administrator recorded trust fund liens under §3111 of the California bond lien statute against the developer's real property, on which the employees had performed work. The administrator alleged that because the unpaid contributions were due on account of work performed on the property, the California statute created liens on that property. *El Capitan*, supra, 53 Cal.3d at p. 1046. The California Supreme Court

held that the action under §3111 of the California lien statute was preempted under ERISA (29 U.S.C. § 1144(a)). *El Capitan*, supra, 53 Cal.3d at p. 1056.

The California Supreme Court recognized in *El Capitan* that the broad scope of the key term, “relate to,” in ERISA’s preemption clause (29 U.S.C. § 1144(a)), based on congressional intent and high court decisions. *El Capitan*, supra, 53 Cal.3d at pp. 1047–1049. The court concluded that “[a]ll that is necessary to invoke ERISA’s statutory preemption provision is that the state law in question ‘relate to’ an ERISA plan.” *Id.* 53 Cal.3d at p. 1047. The court further concluded §3111 of the California lien statute “provid[ed] an additional method of funding, a lien against real property...” and determined that the statute “‘relates to’ such plans by creating a mechanism for enforcing an employer’s contribution obligations that Congress did not provide.” *El Capitan*, supra, 53 Cal.3d at pp. 1047–1048, 1052. The California Supreme Court emphasized that the statute was preempted because it purported to regulate ERISA plans through a new cause of action or remedy not provided under ERISA, the state’s lien laws. *El Capitan*, supra, 53 Cal.3d at pp. 1048, 1051, 1052, 1054, 1055. “The expectations that a federal common law of rights and obligations under ERISA-regulated plans would develop, ... would make little sense if the remedies available to ERISA participants and beneficiaries under [29 U.S.C. § 1132(a)] could be supplemented or supplanted by varying state laws.” *Id.*, supra, 53 Cal.3d at p. 1053. This recognition that the lien statute if applied, would regulate the conditions

under which the terms of an ERISA plan might be enforced supported the court's conclusion that the section related to such plans and thus was preempted. *El Capitan*, supra, 53 Cal.3d at pp. 1048, 1051, 1054.

In 2003, after *Travelers*, the *El Capitan* decision was challenged. In *Betancourt v. Storke Housing Investors*, 31 Cal.4th 1157, 82 P.3d 286, 8 Cal.Rptr.3d 259 (2003), laborers, as individuals and as members of union, and the union, as a party to collective bargaining agreement but **not as a trust fund**, filed action against property owner to foreclose on a mechanics' lien arising from employer's failure to contribute to union benefit plan under §3110 (as opposed to §3111) of the California lien statute. The California Supreme Court held, under the rationale of *Travelers* and *Dillingham*, ERISA does not preempt the laborers' lien foreclosure action under section 3110 because – unlike the Trusts' action here, which arises out of the collective bargaining agreement – it does not make “reference to” or have a “connection with” ERISA plans. *Betancourt*, 31 Cal.4th at 1163. The court reasoned that section 3110 is a statute governing the payment of wages and thus, under federal case law, is the subject of traditional state regulation. *Id.*, 31 Cal.4th at 1166. The California Supreme Court further explained “that unlike section 3111 [which refers to a trust action for fringe benefits]...section 3110 is a mechanic's lien law of general application and does not itself refer to ERISA plans.” *Id.*

Importantly, the California Supreme Court thoroughly distinguishes its decision in *El Capitan* from its decision in *Betancourt*.

Betancourt, 31 Cal.4th at 1169. Quoting its prior decision, the court distinguished the difference between sections 3110 (individual wages) and 3111 (trust fund fringe benefits) of the California lien statutes:

[I]n contrast to persons seeking a mechanic's lien remedy under section 3110, ERISA plans do not provide labor and materials for a construction project. But because section 3111 would treat ERISA plans the same as persons who provide labor and materials by giving these plans a mechanic's lien remedy unavailable under ERISA, we concluded section 3111 would single out ERISA plans for special treatment and thus "relates to" these plans.

Betancourt, supra, 8 Cal.Rptr.3d at 268 citing *El Capitan, supra*, 53 Cal.3d at p. 1049. The court then concluded "that section 3110 does not constitute an alternative enforcement mechanism subject to ERISA preemption." *Betancourt, supra*, 82 P.3d at 294 citing *Standard Industrial, supra*, 247 F.3d 920.

In summary, the California Supreme Court, even when considering *Travelers* and *Standard Industrial*, holds that the California lien statutes under which trust funds seek fringe benefits is preempted by ERISA, but ERISA does not preempt the part of the lien statute that allows laborers to recover their wages. Here, again, the Trusts seek to recover money from W.G. Clark for fringe benefits under a collective bargaining agreement with Paramount, despite W.G. Clark not being a party to the collective bargaining agreement.

The Trusts cannot argue this Court's decision in *Trig Electric* is incorrect on the basis of the 9th-Circuit Court of Appeals' decision in *Standard Industrial* (and the decisions of the U.S. District Courts of Western Washington, which simply rely on the 9th Circuit) when this Court analyzed the same federal cases and comes to a different conclusion and when the California Supreme Court comes to the same conclusion as this Court.

F. Public Policy and Alleged Constitutional Concerns Equally Apply to the General Contractors of Washington State

This Court did not seek to harm Trusts or the rights the Trusts did not enjoy before the legislation was passed by deciding *Trig Electric*. To the contrary, the *Trig Electric* decision protects the thousands of general contractors in Washington (who are not parties to the ERISA collective bargaining agreement) from being forced to pay for a debt they do not owe (plus protection from paying any interest, attorneys' fees, and liquidated damages as the Trusts allege are owed in this matter). Just as much as the Trusts assert they and future trusts will continue to be treated unfairly in state court, so too will W.G. Clark and future general contractors under the jurisdiction of the federal court. W.G. Clark has already paid Paramount in full – the party with whom the Trusts (via the Union) decided to contract – the amount owed on the UW Housing Project for the labor performed, including wages, fringe benefits, union dues, and taxes. It is inequitable for W.G. Clark to be forced to pay a second time, and this time for a debt it does not even owe. Thus, any contention of alleged harm applies to both

parties. Further, the Trusts can protect themselves by checking the credit of their subcontractor participants (employers) and carefully monitoring contributions. Here, the Trusts allowed Paramount to fall over \$750,000 in arrears and expect faultless third-party general contractors to pay without any accountability for the Trusts' own administrative negligence. Additionally, there is evidence that the Trusts would not even apply funds paid directly by Paramount toward the bonded Project and, instead, on their own accord applied payment to other debts owed by Paramount on unbonded jobs.²³ Certainly, W.G. Clark should not be punished for such self-serving choices made by the Trusts.

The Trusts also attempt to argue that their constitutional rights of "due process" and "equal protection" will be violated if this Court follows *Trig Electric*. This argument lacks merit. First, the exercise of supplemental jurisdiction by the federal court, which is the only basis for the Trusts' constitutional arguments, should not be confused with constitutional violations.²⁴ Second, this Court is charged by the State's constitution with interpreting the constitution. *Trig Electric* is consistent with the constitution of this State.

²³ Paramount issued a \$127,590 check to the Trusts of which approximately \$20,000 to \$30,000 was to be applied to the UW Project debt owed by Paramount. The Trusts admit that it received the check and applied the payment "in accordance with the Carpenters Trust's policy" and not to the UW Project. (CP 397, 400-401).

²⁴ The matter of jurisdiction is extensively briefed and properly decided by the federal court in W.G. Clark's Motion to Dismiss and the Trusts' Motion for Summary Judgment. See Appellant Appx., Exhibit 1.

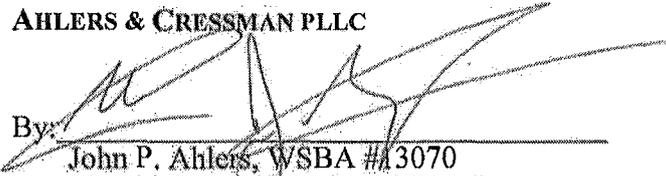
V. CONCLUSION

It is well established that the use of Washington's public works lien laws to compel third parties to fund delinquent benefit plan contributions is preempted by ERISA. The United States Supreme Court decisions since the Washington Supreme court decided *Trig Electric* in 2001 have only further corroborated Washington's correct interpretation. The Trusts in this case have seized upon *Standard Industrial*, its progeny cases decided in the U.S. District Court of Western Washington, and other out-of-state decisions as an ostensible basis to once again bring this same issue to the Washington Supreme Court. There is no basis to overturn *Trig Electric*, especially when the 2nd Circuit Court of Appeals of New York and the California Supreme Court's decisions are aligned with this Court.

The law is well established that the Trusts may not pursue lien rights as supplemental remedies to ERISA. That is the correct application of the law pronounced by the United States Supreme Court.

DATED this 19th day of April, 2012.

AHLERS & CRESSMAN PLLC

By: 

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Attorneys for W.G. Clark Construction
Group, Inc.

Appendix

Exhibit 1

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

CARPENTERS HEALTH AND
SECURITY TRUST OF WESTERN
WASHINGTON; CARPENTERS
RETIREMENT TRUST OF WESTERN
WASHINGTON; CARPENTERS OF
WESTERN WASHINGTON
INDIVIDUAL ACCOUNT PENSION
TRUST; CARPENTERS-EMPLOYERS
VACATION TRUST OF WESTERN
WASHINGTON; and CARPENTERS-
EMPLOYERS APPRENTICESHIP AND
TRAINING TRUST OF WESTERN
WASHINGTON,

Plaintiffs,

v.

PARAMOUNT SCAFFOLD, INC., a
California Corporation; W.G. CLARK
CONSTRUCTION GROUP, INC., a
Washington Corporation; SAFECO
INSURANCE COMPANY OF
AMERICA; and the UNIVERSITY OF
WASHINGTON,

Defendants.

The Honorable Ricardo S. Martinez

Case No. 2:12-cv-01252-RSM

DECLARATION OF MASAKI
JAMES YAMADA IN SUPPORT
OF W.G. CLARK'S
SUPPLEMENTAL BRIEF

NOTE ON MOTION CALENDAR:
Monday, December 3, 2012

DECLARATION OF
MASAKI JAMES YAMADA – 1

LAW OFFICES OF
AHLERS & CRESSMAN PLLC
999 THIRD AVENUE, SUITE 3800
SEATTLE, WASHINGTON 98104-4088
(206) 287-9900 Fax: (206) 287-9902

1 Masaki James Yamada, being first duly sworn on oath, deposes and says:

2 1. I am one of the attorneys for Defendant W.G. Clark Construction
3 Group, Inc. ("W.G. Clark"). I have personal knowledge of the facts contained in this
4 Declaration.

5 2. Attached hereto as **Exhibit A** are true and correct copies of Notices of
6 Appeal filed by the Trust Funds and Carpenters on November 6, 21012 with King
7 County Superior Court.

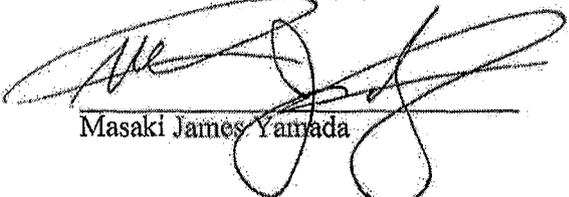
8 3. Attached hereto as **Exhibit B** is a true and correct copy of the Trust
9 Funds' Proof of Service of the Statement of Grounds for Direct Review filed with the
10 Washington Supreme Court on November 21, 2012.

11 4. Attached hereto as **Exhibit C** is a true and correct copy of the Order of
12 Dismissal of Paramount Scaffold's Chapter 11 cases in the United States Bankruptcy
13 Court in the Central District of California, Los Angeles Division.

14 5. Attached hereto as **Exhibit D** are true and correct copies of the check
15 (redacted) dated June 20, 2012, issued to the Trust Funds by Paramount Scaffold's
16 bankruptcy trustee and correspondence between the bankruptcy trustee and Trust Funds
17 (James O'Connor) showing the breakdown of payment for the post-petition period of
18 January 2012 to March 2012.

19 I declare under penalty of perjury under the laws of the state of Washington that
20 the foregoing is true and correct.

21 Dated this 26th day of November, 2012, at Seattle, Washington.

22
23
24 
Masaki James Yamada

DECLARATION OF
MASAKI JAMES YAMADA - 2

LAW OFFICES OF
AHLERS & CRESSMAN PLLC
999 THIRD AVENUE, SUITE 3800
SEATTLE, WASHINGTON 98104-4088
(206) 287-9900 Fax: (206) 287-9902

1 **CERTIFICATE OF SERVICE**

2 The undersigned declares under penalty of perjury under the laws of the State of
3 Washington that I am now and at all times herein mentioned a resident of the State of
4 Washington, over the age of eighteen years, not a party to or interested in the above-
5 entitled action, and competent to be a witness herein.

6 On the date given below, I caused this document to be served upon designated
7 counsel:

8 Jeffrey G. Maxwell, WSBA #33503
9 Ekman, Bohrer & Thulin, P.S.
10 Queen Anne Square
220 W Mercer Street, Suite 400
Seattle, WA 98119
Attorneys for Plaintiffs

Karin L. Nyrop, WSBA #14809
Senior Assistant Attorney General
Washington Attorney General's Office
University of Washington Division
4333 Brooklyn Avenue NE, 18th Floor
Seattle, WA 98105
Attorneys for University of Washington

- 11 Via U.S. Mail
12 Via Legal Messenger
13 Via Facsimile
14 Via Electronic Mail
 CM/ECF System

- Via U.S. Mail
 Via Legal Messenger
 Via Facsimile
 Via Electronic Mail
 CM/ECF System

15 DATED: This 26th day of November, 2012, at Seattle, Washington.

16
17 s/ Kathleen A. Walker
18 Kathleen A. Walker
19
20
21
22
23
24

DECLARATION OF
MASAKI JAMES YAMADA - 3

LAW OFFICES OF
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999 THIRD AVENUE, SUITE 3800
SEATTLE, WASHINGTON 98104-4088
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Exhibit C

1 RON BENDER (SBN 143364)
2 KRIKOR J. MESHEFEJIAN (SBN 255030)
3 LEVENE, NEALE, BENDER, YOO & BRILL L.L.P.lomeli
4 10250 Constellation Boulevard, Suite 1700
5 Los Angeles, California 90067
6 Telephone: (310) 229-1234
7 Facsimile: (310) 229-1244
8 Email: rb@lnbyb.com; kjm@lnbyb.com
9 Attorneys for Chapter 11 Debtors and Debtors in Possession

FILED & ENTERED
JUN 04 2012
CLERK U.S. BANKRUPTCY COURT
Central District of California
BY gonzalez, DEPUTY CLERK

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

9 In re:) Lead Case No.: 2:11-bk-61158-ER
10)
11 PARAMOUNT SCAFFOLD, INC.,) Jointly administered with:
12) 2:11-bk-61186-ER
13 Debtor and Debtor in Possession.) (Paramount Scaffold Gulf Region, Inc.)
14)
15 In re:) Chapter 11 Cases
16)
17 PARAMOUNT SCAFFOLD GULF) **ORDER: (1) APPROVING THE**
18 REGION, INC.,) **DISMISSAL OF THE DEBTORS'**
19 Debtor and Debtor in Possession.) **CHAPTER 11 CASES; (2) APPROVING OF**
20) **THE DEBTORS' PROPOSED**
21) **DISTRIBUTION OF THE ESTATES'**
22) **FUNDS; (3) AUTHORIZING THE**
23) **DEBTORS TO ASSIGN CERTAIN**
24) **PERSONAL PROPERTY LEASES TO THE**
25) **BUYER OF THE DEBTORS' ASSETS AND**
26) **APPROVING SUBLEASE AGREEMENT**
27) **WITH BUYER; (4) APPROVING THE**
28) **RECEIVER'S ACTIVITIES IN THE**
) **DEBTORS' CHAPTER 11 CASES,**
) **TERMINATING THE RECEIVER, AND**
) **EXONERATING THE RECEIVER'S**
) **BONDS, AND (5) APPROVING THE**
) **FINAL RECONCILIATION AND**
) **SETTLEMENT AGREEMENT WITH THE**
) **LIQUIDATION AGENT**
)
) Date: May 23, 2012
) Time: 11:00 a.m.
) Place: Courtroom "1568"
) 255 East Temple Street
) Los Angeles, CA 90012

- Affects Both Debtors
 Affects Paramount Scaffold, Inc. only
 Affects Paramount Scaffold Gulf Region, Inc. only

1 A hearing was held on May 23, 2012, at 11:00 a.m. for the Court to consider the motion
2 (the "Motion") brought by Paramount Scaffold, Inc. ("Paramount Scaffold") and Paramount
3 Scaffold Gulf Region, Inc. ("Paramount Gulf"), Chapter 11 debtors and debtors in possession
4 (collectively, the "Debtors"), for entry of an order of the Court: (1) approving of the dismissal of
5 the Debtors' Chapter 11 bankruptcy cases; (2) approving of the Debtors' proposed distribution of
6 the estates' remaining funds; (3) authorizing the Debtors to assign various of their leases to the
7 buyer of the Debtors' assets and approving a sublease agreement with the buyer; (4) approving
8 the Receiver's activities in the Debtors' Chapter 11 cases, terminating the Receiver, and
9 exonerating the Receiver's Bonds; and (5) approving and authorizing the Debtors to enter into a
10 Final Reconciliation and Settlement Agreement with the Liquidation Agent. Appearances were
11 made at the hearing on the Motion as set forth on the record of the Court.
12

13
14 The Court, having reviewed and considered the Motion and all pleadings filed by the
15 Debtors in support of the Motion, including the Declaration of Andrew De Camara annexed to the
16 Motion (the "De Camara Declaration"), the objection to the Motion filed by King County,
17 Washington, the statements, arguments and representations of the parties made at the hearing on
18 the Motion, and the complete record of these cases, and good cause appearing,

19 HEREBY ORDERS AS FOLLOWS:¹

- 20
21 1. The Debtors' Chapter 11 bankruptcy cases are hereby dismissed.
22 2. The reimbursement to the Liquidation Agent of the \$1.25 million that the
23 Liquidation Agent previously paid to the Debtors (which was paid directly to the Bank) is hereby
24 approved, and the payment to the Liquidation Agent of the \$350,000 Base Fee and reimbursement
25

26 ¹ All defined terms used in this Order which are not specifically defined herein shall have the
27 same definitions as provided to such terms in the Motion.
28

1 to the Liquidation Agent of \$161,541 of expenses which were incurred by the Liquidation Agent
2 is hereby approved. The Liquidation Agent is hereby excused from the need to file any further
3 application with the Court for approval of any fees or expenses. With the consent of the
4 Liquidation Agent, the Liquidation Agent shall not be paid any further sums by the Debtors,
5 including the additional performance based fee in the amount of \$63,395 which the Liquidation
6 Agent contends remains owing by the Debtors. The Final Reconciliation and Settlement
7 Agreement in the form attached as Exhibit "5" to the De Camara Declaration is approved, and the
8 Estate Representative is authorized to enter into the Final Reconciliation and Settlement
9 Agreement on behalf of the Debtors.
10

11 3. Upon entry of this Order (unless it occurs earlier), the Liquidation Agent shall turn
12 over to the Estate Representative the \$1,738,459 of net sale proceeds remaining ("Net Sale
13 Proceeds").
14

15 4. Following the entry of this Order, the Estate Representative shall distribute the Net
16 Sale Proceeds and additional funds in the possession of the Estate Representative remaining from
17 the Debtors' pre-sale business operations, subject to the \$28,996.35 segregation of funds
18 described in paragraph 12 below, in the following manner:

19 i. \$1,281,003.65 will be paid to the Bank upon the receipt of which the Bank
20 has agreed to waive its unsecured deficiency claim.
21

22 ii. approximately \$455,204 of outstanding post-petition operating expenses
23 which were incurred in operating the Debtors' business will be paid in accordance with the
24 schedule attached as Exhibit "1" to the De Camara Declaration.

25 iii. \$183,225 of professional fees and expenses and United States Trustee fees
26 will be paid in the manner set forth in Exhibit "1" to the De Camara Declaration, with all such
27

28

1 professionals excused from the need to file any further application with the Court for approval of
2 any fees or expenses.

3 iv. \$50,000 will be distributed to counsel for the Creditors' Committee which
4 will, in turn, distribute those funds to creditors on a pro rata basis in accordance with the schedule
5 attached as Exhibit "2" to the De Camara Declaration after deducting the expenses incurred in
6 making the distribution, recognizing that, with the consent of the Bank, the Bank will not share in
7 the distribution of these funds on account of the Bank's deficiency claim.

9 5. The Debtors are hereby authorized to assign to CAS the following lease
10 conditioned upon CAS paying the cure amount set forth below to the respective lessor
11 concurrently with accepting the assignment of such lease from the Debtors:

Lessor	Vehicles/Equipment	Estimated Cure Amount
Enterprise Fleet Management	All equipment lease pursuant to Lease Nos. LA50L6, LA00Q9, LA2V62, LA2T23, LA2V61, LA2V63	\$13,410.05

16 The Court hereby orders that the Cure Amount set forth above is the cure amount which
17 CAS must pay to the respective lessor to enable the Debtors to satisfy the cure requirements of
18 Section 365(b)(1)(A) of the Bankruptcy Code with respect to the assignment of the lease.

19 6. The Debtors' sublease agreement with CAS, attached as Exhibit "3" to the De
20 Camara Declaration, is hereby approved conditioned upon CAS paying any and all rent and other
21 charges under all of the Debtors' leases which are the subject of the Sublease (collectively, the
22 "Subleased Premises"), during the entire term of the Sublease. The Debtors' rejection of all of
23 the leases which are the subject of the Sublease is approved effective upon the expiration of the
24 term of the Sublease.

25 7. In the event the Debtors receive money back from an audit of their workers
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27
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1 compensation insurance, the Debtors shall pay such funds to the Bank on account of its secured
2 claim.

3 8. The actions and activities undertaken by the Receiver throughout the Debtors'
4 Chapter 11 cases, as either or both the Receiver and/or the Estate Representative, are approved.

5 9. The Receivership is terminated.

6 10. The Receiver and his staff are discharged of all liability.

7 11. All bonds posted by the Receiver are exonerated.

8 12. The Debtors shall deposit the sum of \$28,996.35 into a segregated account pending
9 the entry of an order of the Court determining the allowed tax claim of King County.
10 Notwithstanding the dismissal of the Debtors' Chapter 11 cases, the Court will retain jurisdiction
11 over the Debtors to determine the allowed tax claim of King County. King County shall be
12 required to file its proof of claim by July 31, 2012. The Debtors and any other party in interest
13 shall file any objection they have to the King County tax claim by August 31, 2012. The Debtors
14 will calendar the matter for hearing before the Court. To the extent the Court allows the claim of
15 King County in an amount which is less than \$28,996.35, the difference shall be paid to the Bank
16 on account of its secured claim.
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25 DATED: June 4, 2012



United States Bankruptcy Judge

1 NOTE: When using this form to indicate service of a proposed order, DO NOT list any person or entity in Category I. Proposed orders
2 do not generate an NEF because only orders that have been entered are placed on the CM/ECF docket.

3 **PROOF OF SERVICE OF DOCUMENT**

4 I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business
5 address is: 10250 Constellation Blvd., Suite 1700, Los Angeles, CA 90067.

6 A true and correct copy of the foregoing document described as: ORDER: (1) APPROVING THE
7 DISMISSAL OF THE DEBTORS' CHAPTER 11 CASES; (2) APPROVING OF THE DEBTORS'
8 PROPOSED DISTRIBUTION OF THE ESTATES' FUNDS; (3) AUTHORIZING THE DEBTORS TO
9 ASSIGN CERTAIN PERSONAL PROPERTY LEASES TO THE BUYER OF THE DEBTORS' ASSETS
10 AND APPROVING SUBLEASE AGREEMENT WITH BUYER; (4) APPROVING THE RECEIVER'S
11 ACTIVITIES IN THE DEBTORS' CHAPTER 11 CASES, TERMINATING THE RECEIVER, AND
12 EXONERATING THE RECEIVER'S BONDS, AND (5) APPROVING THE FINAL RECONCILIATION AND
13 SETTLEMENT AGREEMENT WITH THE LIQUIDATION AGENT. will be served or was served (a) on the
14 judge in chambers in the form and manner required by LBR 5005-2(d); and (b) in the manner indicated
15 below:

16 **I. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF")** – Pursuant to
17 controlling General Order(s) and Local Bankruptcy Rule(s) ("LBR"), the foregoing document will be served
18 by the court via NEF and hyperlink to the document. On May 23, 2012, I checked the CM/ECF docket for
19 this bankruptcy case or adversary proceeding and determined that the following person(s) are on the
20 Electronic Mail Notice List to receive NEF transmission at the email address(es) indicated below:

21 N/A

22 **II. SERVED BY U.S. MAIL** (Indicate method for each person or entity served):

23 On May 23, 2012, I served the following person(s) and/or entity(ies) at the last known address(es) in this
24 bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in
25 the United States Mail, first class, postage prepaid, and/or with an overnight mail service addressed as
26 follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later
27 than 24 hours after the document is filed.

28 Counsel for King County
Verna Bromley/Margaret A. Pahl
516 3rd Avenue, W-400
Seattle, WA 98104

29 **III. SERVED BY PERSONAL DELIVERY** (Indicate method for each person or entity served): Pursuant to
30 F.R.Civ.P. 5 and/or controlling LBR, on May 23, 2012, I served the following person(s) and/or entity(ies) by
31 personal delivery, or (for those who consented in writing to such service method), by facsimile transmission
32 and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on the judge
33 will be completed no later than 24 hours after the document is filed.

34 Hon. Ernest M. Robles
35 U.S. Bankruptcy Court
255 E. Temple Street
36 Los Angeles, CA 90012

37 I declare under penalty of perjury under the laws of the United States of America that the foregoing is true
38 and correct.

39 May 23, 2012 Lourdes Cruz /s/ Lourdes Cruz
40 Date Type Name Signature

41 This form is mandatory. It has been approved for use by the United States Bankruptcy Court for the Central District of California.

42 August 2010

F 9013-3.1.Proof.Service

NOTE TO USERS OF THIS FORM:

- 1) Attach this form to the last page of a proposed Order or Judgment. Do not file as a separate document.
- 2) The title of the judgment or order and all service information must be filled in by the party lodging the order.
- 3) **Category I.** below: The United States trustee and case trustee (if any) will always be in this category.
- 4) **Category II.** below: List ONLY addresses for debtor (and attorney), movant (or attorney) and person/entity (or attorney) who filed an opposition to the requested relief. DO NOT list an address if person/entity is listed in category I.

NOTICE OF ENTERED ORDER AND SERVICE LIST

Notice is given by the court that a judgment or order entitled: ORDER: (1) APPROVING THE DISMISSAL OF THE DEBTORS' CHAPTER 11 CASES; (2) APPROVING OF THE DEBTORS' PROPOSED DISTRIBUTION OF THE ESTATES' FUNDS; (3) AUTHORIZING THE DEBTORS TO ASSIGN CERTAIN PERSONAL PROPERTY LEASES TO THE BUYER OF THE DEBTORS' ASSETS AND APPROVING SUBLEASE AGREEMENT WITH BUYER; (4) APPROVING THE RECEIVER'S ACTIVITIES IN THE DEBTORS' CHAPTER 11 CASES, TERMINATING THE RECEIVER, AND EXONERATING THE RECEIVER'S BONDS, AND (5) APPROVING THE FINAL RECONCILIATION AND SETTLEMENT AGREEMENT WITH THE LIQUIDATION AGENT, was entered on the date indicated as "Entered" on the first page of this judgment or order and will be served in the manner indicated below:

I. SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF") - Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s), the foregoing document was served on the following person(s) by the court via NEF and hyperlink to the judgment or order. As of May 23, 2012, the following person(s) are currently on the Electronic Mail Notice List for this bankruptcy case or adversary proceeding to receive NEF transmission at the email address(es) indicated below.

- Ron Bender rb@lnbyb.com
- Scott E Blakeley seb@blakeleyllp.com, ecf@blakeleyllp.com
- Ronald Clifford rclifford@blakeleyllp.com, ecf@blakeleyllp.com; seb@blakeleyllp.com
- Barry S Glaser bglaser@swllaw.com
- James Andrew Hinds jhinds@jhindsllaw.com
- Kyle J Mathews kmathews@sheppardmullin.com
- Jordan D Mazur jmazur@unioncounsel.net
- Krikor J Meshefejian kjm@lnbrb.com
- Peggy Pahl peggy.pahl@kingcounty.gov, peggy.pahl@kingcounty.gov
- Christian L Ralsner bankruptcycourtnotices@unioncounsel.net, cralsner@unioncounsel.net
- United States Trustee (LA) ustprejion16.la.ecf@usdoj.gov
- Hatty K Ylp hatty.ylp@usdoj.gov

Service information continued on attached page

II. SERVED BY THE COURT VIA U.S. MAIL: A copy of this notice and a true copy of this judgment or order was sent by United States Mail, first class, postage prepaid, to the following person(s) and/or entity(ies) at the address(es) indicated below:

Debtor
Paramount Scaffold, Inc.
16525 S. Avalon Blvd.
Carson, CA 90746

Service information continued on attached page

III. TO BE SERVED BY THE LODGING PARTY: Within 72 hours after receipt of a copy of this judgment or order which bears an "Entered" stamp, the party lodging the judgment or order will serve a complete copy bearing an "Entered" stamp by U.S. Mail, overnight mail, facsimile transmission or email and file a proof of service of the entered order on the following person(s) and/or entity(ies) at the address(es), facsimile transmission number(s), and/or email address(es) indicated below:

This form is mandatory. It has been approved for use by the United States Bankruptcy Court for the Central District of California.

August 2010

F 9021-1.1 Notice Entered Order

OFFICE RECEPTIONIST, CLERK

To: Masaki Yamada
Cc: Jeffrey G. Maxwell; dshanley@deconsel.com; John Ahlers; Glory LaFontaine; Katie A. Walker; ncaywood@deconsel.com; j.weaver@ekmanbohrer.com; Jordan Olson; Thao Do
Subject: RE: W.G. Clark v. Carpenters Trusts | Cause No. 88080-8 - Respondent Brief

Rec'd 4-19-13

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Masaki Yamada [<mailto:myamada@ac-lawyers.com>]
Sent: Friday, April 19, 2013 1:51 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Jeffrey G. Maxwell; dshanley@deconsel.com; John Ahlers; Glory LaFontaine; Katie A. Walker; ncaywood@deconsel.com; j.weaver@ekmanbohrer.com; Jordan Olson; Thao Do
Subject: W.G. Clark v. Carpenters Trusts | Cause No. 88080-8 - Respondent Brief

Clerk of the Court,

We represent the Respondent W.G. Clark Construction Co. in Cause No. 88080-8. Attached for filing are the following documents:

1. Respondent W.G. Clark Construction's Brief in Response to Appellant Trust Funds' Brief; and
2. Proof of Service

Counsel for appellant Trust Funds and Carpenters Union are copied on this email per an email service agreement dated December 5, 2012. If you have any questions or need anything further from our office, please do not hesitate to contact us. We appreciate you filing these documents and your attention to this matter.

Regards,
Saki Yamada

Masaki James Yamada

AHLERS & CRESSMAN PLLC
999 THIRD AVENUE, SUITE 3800
SEATTLE, WA 98104
Phone: 206-287-9900
Direct: 206-529-3015
Fax: 206-287-9902
myamada@ac-lawyers.com
www.ac-lawyers.com

ATTORNEY CLIENT PRIVILEGE CONFIDENTIAL COMMUNICATION. This message contains information which may be confidential and privileged. Unless you are the addressee (or authorized to receive for the addressee), you may not use, copy or disclose to anyone the message or any information contained in the message. If you have received the message in error, please advise the sender by reply e-mail at myamada@ac-lawyers.com and delete the message.