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## I. INTRODUCTION

Olson Brothers has submitted a Motion on the Merits/Response which mischaracterizes both the record and Point Ruston's position on appeal.

As set forth below, Olson Brothers' brief is replete with factual claims for which there is not the slightest support in the record. And, Olson Brothers wrongly claims that, by pursuing this frivolous lien proceeding, Point Ruston "seeks to avoid payment." Motion on the Merits, p. 4. Olson Brothers' right to seek payment is not at issue in this case—only its right to tie up all of Point Ruston's property by lien pending resolution of its claims.

Because Olson Brothers did not establish that it timely filed its claim of lien, its lien claim should be dismissed in its entirety. In addition, because Olson Brothers wrongfully purported to lien property that was not described in its contract, and which it did not improve, the trial court should, in the alternative, have limited Olson Brothers' lien only to the Stack Hill property.

## II. OBJECTION TO OLSON BROTHERS' STATEMENT OF FACTS

Olson Brothers' statement of "facts" consists almost entirely of "facts" that do not have the slightest evidentiary support anywhere in the record. The Court should not consider these so-called "facts."

A statement of the case contained in an appellate brief is supposed to contain “a fair statement of the facts and procedure relevant to the issues presented for review, without argument. A reference to the record must be included for each factual statement.” RAP 10.3(5).

Factual statements contained in a brief should be supported by citations of the evidence in the record that supports the claimed fact. RAP 10.4(f). *See Litho Color, Inc. v. Pacific Employers Ins. Co.*, 98 Wn. App. 286, 305, 991 P.2d 638 (1999). Evidence consists of the sworn testimony of witnesses, and of exhibits properly considered by the court. WPI 1.01, 1.02. “Argument of counsel does not constitute evidence.” *Green v. A.P.C.*, 136 Wn.2d 87, 100, 960 P.2d 912 (1998).

In this matter, the trial court acted based solely on written declarations that had been submitted by the parties. Point Ruston submitted three declarations:

- Verified Complaint (CP 01-44);<sup>1</sup>
- Declaration of Keith Daniel (CP 50-51); and
- Supplemental Declaration of Keith Daniel (CP 97-106).

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<sup>1</sup> A verified complaint is affirmed by a witness under penalty of perjury. It is therefore “the equivalent of an affidavit.” *Gordon v. Seattle-First Nat'l Bank*, 49 Wn.2d 728, 731, 306 P.2d 739 (1957). A declaration is also the equivalent of an affidavit. *See* RCW 9A.72.085.

In response, Olson Brothers also submitted three declarations:

- Declaration of Steve Olson (CP 74-81);
- Declaration of Scott Jamison (CP 82-87); and
- Declaration of Larry Folden (CP 88-91).

These six declarations comprise the entire set of evidence before the Court.

The three declarations submitted by Olson Brothers are remarkable. Olson Brothers' declarants do not, in any way, purport to directly address the merits of the issues before the Court. Instead, in each declaration, the declarant simply describes an exhibit or exhibits. Olson Brothers bases its case entirely on those exhibits.

However, in its recitation of the "facts," Olson Brothers does not confine itself to describing these evidentiary materials or the factual inferences which it claims can be drawn from them. Instead, Olson Brothers repeatedly recites "facts" that do not have the slightest evidentiary basis in the record.

The factual claims contained in Olson Brothers' brief that are not supported by the record include the following:

- *"The contract also included a legal description of the project as originally contemplated, although that legal description*

*changed as time went by.*” Motion on the Merits, p. 2. The “fact” that the legal description somehow changed is not supported by citation to any evidentiary material in the record, and there is nothing in the record to support this claim.

- *“Its [Olson Brothers’] work included hauling dirt from the property originally contemplated in the contract to adjacent and surrounding properties owned by Point Ruston.” RP at 14.* Motion on the Merits, p. 2. The citation is the statement made by counsel during oral argument. No evidence in the record even remotely supports this alleged “fact.”
- *“Throughout the duration of the Stack Hill job, at the request of Point Ruston[,] Olson frequently performed work and supplied equipment and materials not contemplated in the original contract, as [is] typical in large excavation and construction jobs.” CP 53, RP 10-13.* Motion on the Merits, p. 2. The citations are to counsel’s brief (which in turn does not cite to anything in the record), and to statements made by counsel during oral argument. There is nothing in evidence that even remotely supporting this alleged “fact.”
- *“Fraught with financial difficulties as the Olson’s work drew to a close, Point Ruston became late with its payments to Olson, and ultimately ceased payments altogether, at which point Olson ceased submitting further billing statements.” CP 53.* Motion on the Merits, p. 2-3. The citation is to counsel’s brief. There is no evidentiary material in the record even remotely supporting this alleged “fact.”
- *“This Daily Foreman’s Report [attached to the Declaration of Larry Folden at CP 90-91] shows that three Olson employees worked a total of approximately 31 hours at the Stack Hill job on May 27, 2008.”* Motion on the Merits, p. 3. Even if it were admissible, the report does not describe the location at which the three employees allegedly performed work.

- “[T]he June 20 daily foreman’s report shows that Larry Folden was at the Stack Hill site on June 10, 2008, in part to discuss billing and payment issues.” Motion on the Merits, p. 3. Even if it were admissible, the report does NOT purport to describe where Mr. Folden was on June 20, 2008.
- “Notwithstanding the fact that its own spreadsheet shows that Olson contributed a total of \$2,023,307.97 in labor and equipment to the project, Point Ruston now seeks to avoid payment.” Motion on the Merits, p. 4. There is no evidentiary material in the record suggesting that the spreadsheet records anything other than what Olson Brothers claims it was owed (as opposed to what Point Ruston agrees that Olson Brothers is entitled to be paid).
- “The spreadsheet also shows a total of more than 140 change orders throughout the course of the job, all of which were approved in writing by Point Ruston prior to the change work.” Motion on the Merits, p. 4. There is nothing in the record showing that Point Ruston approved 140 change orders in writing prior to the change work.

In addition, Olson Brothers makes generalized, uncited factual claims throughout its brief that are prefaced by such phrases as “it is well known that . . .” or “Invariably . . .” See, e.g., Motion on the Merits, p. 7, 10. These statements are each wholly unsupported by any evidence actually in the record. At best, they can be construed as requests that the Court, on appeal, take judicial notice of “facts” of a kind that plainly are not subject to judicial

notice. ER 201(b). The Court should decline to consider each of these “factual” claims.

Finally, Olson Brothers cites the Court to its unverified answer. Motion on the Merits, p. 14. An unverified pleading is not evidence. And in any event, Olson Brothers did not file its unverified answer until September 23, 2008—well after September 15, 2008, the date the trial court made its decision. CP 107-08. Because it was not before the trial court at the time the trial court made its decision, Olson Brothers’ unverified answer is not properly before this Court. See RAP 9.12.

In sum, Olson Brothers’ recitation of the “facts” is improper. It cannot reasonably be characterized as a good faith description of the evidence actually contained in the record before the trial court at the time it ruled, as is required by RAP 10.3(5). The Court should decline to consider each of the challenged factual statements.

### **III. ANALYSIS**

There are two issues presented to the Court in this frivolous lien action. First, was Olson Brothers’ claim of lien frivolous because it was filed more than 90 days after the date Olson Brothers last performed work on the

Stack Hill job site? Second, was Olson Brothers' claim of lien frivolous or clearly excessive to the extent it purported to lien substantial quantities of property owned by Point Ruston other than the property on which Olson Brothers had contracted to perform work?

The answer to both of these questions is "yes." Olson Brothers did not show that it performed "labor" on the job site on or after May 24, 2008. Therefore, its lien should be dismissed in its entirety. And, Olson Brothers presented the court with no evidence that its work improved any property other than the project site described in the parties' contract. Therefore, the trial court should have, at a minimum, limited Olson Brothers' claim of lien only to that project site.

A. RCW 60.04.091 required Olson Brothers to file its lien within 90 days of the date it last performed labor.

As the party asserting the right to claim a lien, Olson Brothers had the burden of demonstrating that it had strictly complied with every requirement necessary to invoke the statute. *Pacific Industries, Inc. v. Singh*, 120 Wn. App. 1, 6, 86 P.2d 778 (2003). In particular, Olson Brothers had to demonstrate, pursuant to RCW 60.04.091, that it recorded its claim of lien

within 90 days of the date that it last furnished such labor, professional services, materials or equipment:

Every person claiming a lien under RCW 60.04.021 shall file for recording, in the county where the subject property is located, a notice of claim of lien not later than 90 days after the person has ceased to furnish labor, professional services, materials, or equipment . . . .

The period provided for recording the claim of lien is a period of limitation and no action to foreclose a lien shall be maintained unless the claim of lien is filed for recording within the 90-day period stated.

Olson Brothers recorded its claim of lien on August 22, 2008. CP 7.

Therefore, in order to satisfy its burden of demonstrating that it had complied with RCW 60.04.091, Olson Brothers had the burden of showing that it had furnished labor, professional services, materials or equipment on or after May 24, 2008, the 90<sup>th</sup> day preceding August 22, 2008.

The lien statute specifically defines the word "labor" as the "exertion of the powers the body or mind performed at the site for compensation." RCW 60.04.011(7) (emphasis added). Therefore, in order to show that it had performed "labor," Olson Brothers had to show that its employees: (a) exerted the powers of the body or mind; (b) at the site; (c) for compensation.

These facts relating to Olson Brothers' claim that it furnished "labor" on these dates are completely undisputed:

- Because the Stack Hill project site was part of an environmental remediation project, the site is fenced and gated, and access to the job site is restricted. CP 98.
- Point Ruston's site superintendent kept detailed records of which contractors were working on the site on any particular day, and what they were doing. *Id.*
- Point Ruston's records show, and Olson Brothers agrees, that Olson Brothers had a crew performing work on Monday, May 19, 2008. CP 100-101, 84-85.
- On May 20, 2008, Olson Brothers sent Point Ruston its final bill, in which describes its work as being "100 percent complete." CP 38-44.
- Point Ruston's records show, and Olson Brothers does not dispute, that Olson Brothers' crew performed no work at the job site on Tuesday, May 20, 2008; Wednesday, May 21, 2008; Thursday, May 22, 2008; or Friday, May 23, 2008. CP 98.
- Point Ruston's superintendent's log for Tuesday, May 27, 2008, show numerous other contractors working on the job site. His log shows Olson Brothers' crew was NOT on the job site. CP 102.
- Although Olson Brothers had carefully recorded and billed Point Ruston for all the work that Olson Brothers claims it had performed, Olson Brothers never billed Point Ruston for the work it alleges its crew performed on May 27, 2008. CP 02 (Verified Complaint, ¶ 5).

Olson Brothers relies on the reports attached to the declarations of Larry Folden and Scott Jamison to rebut this wholly undisputed evidence. Based solely on these reports, Olson Brothers claims that its crew performed "labor" on Tuesday, May 27, 2008, and that its foreman performed "labor" on June 20, 2008.

However, these reports were inadmissible hearsay. In any event, these reports do not establish that Olson Brothers performed "labor" as that term is defined by the lien statute.

1. The documents attached to Olson Brothers' witnesses' declarations were hearsay, and Olson Brothers did not establish an adequate foundation for their admission as business records.

First, the documents attached to Olson Brothers' witnesses' declarations were hearsay, and Olson Brothers did not establish an adequate foundation for their admission as business records.

The documents attached to Olson Brothers' witnesses' declarations are clearly hearsay. They contain written statements, made out of court, and not made under penalty of perjury. ER 801(c). Therefore, the contents of these documents were presumptively inadmissible. ER 802. Olson Brothers does not dispute this.

Olson Brothers did not lay a proper foundation for admitting these reports as records of a regularly conducted business activity. RCW 5.45.020 describes the foundation necessary to qualify a business record for admission as:

A record of an act, condition or event, shall insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation was such as to justify its admission.

Under the plain language of this statute, a person seeking to admit a document into evidence as a business record has the burden of establishing each of four separate foundational facts: (a) that the record describes an act, condition or event; (b) the record's mode of preparation; (c) that the record was made in the regular course of business; (d) that the record was made at or near the time of the act, condition or event it describes. In addition, the proponent of the record must convince the Court that the sources of information in the record, and the method and time of preparation, are such as to justify the record's admission into evidence. See *State v. Hopkins*, 134 Wn. App. 780, 789 at ¶ 26, 142 P.3d 1104 (2006).

Here, Olson Brothers did not establish each of the foundational facts necessary to admit these reports as business records. In particular, and very conspicuously, none of Olson Brothers' witnesses testified that the reports were prepared at or near the time of the events they purport to describe. See CP 83-83, 88-89. Therefore, these documents were not admissible.

In addition, the May 27, 2008 report on its face shows that it was completed by Larry Folden, a person who did not participate in the events the report purports to describe. Therefore, that report contains hearsay within hearsay. *State v. Barringer*, 32 Wn. App. 882, 650 P.2d 1129 (1982). See also *State v. Hendrickson*, 138 Wn. App. 827, 158 P.3d 1257 (2007). Because Olson Brothers did not lay any foundation for the admission of this interior hearsay, this report was not admissible for this second reason.

Finally, Olson Brothers was not entitled to rely exclusively on business records to establish a key element of its case. *Barringer*, 32 Wn. App. at 885. But that is exactly what Olson Brothers did here. Olson Brothers did not offer the testimony of any of its employees to show that the employees actually performed "labor" at the job site on or after May 24, 2008. Instead, Olson Brothers relied exclusively upon ambiguous and unexplained

statements contained in these hearsay reports, for whose admission Olson Brothers had not laid a proper foundation.

Olson Brothers argues that the court commissioner who heard this matter had the discretion to admit these reports into evidence. But the court commissioner **did not** rule that these reports were admitted. Instead, the court commissioner suggested that, to the extent Olson Brothers had not laid an adequate foundation for the admission of these reports, Olson Brothers would have the opportunity to cure the foundational problems at the time of trial:

The Court: I guess I do have one concern—

Mr. Spencer: What's that?

The Court: —in that—if it is correct that I am not allowed to—if the rules of evidence do apply, how do you get around the fact that this isn't—the spreadsheets are hearsay, that there is no attes—attes—attestation that they are actually—that they were the record holder or the—or the keeper of the record and—

Mr. Spencer: Your honor, they provided the documents. Now that's one thing. But if they are—those spreadsheets don't really matter. It is the document itself, which you have an affidavit that says these documents show and that's the normal course of business. That's a business record and—

The Court: Right.

Mr. Spencer: —they had the business record and that shows they were on the site.

The Court: I—

Mr. Spencer: That's how (inaudible)

The Court: I am ready to rule. I am going to deny the request to dismiss the lien as frivolous and I am not going to change anything at this point. I believe that there is significant issues that need to be raised obviously at trial and would be the best route for—for a decision to be made with regards to the accuracy, the veracity of all these things. . .

RP at 16-17.

The court commissioner's reasoning had two flaws: First, Olson Brothers had **not** laid an adequate foundation for the admission of these reports under the business record exception to the hearsay rule. Therefore, she erred in considering them for any purpose.

Second, the court commissioner fundamentally misunderstood the procedure applicable to a frivolous lien proceeding. The hearing the court commissioner conducted was not a hearing preliminary to a future trial. The hearing before the court commissioner **was** the trial in this frivolous lien proceeding. *W.R.P. Lake Union Ltd. Partnership v. Exterior Services, Inc.*, 85 Wn. App. 744, 750, 934 P.2d 722 (1997).

The reports were hearsay. Olson Brothers had not laid a proper foundation for their admission. Therefore, the trial court erred in considering them.

2. Even if the court commissioner had the discretion to consider the contents of these reports, they did not show that Olson Brothers performed any work at the site qualifying as lienable "labor."

Moreover, even if the court commissioner had the discretion to consider these reports, they did not show that Olson Brothers performed any work at the site qualifying as lienable "labor."

As set forth above, in order to qualify as lienable "labor," the work in question has to be performed at the job site. RCW 60.04.011(7). The reports which Olson Brothers attached to its witnesses declarations do not purport to show that Olson Brothers' employees performed any work at the Stack Hill job site. Although the May 27, 2008 report purports to describe work on a "site," it does not clearly describe what "site" is being referred to. CP 91. The June 20, 2008 report does not describe where the meeting with the "project manager" supposedly occurred (and, in any event, does not describe "labor" within in the meaning of the lien statute). CP 86-87.

Moreover, pursuant to RCW 60.04.011(7), in order to qualify as “labor,” the work must be performed “for compensation.” It is completely undisputed that Olson Brothers never billed Point Ruston, and thus never sought compensation for, the work described in these reports.

Olson Brothers also did not satisfactorily explain the contradiction between its own records. Olson Brothers certified in May 2008 that Olson Brothers had completed 100 percent of its work. CP 38-44. Olson Brothers, remarkably, purports to explain away this declaration by asserting that Olson Brothers was merely following an industry practice of submitting perjured testimony in order “to move things along.” Motion on the Merits at p. 10 (“Efficiency on large construction jobs dictates this industry practice to move things along.”). That is not an adequate explanation.

Finally, Olson Brothers did not explain—and even though Point Ruston specifically challenged Olson Brothers to do so in Point Ruston’s opening brief, Olson Brothers still has not explained—why Olson Brothers failed to offer the direct testimony of the individuals who allegedly performed this work in order to prove that its employees performed “labor” on or after May 24, 2008. Its failure to offer the testimony of witnesses under its control

give rise to the inference that its employees could not truthfully testify that they worked at the job site for compensation on May 27, 2008. See Lynott v. National Union Fire Ins. Co., 123 Wn.2d 678, 689, 871 P.2d 146 (1994).

Olson Brothers did not carry its burden of proving that it had performed lienable labor on or after May 24, 2008. Its lien claim should have been dismissed.

B. Olson Brothers submitted no admissible evidence establishing that its work had improved property other than that described in the Stack Hill contract.

For the reasons set forth above, the Court should hold that Olson Brothers' Claim of Lien was invalid and frivolous because it was not timely filed. However, in the alternative, the Court should hold that Olson Brothers' Claim of Lien was frivolous and clearly excessive to the extent that it purported to lien property other than that described in the contract pursuant to which Olson Brothers had performed its work.

Point Ruston, and only Point Ruston, submitted evidence addressed to this issue. In its Verified Complaint, Loren Cohen, Point Ruston's Project Manager, testified, under penalty of perjury, that Point Ruston and Olson Brothers entered into a contract for work at the Stack Hill project site, the

legal description of which site was attached to the Complaint as Exhibit C.  
CP 2 (Verified Complaint, III. Facts, ¶¶ 1-2 and Exhibit C). In the Verified  
Complaint, Mr. Cohen testified that:

Olson Brothers had subsequently recorded a claim of lien which purport[ed] to assert that Olson is claiming a lien against all the properties contained in the legal description attached to the Claim of Lien as Exhibit A. The properties described in said Exhibit A included numerous properties owned by Point Ruston that were not part of the Stack Hill project, and upon which Olson performed no work.

CP 3 (Verified Complaint, III. Facts at ¶ 9). Therefore, Mr. Cohen testified that Olson Brothers had improperly asserted its Claim of Lien against these other properties:

D. Olson has improperly asserted the claim against land that it is not entitled to lien.

1. The Mechanics' and Materialmen's Lien statute only authorizes a contractor to claim a lien on the "lot, tract or parcel of land which is improved." RCW 60.04.051.

2. Olson's Claim of Lien is frivolous, without reasonable cause and/or clearly excessive because Olson purports to claim a lien not merely upon the parcel improved by its work, but upon every piece of real property Point Ruston owns in the area, even though Olson performed no work upon and did nothing to arguably "improve" these properties.

CP at 3-4 (Verified Complaint, IV. Claim at ¶ B).

At the same time that it filed its Verified Complaint, Point Ruston also filed a motion asking the court to determine that Olson Brothers' Claim of Lien was frivolous. CP 45-49. The motion squarely raised this issue:

The burden is upon Olson as the claimant to establish a factual basis supporting its claim that its lien should extend to a specific parcel. *Wilhite v. Ludwig*, 154 Wash. 541, 543-44, 282 Pac. 847 (1929); *Dietz v. Bartell*, 120 Wash. 443, 445, 207 Pac. 663 (1922).

Here, Olson has purported to lien not only the "Stack Hill" parcel where it performed work, but also numerous additional parcels where it did not perform any work. Verified Complaint, ¶ 9. See also Verified Complaint, Exhibit C. Olson has not and cannot assert any tenable basis for claiming a lien with respect to these parcels. Therefore, even if the Court for some reason does not dismiss Olson's lien on the grounds that it was untimely, the Court should dismiss the lien to the extent it purports to be asserted against parcels upon which Olson performed no work.

CP 49.

When Olson Brothers filed its Responsive Brief and supporting declarations, Olson Brothers did not submit any evidence, whatsoever, alleging that its work had somehow improved other properties. CP 52-91. Olson Brothers did not attempt to explain why its Claim of Lien purported to encumber property other than that described in its contract. **Olson Brothers did not in any way dispute Point Ruston's claim on this issue.**

Point Ruston pointed this out in its reply brief:

Finally, Olson Brothers' lien is clearly excessive because it extends to real property on which it performed no work. Point Ruston clearly pointed out both the law and the facts in support of its claim in this regard in its original motion. Olson Brothers has not responded to this issue at all. Therefore, it has effectively conceded that its claim of lien is clearly excessive in this regard.

Therefore, even if the Court does not strike the claim of lien in its entirety, it should order that the lien be limited only to the real property that was improved, the legal description of which is attached to Point Ruston's Verified Complaint.

CP 96.

In its Motion on the Merits, Olson Brothers cites to exactly two portions of the record to suggest that it even contested this issue. See Motion on the Merits, p. 14. First, Olson Brothers cites counsel's statements made during oral argument. *Id.* (citing RP at 15). As previously noted, counsel's argument is not evidence. *Green v. A.P.C.*, 136 Wn.2d 87, 100, 960 P.2d 912 (1998).

Second, Olson Brothers cites the wholly conclusory denials contained in its unverified answer. *Id.* Because it was not verified, this answer is not evidence. In any event, Olson Brothers did not file this answer until well after

the trial court had made its decision. Therefore, it was not properly before the trial court, and it is not properly part of the record on review. See RAP 9.12. Olson Brothers has not, and cannot, cite to a single bit of evidence actually in the record to support its claim that it was entitled to lien any property other than that specific property which it had contracted to improve.

Finally, Olson Brothers argues that Point Ruston's briefing on this issue to the trial court had not been specific enough. The Court should reject this argument for three reasons.

First, Olson Brothers did not make this argument to the trial court. Therefore, it should not be considered on appeal. RAP 2.5(a).

Second, Loren Cohen of Point Ruston in fact testified directly, under penalty of perjury, that Olson Brothers' work had not improved any of Point Ruston's property other than that described in the Stack Hill contract. CP 3 (Verified Complaint, III. Facts, ¶ 9). What more could be expected of Point Ruston, which was in the position of attempting to prove a negative?

Finally, under the case law, once Point Ruston had clearly described this issue, the burden shifted to Olson Brothers to present evidence sufficient to make out a prima facie case as to how its work had improved each of the

parcels that it had liened. *Williams v. Athletic Field, Inc.*, 142 Wn. App. 753, 766 at ¶ 31, 139 P.3d 426 (2006). Olson Brothers submitted no such evidence.

In sum, the evidence presented to the trial court permitted, and permits, of only one conclusion: Olson Brothers' wrongfully purported to lien a substantial number of properties in addition to the Stack Hill property which it had contracted to improve. Point Ruston was, and is, entitled to have Olson Brothers' Claim of Lien limited to only that property described in Olson Brothers' contract and on which it performed work pursuant to that contract.

C. The Court should award Point Ruston its attorneys' fees.

Finally, pursuant to RCW 60.04.081(4), to the extent Point Ruston prevails on either of the issues it has raised, it is entitled to an award of its attorneys' fees, both before the trial court and on appeal. The Court should make an appropriate award of fees.

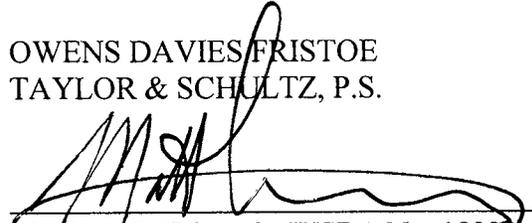
**IV. CONCLUSION**

Olson Brothers did not establish that it performed lienable work at any time within 90 days of the date it recorded its Claim of Lien. Therefore, its Claim of Lien should be dismissed in its entirety. At a bare minimum, Point

Ruston is entitled to dismissal of the Claim of Lien to the extent it purports to attach to properties other than that described in the Stack Hill contract.

DATED this 31 day of December, 2008.

OWENS DAVIES FRISTOE  
TAYLOR & SCHULTZ, P.S.

A handwritten signature in black ink, appearing to read 'M. Edwards', is written over a horizontal line.

Matthew B. Edwards, WSBA No. 18332  
Attorneys for Plaintiff Point Ruston, LLC

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY E DEPUTY

**CERTIFICATE OF SERVICE**

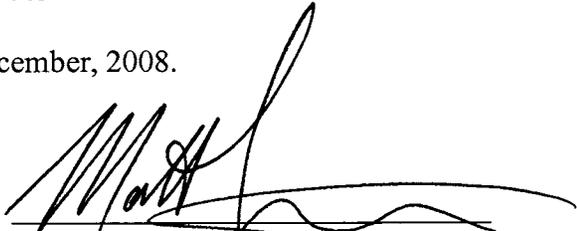
I hereby certify that I deposited a complete copy of Point Ruston's Reply Brief, including this Certificate of Service, with the United States Postal Service, first class postage prepaid, addressed to the following on this 31st day of December, 2008:

**John R. Spencer  
Michelle Branigan  
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I hereby further certify that I deposited the original and one copy of Point Ruston's Reply Brief, including this Certificate of Service, with the United States Postal Service, first class postage prepaid, addressed to the following on this 31<sup>st</sup> day of December, 2008.

**Court of Appeals, Division II  
950 Broadway, Suite 300  
Tacoma, WA 98402-4454**

DATED this 31 day of December, 2008.

  
Matthew B. Edwards, WSBA #18332