No. 103939-5

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

Kenneth Wren and Alice Wren, et al.

Petitioners.

vs.

DAVID G. WHITEHEAD, individually;

Respondent,

STANFORD AND SONS, LLC, a Washington limited liability company; HERBERT L. WHITEHEAD, III, JENNIFER L. WHITEHEAD, et al.

RESPONSE TO AMICUS CURIAE BRIEF OF CLAI

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APPENDIX

1. Trial Exhibit 100, Bates Stamped KW 000045, as provided to the Court of Appeals on or about November 17, 2023 in associated cases 58269-4 and 58272-4

A. Identity of Petitioners

Petitioners Kenneth and Alice Wren submit this Response in support of the Memorandum of the Commercial Law Amicus Initiative ("CLAI").

B. Statement of Facts

Contrary to the unsupported factual contentions of David "Gage" Whitehead at page one of his May 27, 2025 Response to Amicus Curiae Brief, the Wrens were not the only secured creditors of Stanford and Sons, LLC. During the first day of trial of this matter on February 13, 2023, fact witness and attorney James Aiken testified as to the identity of other secured creditors of Stanford and Sons. VRP Vol. 1, pp. 66-67. Mr. Aiken so testified in conjunction with Trial Exhibit 100, which was admitted at that time. Id. (A copy of Trial Exhibit 100 is attached to this response for the convenience of the Court.)

Exhibit 100 is a UCC Search Report on Stanford and Sons, LLC as Debtor. It lists the secured creditors ("Secured

Parties") of that entity. As the Court can see from Exhibit 100, Stanford and Sons had more than one secured creditor with perfected security interests in the assets of Debtor Stanford and Sons. As Exhibit 100 indicates, the secured creditors of Stanford and Sons both pre-dated and post-dated the perfection of the Wrens' UCC-1 Filing. It is also appropriate to observe that Exhibit 100 lists only the secured creditors of Stanford and sons, with no *unsecured* creditors listed therein.

C. Argument

In addition to Gage Whitehead's factually-false assertion that the Wrens were Stanford and Sons' only secured creditor, Mr. Whitehead makes an obvious error of law related to the CLAI's Memorandum and the proper application of RCW 62A.9A-102(20).

As the CLAI forcefully argues at pages 7 to 12 of its Memorandum, the inclusion of the plural "s" in RCW 62A.9A-102(20)(A)(iii) serves significant policy purposes of the

Uniform Commercial Code, and that inclusion is and was intentional.

RCW 62A.9A-102(20)(A)(iii) reads in relevant part:

> (20) "Consignment" means a transaction, regardless of its form, in which a person delivers goods to a merchant for the purpose of sale and:
>
> (A) The merchant: . . .
>
> iii) Is not generally known by its creditors to be substantially engaged in selling the goods of others;

(Underlined emphasis added.) What no doubt jumps out at the Court from the underlined portion of this quotation is the complete omission of the words "secured" or "unsecured" from the phrase "by its creditors." By omitting both of those words, the plain meaning of the statute applies to the universe of all creditors, meaning both those that are secured and those that are unsecured.

The CLAI argues at page 10 of its Memorandum that it took incredible hubris for the Delaware bankruptcy court to disregard an obviously-plural use of the word "creditors" in the UCC. It takes even more hubris, indeed it is absurd, for Gage

Whitehead to argue that this Court should *presume* that the *omission* by both the UCC and the Washington State Legislature of the words "secured" and/or "unsecured" from in front of the word "creditors" was accidental, and to then *sua sponte* decide to insert the word "secured" into that phrase of the statute to serve the personal interests of Gage Whitehead. Indeed, as recently as April 17, 2025, this Court held that it "must not add words where the legislature has chosen not to include them." Brown v. Old Navy, LLC, 567 P.3d 38, 43 (4/25/2025), *citing* Rest. Dev., Inc. v. Cananwill, Inc., 150 Wash.2d 674, 682, 80 P.3d 598 (2003).

Finally, Gage Whitehead argues that the issues related to the erroneous interpretation of consignment law under Article 9 were not raised below. Whitehead then relies on RAP 2.5(a), which states that the "appellate court *may* refuse to review any claim of error which was not raised in the trial court", as a reason why this Court should ignore what is now established to be plain error below.

Like Gage Whitehead's assertion that the Wrens were Stanford and Sons' only secured creditor, the assertion that the Wrens failed to object to the instructions, and special jury questions, at issue here is simply wrong. For instance, in one extended colloquy between the trial court and counsel regarding the instructions and special verdict questions, the trial court and Wrens' counsel dug into the public policy issues relevant here. *See* VRP Vol. 10, p. 1310, ll. 11 to 1312, l. 8.

Just like the Delaware bankruptcy court went wrong in the In re TSAWD Holdings cases, Superior Court Judge Rumbaugh incorrectly stated (i.e., held) that:

> THE COURT: It seems to me that once you know that there is a substantial engagement in consignment, that puts you on notice that some of the vehicles in the inventory may not belong to PCAT and may not be subject to a security interest because those are just being consigned and the actual owner is somebody other than PCAT.

VRP Vol. 10, p. 1310, l. 11. Here, the "you" meant Kenny Wren, and Kenny Wren alone. The Wrens' counsel and the

trial court then engaged in a back-and-forth on policy issues that reflects the same types of problems and legal issues discussed by the CLAI in its Memorandum

In addition to raising these issues in the trial court, the Wrens also presented them on appeal. For instance, in their Petition for Review, at pages 29-31, the Wrens relied on the UCC Permanent Editorial Board ("PEB") Publication No. 20 Commentary, specifically its pp. 5-8, notes 29 and 37, and also on Official Comment 14 to §9-102, in arguing that the Court of Appeal's Decision is erroneous. Both of those legal authorities drive home the point that the focus of Special Verdict Form Question 1, on what the Wrens *alone* knew about Stanford and Sons, was in error. CP000511 The Wrens have at all times contended that this Special Verdict Question 1 was an incorrect statement of the law and constitutes reversable error.

D. Conclusion

"The purpose of an amicus brief is to help the court with points of law." Ochoa AG Unlimited, L.L.C. v. Delanoy, 128

Wash.App. 165, 172, 114 P.3d 692 (2005). Mr. Whitehead complains, it seems, because the authoritative members of the CLAI chose not simply to repeat the arguments made by the parties below. Yet, RAP 10.3(e) instructs that "Amicus must review all briefs on file and avoid repetition of matters in other briefs." The CLAI fulfilled that objective, and it did so in a decisive manner. Petitioners accordingly concur with the CLAI that the Court should grant the Petition for Review and reverse. In doing so, the Court should hold that the trial court misapplied RCW 62A.9A.102(20), and more specifically, erroneously failed to apply the plain text and meaning of RCW 46.12.520(2) to resolve these issues.

I hereby certify that this Response contains 1,136 words in compliance with RAP 18.17.

DATED this 28th day of May, 2025.

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of May, 2025, I caused to be delivered the foregoing RESPONSE TO AMICUS CURIAE BRIEF OF CLAI to the following parties via the Washington Appellate Portal electronic email service system:

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