Case No. 73044

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

CITY OF KANSAS CITY, MISSOURI, ET AL.,
APPELLANTS,

v.

TRAVELERS CASUALTY AND SURETY CO. OF AMERICA,
RESPONDENT,

Appeal from the Circuit Court of Jackson County, Missouri

Case No. 0816-CV-19198

MOTION OF AMERICAN SUBCONTRACTORS ASSOCIATION AND AMERICAN SUBCONTRACTORS ASSOCIATION—GREATER KANSAS CITY CHAPTER FOR LEAVE TO FILE SUGGESTIONS AS *AMICUS CURIAE* IN SUPPORT OF APPELLATE BRIEF OF APPELLANTS LAFARGE NORTH AMERICA, INC. AND QUICKSILVER 2005, LLC

COMES NOW the American Subcontractors Association and the American Subcontractors Association—Greater Kansas City Chapter(collectively both movants are referred to as "ASA"), by and through counsel, and respectfully moves the Court to grant them leave to file, as *Amicus Curiae*, their Suggestions in Support ("Suggestions in Support") of the Appellate Brief by Appellants LaFarge North American, Inc. ("LaFarge") and Quicksilver 2005, LLC ("Quicksilver"). In support of this Motion, ASA states as follows:

1. ASA is a national organization advocating and representing the interests of approximately 5,000 member firms of subcontractors, specialty contractors, and material suppliers before all branches and levels of government. ASA is affiliated with 37 local chapters throughout the country, including the Kansas City Chapter of the ASA ("KCASA") which fosters and promotes the interests of subcontractors and suppliers in the Kansas City metropolitan area and the ASA-Midwest Council which serves the interests of subcontractors and suppliers in the St. Louis metropolitan area.

2. The trial court's Judgment found, among other things, that La Farge and/or Quicksilver were prohibited from recovering on payment bonds issued by Travelers Casualty and Surety Company ("Travelers") on behalf of its principal, Ace Pipe Cleaning, Inc. ("Ace"), in connection with four sewer repair and construction projects commenced by the City of Kansas City, Missouri. The trial court found that neither LaFarge nor Quicksilver were within the protection of the payment bonds because they were not in sufficient privity of contract under Missouri law in that they occupied 4th tier supplier status having supplied material to a materialman who supplied the material to a subcontractor who supplied the material to Ace, the general contractor. The trial court refused to disregard the rank or position in the construction chain held by Defendant Excel Trucking, Inc. ("Excel"), the entity which ordered concrete from LaFarge and/or Quicksilver in connection with the projects, despite its finding that Excel did nothing on the projects and "merely acted as a strawman for U.S. Constructall." The trial court's findings were wrong, from both a legal and a public policy standpoint.

3. The issue of whether Missouri courts should in payment bond claims apply the concept of "telescoping" employed by federal courts (to expand the protections of the public payment bond statute by treating as a single entity any companies that act as a "strawman" or occupy a sham role in a construction project) is tremendously significant to subcontractors and suppliers. This issue is also of importance in the Kansas City area, which involves many public works projects in which the issues that arose here (regarding the use of sham lower tiers) could repeat themselves to the detriment of future Missouri subcontractors and suppliers like LaFarge, particularly if the bad precedent urged by the bond principal (Ace) and surety here becomes law in Missouri. As a result, this issue is of abundant interest to ASA and its members, including the KCASA.

4. Furthermore, the Judgment has important consequences that go beyond the scope of the order entered by the trial court. As is apparent from the Judgment of the trial court, whether a "strawman" or sham entity should be disregarded for bond protection purposes is a case of first impression in Missouri. As noted above, federal circuits interpreting the federal Miller Act have historically set aside such straw parties in determining privity of contract. Missouri courts, while not addressing the "telescoping" concept at issue here, have often sought and adopted guidance from federal courts in implementing Missouri's own "Little Miller Act" found in § 107.170, R.S.Mo., *et.seq.* One of the objectives of both the Miller Act and Missouri's equivalent "Little Miller Act" is to provide a bond remedy to entities which have participated in a public works project, and the acts are broadly construed to satisfy this objective.

5. Subcontractors and suppliers have a vested interest in assuring that those participating in the construction chain occupy genuine, bona fide, and reliable roles and that, to the greatest extent possible, bond rights are maintained for those who perform valuable labor and/or provide indispensable materials and goods for the good of the community.

6. Because this case will likely provide guidance to future bond claimants and participants in public works projects, ASA has an interest in this matter that may not be addressed by the parties, who are litigating the specific factual situation of this case.

7. The ASA has received consent from counsel for Respondents Ace and Travelers to file its Suggestions in Support. The ASA has sought permission to file its Suggestions in Support from counsel for Appellants LaFarge and Quicksilver; however, counsel for Appellants have not granted consent to ASA. Therefore, ASA is seeking an Order from this Court granting leave to file ASA's Suggestions in Support as *Amicus Curiae*.

8. ASA has attached its proposed Brief as *Amicus Curiae* in the event this Motion is granted and can be ready to file said brief in compliance with Rules 84.04 and 84.06 M.R.C.P immediately if this motion is granted.

WHEREFORE, for the foregoing reasons, ASA respectfully requests that the Court enter an Order granting ASA leave to file, as *Amicus Curiae*, ASA's Suggestions in Support of Appellants' Appellate Brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 8th day of March, 2011, a true and accurate copy of the foregoing was mailed to:

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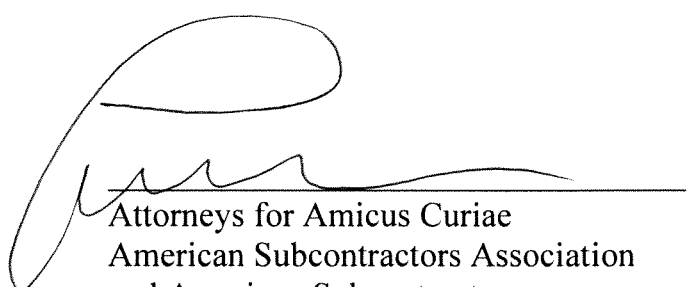

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BRIEF OF AMICUS CURIAE AMERICAN SUBCONTRACTORS ASSOCIATION and AMERICAN SUBCONTRACTORS ASSOCIATION— GREATER KANSAS CITY CHAPTER

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JURISDICTIONAL STATEMENT

This appeal is taken from the Judgment of the Circuit Court of Jackson County, Missouri, Division No. 9, The Honorable Joel F. May presiding. The Judgment was entered on September 3, 2010. The action was brought by Relators LaFarge North America, Inc. ("LaFarge") and QuickSilver 2005, LLC ("QuickSilver") (hereafter collectively "LaFarge") against Ace Pipe Cleaning, Inc. ("Ace") for breach of a settlement agreement; against Ace, Travelers Casualty and Surety Company of America ("Travelers"), and U.S. Constructall, Inc. ("US Constructall") for claims on bonds; and against Excel Trucking, Inc.("Excel") and US Constructall for breach of contract.

Relator/Appellant LaFarge timely filed its Notice of Appeal on October 12, 2010. Pursuant to Rule 84.05(f) and Local Rule 26, Amicus Curiae, American Subcontractors Association and American Subcontractors Association—Greater Kansas City Chapter (collectively "ASA" or "Amicus Curiae"), have filed simultaneously with this brief their Motion for Leave to File Brief of Amicus Curiae.

This case does not involve any issues within the exclusive jurisdiction of the Missouri Supreme Court and, therefore, the Missouri Court of Appeals, Western District, has general appellate jurisdiction or this appeal is provided by Mo. Const. Art. V, Section 3 and § 477.050 R.S.Mo.

ASA is a trade organization with over 5,000 constituent members. ASA represents the interests of subcontractors in Missouri and elsewhere, and the Greater Kansas City Chapter of ASA represents subcontractors, suppliers and materialmen specifically in the

Greater Kansas City area, and includes fifty-five (55) member firms just in the Greater Kansas City area (ASA includes a total of 234 member firms in the State of Missouri). The specific issue sought to be addressed by Amicus Curiae ASA in this case involves the claims of LaFarge on the payment bonds issued for the municipal public works projects. Payment bond rights are an imperative and critical interest to subcontractors and suppliers in Missouri and across the nation. Preserving and expanding those rights where it is fair and equitable to do so is a core mission principle of the ASA. For that reason alone, the application of the equitable principle of "telescoping" in this case is of significant importance to Missouri subcontractors and suppliers. If LaFarge is successful in convincing this Court that telescoping is a concept that should be applied to Missouri Little Miller Act claims, the court will set a valuable precedent that will not only help preserve and expand bond rights for legitimate subcontractors and suppliers but will also help regulate and police unscrupulous subcontractors and suppliers which are operating under false or deceptive pretenses.

STATEMENT OF FACTS

Amicus Curiae references these Findings of Fact contained in the trial court's Judgment of September 3, 2010.

1. Plaintiffs LaFarge North America, Inc. ("LaFarge") and its affiliate Quicksilver 2005, Inc. ("Quicksilver"; LaFarge and Quicksilver are collectively, "LaFarge") are concrete suppliers.

2. Defendant Ace Pipe Cleaning, Inc. ("Ace") is a sewer repair and

construction company based in Kansas City, Missouri.

3. Defendant U.S. Constructall, Inc. ("US Constructall") was a sewer repair company owned by Henok Woldermariam and Daniel Hlavna and operated by Daniel Hlavna from 1999 until it ceased operations sometime in the spring of 2008.

4. Defendant Excel Trucking, Inc. ("Excel Trucking") was a trucking company 100% owned and operated by Andi Hlavna, Daniel Hlavna's wife, from 2004 until it ceased operations sometime in the spring of 2008. Excel Trucking was certified by the City of Kansas City, Missouri (the "City") as a woman-owned business enterprise ("WBE").

5. From 2006 through 2009, Ace served as the general contractor for five sewer repair and construction projects under contracts with the City of Kansas City, Missouri ("City"). These projects are generally referred to as Phase J, Phase K, KC 909, 66th and Manchester and Ruskin Heights.

6. As required by Missouri's public works bonding requirement set forth in Missouri Revised Statute § 107.170, Ace, as principal, obtained a separate payment bond for each of the five projects through Travelers Casualty and Surety Company ("Travelers").

7. As a condition to issuing the bonds, Travelers required that Ace agree to indemnify and hold Travelers harmless from any claims against the bonds.

8. During the course of the Phase K, KC 909, 66th and Manchester, and Ruskin Heights projects, Ace subcontracted certain work to US Constructall. Ace

authorized US Constructall to further subcontract certain trucking work to Excel Trucking to achieve the requisite minority participation on certain projects. On some projects, no trucking was required.

9. For the Phase K, KC 909, 66th and Manchester, and Ruskin Heights projects, Excel Trucking, as a sub-subcontractor to US Constructall, contracted with LaFarge to supply concrete on these projects because, unbeknownst to Ace at the time, US Constructall's account with LaFarge was cash-only.

10. During the course of the Phase J project, Ace subcontracted certain work directly to Excel Trucking. Excel Trucking contracted with LaFarge to supply concrete on this project.

11. Excel Trucking had a $5,000.00 credit limit with LaFarge and there was no evidence this credit limit was ever increased. The only evidence on the Excel Trucking's credit limit came from Andi Hlavna who testified that Excel Trucking's financials would not have supported an increase in its credit limit.

* * *

23. On April 23, 2008, LaFarge filed claims against the Ace's payment bonds for two of Ace's projects (KC 909 and Phase J).

* * *

28. Steve Hontz, Vice-President of Ace, compiled a list of unpaid invoices for each of the bonded projects (Ex. 2), and the total amount unpaid on Phase J, Contract 110, was $32,916.61.

* * *

POINTS RELIED ON

I. The trial court erred in failing to apply the well-recognized public policy behind telescoping that would allow LaFarge, the concrete supplier on this public project, to establish the requisite degree of privity to allow it to pursue its bond claim under Missouri's Little Miller Act § 107.170, R.S.Mo. The public policy reasons behind allowing telescoping in federal Miller Act cases are equally applicable to Missouri's Little Miller Act claims and the Court should allow telescoping in this case in light of its specific finding that the third tier sub-subcontractor Excel was a sham sub-subcontractor. Further, the trial court erred in ruling that the threat that the prime contractor, Ace, would have to indemnify the bond company was a reason to deny telescoping.

SUMMARY OF ARGUMENT

This Court should apply telescoping principles as articulated in federal cases interpreting the Miller Act, 40 U.S.C. sec. 270a-270e, to allow LaFarge, the concrete supplier on the public projects which are the subject matter of the underlying case, to enforce its bond rights under Missouri's "Little Miller" statute 107.170 R.S.Mo. The privity requirement of both the federal Miller Act and Missouri's "Little Miller" Act was not intended to allow contractors and subcontractors through artifice and subterfuge to thwart legitimate bond claims by creating "sham" entities that destroy the statute's privity requirement. Federal cases have interpreted the Miller Act's remedial purposes broadly.

Missouri courts have consistently found federal cases interpreting the Miller Act persuasive when analyzing Missouri's public project bond statute, § 107.170 R.S.Mo.

ARGUMENT

Missouri's "Little Miller Act" provides protection to persons who supply labor and material under a contract with a prime contractor or a subcontractor on municipal public works project. § 107.170 R.S.Mo. With regard to enforcing such a bond claim, § 522.300, R.S.Mo. provides "every person furnishing material or labor, either as an individual or as a subcontractor for any contractor, with the state, or any county, city, town, township, school or road district, where bonds shall be executed as provided in § 107.170, R.S.Mo., shall have the right to sue on such bond in the name of the state, county, city, town, township, school or road district, for his use and benefit..."

The purposes behind Missouri's Little Miller Act, § 107.170 R.S.Mo. are: (1) to provide a remedy to entities who would have a right to file and enforce a mechanic's lien except that public property is involved; (2) to facilitate construction of public works; and (3) to prevent unjust enrichment of those who receive the material benefit from a material furnisher or subcontractor." *Collins & Hermann, Inc. v. TM II Construction Company*, 263 S.W.3d 793, 797 (Mo.App. 2008). The statute is broadly construed to carry out these purposes. *Energy Masters Corp. v. Fulston*, 839 S.W.2d 665, 668-669 (Mo.App. 1992).

As interpreted by Missouri courts, a party seeking to enforce a bond claim under § 107.170 pursuant to the procedures set forth in § 522.300 must establish privity of contract. *St. Louis ex rel. Stone Creek Brick Company v. Kaplan-McGowan Co.*, 108

S.W.2d 987, 990 (Mo.App. 1937). Absent privity, a materialman is not within the protection of the bond. *Id.* at 991. "One who supplies material to a materialman, who in turn supplies the subcontractor, is to be relegated to the status of a stranger to the original contract, since such person's contract or undertaking is neither with the principal contractor, nor with one who, as in the case of a subcontractor, deals directly with the principal contractor." *Id.*

The trial court found that on four of the five sewer projects at issue, LaFarge did not deal directly with the general contractor, Ace, or its immediate subcontractor, US Constructall. Rather, LaFarge had contracted with US Constructall's purported subcontractor, Excel. Therefore, under the standard privity concept articulated in *Stone Creek Brick*, the trial court held that LaFarge was not able to pursue a bond claim for concrete provided to Excel on four of the five sewer projects at issue. As the trial court noted in its Findings of Fact, during that part of the project known as Phase J, Ace, the prime contractor, subcontracted certain work directly to Excel. Because of this, the trial court found that LaFarge's bond claim with regard to Phase J was viable and met the privity requirements of § 107.170 and § 522.300.

While the trial court found there was no privity in the traditional sense, the trial court did recognize and consider application of the concept of "telescoping" as applied in cases interpreting the Federal Miller Act. Under the pertinent federal cases, where the participation of a closely related or sham entity destroys an otherwise legitimate subcontractor's or supplier's privity under the bond statute, the tier represented by that

sham entity is disregarded thereby establishing the requisite degree of privity to establish a bond claim. The trial court found that Missouri Courts have neither adopted nor rejected application of the Federal Miller Act telescoping principles to Missouri's Little Miller Act, but concluded that telescoping was not appropriate.

Amicus Curiae suggests that this is exactly the type of case where the broad policy considerations set forth in the numerous federal court decisions interpreting the Federal Miller Act are applicable to Missouri's Little Miller Act bond claims, and this Court should adopt these public policy considerations in interpreting and determining the scope of Missouri's bond statute.

The Miller Act

Bonding requirements for federal projects are established under 40 U.S.C. § 270a-270e (hereafter "the Miller Act"). Under the Miller Act, recovery on a payment bond is permitted by unpaid suppliers to the prime contractor or his immediate subcontractors. *Id.* Thus, not unlike Missouri's generally applied law on the subject, recovery is limited to those who have a direct contractual relationship, express or implied, with the prime contractor, or a subcontractor of the prime contractor. See § 270(b); *Fidelity & Deposit Co. of Maryland v. Harris,* 360 F.2d 402, 408 (9th Cir. 1966). Subcontractors and suppliers with contractual relationships beyond those outlined above are deemed 'too remote' to recover under the Miller Act. *See MacEvoy Co. v. United States for Use and Benefit of Calvin Tomkins Co.,* 322 U.S. 102 (1944).

Federal Court Interpretation

Like Missouri's Little Miller Act, the Federal Miller Act has consistently been liberally interpreted in favor of protecting both suppliers and subcontractors. *See McWaters & Bartless v. U.S. ex rel. Wilson,* 272 F.2d 291 (10th Cir. 1959); *U.S. ex rel. Superior Insulation Co. v. Robert E. McKee, Inc.,* 702 F.Supp. 1298 (N.D. Tex. 1988). "The Miller Act is 'highly remedial [and] entitled to liberal construction and application in order to properly effectuate the Congressional intent to protect those whose labor and materials go into public projects.'" *F.D. Rich Co., Inc. v. United States,* 417 U.S. 116 (1974) (citing *MacEvoy Co. v. United States for Use and Benefit of Calvin Tomkins Co.,* 322 U.S. 102 (1944)).

Rather than employing a rigid test for determining eligibility for bond protection, in *Glenn Falls Ins. Co. v. Newton,* 388 F.2d 66 (10th Cir. 1967), the court explained that it is proper to use "substance, rather than form" in determining whether a party is a subcontractor under the Miller Act. This is commonly referred to as "telescoping" which serves to disregard or eliminate a tier represented by the sham entity such that the sub or supplier is within the requisite degree of privity to assert the bond claim under the statute. The court reasoned that this method was necessary because "[o]therwise, the purpose of the remedial [Miller Act], to protect suppliers of materials to the actual subcontractors of the prime contractor, could be defeated by setting up by formal contract a straw man as a subcontractor between the prime contractor and one who is in substance and intent the actual subcontractor." *Id.* (citing *St. Paul-Mercury Indemnity Co. v. United States,* 238

F.2d 917, 921 (10th Cir. 1956); *Ryan v. Bethlehem Sparrow Point Shipyard,* 209 F.2d 53, 56 (4th Cir. 1953).

In interpreting whether telescoping is appropriate, the United States Supreme Court made clear that the "test for whether one is a subcontractor [is] the substantiality and importance of his relationship..." between the entities involved. *F.D. Rich Co.,* 417 U.S. at 126 (citing *Aetna Casualty & Surety Co. v. United States .for Use and Benefit of Gibson Steel Co..* 382 F.2d 615 (5th Cir. 1967); *Baisich Bros. Construction Co. v. United States for Use of Turner,* 159 F.2d 182 (9th Cir. 1946); *United States for Use of Bryant v. Lembke Construction Co.,* 370 F.2d 293 (10th Cir. 1966). Applying this test, the Court in *F.D. Rich* determined that a party was "clearly a subcontractor" based on the "total relationship" between the parties, and "not just the contract to supply [materials]." *Id.*

Federal courts have historically recognized that in practice, contractors and subcontractors will sometimes attempt to limit those eligible to bring an action on the bond by creating a false subcontractor or a strawman within the higher tiers of subcontractors. This generally occurs where a sham entity, i.e., an entity which otherwise provides no bona fide or genuine construction services, participates and destroys the requisite degree of privity required to pursue a Miller Act bond claim. This type of smoke and mirrors activity circumvents the Miller Act, leaving an entire class of contractors and suppliers without the benefits and protections the Act was intended to provide them. To prevent this circumvention, telescoping tiers of subcontractors has been allowed. Under this theory, those fraudulent actors are simply bypassed or

collapsed for Miller Act purposes. Many courts have taken the approach that telescoping is appropriate "in cases involving subterfuge, collusion between the prime contractor and subcontractor or circumstances indicating the interposition of straw men . . . for the purpose of insulating the prime contractor and surety company from extensive Miller Act liability." *Fidelity & Deposit Co. of Maryland v. Harris.*, 360 F.2d 402, 408 (9th Cir. 1966) (citing *Fine v Travelers Indemnity Co.*, 233 F.Supp. 672 (W.D.Mo. 1964); *United States, etc. to the Use of Acme Furnace Fitting Co. v. Fort George G. Meade,* 186 F.Supp. 639 (D.Md. 1960); *Continental Casualty Co. v. United States etc.*, 308 F.2d 846 (5th Cir. 1962).

In *F.D. Rich, supra,* Rich was the prime contractor. Cerpac Co. acted as a supplier of plywood and millwork under two contracts, but was "closely intertwined" with Rich in that the principals of Rich held a substantial voting interest in Cerpac stock, supplied most of Cerpac's capital, and were well aware of its day to day operations and finances. 417 U.S. at 118. Industrial Lumber Co. supplied lumber to Cerpac, who in turn supplied the lumber to Rich. When Cerpac failed to make payment, Industrial Lumber made a claim on the bond. This claim was defended by alleging that Cerpac was acting as a supplier and not a subcontractor based on written contracts, and thus Industrial Lumber had not contracted with a subcontractor. The court rejected this defense, and chose to look beyond the written contracts to the true nature of the relationship between Cerpac and Rich. Based on this relationship, the court found that Cerpac was a subcontractor under the *MacEvoy* definition. *Id.* As is relevant to the case at bar, the U.S. Supreme

Court recognized in *Rich* that a close relationship between entities in separate tiers can lead to a strategy for deception or subterfuge in which one tier attempts to secure itself from loss in the event of default by placing, in essence, an artificial, non-participating tier between it and the legitimate sub or supplier.

In *Glenn Falls Ins. Co. v. Newton,* telescoping was allowed where a purported contract between an agent and employee which imposed no actual obligations was set aside and disregarded as a sham. 388 F.2d 66 (10th Cir. 1967). The court found that the relationship between the parties to this sham contract was not that of a contractor and subcontractor. *Id*

In *North Star Terminal & Stevedore Co. v. Nugget,* 126 Fed. Appx. 348, 2005 WL 487313 (9th Cir. 2009), the court "look[ed] through" the materialmen in order to "find a direct contractual relationship between the appellees and. . . the primary contractor. 126 Fed. Appx. 348 (9th Cir. 2004). The *North Star* court held that where a party was secretly converted into a straw man and where the performance of construction functions and interactions become intertwined, a material issue of fact as to subterfuge or collusion existed. *Id.* at 351.

In *Continental Casualty Co. v. United States ex rel. Conroe Creosoting Co.,* 308 F.2d 846 (5th Cir. 1962), the Fifth Circuit allowed telescoping because the uses of a closely intertwined company was analyzed under the sham/subterfuge telescoping test, which is based on the prescribed liberal interpretation of the Miller Act. In *Continental Casualty Co.*, a prime contractor entered into contracts with three of its subsidiaries, one

of which contracted with Mojave Electric, which in turn purchased materials from Conroe Creosoting. When a claim on the bond arose, the surety alleged that Conroe was one tier removed because they had contracted with a subcontractor. Further, the surety argued that telescoping was inappropriate in this context because piercing the corporate veil was not permitted under Texas law, and thus the sham or subterfuge argument could not be pursued. However the court allowed telescoping because it found sufficient dissimilarity between the validity of corporate structure and the sham/subterfuge for benefit concept. *Id.* The court explained that "the verdict of the jury was not based upon the validity of the corporate structure of Winn Contractors, Inc., but rather was based upon the fact whether the corporation was used as a sham, subterfuge and a tool by Hal Hayes Texas, Inc., for its own benefit and protection." *Id.* at 849. The court found no error in submitting the sham/subterfuge concept to the jury in spite of the lack of any Texas veil piercing law. The Miller Act utilizes a much lower sham/subterfuge test than that of veil piercing. It simply analyzes the substantiality and importance of the relationship between actors in light of the remedial nature of the Act.

In *Fine v. Travelers Indemnity Co.,* 233 F.Supp. 672 (W.D.Mo. 1964), the court explained that *Bushman Construction Co. v. Conner,* 307 F.2d 888 (10th Cir. 1962) "illustrates that paper relationships may be telescoped at points other than that between the prime contractor and one of his shadow subcontractors." The court expressed that where a joint venture existed, "no court would be so unrealistic as to hold that...a supplier stood in a too remote relationship from the prime contractor to be outside the

protection of a government bond" and thus two tiers must be telescoped. Rather than looking strictly to bond provisions, the court stated that "[c]onsideration must...be given to the substantive rights established by the Miller Act." *Id.* In *Fine,* the court adopted "the principles of *MacEvoy"* and explained that those principles will be applied "realistically to [the] facts of each pending case." *Id.* Because the alleged subcontractor in *Fine* did not "take from and perform a specific part of the labor or material requirements of the original contract in a manner consistent with the established usage in the construction industry, within the meaning of a 'subcontractor' as defined...in the Miller Act as explained in *MacEvoy,"* the "relationship in fact" was a sham warranting telescoping. *Id.* at 680-83.

Application of Miller Act Principles to Present Case

The trial court found that federal cases have readily applied the "telescoping" concept looking to the substance of the relationship between the parties as opposed to the technical form and noted that the purpose of the Miller Act remedial statute was to protect suppliers of materials. The trial court also held that this approach is consistent with the purpose of Missouri's statute. Citing much of the precedent set forth above, the trial court recognized that when an entity is merely acting as a "straw party" or as a "sham" the form of that entity is disregarded and privity is established. The trial court found that telescoping was not limited to the situation where a general contractor, through subterfuge, was attempting to avoid paying lower tiered subs or suppliers. The trial court found that this theory has not been so limited and has been applied to subcontractors.

In this case, it is undisputed that Excel provided no labor or materials on the projects and merely acted as a strawman for US Constructall. This arrangement was clearly concocted by US Constructall and Excel or, better stated, by the husband and wife actors, the Hlvanas, to circumvent the fact that US Constructall had no credit with LaFarge and was apparently in very poor financial condition; it was a strategy employed solely to permit the purchase of concrete from LaFarge on credit. The strategy was clearly designed to benefit US Constructall and, as such, having provided no construction services, Excel acted purely in an agency role. *See Continental Casualty Co. v. United States ex rel. Conroe Creosoting Co., supra* (the lower-tiered entity was disregarded in the construction chain because it was used as a sham, subterfuge and a tool by the higher tiered entity for its own benefit and protection). LaFarge and other lawfully operating subs and suppliers should, at the very least, be in a position to determine the creditworthiness of those entities with whom they deal. In this instance, LaFarge was in no position to understand that the presence of Excel in the construction chain was an artifice to allow US Constructall to indirectly obtain LaFarge's concrete products where it could not so directly due to its poor credit standing. Based on the record, this Court can readily find that the subterfuge conducted by US Constructall and Excel is contrary with the purposes of Missouri's Little Miller Act.

The trial court indicated in its Judgment that because US Constructall and Excel were separate entities for veil-piercing purposes, there were insufficient grounds to collapse or disregard the tier represented by Excel. This finding deemphasizes the

significance of US Constructall and Excel's creation of a strawman and makes it very difficult for a party in LaFarge's circumstances to gain fair bond protection. Amicus Curiae ASA urges this court to apply the sham/subterfuge test in determining privity of contract for bond protection purposes in lieu of the more burdensome and costly alter ego common law applied in Missouri. Just as the court in *Continental Casualty Co. v. United States ex rel. Conroe Creosoting Co., supra* eschewed the veil piercing law for the sham/subterfuge test, Amicus Curiae urges this court to adopt the federal Miller Act's emphasis on the substantiality and importance of the relationship between actors in light of the remedial nature of both the federal Act and Missouri's companion. In fact, there is ample precedent for a Missouri court adopting federal cases interpreting the Miller Act as persuasive authority when construing Missouri's Little Miller Act. *Board of Education of St. Louis v. Vince Kelly Construction Company*, 963 S.W.2d 331, 334 (Mo.App. 1997); *Public Water Supply Dist. No. 3 of Ray County ex rel. Victor L. Phillips Co., Inc. v. Reliance Ins. Co.,* 708 S.W.2d 190 (Mo.App. 1986); *School District of Springfield R-12, ex rel. Midland Paving Co. v. Transamerica Ins. Co.,* 633 S.W.2d 238 (Mo.App. 1982); *State ex rel. U.S. Fidelity & Guaranty Co. v. Mehan,* 581 S.W.2d 837 (Mo.App. 1979); and *First State Bank v. Reorganized School Dist. R-3, Bunker,* 495 S.W.2d 471 (Mo.App. 1973).

The trial court was concerned that if LaFarge was allowed to pursue its bond claims, Ace would be at risk for having to pay double as a result of its indemnity agreement with its surety company. But this "risk" has never been held to be a valid

reason to defeat a Miller or Little Miller Act bond claim. In fact, if the trial court's reasoning in this regard was affirmed it would create law unique to Missouri while undermining virtually the entirety of the protections that payment bonds on public works are intended to provide.

Moreover, Ace clearly faces the double payment risk already with regard to the Phase J bond claim which the trial court allowed. There does not seem to be a real distinction between the threat faced by Ace in the circumstances on the other four bond projects. This is especially so where Ace authorized US Constructall to further subcontract certain trucking work to Excel to achieve the requisite minority participation on certain projects. Ace knew that Excel was providing concrete for the sewer projects both through its direct subcontracts with Ace as well as its alleged work as a minority participant on certain of the projects. Ace had contracted directly with Excel as well as dealing with it as a minority contractor through its association with US Constructall. The concerns voiced by the trial court with regard to unfairness in having to make a double payment as a result of the indemnification agreement with the surety does not seem to apply. There is no recognized exception in Missouri lien law for those owners or contractors that have to pay twice because of some unscrupulous subcontractor's failure to pass along funds to those with whom they deal further down the construction chain. Rather, the legislature, in both the lien and bond statutes have, in effect, transferred the risk of such instances of nonpayment to owners and/or contractors and their sureties in favor of allowing subs and suppliers a remedy to recover. While the remedies do have

limitations, double payment is not one of them.

In applying the concept of telescoping in a Federal Miller Act case, the United States District Court for the Western District stated as follows: "Under the facts we must find that no real tier of the type of subcontract or the sort of contractual relationships within the meaning of either the definition in the Capehart bond or within the meaning of the proviso in Section 2(a) of the Miller Act...was established by the relationship that in fact existed between the..." participating entities. *Fine v. Travelers Indemnity Company,* 233 F.Supp. 672 (W.D.Mo. 1964).

Similarly here, the Court should disregard the tier represented by Excel which destroys the requisite privity required for LaFarge to pursue its bond claim. It is simply unfair under the circumstances for what the court found to be "a strawman" represented by Excel to thwart the purposes of Missouri's Little Miller Act. For these reasons, the Court should apply the policies articulated by federal court precedent interpreting the Federal Miller Act to the circumstances of this case under Missouri's Little Miller Act and should allow LaFarge to pursue its bond claims accordingly.

CONCLUSION

WHEREFORE, for the foregoing reasons, Amicus Curiae American Subcontractors Association and American Subcontractors Association—Greater Kansas City Chapter respectfully requests the Court reverse the trial court decision and further the interests and goals of Missouri's Little Miller Act by (a) following the lead of federal courts and allowing telescoping of closely related entities in recognizing that granting

legitimacy to sham subcontractors or suppliers furthers no policy interests and misguidedly reduces the reach and protections of the bond statute for purposes of bond claims under Missouri's Little Miller Act; and (b) by expressly holding that payment by the bond principal to a lower tier is not a valid defense to a bond claim; and (c) for such other and further relief as the Court deems just.

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CERTIFICATE OF SERVICE

I do hereby certify that on this ____ day of _____, two (2) copies of the above and foregoing were mailed to:

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RULE 84.06(c) AND RULE 84.06(g) CERTIFICATION

I certify that this Brief complies with the limitations contained in Rule 84.06(b) and contains 5,767 words. I rely on the Word Count in the word processing software, which was Microsoft® Word 2007, used to create this Brief.

In addition, I certify that the disk has been scanned and is virus-free.

Dated this ____ day of March, 2011.

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