70958-5

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NO. 70958-8-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY, a regional transit authority, dba SOUND TRANSIT,

Respondent,

vs.

AIRPORT INVESTMENT COMPANY, a Washington corporation, dba Hampton Inn;
HORIZON AIR INDUSTRIES, INC., a Washington corporation; IBEW 77 INTERNATIONAL BOULEVARD, LLC, a Washington limited liability company; JP MORGAN CHASE BANK, N.A., fka The Chase Manhattan Bank, as Trustee for the Registered Holders of Prudential Securities Financing Corporation Commercial Mortgage Pass-Through Certificates, Series 199-C2; KING COUNTY; and ALL UNKNOWN OWNERS and UNKNOWN TENANTS,

Appellants.

APPELLANT AIRPORT INVESTMENT CO.'S REPLY BRIEF

Averil Rothrock, WSBA #24248
Joaquin M. Hernandez, WSBA #31619
Dennis Dunphy, WSBA #12144
Christopher H. Howard, WSBA #11074
SCHWABE, WILLIAMSON & WYATT, P.C.
1420 5th Avenue, Suite 3400
Seattle, WA 98101-4010
Telephone: 206.622.1711
Facsimile: 206.292.0460
Attorneys for Appellant

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I. INTRODUCTION AND OVERVIEW OF REPLY

This Court should apply existing law, rules of evidence, and accepted appraisal measures to reverse in order to protect the rights of landowners in many condemnation actions to come. In its brief, Sound Transit raises the same flawed arguments that led the trial court to err. It asks this Court to stamp its tactics with a seal of approval. The Court should decline. Airport Investment has established prejudicial error that warrants a new trial.

Sound Transit offers no legitimate grounds to uphold exclusion in a pre-trial ruling of evidence of the Hampton Inn franchise agreement and related business practices. The record demonstrates that Airport Investment offered this evidence to support its expert's valuation of the remainder under the income method of appraisal not to prove and recover "lost profits." The law supported its admission. Sound Transit does not argue to this Court, and did not argue to the trial court, that such evidence lacks relevance to the income method of appraisal. Indeed, its own expert's testimony demonstrated the relevancy under this accepted method of appraisal. Sound Transit instead retreats to the same inapposite authority regarding "lost profits" that it foisted on the trial court. These inapposite cases do not support the ruling in this case. Nor does any other ground raised by Sound Transit.

Sound Transit fails to show that its use of an out-of-court appraisal by Airport Investment's consulting expert to influence the jury's deliberation on fair market value was legitimate. Airport Investment obtained the preliminary appraisal when Sound Transit offered to pay for it at the inception of the condemnation. No party listed that consultant as a witness or called it to testify. Sound Transit's conduct in this case turns a preliminary appraisal so obtained into a weapon to undercut the landowner's valuation case at trial. This Court should disallow Sound Transit's tactic. Admission of the consulting appraiser's out-of-court valuation opinion as Ms. Oh's "belief" is unsupported by the record. And the trial court erred when it failed to grant Airport Investment's prior **unopposed** motion *in limine* to prevent admission of that opinion.

As a result of these two evidentiary errors, Airport Investment did not enjoy its right to a fair jury trial of just compensation required by the Constitution. This Court should reverse and grant a new trial.

RCW 8.25.070(1)(a) or RCW 8.25.075(1)(b) require an award of attorney fees to Airport Investment in this case. Sound Transit asks this Court to create a condemnor's unqualified right to avoid fees despite changing the taking at trial from what it presented in its Complaint, in the possession and use order, and at the time it made its thirty-day offer.

Sound Transit unjustifiably relies on its choice to pursue a "design build" project to place all associated risks on the landowner. Sound Transit takes the extreme position that **any** offer, regardless of its relationship to the taking tried to the jury, is sufficient to avoid fees. This is not what the statute provides. Sound Transit's offer did not comply with the statutory scheme. A fee award legally was due.

II. REPLY ARGUMENT

In its brief, Sound Transit retreads the erroneous arguments it presented to the trial court that caused the court to err. This Court should conclude they do not withstand appellate scrutiny. This Court should order a retrial to protect Airport Investment's constitutional right to a fair jury determination of just compensation.

A. A new trial is warranted because the trial court—based on misapprehension of the law—excluded evidence of the Hampton Inn franchise agreement and related business practices that was relevant to valuation of the remainder.

In its Opening Brief ("OB"), Airport Investment established that evidence of hotel operation requirements and business practices imposed by its Hampton Inn franchise agreement should have been admitted under existing case law because it was of critical relevance to show the price a willing buyer would pay for this hotel property in its post-taking condition. *See* OB 23-34 at VI.A. Airport Investment demonstrated that

the trial court's pre-trial exclusion of this evidence was an error of law because Washington courts recognize the income method of appraisal to determine fair market value and the evidence was relevant to that method. *Id.* Airport Investment showed that exclusion of the evidence resulted in a lopsided effect: Sound Transit's appraiser supported to the jury his "before" valuation based on the property's current "strong branding" as a "Hampton Inn" franchise, but the order prevented Airport Investment's appraiser from addressing whether that value could be maintained post-taking. OB 28-29. Exclusion of the evidence harmed the landowner's fair market value case. Sound Transit does not deny this conclusion.

Sound Transit instead argues that reversal of this error would conflict with case law holding that a landowner cannot recover lost profits or establish value that is personal to the owner, i.e., not transferrable with the property. RB 25-30. This case law does not apply.

1. Sound Transit remains wrong on the law: its cases are inapposite.

Sound Transit misdescribes Airport Investment's position, just as it did before the trial court. It argues that Airport Investment merely is trying to recover lost profits or damage personal to the owner. RB 25-30 at Argument A.1-2. This is false. Airport Investment adequately

explained the proper relevance of the evidence both to the trial court before the ruling (CP 519, 525) and in its Opening Brief to this Court. OB 23-34. Sound Transit cannot prevail by ignoring Airport Investment's position and the actual relevance of the evidence.

Sound Transit's authorities holding that lost profits and value personal to an owner are not recoverable do not support the ruling. They miss the point. For example, admission of the evidence would have been consistent with *Seattle & Montana Railroad Co. v. Roeder*, 30 Wash. 244, 261-62, 70 P. 498 (1902), in which an instruction was approved that would permit a jury to value a quarry based on its fair market value *including* its stone inventory, so long as the jury was not computing "profits" from selling the stone to customers. *See* RB at 26. Airport Investment, similarly, sought to contrast the fair market value of the property when it qualified for a Hampton Inn franchise (the "before" value), with its fair market value "after" the taking when its qualifications as a Hampton Inn franchise would be compromised. This use of the evidence had nothing to do with recovering lost profits. The evidence was admissible under *Roeder*.

Additionally, in *Roeder*, no evidence was offered pursuant to the income method of appraisal, as it is here. In the case at bar, the trial court had difficulty reconciling the prohibition on recovery of lost

profits with Airport Investment's offering the evidence because it supported its expert's opinion pursuant to the income method of appraisal. Airport Investment could find no case that addresses both the jurisprudence preventing recovery of lost profits *and* evidence offered to support an opinion based on the income method of appraisal.

In reversing, this Court should establish that the prohibition on recovery of lost profits does not mean that factors pertinent to the income method of appraisal must be excluded even when they are not offered to recover lost profits. Here, Sound Transit never contested the relevance of the evidence to Mr. Biethan's valuation opinion based on the well-accepted income method of appraisal.[1] The trial court erred in following the inapposite law offered by Sound Transit.[2] These

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[1] As shown in the Opening Brief at 26, 28-29, Sound Transit's own expert, Murray Brackett, testified in his deposition that such factors were relevant. This testimony was offered to the trial court to resist Sound Transit's motion *in limine*. CP 523. Sound Transit does not refute this point. It also does not dispute that exclusion of this evidence left Airport Investment vulnerable to Mr. Brackett's testimony to the jury that no evidence supported a post-taking change to the capitalization rate. *See* OB 30 citing 7/24/13 VBR 1154:11-19. The order *in limine* prevented presentation of such evidence.

[2] *See* RB at 26-33 and cases cited. Airport Investment already demonstrated that *Martin v. Port of Seattle*, 64 Wn.2d 309, 391 P.2d 540 (1964), and *Seattle P.A. & L.C. Railway v. Land*, 81 Wash. 206, 216, 142 P. 680 (1914), are inapposite or distinguishable. OB 32-33. Sound Transit does not address Airport Investment's briefing or rehabilitate those cases.

authorities prove Airport Investment's point: so long as the evidence relates to "the market value of the remaining property," *see* WPI 151.07-08, it is admissible.

The instructions demonstrate this difference, allowing the jury to consider evidence related to fair market value while also instructing the jury that lost profits are not recoverable. *See* CP 964-67, 970, 972-73 (Instructions 7-10, 13, 15-16) (App. A). The evidence was relevant to fair market value and evaluation of the experts' opinions. Its exclusion unjustifiably prevented Airport Investment from presenting its case of fair market value and arguing it to the jury.

2. This Court should decline Sound Transit's invitation to affirm because the trial court hypothetically *might have* excluded the evidence under ER 403 by finding it "prejudicial," which the trial court admittedly did not consider or do and which the record does not support.

This Court should reject Sound Transit's request for affirmance on the alternative ground that the trial court "had discretion to exclude the evidence as misleading and prejudicial under ER 403." RB 30-31. Sound Transit did not raise this issue below. Had Sound Transit raised an ER 403 issue, had Airport Investment responded, had the trial court actually performed an ER 403 analysis, and had the trial court actually found the evidence unduly prejudicial, this Court would consider that alternative ground. Affirmance on that alternative ground is not

appropriate in these circumstances or on this record.

Sound Transit offers no authority to support its request. Sound Transit provides no authority regarding ER 403, nor any authority demonstrating affirmance on the basis that the trial court *might have* exercised its discretion to exclude the evidence under ER 403. *See* RB 30-31. An issue unsupported by argument and citation to authority generally is not entertained. *American Legion Post No. 32 v. City of Walla Walla*, 116 Wn.2d 1, 7, 802 P.2d 784 (1991).

The Court should decline to affirm on the alternative basis of exclusion under ER 403. "A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground." RAP 2.5(a). Sound Transit fails to demonstrate that any Washington appellate court has applied RAP 2.5(a) to affirm the exclusion of evidence under ER 403 when the trial court did not rule on that basis. Appellate courts generally leave such discretionary determinations to the trial courts and do not undertake them in the first instance. A trial judge is in a better position to weigh the competing considerations between probative value and unfair prejudice. *Holz v. Burlington Northern*, 58 Wn. App. 704, 708, 794 P.2d 1304 (1990). "Reasonable minds often differ as to how to strike the balance between probative value and unfair

prejudice, and the trial judge in general is in a better position to weigh the competing considerations." *Id.* If Sound Transit had a meritorious argument for exclusion under ER 403, which it does not, it should have raised it to the trial court and obtained a ruling.

The record is insufficiently developed to consider the issue. An appellate court will consider alternative grounds only where the record has been sufficiently developed. RAP 2.5(a); *Plein v. Lackey*, 149 Wn.2d 214, 222, 67 P.3d 1061 (2003). Sound Transit makes not one citation to the record in support of its argument. RB 30-31.

The record fails to support a conclusion that the evidence was unfairly prejudicial. "Under ER 403, relevant evidence may be excluded if the danger of unfair prejudice substantially outweighs its probative value." *State v. Kennealy*, 151 Wn. App. 861, 890, 214 P.3d 200 (2009). Here, as is typical, the jury was instructed that Airport Investment could not recover lost profits. CP 973 (Instruction #16) (App. A). In opposing the motion *in limine*, Airport Investment welcomed such instruction to the jury. CP 525-26 ("The jury will be instructed that it may not equate lost profits with just compensation."), citing WPI 151.05. Sound Transit fails to show this instruction—alone or with a tailored limiting instruction—would have been inadequate. Juries are presumed to follow their instructions. *State v. Dye*, 178 Wn.2d 541, 556, 309 P.3d 1192

(2013). And the high probative value of the evidence to the issue of fair market value and evaluation of the experts' appraisals according to the accepted income method of appraisal outweighs the tenuous argument of prejudice.

This Court should not affirm on the hypothetical basis that the trial court might have exercised its discretion to exclude the evidence under ER 403. The record does not support exclusion under ER 403.

3. The error is reviewable because Airport Investment demonstrated the proper relevance of the evidence in its opposition memorandum to Sound Transit's motion *in limine*.

In its Opening Brief, Airport Investment established that its materials opposing Sound Transit's motion *in limine* provided the trial court the proper basis for introduction of the evidence. *See* OB 27-28 citing CP 519-26 (*Opposition Memorandum*) (App. B). An appellate court can review exclusion of evidence where a party made clear to the trial court what it is that the party offers and the reason why the party deems the offer admissible over the objections of his opponent "so that the court can make an informed ruling." *Sturgeon v. Celotex Corp.*, 52 Wn. App. 609, 617, 762 P.2d 1156 (1988). *See also* ER 103(a)(2). That occurred in this case. Review is proper.

Sound Transit incorrectly argues that the error is not preserved because Airport Investment did not make an "offer of proof." *See* RB

32. Sound Transit relies on the progression of trial testimony in making this argument. *Id.* at 32-34. By then, the trial court already had granted the motion *in limine* and excluded the evidence. **The material part of the record is Airport Investment's opposition to Sound Transit's motion *in limine*.** Sound Transit overlooks this part of the record that establishes the error is reviewable. When evidentiary decisions are made pursuant to a motion *in limine*, the losing party is deemed to have a standing objection where the trial court has made a final ruling on the motion. *State v. Powell*, 126 Wn.2d 244, 256, 893 P.2d 615 (1995). That is the case here.

Sound Transit made a broad motion *in limine* to exclude "evidence of hotel operation requirements and business practices imposed by Airport Investment's current franchise agreement on the ground that they are not relevant to the fair market value of the easements Sound Transit is taking in this action." CP 339 (*Motion*). The trial court granted this relief. CP 736-37 (*Order*) (App. 1 to OB).

Airport Investment opposed the motion, submitting an opposition memorandum (CP 519-26) (App. B) and two declarations. CP 1437-964 (Decl. of Joaquin Hernandez); CP 528-648 (Supplemental Decl. of Joaquin Hernandez). Airport Investment defended the admissibility of the evidence on the same grounds presented to this Court. Airport

Investment explained to the trial court its expert's reliance to reach his valuation opinions on the evidence that Sound Transit sought to exclude. The opposition memorandum first stated that Airport Investment "is not seeking business damages or lost profits," CP 519, explaining that "the franchise agreement and the franchise standards (i.e. 100% Satisfaction Guaranty and Parking Requirement) are indicative of the property's ability to attract income, which in turn are indicative of the property's value." CP 519-20. Airport Investment explained the income approach to valuation and how a property's income and expenses go into considerations of fair market value, expressly telling the trial court that "the property's characteristics of maintaining a national brand (Hampton Inn/Hilton) and standards add value to the property." CP 522:18-21.

Airport Investment specifically informed the trial court that its expert would opine regarding the negative impacts of the project and "how Hilton will view the project's impact on the property," further explaining how this would detrimentally impact the property's fair market value, as follows:

> There is a danger that Hilton will choose not to renew the franchise agreement. If the property loses its franchise with Hilton, the property's value significantly lessens. Thus buyers and sellers must account for this risk and uncertainty. They do so by offering less money to purchase the property.

CP 524:14-17. The trial court was aware of Airport Investment's

position that evidence of the property's continued ability to qualify for its Hilton franchise agreement would show that buyers would "offer less money to purchase the property." *Id.*

Airport Investment also informed the trial court how the risk of increased refunds would negatively impact the property's value to any potential buyer. CP 524:18-21. It explained that a "'well-informed' buyer or seller—words used in WPI 150.08 defining 'Fair Market Value'—[would] consider a property's income and expenses as part of due diligence in a prospective property sale." CP 522:7-9. Airport Investment's opposition memorandum concluded by stating, "AIC is not seeking lost profits or consequential damages. The evidence that is subject to the motion is being used [to show] how the property's characteristics are such that it is capable or less capable of producing income. This goes to the value of the property." CP 525:23-25.

During oral argument of the motion, the trial court and Airport Investment's attorney discussed the relevancy of the evidence to fair market value. *See* 7/16/13 VBR 16:16 to VBR 23:8 (App. C). The trial court specifically stated that it understood Airport Investment's position that evidence of the Hampton Inn franchise requirements and the hotel's ability to meet those requirements post-taking "goes to the heart of the value of the property," but ruled to exclude the evidence because "your

theory doesn't seem to be supported by case law." *Id.* at 20:17 to 22:12. This was a misapprehension of case law.

This record demonstrates that the trial court received adequate information to make an informed ruling.

4. Sound Transit fails to argue that the error was harmless.

Sound Transit does not argue that the exclusion of the evidence supporting Mr. Biethen's valuation of the property was harmless. The prejudice is plain. OB 23-34. Prejudice should be deemed conceded.

This Court should reverse to preserve a landowner's right to submit evidence relevant to fair market value, and hold that case law prohibiting recovery of lost profits and personal damages is inapposite to bar admission of evidence offered to substantiate an appraisal of fair market value according to a legitimate appraisal method.

B. **A new trial is warranted because the trial court on untenable grounds allowed the jury to hear the out-of-court valuation of a consulting expert, which demonstrably was highly prejudicial.**

Airport Investment demonstrated that Sound Transit wrongfully succeeded in presenting to the jury an out-of-court valuation opinion by a consulting expert that no party called to testify. OB 34-40. Airport Investment showed the resulting prejudice based on Sound Transit's closing argument concerning the "third appraisal," and the jury's

question during deliberations about that appraisal. OB 39-40 citing 7/30/2013 VBR 1761-62 (closing argument) and CP 952 (jury question: "How should we consider the estimate from a third appraiser, who was briefly mentioned? We think that estimate was $485,000. . . .").[3] The harmful error prejudiced Airport Investment and warrants a new trial.

Sound Transit pretends that the valuation opinion was Sandra Oh's and cites authorities that allow a landowner to opine on value. RB 34 citing WPI 150.15 and *State v. Wilson*, 6 Wn. App. 443, 493 P.2d 1252 (1972). The record contradicts Sound Transit's pretension. The record—including the voir dire by the trial court—defies the characterization of the appraisal opinion as Ms. Oh's. This Court should see Sound Transit's tactic for what it was: an effort to prejudice the jury with evidence of an appraisal by another expert whom no party called to testify before the jury. This Court should reject the tactic.

1. The record does not support admission of the consulting expert's valuation opinion as "the landowner's" valuation opinion.

Sound Transit first defends the wrong evidence. Sound Transit

[3] Sound Transit appears to misconceive Airport Investment's references to these events as additional assignments of error, because Sound Transit argues that those two events are not error. RB 37. Airport Investment does not assign error to those events. These later events show the prejudice from the preceding error of requiring Ms. Oh to testify to the consulting expert's out-of-court opinion of value.

addresses a letter dated July 16, 2012. RB 35. It asserts that the content of the letter was not hearsay. RB 35. This letter ("Unadmitted Exhibit 158") never was admitted. 7/25/13 VBR 1206:4-7. Sound Transit's defense of the contents of the letter is irrelevant. The letter is not the evidence at issue.

The error concerns the testimony of Ms. Oh. Sound Transit originally tried to introduce the out-of-court appraisal through the settlement letter. 7/25/13 VBR 1186:13-1191:4. When that failed, Sound Transit sought to elicit from Ms. Oh the precise number valuation reached by the consulting expert. The trial court should not have allowed this. Sound Transit's burden to substantiate admission of the evidence under WPI 150.15 or *State v. Wilson* was to show that owner Ms. Oh held an opinion of the value of the property. Sound Transit never established this. Ms. Oh repeatedly explained that she held no independent opinion of value, and that she relied on the expert to value the property. *See* 7/25/13 VBR 1198-1202. The Court should not affirm based on WPI 150.15 or *State v. Wilson.*

After its voir dire of Ms. Oh, the trial court knew the content of Ms. Oh's testimony. The voir dire demonstrated that Ms. Oh would testify that she held no independent opinion on value but relied on the consulting expert to value the property. Airport Investment's attorneys

objected that such testimony would include hearsay. 7/25/13 VBR 1203:12. The trial court overruled the objection, compelling Ms. Oh to testify. *Id.* at 1203:14-16, 1205-06. This was error. Ms. Oh testified exactly as she had during voir dire. *Id.* Sound Transit argues that Airport Investment should have moved to strike the answer, but the answer was exactly what the voir dire showed it would be. The trial court already had overruled the hearsay objection. Airport Investment had no further obligation and was bound by the ruling.

This Court also should reject Sound Transit's argument that Airport Investment itself introduced the testimony. *See* RB 37. Sound Transit presumably bases this argument on the fact that the witness Sandra Oh owns Airport Investment. This is irrelevant. The record shows that Sound Transit solicited, and the trial court compelled, the testimony during Sound Transit's direct examination of Ms. Oh. Airport Investment's attorneys clearly objected to admission of this testimony.

Sound Transit also asks this Court to deny the appeal because Airport Investment "did not move to strike" or "ask for a limiting instruction," but chose "to examine [Ms. Oh] about the appraisal and why, in her current view, it was not accurate." RB 36. This is meritless. A party will not be deemed to have invited error simply by adopting tactics to mitigate the effects of an erroneous trial court ruling. *State v.*

Thank, 145 Wn.2d 630, 648, 41 P.3d 1159 (2002) citing *McCormick on Evidence* §55 at 246 (John W. Strong ed., 5th ed. 1999) ("[W]hen [a party's] objection is made and overruled, he is entitled to treat this ruling as the 'law of the trial' and to explain or rebut, if he can, the evidence admitted over his protest.").

This Court should reverse the trial court's ruling, over objection, requiring Ms. Oh to testify to the out-of-court appraisal opinion. It was legal error or untenable to conclude that this out-of-court appraisal opinion could be introduced through Ms. Oh.

2. The trial court abused its discretion when it failed to grant Airport Investment's **unopposed** motion *in limine* to exclude evidence of the consulting expert's appraisal opinion.

Prior to trial, Airport Investment sought to exclude reference to the consulting expert's appraisal. CP 396 at #5, CP 406 ("Evidence regarding AIC's initial appraisal valuation should be excluded as: 1) work product produced by a consulting expert; 2) evidence related to settlement discussions; and 3) as prejudicial to AIC.") Sound Transit did not oppose this motion. On this record, as argued at OB 35-36, it was an abuse of discretion to deny the **unopposed** motion.

Sound Transit waived the argument it now asserts that Airport Investment failed to meet its burden as the moving party. *See* RB 38 (Airport Investment "failed to present any argument that Mr. Lamb was

a consulting expert whose opinion was work-product or that his opinion was an offer of compromise under ER 408, the grounds for exclusion Airport Investment asserted."). First, the assertion is flatly wrong, as the initial briefing demonstrates. *See* CP 406-09; CP 1438 ¶ ¶ 4-5. Second, the assertion comes too late. Sound Transit told the trial court only that it "agrees generally" to the exclusion "but presents some caveats and clarifications." CP 661. The only "caveat and clarification" was that Sound Transit would like the exclusion to be mutual, stating:

> **Motion in Limine Number 5**: Airport Investment requests the court to exclude evidence of its initial appraisal. Sound Transit will agree to the exclusion so long as Airport Investment likewise agrees to the same exclusion with respect to evidence of Sound Transit's initial exclusion.

CP 667. Sound Transit **never challenged** the factual grounds for the motion or offered evidence of waiver. Nor did it offer authority or facts supporting its position that exclusion should be mutual.

Instead of granting the unopposed motion, the trial court unreasonably required a "deal" between the parties that both sides would or would not raise the "initial" appraisals. *See* OB 13, 35-36. No legal authority or rational ground supports requiring Airport Investment to "pick its poison" like this. *See* OB 13. The trial court equated the two initial appraisals based on untenable grounds. OB 35-36. Sound Transit does not argue that the two appraisals legitimately could be equated.

Sound Transit instead argues that the trial court found that Airport Investment waived the privilege attending offers of compromise under ER 408 and RCW 8.25.070(5) (prohibiting reference to settlement offers during trial of just compensation) when it sent Sound Transit the letter of July 16, 2012, containing the consulting expert's valuation opinion. RB 38 citing 7/16/13 VBR 53. But the letter demonstrates an active negotiation to compromise the condemnation action. *See* Unadmitted Exhibit 148 (App. 7 to OB). No reasonable person could conclude the letter was not an offer of compromise.

This Court should conclude that the trial court abused its discretion by denying Airport Investment's unopposed motion *in limine*.

3. Sound Transit does not argue that the error was harmless.

Sound Transit does not contest the harm of the admission of the out-of-court valuation opinion. Airport Investment established that its admission was highly prejudicial, including demonstrating how Sound Transit seized on the testimony during closing and the jury's concern during deliberations with the "third appraisal." OB 18-20, 39-40. Prejudice should be deemed conceded.

Admission of the out-of-court appraisal as the landowner's valuation opinion was legal error, or an abuse of discretion, that impermissibly advantaged Sound Transit in the trial. A new trial is

warranted.

C. Sound Transit's excuses to avoid a fee award contravene the statute.

Sound Transit offers no legitimate defense of the trial court's denial of Airport Investment's motion for fees when Sound Transit changed the description of the condemned TCE on the second day of trial, long after it had made its thirty-day offer of settlement. It cannot avoid a fee award.

Airport Investment provided numerous reasons this Court should reverse as a matter of law the denial of the motion for fees. OB 40-47. Sound Transit barely responds to these arguments, instead adopting extreme positions such as its lead argument that if "any" offer is made thirty days before trial, the condemnor can avoid a fee award regardless of the fact that the taking it presents to the jury is different than the taking for which it made the offer. *See* RB 40. For this extreme position, Sound Transit cites RCW 8.25.070(1)(a) as providing that "the condemnee is entitled to fees only if the condemnor 'fails to make **any** written offer in settlement' at least thirty days before trial." RB 40 (emphasis original). Sound Transit then argues that "[t]here are no additional statutory criteria," and concludes that because there is no dispute that Sound Transit made "a" thirty-day offer, it has complied. RB 40.

This acutely literalist approach ignores all rules of statutory construction. "A court's objective in construing a statute is to determine the legislature's intent." *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 909, 154 P.3d 882 (2007). "Plain meaning is 'discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.'" *Id.* This Court should reject Sound Transit's invitation to establish as the law of Washington that "any" offer is sufficient to stave off a fee award, regardless of whether that offer was for the taking presented to the jury. This Court should adopt Airport Investment's sound analysis of both RCW 8.25.070(1)(a) and RCW 8.25.075(1)(b).

Sound Transit's position also is strongly undercut by the examples in the Opening Brief showing that the change disadvantaged and prejudiced Airport Investment (OB 16-18, 43, 44, 45 note 5) and that a condemnor easily could manipulate the statutory scheme if Sound Transit's construction were correct. OB 45. Public policy and legislative intent weigh against Sound Transit's construction. OB 44.

Sound Transit makes no persuasive response. It argues that a condemnor should have the flexibility to ameliorate condemnees' concerns and make minor changes. RB 42-43. Sound Transit stresses

the "design-build" nature of the project, arguing that its needs changed. *Id.* Sound Transit essentially tells this Court that it "over-condemned" for the project, and later determined to scale back its condemnation once it had a more accurate understanding of its own needs. This Court should place the risks of a "design-build" project on the condemnor, not the landowner. *See State v. Buckley*, 18 Wn. App. 798, 799-801, 572 P.2d 730 (1977) (refusing to place risk on landowner that State may not use property for which it obtained possession and use). If a condemnor makes changes to the taking within thirty days of, or during, trial, it must accept the ramifications under the fee statutes.

Sound Transit argues that the change was not material. RB 44. This contradicts its argument to the trial court in support of the change that the reduction of the duration and character of its use was "essential to determining the TCE's fair market value." OB 44 citing CP 661. According to Sound Transit, the change is "not material" when this characterization might assist Sound Transit in avoiding a fee award. The change is "essential," however, to the fair valuation of the TCE. Sound Transit does not attempt to explain its contradictory positions.

Sound Transit also does not defend its argument to the jury that its compensation was especially generous considering that it would pay Airport Investment for three years of use of the easement area (pursuant

to the original taking description), even though it only would use the area for half a year (pursuant to the new taking description presented at trial). *See* OB 43 citing 7/30/13 VBR 1696:15-25, 1696:21-1697:4. *See also* OB 16-18 citing 7/16/13 VBR 33:11-14, 33:15-37:3. Sound Transit's silence now is understandable: the tactic is indefensible.

Sound Transit misconceives this appeal as challenging its "right" to change the taking description. *See e.g.*, RB 43 n. 8 (Airport Investment is "flirting with the argument that Sound Transit lost its right to make even these minor changes when Airport Investment granted possession and use."). Airport Investment has not challenged Sound Transit's "right" to change the taking, deeming the issue unnecessary to its appeal. This appeal instead highlights the fee *ramifications* when a condemnor changes the taking long after a thirty-day offer has been made. This Court should reject Sound Transit's position that under RCW 8.25.070(1)(a) and RCW 8.25.075(1)(b), no ramifications exist.

III. CONCLUSION

The two evidentiary errors compounded the unfairness of the trial on just compensation. The trial court unjustifiably handicapped Airport Investment's presentation of its fair market value case when it excluded significant evidence supporting its appraiser's opinions. Sound Transit, meanwhile, unfairly benefitted from hearsay evidence that

should not have aided its valuation case. The evidentiary errors warrant reversal and a new trial. This Court should reject Sound Transit's defense of these trial court decisions to maintain a level playing field between condemnors and landowners.

This Court should reject Sound Transit's superficial defense of the trial court's denial of fees to Airport Investment. Sound Transit's extreme construction of the statute is not supportable. As a matter of law, the statutes plainly required a fee award in these circumstances.

Respectfully submitted on this 9th day of June, 2014.

SCHWABE, WILLIAMSON & WYATT, P.C.

By: Averil Rothrock

Averil Rothrock, WSBA #24248
arothrock@schwabe.com
Joaquin M. Hernandez, WSBA #31619
jhernandez@schwabe.com
Dennis Dunphy, WSBA #12144
ddunphy@schwabe.com
Christopher H. Howard, WSBA #11074
choward@schwabe.com
Attorneys for Appellant Airport Investment Co.

APPENDIX

A. Court's Instructions to the Jury #7, 8, 9, 10, 13, 15, 16 (CP 964-67, 970, 972-73)

B. Airport Investment's Opposition to Motion in Limine re Franchise Agreement (CP 519-26)

C. 7/16/13 VBR 16-23 (oral argument of motion in limine re Franchise Agreement)

APPENDIX - A

INSTRUCTION 7

Fair market value means the amount in cash that a well-informed buyer, willing but not obligated to buy the property, would pay, and that a well-informed seller, willing but not obligated to sell it, would accept, taking into consideration all uses to which the property is adapted or may be reasonably adaptable.

INSTRUCTION 8

In determining just compensation, you should take into consideration any and all uses to which the property in question is adaptable at the time of trial. You also should take into consideration the existing demand for such property within the market where the property is situated or such demand as may be reasonably expected in the reasonably near future.

INSTRUCTION 9

In determining the amount of just compensation, you should limit your consideration to those factors that will actually affect the fair market value of the property and that are established by the evidence. You should not consider any factors that a well-informed and prudent person would find to be remote, imaginary, or speculative.

INSTRUCTION 10

In deciding what compensation should be paid for damages, if any, to the remainder of the property, you should take into consideration the uses for which the land is adaptable before and after the acquisition, the character and quality of the property, the shape and condition in which such remaining property is left, the convenience of using the property before and after such acquisition, and such other factors as you believe would affect the fair market value of the property.

INSTRUCTION 13

As to the permanent easement, Airport Investment Company is entitled to recover any diminution in the fair market value of its property remaining after the acquisition of the permanent easement that is attributable to Sound Transit's actual use of the permanent easement that Sound Transit is acquiring from Airport Investment Company.

Airport Investment Company is not entitled to recover any diminution in the fair market value of its property remaining after the acquisition of the permanent easement that is attributable to Sound Transit's use of surrounding property acquired from other property owners or from the project as a whole.

INSTRUCTION 15

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

In this case, a representative of Airport Investment Company has also expressed an opinion as to the value of the property in question. Again, you are not required to accept this opinion. In determining the weight to be given to this opinion, you should consider the facts and reasons upon which the opinion is based and the representative's knowledge of, and experience with, the subject. You should also consider the general rules for determining the credibility of witnesses, contained elsewhere in these instructions.

INSTRUCTION 16

Although evidence has been introduced with reference to the income or profits earned by the business on the premises, this evidence was admitted solely for the purpose of showing a use to which the property is adapted and should be considered by you for this purpose only. You may not award compensation for any loss of profits or income that may be caused by the taking. It is Airport Investment Company's real property, not the business, that is being acquired, and you may award compensation only for Airport Investment Company's rights in the real property.

APPENDIX - B

The Honorable LeRoy McCullough
Responding Party: Airport Investment

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR THE COUNTY OF KING

CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY, a regional transit authority, dba SOUND TRANSIT,

Petitioner,

vs.

AIRPORT INVESTMENT COMPANY, a Washington corporation, dba Hampton Inn; HORIZON AIR INDUSTRIES, INC., a Washington corporation; IBEW 77 INTERNATIONAL BOULEVARD, LLC, a Washington limited liability company; JP MORGAN CHASE BANK, N.A., fka The Chase Manhattan Bank, as Trustee for the Registered Holders of Prudential Securities Financing Corporation Commercial Mortgage Pass-Through Certificates, Series 199-C2; KING COUNTY; and ALL UNKNOWN OWNERS and UNKNOWN TENANTS,

Respondents.

No. 12-2-33275-4 KNT

RESPONSE TO MOTION IN LIMINE TO EXCLUDE EVIDENCE OF FRANCHISE REQUIREMENTS AND BUSINESS PRACTICES

INTRODUCTION

People buy hotel property (i.e., income-producing property) because of the income the property is capable of producing. In other words, the income creates the value of the property. Sound Transit's appraiser agrees. To be clear, Respondent Airport Investment Company ("AIC"") is not seeking business damages or lost profits. Rather, the franchise agreement and the franchise standards (i.e. 100% Satisfaction Guaranty and Parking

SCHWABE, WILLIAMSON & WYATT, P.C.
Attorneys at Law
U.S. Bank Centre
1420 5th Avenue, Suite 3400
Seattle, WA 98101-4010
Telephone: 206.622.1711

Requirement) are indicative of the property's ability to attract income, which in turn are indicative of the property's value. Sound Transit's motion should be denied.

LEGAL AUTHORITY

Evidence of property values based on income is admissible. Courts accept that appraiser utilize the "income approach" to valuation.[1] The income approach to valuation (which was utilized by each party's appraiser) requires an expert to determine the amount of net income the owner of the subject property could reasonably expect to receive. This amount is then capitalized at an appropriate rate derived from hotel property market studies, hotel property sales, and investigation/analysis by an appraiser among other things to arrive at the return a prudent investor could expect to receive on his investment.[2]

> The income capitalization approach to value consists of methods, techniques, and mathematical procedures that an appraiser uses to analyze a property's capacity to generate benefits (i.e., usually the monetary benefits of income and reversion) and convert these benefits into an indication of present value.[3]

Thus, any factors that affect the property's capacity to generate benefits is relevant—including the fact the property is capable of being branded by a national franchise like Hilton. The analysis results in an opinion of fair market value of the Property.

Business profits (i.e., income) are admissible in determining the value of property. The State Supreme Court reversed a trial court that disallowed a jury to consider the value of crops. The landowner was unable to plant crops as a result of the government taking an easement over his property. Although the Supreme Court stated the owner may not recover lost profits, the Court endorsed that "the only context in which evidence of the value of annual crops is admissible is in determining the value of the land."[4] Accordingly, Sound

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[1] 5 Nichols on Eminent Domain (3d ed.) § 19.01).

[2] *Id.*

[3] The Appraisal of Real Estate, 13th ed. (2008) p. 445.

[4] *State v. McDonald*, 98 Wn.2d 521, 531, 656 P.2d 1046 (1983) (citation omitted).

SCHWABE, WILLIAMSON & WYATT, P.C.
Attorneys at Law
U.S. Bank Centre
1420 5th Avenue, Suite 3400
Seattle, WA 98101-4010
Telephone: 206.622.1711

Transit's authority pertaining to lost profits and business expectancy damages, while instructive, are inapplicable. AIC *is not* seeking the sorts of damages (i.e., lost profits) those cases identify. Instead, AIC seeks to discuss how Sound Transit's project negatively impacts the property's ability to earn income, thus diminishing the value of its property—the same issue the Supreme Court faced in reversing the trial court above.

The jury will be instructed that "just compensation" reflects the fair market value of property. Sound Transit's appraiser acknowledges that a property's income is the best way to measure the property's value. During his deposition he stated as follows:

> Q. In general, what is the best measure of a hotel property's value?
>
> Mr. Beaver: Object to form.
>
> A. It would be the income stream.
>
> Q. Why?
>
> A. It's an investment property.
>
> Q. Any other reasons?
>
> A. That's primarily the reason folks purchase properties like that, is for the income.
>
> Q. So the revenue stream creates value for the property, correct?
>
> A. Yes, as is typical with most investment properties.[5]

Sound Transit's appraisal also acknowledges that the revenue stream affects the property's value:

> The Income Approach to Value, as applied to the subject property, involves the estimation of a gross economic rental, which is then processed by subtracting an estimated vacancy and credit loss and operating expenses to obtain an estimated net operating income. The net operating income is then capitalized into a value estimate by the appropriate capitalization rate derived from the market."[6]

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[5] Declaration of Joaquin Hernandez ("Hernandez Decl.") ¶ 36, Exhibit Z (Bracket Dep. 75:01–75:12).

[6] Supplemental Declaration of Joaquin Hernandez ("Hernandez Supp. Decl.") ¶ 4, Exhibit GG (Brackett Appraisal at p. 15).

SCHWABE, WILLIAMSON & WYATT, P.C.
Attorneys at Law
U.S. Bank Centre
1420 5th Avenue, Suite 3400
Seattle, WA 98101-4010
Telephone: 206.622.1711

The report recognizes refunds for guest complaints as an expense item.[7] To say Hampton Inn's 100% Guaranty franchise standard plays no role in this expense ignores the fact this standard affect the property's income. AIC will put forth evidence of some of the frankly ridiculous reasons guests demand their money back. AIC has no choice but to honor the 100% Guaranty and give a refund. This guaranty factors into the property's expenses. Discussions of the property's income and expenses are peppered throughout Sound Transit's appraisal report.[8] A "well-informed" buyer and seller—words used in WPI 150.08 defining "Fair Market Value"—consider a property's income and expenses as part of due diligence in a prospective property sale. Sound Transit's appraiser testified on the subject as follows with regard to findings in his appraisal report:

> Q. Do market participants study a hotel's income and expenses like you have done here in the middle of the page?
>
> A. Yes, I think so.[9]
>
> ---
>
> Q. What makes projects risky or justifying a higher cap rate?
>
> A. There's an endless list of factors for that.
>
> Q. Limitations on the how the property is used?
>
> A. It could. As could variations in NOI [net operating income]. Revenue or expenses, if that's inconsistent, that would be considered risky.[10]

Based on these admissions, it logically follows that anything that *affects* the property's income-producing potential is relevant to the value of the property. The property's characteristics of maintaining a national brand (Hampton Inn/Hilton) and standards add value to the property. Sound Transit's appraiser noted the importance of a hotel's brand during his deposition:

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[7] Hernandez Supp. Decl. ¶ 4, Exhibit GG (Brackett Appraisal at p. 24).

[8] Hernandez Supp. Decl. ¶ 4, Exhibit GG (Brackett Appraisal at p. 24).

[9] Hernandez Decl. ¶ 36, Exhibit Z (Brackett Dep. 105:03– 105:05).

[10] Hernandez Decl. ¶ 36, Exhibit Z (Brackett Dep. 107:08– 107:10, 107:17– 107:20).

SCHWABE, WILLIAMSON & WYATT, P.C.
Attorneys at Law
U.S. Bank Centre
1420 5th Avenue, Suite 3400
Seattle, WA 98101-4010
Telephone: 206.622.1711

Q. Tell me some of the characteristics you were looking for in selecting the [comparable properties to the subject property].

A. Well, generally, in the same category, select-service, limited-service hotel; typically, *sales with similar branding*, similar room size, overall size in terms of rooms; to the extent we were able to find properties of similar ages, but the ages in the assignments we had varied quite a bit.[11]

A. *Those hotel properties in good condition with strong branding* and location are generating investor returns on par with the pre-recession climate.

Q. What do you mean by *strong branding*?

A. Where you've got a national affiliation.

Q. Does the old Hampton Inn have a national affiliation?

A. Yes.

Q. *Do you consider the Hampton Inn a strong brand?*

A. *Yes.*

Q. Why?

A. *It's a good, national brand with a good reputation.*[12]

Compare the similarity of the above testimony to AIC's appraiser's testimony when asked what "market, brand, and subject characteristics" he considered in his analysis, Mr. Biethan responded:

A. Okay. Including, but not limited to, the SeaTac market appears to be in a recovery mode, relatively well balanced for supply and demand. There is some risk of new supply. *The subject has got a Hilton-branded franchise.* Subject is in relatively good condition. Subject is of an older age compared to some of the properties in the competitive set.

* * * *

Generally speaking, SeaTac, Seattle, limited-service, *nationally branded* product is going to be at least better than a national average.

People buy hotels because of the money they produce. No one would buy hotel

[11] Hernandez Decl. ¶ 36, Exhibit Z (Brackett Deposition 77:05– 77:12) (emphasis added).

[12] Hernandez Decl. ¶ 36, Exhibit Z (Brackett Deposition, 94:19– 95:05) (emphasis added).

SCHWABE, WILLIAMSON & WYATT, P.C.
Attorneys at Law
U.S. Bank Centre
1420 5th Avenue, Suite 3400
Seattle, WA 98101-4010
Telephone 206.622.1711

property without first knowing the income stream that may be derived from the property. The concept is similar in cases where condemnation actions involve gravel pits. The rationale is that "no one would either buy or sell a gravel pit without having some idea of the amount of gravel available, and its value in its natural condition."[13] Similarly, a well-informed buyer and seller will want to know what is the income and expenses produced by AIC's property and what affects the property's capability of producing the property. The Hampton Inn's brand and standard are among the issues that a potential buyer/seller will want to know about.

AIC will put forth evidence of how Sound Transit's project negatively impacts its property negative impact potential. The project's noise, proximity, and view obstructions all affect the property's occupancy rate and average daily room rate. Hampton Inn's 100% Guaranty factors into the impact. AIC's hotel consultant will opine that the project negatively impacts the project and will give insight about how Hilton will view the project's impact on the property. There is danger that Hilton will choose not to renew the franchise agreement. If the property loses its franchise with Hilton, the property's value significantly lessens. Thus, buyers and sellers must account for this risk and uncertainty. They do so by offering less money to purchase the property.

The increased risk of refunds as a result of the Project also contributes to valuation. An increase in the risk of room refunds should also be admissible as part of the valuation of the Property. It is captured as an expense, and both appraisers examine those expenses in the context of valuing the Property and the deciding-upon just compensation.

The issues above also apply to the temporary construction easement ("TCE") seeks to take. Temporary takings such as TCEs, are measured differently than other takings. The impact in loss of income may also be a form of damages for temporary takings.[14] This

[13] *State v. Mottman Mercantile Co.*, 51 Wn.2d 722, 724, 321 P.2d 912 (1958).

[14] *See* comments to WPI 150.06.02; *Colella v. King County*, 72 Wn.2d 386, 433 P.2d 154 (1967).

SCHWABE, WILLIAMSON & WYATT, P.C.
Attorneys at Law
U.S. Bank Centre
1420 5th Avenue, Suite 3400
Seattle, WA 98101-4010
Telephone: 206.622.1711

potential loss in income is translated into the fair rental value of the TCE. In other words, if someone wants to use part of another land temporarily, the landowner should be entitled a rent amount that captures the loss or impact to the rest of his property. Otherwise, the landowner will not rent the part of the land. In this case, construction on the hotel property will impact the property and operations negatively like any other loud construction project on hotel grounds. This should factor into the value of the TCE.

The jury will also be asked to consider certain measures AIC will need to take to mitigate parking problems caused by Sound Transit's use of the TCE. Particularly, the jury will need to "consider evidence of costs of repairs to the remaining property made necessary by this taking only to the extent that such costs affect the market value of the remaining property."[15] As stated above, the franchise and brand standards factor into the market value. AIC will put forth evidence that a breach of the branch standards may result in termination of the franchise/brand. The TCE will eliminate about 25 parking spaces abutting 28th Ave. South and also make it difficult for cars to use 6 parking spaces abutting the hotel building. Maneuvering in the area will be tricky and will inconvenience guests. Hilton, under the franchise agreement, requires AIC to provide one parking space per room. There are 130 rooms at the hotel. Sound Transit's construction activities may essentially put AIC in breach of its agreement with Hilton—something Sound Transit's appraiser failed to consider by his own admission, notwithstanding that he agrees the Hampton Inn brand provides value to the property. AIC will require valet services during construction to help mitigate these issues and evidence of such mitigation should be admissible.

CONCLUSION

AIC is not seeking lost profits or consequential damages. The evidence that is subject to the motion is being used how the property's characteristics are such that it is capable or less capable of producing income. This goes to the value of the property. Moreover, the jury

[15] WPI 151.08.

SCHWABE, WILLIAMSON & WYATT, P.C.
Attorneys at Law
U.S. Bank Centre
1420 5th Avenue, Suite 3400
Seattle, WA 98101-4010
Telephone: 206.622.1711

will be instructed that it may not equate lost profits with just compensation.[16] For the foregoing reasons, the Court should deny Sound Transit's motion.

Dated this 11th day of July, 2013.

SCHWABE, WILLIAMSON & WYATT, P.C.

By: _____
Dennis J. Dunphy, WSBA #12144
Joaquin M. Hernandez, WSBA #31619
Milton Reimers, WSBA #39390
Attorneys for Respondents, Airport Investment Company

[16] WPI 151.05.

SCHWABE, WILLIAMSON & WYATT, P.C.
Attorneys at Law
U.S. Bank Centre
1420 5th Avenue, Suite 3400
Seattle, WA 98101-4010
Telephone: 206.622.1711

APPENDIX - C

THE COURT: Right. Not what you would lose because you're this particular franchise at this particular location doing this particular business.

MR. HERNANDEZ: Right. And -- and I don't think that's exactly what we're going to be getting into.

THE COURT: Good. Then the [unintelligible] agreement, I think I'm granting the motion as brought. 'Cause I think it's an accurate statement of the law.

MS. LINDELL: Thank you, Your Honor.

THE COURT: Um-hmm.

MS. LINDELL: So with regard to Motion in Limine No. 6 to exclude lost business opportunities --

THE COURT: Um-hmm.

MS. LINDELL: -- and so this is along the lines of what we are talking about in terms of the evidence should not be what this owner might lose in terms of business opportunities, but what the market owner of a property that is suited to a hotel in the Sea-Tac Airport market [verbatim]. And so we exclude any evidence with regard to risk of loss of franchise and national brand.

THE COURT: Right. That's my understanding. I mean, I'm not saying that another

nationally branded property couldn't go here and that that can't be something that appraisers take into account. But --

MR. HERNANDEZ: Well --

THE COURT: -- the details of this specific property, it seems to me, in terms of lost business opportunities and hypothetical transactions are out.

MR. HERNANDEZ: Well, I disagree with Sound Transit's position on it because both appraisers have said that the fact this hotel is nationally branded adds value to the property.

We will put on evidence -- the franchise agreement, for example, for Hilton or Hampton that says this is what the hotel is. The hotel is the land, the property, the bricks, the mortar. It doesn't --

THE COURT: Right. And that's a lot like the case involving the growing of crops on land. Okay?

MR. HERNANDEZ: Correct.

THE COURT: If you decided not to be a Hampton and be a Red Lion --

MR. HERNANDEZ: Right. There's going to --

THE COURT: -- okay, or be -- or be a Sheraton, I'm sure that your property could be put to use by any other national brand. So that's a

legitimate measure. It's sort of a general generic --

MR. HERNANDEZ: Right.

THE COURT: -- use of your land. The specifics, however, of your franchise --

MR. HERNANDEZ: Um-hmm.

THE COURT: -- okay, the specific lost opportunities that you're going to suffer, the uniqueness, in other words, of your losses, don't feed into that.

MR. HERNANDEZ: I -- I guess I'm not understanding where the Court's [unintelligible].

THE COURT: Well, let's put it this way: If you have a farmer that's growing a special kind of wheat on their land --

MR. HERNANDEZ: Right.

THE COURT: -- that's really valuable --

MR. HERNANDEZ: Right.

THE COURT: -- okay?

MR. HERNANDEZ: Right.

THE COURT: And properly licensed by Montana, okay?

MR. HERNANDEZ: Right.

THE COURT: You know, when we measure the value of that land, of course the fact that the land is suitable for growing crops --

MR. HERNANDEZ: Right.

THE COURT: -- comes into the picture. But all the plans that were made by that particular owner to work with Montana under their contracts and do more profitable --

MR. HERNANDEZ: Right.

THE COURT: -- growing would be irrelevant. Because that would pertain to the specific plans that that owner has for future development of that property.

MR. HERNANDEZ: Right. And -- and I -- and I want to be clear about this 'cause I'd hate to violate this particular order during trial.

THE COURT: Me, too.

MR. HERNANDEZ: [Unintelligible]. I know you would hate for me to do that, too.

THE COURT: You really wouldn't like it.

MR. HERNANDEZ: Along those lines, for example, if this was an office building with a Starbucks on it, for example, as opposed to Flo's Cafe, for example, someone would assign more value that there's a Starbucks on this property because there's a Starbucks on this property.

THE COURT: Right. But for a [unintelligible] --

MR. HERNANDEZ: The land -- the land is suited to have a Starbucks or a national [unintelligible].

THE COURT: Right. But --

MR. HERNANDEZ: But --

THE COURT: But one more time, okay? The fact that this is an appropriate property for a national brand --

MR. HERNANDEZ: Right.

THE COURT: -- that's more valuable because it's --

MR. HERNANDEZ: Right.

THE COURT: -- appropriate for a national brand is not the same thing as getting into your --

MR. HERNANDEZ: Right.

THE COURT: -- specific national brand.

MR. HERNANDEZ: Right. Exactly. And -- but I also want to be able to explain why it's suited for a Hampton Inn national brand. A lot of the features that are required by Hampton Inn, for example, deal with parking, they deal with how the pool is set up, they deal with how the building has to be set up.

THE COURT: Right. But it doesn't really matter whether Hampton requires this or whether you've done it and that makes it great for some other brand to

pick up on, too.

MR. HERNANDEZ: Um-hmm.

THE COURT: Do you follow me?

MR. HERNANDEZ: Right. But the fact that the -- this project use of the easement endangers their requirements under the brand is relevant.

THE COURT: It's a peculiar thing about this owner's use of the property which isn't relevant in a condemnation case.

MR. HERNANDEZ: Okay.

THE COURT: You can bring in the features and facilities of your property, of course, because that's something you would market to another national brand, for example, if you wanted to sell this property or rent it.

But you cannot bring in, And we do this because our franchise requires it, and we're going to get screwed if our franchise is -- is not followed.

Do you follow me?

MR. HERNANDEZ: Understood. So I won't be able to talk about the standards for the pools at all whatsoever --

THE COURT: Sure.

MR. HERNANDEZ: -- or the fact --

THE COURT: Sure. The fact that you have

done X, Y, and Z that makes it a wonderful pool on your property --

MR. HERNANDEZ: Right.

THE COURT: -- that seems to me to go to the value of the property.

MR. HERNANDEZ: Right.

THE COURT: The fact that Hampton required that of you, no.

MR. HERNANDEZ: Well, that goes to the heart of the value of this property.

THE COURT: I know that. But your theory doesn't seem to be supported by case law. Okay? Your theory seems to deal with your unique use of the property, which is something that we can't compensate you for. You can only get compensated by looking at your property against the market, not against the particular use of it.

It's like having a house that somebody loves because they've got a movie theatre inside it. Well, that will probably make the house more marketable. But the value they put on the movie theatre or why they put it in or what would happen to the movie theatre if somebody else used the property, those wouldn't come into valuation.

MR. HERNANDEZ: Right. But both

appraisers agree that it adds value to the property.

THE COURT: The national branding of facilities do. And that part of their opinion comes in.

MR. HERNANDEZ: Okay.

THE COURT: All right. I think my ruling's clear, even though I know that AIC disagrees with me. And I'm noting their objection to my ruling.

All right. Next motion?

MS. LINDELL: Motion in Limine No. 7 by Sound Transit to exclude -- excuse me, exclude opinion testimony regarding fair market value from witnesses that are not either the owner or licensed appraisers; in particular, Mr. Olsen.

THE COURT: Right. This --

MS. LINDELL: Airport Investment appears to want to have --

THE COURT: Yeah. Let me -- let me turn back to AIC. I'd really like to hear from you about Mr. Olsen's qualifications to provide appraisal opinions.

MR. HERNANDEZ: Mr. Olsen is not going to give you a num- -- is not going to give us a number on value. He is going to talk about how he consults with the buyers and sellers of hotel investments and discuss

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of June, 2014, I caused to be served the foregoing APPELLANT AIRPORT INVESTMENT CO.'S REPLY BRIEF on the following parties at the following address by United States Mail, postage first class:

Marisa V. Lindell, WSBA #18201
Matthew R. Hansen, WSBA #36631
Estera Gordon, WSBA #12655
Graham & Dunn PC
Pier 70
2801 Alaskan Way, Ste. 300
Seattle, WA 98121-1128
Telephone: (206) 340-9652
Facsimile: (206) 340-9599
E-Mail: mlindell@grahamdunn.com
E-Mail: mhansen@grahamdunn.com
E-Mail: egordon@grahamdunn.com
E-Mail: hreynolds@grahamdunn.com
E-Mail: kfielder@grahamdunn.com
Attorneys for Plaintiff Sound Transit

Averil Rothrock
Averil Rothrock