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Appellants Virág Hegyi (Ms. Hegyi) and Attila Hegyi (Mr. Hegyi) object the Opening Brief of Respondent Washington [State] Department of Retirement Systems (Brief of DRS). The Brief of DRS provided opening arguments promoting the Settlement agreed between them and Class Counsel instead of providing answers to the Brief of Appellants as per the applicable provision of RAP RULE 10.3(b):

“The brief of respondent should ... answer the brief of appellant”

1 Reply to the Introduction in the Brief of DRS

The Introduction in the Brief of DRS did not answer the Introduction in the Brief of Appellants, which consisted of three key points that the Introduction in the Brief of DRS could/should have answered:

- *“this is an Appeal ... from Court Orders related to the Class Action Settlement Agreement (Settlement)”*
- [Appellants (then Objectors)] *“objected both the Settlement and the Trial Court’s order of December 14, 2007”*
- *“The Trial Court’s order of June 30, 2008 (Approval Order) overruled all elements of the objections without addressing any elements of their merit.”*

The Introduction in the Brief of DRS was rather a summary argument consisted of mostly untrue or misleading statements that the DRS Counsel presented to promote the Settlement. The following is a sample of DRS Counsel’s such statements, followed by Appellants’ reply to each:

- (a) *“Appellants seek to overturn the superior court's approval of a class action settlement agreement ("Settlement Agreement") between the*

Washington State Department of Retirement Systems (the "Department") and a plaintiffs class consisting of state employees who transferred funds between two public employee retirement programs, PERS Plan 2 and PERS Plan 3."

This statement is false. It is not true that the plaintiff's class consisted of:

"state employees who transferred funds between two public employee retirement programs, PERS Plan 2 and PERS Plan 3."

Among many other retirement systems and plans, the DRS manages the retirement funds of PERS members [consisting of several groups of public employees, which groups, in addition to certain State employees, include elected officials, elected or appointed Court judges (other than already in JRS), employees of legislative committees, certain employees of higher education institutions, non-certificated employees of school districts, employees of local government, etc.].

The named Plaintiff Jeffrey Probst (Mr. Probst) was a state employee member of PERS Plan 2 (PERS 2) who transferred his retirement funds to PERS Plan 3 (PERS 3).

Practically, pertinent part of ¶6 on (CP 48) in (CP 46-64) incorporated by reference pertinent parts of (CP 3-8) and (CP 9-20) and the second sentence under ¶3 on CP 3 defined, and ¶19 on CP 7 described, the plaintiff's class as it includes:

"all former, current, and future members of the state retirement systems with claims for accrued interest under RCW 41.04.445."

The Claims under ¶11 on CP 5 in (CP 3-8) were:

“DRS has violated its fiduciary and statutory duties, including RCW 41.04.445 and RCW 41.40.795, by failing to calculate and pay accrued interest to Probst and members of the class. ”

In pertinent part, the Relief Sought under sub-¶22(A) on ¶11 on CP 5 in (CP 3-8) specified the meaning of calculating accrued interest and, implicitly, clarified the Claims:

“calculate interest from the date of receipt of each member’s contribution to the date of ... withdrawal and/or transfer”

Under ¶5 on CP 10 in (CP 9-20), DRS Counsel admitted that:

*“The department admits that each member of the following retirement systems and/or plans has an individual account, and that the individual account contains the amount of the member’s employee contributions plus interest thereon:
PERS Plans 1 and 2;
TRS Plans 1 and 2;
LEOFF Plans 1 and 2;
WSPRS Plans 1 and 2;
SERS Plan 1; and
JRS.”*

Accordingly, under sub-¶ 6.2 including all sub-¶¶ on CP 48, Appellants (then Objectors) stated that the Plaintiff’s Class [with claims for accrued interest] included [at least] all former, current, and future members of the:

*[Public] Employees’ Retirement System (PERS) Plans 1 and 2
Teachers’ Retirement System (TRS) Plans 1 and 2
Law Enforcement Officers’ and Fire Fighters’ Retirement System (LEOFF) Plans 1 & 2
Washington State Patrol Retirement System (WSPRS) and/or WSPRS Plans 1 and 2
School Employees’ Retirement System (SERS) Plan 2 and the
Judicial Retirement System (JRS)*

Appellants herein incorporate by reference RCW 41.04.445 and they rely on the expertise and discretion of the Court of Appeals to verify that members of which state retirement systems and/or plans could have had claims for accrued interest under RCW 41.04.445, and members of which state retirement systems could have consisted of the Plaintiff's Class.

The Court certified a litigation class (Certified Class) (CP 21-24). Such Certified Class consisted of all (not only State employee) members of PERS who transferred from PERS Plan 2 to PERS Plan 3.

Then, the Attorneys on behalf of Mr. Probst and the Attorneys on behalf of the DRS filed briefs on the merits associated with Mr. Probst's individual case under the Judicial Review Action (RCW 34.05.570), which then was already consolidated with the Complaint Class Action.

And then¹, the Court directed DRS Counsel and Counsel for Mr. Probst and the Certified Class² to enter into settlement discussions³.

"In reaching the settlement^[4] and pursuant to this Court's direction, the Parties ^[5] engaged in three full-day mediation sessions before an experienced mediator ^[6] knowledgeable in this field and the settlement arises from the mediator's proposal for resolving the settled claims. Counsel for the Settlement Class and

¹ Shortly after the Court certified a litigation class for a possible trial as opposed to certifying a settlement class for settlement purposes only

² As it would be illogical to assume that the Court either reduced or expanded the litigation Class the Court then recently certified without issuing a new Order

³ Interpretation of the first sentence of ¶ 8 in pertinent part on (CP 82) in (CP 80-93)

⁴ On October 16, 2006

⁵ Rather the said Attorneys

⁶ Also an Attorney

for the Department are knowledgeable and experienced in class action litigation and in the subject matter involved in this case.” (Sentences 4 and 5 under ¶ 3 on (CP 37) in (CP 36-45).

The preparation and repeated revisions of documents related to the already agreed settlement took more than one year (from October 16, 2006, to November 30, 2007) for Attorneys “knowledgeable and experienced in class action litigation and in the subject matter involved in this case”. In the final version, the Settlement Class consisted of:

“All (a) persons who transferred Accumulated Contributions from PERS Plan 2 to PERS Plan 3 with a transfer date through the date on which the Court enters the Preliminary Approval Order, (b) persons who transferred Accumulated Contributions from TRS Plan 2 to TRS Plan 3 with a transfer date from January 20, 2002 through the date on which the Court enters the Preliminary Approval Order; (c) persons who withdrew Accumulated Contributions from PERS Plan 2 from January 20, 2002, through the date of the Preliminary Approval Order, and (d) persons who withdrew Accumulated Contributions from TRS Plan 2 from January 20, 2002, through the date of the Preliminary Approval Order; provided, however, that any person who withdrew Accumulated Contributions as described in items (c) or (d) above and subsequently restored the withdrawn contributions to the account from which they were withdrawn on or before the date of the Preliminary Approval Order, is not a Settlement Class Member by virtue of that withdrawal.” (Pertinent part of ¶ 1 on CP 38 in CP 36-45)

Each of the Plaintiff’s Class, the Settlement Class and the Certified Class was different from the “plaintiffs class” in the introductory argument.

(b) *The Settlement Agreement was the result of extensive negotiations between the Department and class counsel facilitated by a neutral mediator.*

Entering into settlement discussions was the result of the Trial Court’s

direction of Counsels for the parties to do so (fourth sentence in pertinent part under ¶ 3 on (CP 37) in (CP 36-45) (supra quote), and first sentence of ¶ 8 in pertinent part on (CP 82) in (CP 80-93));

Based on “the recommendation by the experienced mediator John Aslin that the parties settle the action on the terms contained in the settlement agreement” (pertinent part of the second ¶ under ¶18 on CP 85 in (CP 80-93), the Settlement Agreement was the result of “the mediator’s proposal for resolving the settled claims” (fourth sentence in pertinent part under ¶ 3 on (CP 37) in (CP 36-45) (supra quote) and not the “result of extensive negotiations between the Department and class counsel facilitated by a neutral mediator” in sub-¶ 1(b) (Id.).

Apparently, the extensive interaction between DRS Counsel and Class Counsel occurred not to negotiate the terms of the Settlement but to change the already agreed terms of the Settlement during a more than 13 month period after concluding the third [and last] mediation meeting facilitated by a mediator and agreeing on the terms of the Settlement on October 16, 2006.

Based on the Court records as of before October 21, 2008, neither Mr. Probst (the named Plaintiff in the Complaint class Action) nor any Certified Class member participated in the settlement discussions. However, the first sentence under ¶92 on CP 187 in the Class Action

Settlement Agreement (CP 166-191) filed with the Superior Court on October 21, 2008 [not 2006] stated:

“Class Counsel contend that Plaintiff contributed to the creation of a common fund in this case by bringing the claim to the attention of counsel, pursuing a lengthy administrative process, providing discovery, and participating in settlement discussions”;

Appellants could not find any neutral Court record of the negotiations; The mediator rather proposed the solution than directed Counsels to appropriate sources for any information they might have needed; Counsels⁷ rather accepted the proposed terms of the Settlement Agreement [and then, they prepared and repeatedly revised the settlement documents during a more than 13-month period⁸] than applied their knowledge and experience in class action litigation and in the subject matter involved in this case to establish either the amount of actual monetary damages of the class or the probability⁹ of winning¹⁰ the case during a fair jury trial¹¹.

⁷ who allegedly “are knowledgeable and experienced in class action litigation and in the subject matter involved in this case”

⁸ Such period included (see under ¶ 5, including sub-¶¶, on CP 71 and CP 72 in CP 70-79) the submittal of a legislative bill (SB 6167) by request of DRS (to reinstate statutory language affirming the authority of the DRS Director to determine the method and amount of interest to be credited to member’s retirement contributions), the approval of Chapter 493, Laws of 2007, adding section RCW 41.50.033 to RCW 41.50 and that such law/section to be curative, remedial, and retrospectively applicable.

⁹ A numerical value between 1 and 0 that expresses the likelihood that a specific event (in this case, the winning of the Complaint Class Action during a fair jury trial) would occur.

¹⁰ that would have provided the negotiating Attorneys an objective foundation to calculate the monetary value of Probable Class Recovery including the unpaid part of the interest under sub-¶22(A) and (B), prejudgment interest under sub-¶22(C) and Attorney fees under sub-¶22(D) on CP 7 in (CP 3-8).

¹¹ both of which would have provided a rational basis for computing the settlement amount

(c) *The trial court held multiple hearings on the approval issues and made careful findings and rulings based on a fully developed record.*

The Trial Court made allegedly careful findings and rulings approving the [Proposed] Settlement Agreement during a part of one hearing on June 30, 2008 (CP 80-93) based on the allegedly fully developed record, which record had not included the Proposed Settlement Agreement up to October 21, 2008 (after the issuance of the Appellants-designated Clerk's Papers Index on October 1, 2008).

In ¶35 on CP 91-92 in (CP 80-93), the Superior Court ruled as follows:

“Atilla [sic.] Hegyi and Virág Hegyi object to just about every part of the Settlement. The Court, however, finds the Settlement is fair and reasonable for the reasons set forth in this order. The Hegyi's objection is therefore overruled.”

It is evident, that, without identifying or evaluating any element of Appellants' (then, the Hegyi Objectors') Objection, the Superior Court overruled the “Hegyi's objection” that objected “to just about every part of the Settlement” because the Superior Court has already found that “the Settlement is fair and reasonable” based on unspecified reasons in the Order¹². Apparently, the Superior Court did not feel as being obligated to identify and respond to the issues in the Objection because it had already made its decision based on the reasons submitted by Class Counsel.

¹² a faxed copy of a document sent from Seattle to Olympia for signatures, signed and submitted by Class Counsel after Class Counsel and/or DRS Counsel blocked out and replaced a part of ¶ 34; Approved as to form and signed by DRS Counsel as per the request of the presiding Judge; and then, dated and signed by the presiding Judge

- (d) *An appellate court may not substitute its opinion for that of the trial court. Indeed, the Washington appellate courts give great weight to a superior court's ruling that a class action settlement is "fair, adequate, and reasonable" and therefore should be approved.*

The meaning of giving great weight to a ruling is not the same as that such ruling "therefore should be approved".

- (e) *The partial settlement in this case is "fair, adequate, and reasonable;" the superior court did not abuse its discretion in so finding.*

The Superior Court did not find that the Settlement was adequate:

"The Court, however, finds the Settlement is fair and reasonable"

(the first half of the second sentence) under ¶35 on CP 91 in (CP 80-93).

The Superior Court abused its discretion by finding that the Settlement is fair and reasonable.

The partial settlement in this case is not adequate and not fair for many reasons (consequently, it is not reasonable) including that (i) Such Settlement was not part of the Court records before the superior court found it fair and reasonable (ii) Class Counsel acted in contrary to a Court Order in the last sentence under ¶10 on CP 23 in (CP 21-24) by including others than Certified Class members in the class before further briefing and further order of the Court; (iii) Class Counsel acted in contrary to pertinent part of ¶8 on CP 40 in (CP 36-45) by not representing Settlement Class Members (at least, Ms. Hegyi and Mr. Hegyi) who did not enter an appearance through their own attorneys at the Final Settlement Hearing;

(iv) Mr. Probst (the named Plaintiff) acted in contrary to pertinent part of ¶2 on CP 39 in (CP 36-45) by not representing the proposed Settlement Class at the Final Settlement Hearing, and in contrary to pertinent part of ¶8 on CP 40 in (CP 36-45) by not representing those Settlement Class Members (at least, Ms. Hegyi and Mr. Hegyi) who did not enter an appearance through their own attorneys at the Final Settlement Hearing;

(v) The Settlement Agreement incorporated the amount of Attorney Fee Award measured as a percentage of the common fund created for the benefit of the class¹³ that allowed too much leeway for Class Counsel to spurn a fair, adequate and reasonable settlement for the Certified Class in favor of securing the \$1,650,000.00 Attorney Fee Award that Class Counsel was seeking and switching such Fee relief sought for the Plaintiff's Class under sub-¶ 22.(D) on CP 7 in (CP 3-8) to a burden for the Settlement Class; (vi) Neither the Settlement nor the Court Order approving such Settlement showed how the \$5,500,000.00 Settlement Amount was calculated; (vii) The distribution of the Settlement Amount (including the calculation of the Net Settlement Proceeds) was unfair, in part because not only the fixed amount of Attorney Fee Award but also the

¹³ The United States Court of Appeals for the Ninth Circuit held "that the parties to a class action may not include in a settlement agreement an amount of attorneys' fees measured as a percentage of an actual or putative common fund created for the benefit of the class" See Page 12, *Staton v. Boeing Co.*, 327 F.3d 938 (9th Cir. 2003)

fixed amount of Mr. Probst's Class Representative Award were included in the Settlement Agreement and such Class Representative Award was taken not from the Attorney Fee Award¹⁴ but from the Settlement Proceeds in spite of that such Class Representative Award, in part, was a finder's fee for bringing business for counsel¹⁵. By not appearing at the Final Settlement Hearing, Mr. Probst failed to fulfill his court-ordered duties as appointed representative of the proposed Settlement Class "[f]or purposes of holding the Final Settlement Hearing regarding final Approval of the proposed settlement" (the first part of ¶2 on CP 39 in (CP 36-45)) and "Settlement Class Members who do not enter an appearance through their own attorneys will be represented at the Final Settlement Hearing by Plaintiff as Class Representative" (pertinent part of ¶8 on CP 40 in (CP

¹⁴ "[i]f class representatives expect routinely to receive special awards in addition to their share of the recovery, they may be tempted to accept suboptimal settlements at the expense of the class members whose interests they are appointed to guard." *Weseley v. Spear, Leeds & Kellogg*, 711 F. Supp. 713, 720 (E.D.N.Y. 1989); see also *Women's Comm. for Equal Employment Opportunity v. Nat'l Broad. Co.*, 76 F.R.D. 173, 180 (S.D.N.Y. 1977) ("[W]hen representative plaintiffs make what amounts to a separate peace with defendants, grave problems of collusion are raised.") on Pages 73-74 in *Staton v. Boeing Co.*, 327 F.3d 938 (9th Cir. 2003).

"Class members can certainly be repaid from any cost allotment for their substantiated litigation expenses, and identifiable services rendered to the class directly under the supervision of class counsel can be reimbursed as well from the fees awarded to the attorneys." See *Missouri v. Jenkins*, 491 U.S. 274, 285 (1989)" on Page 76 in *Staton v. Boeing Co.*, 327 F.3d 938 (9th Cir. 2003).

"If, on the other hand, the active members of the class can be provided with special "incentives" in the settlement agreement, they will be more concerned with maximizing those incentives than with judging the adequacy of the settlement as it applies to class members at large." on Pages 76-77 in *Staton v. Boeing Co.*, 327 F.3d 938 (9th Cir. 2003)

¹⁵ "bringing the claim to the attention of counsel" (relevant part of the first sentence under ¶92 on CP 187 in (CP 166-191))

36-45)). In the first sentence under ¶14 CP 84 in (CP 80-93), the Superior Court made the following finding: “The settlement provides for a \$7,500 payment to class representative Jeff Probst for his participation from 2003 through 2007.” However, only the December 14, 2007, Preliminary Approval Order (CP 36-45) made Mr. Probst the “appointed representative of the proposed Settlement Class” for “the purposes of holding the final Settlement Hearing regarding final approval of the proposed Settlement”. Before December 14, 2007, the Superior Court did not appoint Mr. Probst as the class representative and after December 14, 2007, Mr. Probst did not fulfill the purpose and duty of the appointed class representative; (viii) The calculation of the individual recovery amount was not based on the alleged damages (the allegedly earned but unpaid interests on individual retirement accounts) but on the Accumulated Contributions (practically, the accumulated principals on individual retirement accounts, where each of such principals consisted of the member’s contributions and the earned compound interest minus the unpaid interest (at issue in this Class Action), which basis was both inappropriate and biased.

(f) *After extensive arms' length negotiations, the case was partially settled for \$5.5 million, payable as awards to the named class plaintiff, Individual Recovery Amounts to Settlement Class Members, and attorney fees to Class Counsel.*

Using the expression “extensive arms’ length negotiations” is misleading.

(See sub-¶ 1(b) supra). The Court abused its discretion when it approved that the Attorney Fee Award was included in the Settlement as a percentage of, and payable from, the common fund. It was a clear sign of collusion that the Attorneys repeatedly revised/changed the terms of the already agreed settlement during a more than 13 month period (between October 16, 2006 and November 30, 2007) but they kept the Attorney Fee Award, the associated Settlement Amount and the Class Representative Award unchanged.

(g) *The settlement amount was between 47% and 87% of the Settlement Class's alleged damages.*

The Settlement Class has not alleged the amount of its damages. The Settlement Amount was established and the Individual Recovery Amount was calculated independently from the damages claimed in the Complaint Class Action under ¶11 on CP 5 in (CP 3-8). Only the DRS had the data necessary to calculate the Settlement Class's alleged damages. However, the DRS did not agree to calculate the accrued interest on the retirement accounts of individual Settlement Class members "from the dates their contributions were received up to the dates of their withdrawals and/or transfers" for the entire period¹⁶ beginning with the date of receiving the first contribution of each Settlement Class member and then each

¹⁶ Technically, such period could be only a few days or several decades and the number of member contributions could be only one or several hundreds in an individual case.

subsequent contributions (typically twice a month), which was the cause of the alleged damages (the first sentence under ¶8 in pertinent part on CP 4 in (CP 3-8)). Without calculating the alleged damages based on the full terms of the allegation for each member of the Settlement Class, and then, adding all such calculated individual damages together, the alleged damages of the Settlement Class cannot be established. As the alleged damages of neither the individual Settlement Class members nor the Settlement Class as a whole were properly established, a meaningful percentage of the alleged damages of the Settlement Class cannot be calculated.

(h) *Individual recovery amounts were awarded to Settlement Class Members pro rata, based on the amount of the alleged claim of each.*

Again, this is an untrue statement in the introductory argument of DRS Counsel. Claim is what was claimed in the Complaint Class Action (the first sentence under ¶8 in pertinent part on CP 4 in (CP 3-8)). As we previously stated under sub-¶1(g) supra, “the alleged damages of neither the individual Settlement Class members nor the Settlement Class as a whole were properly established”. Although, individual recovery amounts were awarded to Settlement Class Members pro rata, the calculation was not based on the amount of the alleged claim of each [sub-¶1(g) supra]. In addition, it was stated, in pertinent part, under ¶13 on CP 83 and CP 84

in (CP 80-93) that: “the individual recovery amount will be determined on a *pro-rata* basis that is calculated on the amount each individual transferred or withdrew from their retirement account” [underline added].

(i) *The Settlement Class contained approximately 76,000 members.*

The DRS estimated that out of such approximately 76,000 members (or 76,142 as stated under ¶2 on CP 81 in (CP 80-93)), there were approximately 52,076 Settlement Class Members (68%) who would not receive any relief for their alleged claim. Active Plan 2 members (and possibly members of other plans and/or systems) who were members of the Plaintiff’s Class will have to pay an increased percentage of their salaries as retirement contributions in part to cover the DRS’s cost associated with the Settlement and the litigation of this Class Action.

(j) *Indeed, the overwhelming majority of Settlement Class Members were and are satisfied with the agreement.*

This statement cannot be true considering the fact that such agreement (the Settlement) does not provide any remedy to the overwhelming majority (68%) of the Settlement Class Members.

(k) *In short, the partial settlement is "fair, adequate, and reasonable."*

In short, this partial settlement is neither fair nor adequate; consequently, it is not reasonable: (i) Members of the Plaintiff’s Class (which includes but not limited to members of the Settlement Class) allegedly did not receive the full amount of earned interest on their retirement accounts and

this Settlement does not provide any relief for the overwhelming majority of the Plaintiff's Class and the overwhelming majority (68%) of the Settlement Class; (ii) This Settlement compromised the interests of the Certified Class; (iii) As none of the Settlement Class members remained in Plan 2 of either PERS or TRS, all active members of the Plaintiff's Class in Plan 2 of both PERS and TRS would need to pay an increased amount of member contributions to the retirement funds partially because of the need to cover the DRS's costs incurred in connection with the Settlement Agreement and the defense against this Consolidated Class Action, but they were notified neither about having possible claim based on alleged damages and being members of the Plaintiff's Class nor that, ultimately, they would need to pay the DRS's costs (including the Attorney Fee Award and the costs of defense) incurred in connection with this Consolidated Class Action and the Settlement Agreement, which provides some partial relief for the minority of the Settlement Class members.

(l) *This appeal should be dismissed and the case remanded to the superior court for implementation of the settlement.*

The Appeal should be allowed and its merits rigorously evaluated based on the facts that: (i) DRS Counsel clearly violated RAP RULE 10.3(b) by not answering the Brief of Appellants; (ii) DRS Counsel provided untrue statements to the Court of Appeals ; and (iii) for all reasons in our reply

under sub-¶¶ 1(b) through and including 1(k) supra.

The three orders of the Trial Court, that is: (CP 36-45) and (CP 80-93) and the Order Approving Class Counsel's Fee Award (filed with the Court of Appeals on September 9, 2008) should be reversed and remanded.

2 Reply to the Assignments of Error – Restatement of Issues

2.1 The Assignments of Error – Restatement of Issues in the Opening Brief of DRS: (i) Acknowledged the existence of three Assignments of Error in the Brief of Appellants; (ii) Identified two of those three Assignments of Error; and (iii) Renamed/referenced the two identified Assignments of Error as Issues. However, DRS Counsel did not answer any of the numerous Issues (Pertaining to the three Assignments of Errors) in the Brief of Appellants in contrary to pertinent part of RAP RULE 10.3(b):

“The brief of respondent should ... answer the brief of appellant”

2.2 The Issues in the Brief of Appellants included not only whether the Settlement was fair, adequate and reasonable but also whether the prerequisites of a class action under CR 23(a)(3), CR 23(a)(4), CR 23(b)(1) and CR 23(b)(2) have been met for the Settlement Class. Pertinent part of RAP RULE 10.3(b) also states that:

“A statement of the issues ... need not be made if respondent is satisfied with the statement in the brief of appellant.”

Accordingly, DRS Counsel either disobeyed the applicable provision of

RAP RULE 10.3(b) or they were satisfied with the statement of the Issues [Pertaining to the three Assignments of Errors] in the Brief of Appellants as it had no bearing on their case, which case was exclusively based on their attempt to prove that if the procedural requirements of CR 23(e) were met and if they allege that the settlement was fair, reasonable and adequate these would supersede the class-qualifying criteria of CR 23(a) and (b). However, this approach is illogical as it would “*put the carriage before the horse*”. Because CR 23(e) applies to the dismissal or compromise of a class action, an action first must qualify as being a class action before it can be dismissed or compromised pertinent to the provisions of CR 23(e) as a class action. This common-sense approach of Appellants is supported by the following quotes from the U.S. Supreme Court’s opinion in *Amchem Products, Inc. v. Windsor*, 521 U. S. 591 (1997):

“Settlement is relevant to a class certification.” 521 U. S. 591 (1997), 619

“On settlement of class actions, the provisions of Rule 23(e) “was designed to function as an additional requirement, not a superseding direction, for the “class action” to which Rule 23(e) refers is one qualified for certification under Rule 23(a) and (b). ... Subdivisions (a) and (b) focus court attention on whether a proposed class has sufficient unity so that absent members can fairly be bound by decisions of class representatives. That dominant concern persists when settlement, rather than trial, is proposed.” 521 U. S. 591 (1997) 621

“courts, in any case, lack authority to substitute for Rule 23’s certification criteria a standard never adopted—that if a settlement is “fair,” then certification is proper. 521 U. S. 591 (1997) 622

Further, Counsels for the parties disobeyed the Superior Court's direct order in the last sentence under ¶10 on CP 23 in (CP 21-24) by including in the class others than members of the Certified Class before further briefing and further order of the Court.

Furthermore, the Superior Court did not find that the Settlement Agreement was adequate; and the Superior Court abused its discretion in ruling that the Settlement Agreement was fair and reasonable in the Final Approval Order (CP 80-93).

In context, the DRS's actions of (i) agreeing to settle the case and the terms of the Settlement¹⁷ (which included the \$1,650,000.00 Attorney Fee Award, the \$5,500,000.00 Settlement Award and the \$7,500.00 Class Representative Award) on October 16, 2006; (ii) then, supporting their request with a reference to this settled case, the DRS pushed through a legislative bill¹⁸ (SB 6167) in a rush during the early spring of 2007; (iii) and then, repeatedly changing, or requiring Class Counsel to change, many agreed terms of the Settlement Agreement while keeping Class

¹⁷ "Ultimately, the mediator made a proposal for settlement and recommended to both Parties that a portion of the claims be settled under the material terms set forth in this Settlement Agreement. On October 16, 2006, the Parties agreed to general principles of a settlement, subject to signing a definitive agreement and obtaining court approval." (The last two sentences of ¶7 on CP 168 in (CP 166-191))

¹⁸ which affirmed the authority and responsibility of the DRS Director to establish the amount and all conditions of regular interest to be credited to member's individual retirement accounts in applicable plans of PERS, TRS, PSERS, LEOFF and WSPRS except that if interest is credited, it shall be done at least quarterly. Intent of the legislature was that this act to be curative, remedial, and retrospectively applicable.

Counsel and the named Plaintiff “on leash” with the promised \$1,650,000.00 Attorney Fee Award and the \$7,500.00 Class Representative Award, respectively, and under the possible threat of utilizing the changed provisions of the law, which then supported the DRS’s defense against this consolidate class action, show the absence of good faith and the collision possibly involved in the preparation of the signed version of the November 30, 2007 Settlement Agreement.

3 Reply to the Statement of the Case in the Brief of DRS

The Statement of the Case in the Brief of DRS did not answer the Statement of the Case in the Brief of Appellants.

In reply to the Title of ¶B on Page 4 of the Brief of DRS, Appellants present the following: The restriction of the claims in the lawsuits to PERS members in the Title of ¶B makes such statement untrue. (See Appellants reply under ¶1(a) supra).

In reply to pertinent part of the first sentence under sub-¶B.2 on Page 5 in the Brief of DRS, that is, “On June 30, 2006, the superior court ... appointed Mr. Probst as a class representative” is not true in spite of it was stated in (CP 82, Final Approval Order ¶7). The Certification Order (CP 21-24) did not appoint Mr. Probst as a class representative.

In reply to the second clause under ¶C on Page 6 in the Brief of DRS, we would like to clarify that the Counsels for the Parties agreed to the

mediator-proposed settlement on October 16, 2006, and they signed the final version on November 30, 2007. Further, we incorporate by reference our earlier statements under sub-¶1(b) on Pages 5-7 (supra).

In reply to the first sentence under ¶D on Page 6 in the Brief of DRS, we incorporate our earlier statements under sub-¶1(i) on Page 15 (supra).

In reply to the title of ¶F. on Page 9 in the Brief of DRS, we incorporate by reference our earlier statements under sub-¶1(e) on Pages 9-12 (supra).

In reply to the second clause under ¶F. on Page 9 in the Brief of DRS, we clarify the following: The March 21, 2008, hearing was related to the topic of whether Objector Steven Nelsen (Mr. Nelsen) should be disqualified as Objector. Most part of the June 30, 2008, hearing was related to the disabled Ms. Hegyi's GR 33 request for Reasonable Accommodation for a specified duration (a copy of which is affixed as "Appendix A" to this Reply to the Brief of DRS) and to the Appellants' (then, the Hegyi Objectors') Objection of both the Settlement Agreement and the Preliminary Approval Order.

In reply to ¶G. on Page 10, we clarify the following: The September 5, 2008, hearing was related to Mr. Nelsen's Objection to the Attorney Fee Award in the Settlement Agreement and not to Class Counsel's fee request submitted separate from, and after the approval of, the Settlement.

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4 Reply to the Summary of Argument in the Brief of DRS

The Brief of Appellants did not contain any section or paragraph with a title of “Summary of Argument”. Consequently, the Summary of Argument in the Brief of DRS could not and did not answer the non-existent Summary of Argument in the Brief of Appellants. In reply, we incorporate our entire response under sub-¶1(b) through, and including ¶3. Further, in (CP 70-79), the Superior Court did not find (i) the presence of good faith, (ii) the absence of collusion or (iii) that the Settlement Agreement was adequate.

Furthermore, in (CP 70-79), the Superior Court abused its discretion both in finding that the Settlement Agreement was fair and reasonable and in approving the Settlement Agreement.

5 Reply to the Argument in the Brief of DRS

The Argument in the Brief of DRS did not answer the Argument in the Brief of Appellants. In reply to ¶¶A and B, we emphasize that the Brief of DRS argued that CR 23(e) strictly limited to its procedural requirements and that “[a] court should approve a class action settlement agreement if it is “fair, adequate, and reasonable”. This argument ignores the Seventh Amendment rights of absent class members to a jury trial and that the prerequisites of a Class Action regarding the Settlement Class have not been met. Further, we refer to our reply in sub-¶2.2 (Pages 17-20 supra).

In reply to ¶B6, in part, we object that, on Page 17, the Brief of DRS alleged that there was an October 2006 Memorandum of Understanding while such alleged Memorandum was not a part of the Court record at the time the Trial Court approved the Settlement.

6 Reply to the Conclusion in the Brief of DRS

In (CP 70-79), the Superior Court did not find (i) the presence of good faith, (ii) the absence of collusion or (iii) that the Settlement Agreement was adequate. In (CP 70-79), the Superior Court abused its discretion in (i) finding that the Settlement Agreement was fair and reasonable and (ii) approving the Settlement Agreement. Appellants respectfully request this Court of appeals to find that the Superior Court abused its discretion in approving the Settlement Agreement without first considering: (i) whether the prerequisites of a Class Action regarding the Settlement Class have been met? (ii) Whether there was good faith present? (iii) Whether collusion was absent?; and (iv) Whether the Settlement Agreement was adequate? and in finding that the Settlement Terms and Conditions are fair and reasonable when the process included deficient and misleading notification of the Settlement Class Members, inadequate representation [by both the Class Representative and Class Counsel] of the Settlement Class Members, and the unfair and unreasonable distribution of the Settlement Amount (including that both the Attorney Fee Award and the

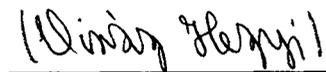
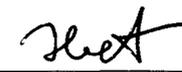
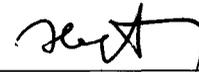
Class Representative award were included in the Settlement agreement; that 68% of the Settlement Class Members would receive no relief; establishing the \$15 individual recovery floor; and that the calculation of both the Settlement Amount and the Individual Recovery Amount were independent of the alleged claims).

7 Reply to the Appendix in the Brief of DRS

We object that a photocopy of the Class Action Settlement Agreement, an unsigned photocopy of the Preliminary approval Order (CP 36-45) and a photocopy of the Class Action Notice were appended to the Brief of DRS when such Agreement and Class Action Notice were not parts of the Court record at the time the Trial Court approved the Settlement and said Agreement was already included in the supplemented Clerk's Papers (CP 166-191) [showing an incorrect date of filing (October 21, 2006) when, according to the Court Records, it was filed on October 21, 2008].

8 Dates and Signatures

Dated in Edmonds, Washington this 8th day of January 2009, by:

Virág Hegyi by her Guardian Attila Hegyi and Attila Hegyi (Pro se)

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///

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9 Affidavit of Service

I declare that I have caused a copy of this document (the Brief of Appellants in Reply to the Opening Brief of Respondent Washington State Retirement Systems) to be mailed to each addressee below:

Department Counsel Timothy J. Filer, Esq.

Foster Pepper PLLC

1111 Third Ave. Suite 3400

Seattle, WA 98101-3299

Class Counsel Stephen K. Strong, Esq.

Bendich, Stobaugh & Strong, P.C.

701 Fifth Avenue, Suite 6550

Seattle, WA 98104-7097

FILED
COURT OF APPEALS
DIVISION II
09 JAN -9 PM 12:21
STATE OF WASHINGTON
BY DEPUTY

I declare under penalty of perjury under the laws of the state of Washington that the forgoing is believed to be true and correct.

Dated in Edmonds, Washington this 8th day of January, 2009, by:



Marianna B. Hegyi

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///
///
///

APPENDIX

FILED
JUN 30 2008
SUPERIOR COURT
BETTY J. GOULD
THURSTON COUNTY CLERK

EXPEDITE (if filing within 5 court days of hearing)
 Hearing is set:
Date: June 30, 2008
Time: 9:00 AM
Judge/Calendar: Chris Wickham

SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY
JEFFREY PROBST, and a class of
similarly-situated individuals
Plaintiff/Petitioner,
vs.
Department of Retirement Systems
Defendant/Respondent.

The Honorable
CHRIS WICKHAM

NO. 05-2-00131-1
(Consolidated Case)

TITLE OF DOCUMENT:

Request for Reasonable Accommodation for
Persons with Disabilities

NAME: ATTILA HEGYI
ADDRESS: 19620 81 PL W
EDMONDS, WA 98026
Home PHONE: (425) 778-4099
Cell: (206) 388-8801

PLEASE PRINT CLEARLY

COPY

ORIGINAL

Request for Reasonable Accommodation for Persons with Disabilities

If you have a disability and you believe you may need an accommodation to fully and equally participate in a particular court proceeding or activity, you may request a reasonable accommodation.

To request a reasonable accommodation, complete the **Request for Reasonable Accommodation Form** and return to the [*presiding judge, officer of the court or designee*]. If you need assistance completing this form, contact the [*presiding judge, officer of the court or designee*].

Accommodation requests are granted to any qualified person with a disability for whom such accommodation is reasonable and necessary under the Americans with Disabilities Act of 1990 (ADA), other similar local, state, and federal laws and Washington State General Rule (GR) 33. A request will be granted unless:

- It is impossible for the court to provide the requested accommodation on the date of the proceeding; and the proceeding cannot be continued without prejudice to a party to the proceeding.
- or
- It is impractical for the court to provide the requested accommodation on the date of the proceeding; and the proceeding cannot be continued without prejudice to a party to the proceeding.

You may be required to provide additional information for [*the court*] to properly evaluate your reasonable accommodation request. ***Medical and other health information submitted under form WPF All Cases 01.0300, Sealed Medical and Health Information (Cover Sheet) shall be sealed automatically. If medical and other health information is not submitted under form WPF All Cases 01.0300, Sealed Medical and Health Information (Cover Sheet), the submitter may ask the court to seal the documents later.***

Generally, five day advance notice is required to review reasonable accommodation requests. However, a response to an immediate need for accommodation will be considered to the fullest extent possible.

COPY

(Form Approved by the Washington State Administrative Office of the Courts Pursuant to GR 33 (____))

REQUEST FOR ACCOMMODATION BY PERSONS WITH DISABILITIES & REVIEW AND ACTION BY THE COURT

Request for Reasonable Accommodation (_____)

1. Case No: **05-2-00131-1** Date: **06/28/2008**
Superior Court of Washington County of Thurston

Case Name: **JEFFREY PROBST and CLASS Plaintiffs vs. DEPARTMENT OF RETIREMENT SYSTEMS, Defendant**

2. Name of Person Requesting: **ATTILA HEGYI as Guardian for VIRÁG HEGYI**

Address: **19620 81 PL W**
(Mailing Address)

Phone No.: **425-778-4099**
(Area Code, Phone Number)

EDMONDS, WA, 98026-6408
(City, State, Zip Code)

E-mail: **sebes1@comcast.net**

3. I am participating in a court proceeding/activity as a (check all that apply):

- Petitioner/Plaintiff Defendant/Respondent Attorney
 Witness Juror Judicial Officer

Other (specify interest in or connection to proceeding, if any) **Objector and Guardian**

4. List all known dates/times the accommodation(s) are needed (specify):

Until the decision of subject class action becomes final

5. Why is an accommodation needed? Defendant's Response (dated June 27, 2008) alleged that Objector(s) Virág Hegyi (and Attila Hegyi, who also represents Virág Hegyi as her Guardian) [is/are] "either mis-reading or misunderstanding of the scope of this litigation or the terms of the Settlement Agreement." Virág Hegyi has disabilities (see Sealed Medical and Health Information) that prevents her from fully and equally participate in this court proceeding and protect her own interests. Her Guardian is inadequate to represent her and her interests in this particular court proceeding. Virág Hegyi has immediate need for accommodation. She requires assistance by an appointed counsel to represent her interests in this particular court proceeding and an appointed expert or special master to review and evaluate the Preliminary Approval Order and/or the Proposed Settlement Agreement.

6. What accommodation would you like? And why?

Appointed counsel for a person with disabilities (see the Sealed Medical and Health Information) and an appointed expert or special master. To enable Virág Hegyi to fully and equally participate in this particular court proceeding, including reviewing and evaluating the Preliminary Approval Order and/or the Proposed Settlement Agreement.

7. Please provide any information that would help the court respond to your request.
"...a response to an immediate need for accommodation will be considered to the fullest extent possible." (Last sentence on the first page, supra)

(Form Approved by the Washington State Administrative Office of the Courts Pursuant to GR 33 (_____))

8. How do you want to be informed of the status of your request for accommodation?

Phone Writing E-mail In person Other (specify): **All checked**

Date: **06/28/2008**

→ 
(Signature of Person Requesting)

ATTILA HEGYI, Guardian for VIRÁG HEGYI
(Print Name of Person Requesting)

Review and Action by the Court

(For Court Use Only-Copy of completed form should be maintained for future reference.)

Request No.: _____
(Court, Sequential Number)

Reasonable Accommodation Request Form received: _____
(Date)

Additional information requested: _____
(Date)

Additional information received: _____
(Date)

Type of proceeding: Criminal Civil Family Probate Juvenile

Proceedings include but are not limited to: bail hearing, preliminary hearing, trial, sentencing hearing.

Requested Accommodation Denied: _____
(Date)

- Fails to satisfy the requirements of GR 33 (specify)
- Creates an undue burden on the court
- Fundamentally alters the nature of the service, program or activity
- Permitting the applicant to participate in the proceeding with the requested accommodation creates a direct threat to the safety or well-being of the person requesting or others.

Basis for Finding: _____

Requested Accommodation Granted: _____

(Date)

In whole In part (*specify*) Alternative (*specify*)

Dates accommodation will be provided:

Person requesting notified on: _____

(Date)

Notification achieved via:

Phone Writing E-mail In person Other (*specify*):

Date: _____

➤ _____

(*Signature of Court Official*)

(*Type or Print Name of Court Official*)