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THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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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.

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SUPPLEMENTAL BRIEF BY AIRPORT INVESTMENT COMPANY

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## I. INTRODUCTION

This appeal results from a just compensation trial for two easements (one temporary, one permanent) condemned by Sound Transit across the hotel property of Airport Investment Co (“AIC”).

At the close of the trial, the trial court denied Airport Investment’s request for attorney fees and expenses. To avoid eviscerating the statutory scheme that authorizes such fees and sets clear requirements for a condemnor to avoid them, this court should reverse that ruling. Specifically, AIC is entitled to such an award because Sound Transit failed to make a thirty-day offer to settle the taking tried to the jury. According to the plain terms of the statute, Sound Transit cannot avoid a fee award. Sound Transit argues that because it made “any” offer thirty days before trial, albeit not one that offered to pay for the temporary easement by the same description that was tried to the jury, this satisfies the statute. This position defies the express language and function of the statute.

Sound Transit also argues that the change in description between the pre-trial offer and the one actually tried to the jury was immaterial, so that Sound Transit may avoid an award. No authority states this is the test. If it is, the change was not immaterial. It reduced the physical property taken, causing Sound Transit to reduce by 10% its valuation presented to the jury for this easement. Additionally, the change for the first time

limited Sound Transit's exclusive use of the easement from a potential 1,080 days to only 160, which is a significant limitation by any measure. Sound Transit presented the jury a valuation based on the full 1,080 days, and argued its generosity in light of the 160-day limitation. Sound Transit's conduct prevented AIC from having the opportunity to receive and consider a settlement offer for the reduced taking and from evaluating Sound Transit's case as it would be presented to the jury. This Court should enforce the statutory fee scheme by reversing.

This Court also should reverse the judgment and remand for a new trial based on the trial court's ruling, over a well-taken hearsay objection, that permitted the jury to consider an inadmissible opinion of property value of an expert not called to testify. This Court should hold that a hearsay objection is adequate to raise the issue in question, and that the trial court erred in overruling it. AIC is entitled to a new trial.

## II. ISSUES PRESENTED FOR REVIEW

The Court accepted these issues:

1) Did the trial court err post-trial as a matter of law when it denied Airport Investment's request for fees under the plain, bright-line requirements in RCW 8.25.070(1)(a) or RCW 8.25.075(1)(b) that fees *shall* be awarded if the condemnor fails to make a thirty-day offer to settle the taking tried to the jury, when Sound Transit failed to abide by these clear statutory requirements?

2) Did the trial court err during trial when it overruled Airport Investment's hearsay objection to the admission, through direct

examination of a lay adverse party, of the valuation opinion of a non-testifying expert as the lay witness's "*belief* of value," notwithstanding that voir dire revealed the lay witness held no independent opinion respecting that valuation but, instead, based her "belief" exclusively on what the non-testifying expert had said was the value? Should the trial court have sustained the hearsay objection based on principles this Court explained in *SentinelC3* instead of compelling the lay witness to parrot the non-testifying appraiser's valuation to the jury?

### III. STATEMENT OF THE CASE

The Petition for Review contains a Statement of the Case, which is incorporated here.

In its Answer Sound Transit does not dispute the facts concerning its change to the original TCE on the second day of trial.<sup>1</sup> Sound Transit instead emphasizes its *informal* representations to Airport Investment about the "true" scope of the TCE leading up to trial, *see* Answer 4-10, as if informal response—the substance of which kept changing—was a substitute for a definitive taking description with sufficient information to

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<sup>1</sup> This includes that Sound Transit had refused to be definitive when Airport Investment sought pre-trial to nail down the TCE description. *See* Petition for Review 4 n. 1 citing CP 401:12 to 402:11, CP 1312 ¶ 6, CP 1312 ¶¶ 4-5; CP 401:19-20; Decision 15-16. AIC moved *in limine* to prevent Sound Transit from amending the TCE. CP 396, 398-99, 401-03:11; 7/16/13 VR 30-37. Airport Investment also notified Sound Transit and the trial court it would seek attorney and expert fees if Sound Transit changed the TCE taking at the last minute. CP 402:12-403:11. The trial court nonetheless said it would permit Sound Transit to revise the TCE taking. CP 904 at #1. Sound Transit did so on the second day of trial, changing the description of the TCE by both reducing the physical description and limiting its exclusive use of the property from any time during a three-year period to only 160 days within that period. CP 1313 ¶ 8; CP 1336-45; Exhibits 148-49.

permit Airport Investment the opportunity to evaluate whether it should settle the taking before that taking would be tried to a jury.

Sound Transit also concedes that the details of the TCE, including the actual days of exclusive use, had significant ramifications to part of AIC's damages theory. *Answer* 9. Even though AIC did not ultimately make this presentation to the jury, *id.*, the TCE details had significance for settlement by Sound Transit's own admission.

During the motion *in limine* hearing the trial judge told Sound Transit, "If you're taking for three years, then you can't undercut compensation by saying to the jury, But actually we'll be taking for less than that period." 7/16/23 VR 33:11-14; see also 33:15-37:3. Denial of the fee motion, however, allowed Sound Transit to undercut its settlement offer exactly this way.

#### IV. ARGUMENT

This Court should reverse on both issues. Sound Transit had no legal basis on which to avoid a fee award when Sound Transit opted to change the TCE taking during trial. This Court should hold that RCW 8.25.070(1)(a) and RCW 8.25.075(1)(b) required an award. Further, a new trial is warranted because admission of a valuation opinion of a non-testifying expert as if it were the opinion of value held by the lay witness Sandra Oh—when it clearly was not—was harmful error.

**A. Airport Investment is legally entitled to attorney and expert fees pursuant to the eminent domain statutes because Sound Transit refused to finalize the TCE description pre-trial, then changed the TCE description on the second day of trial.**

AIC assumes that this Court has allowed review in this case, at least in part, to establish the legal ramifications under RCW 8.25.070(1)(a) and RCW 8.25.075(1)(b) when a condemnor alters the description of property taken after its thirty-day offer has been made. AIC respectfully submits that the answer to that issue is that, in such cases, the statutes require an award of fees to the landowner. Whether to award fees in such circumstances is not discretionary and does not require a landowner to prove either bad motive by the condemnor or resulting harm to itself. The Opinion allowed Sound Transit to circumvent the statutory requirements but avoid an award. This Court should enforce the bright lines set by the Legislature.

The legal analysis is straightforward under the plain statutory language. An award is due under RCW 8.25.070(1) because Sound Transit did not make a timely offer for the interest in property that it condemned, which was required as follows:

8.25.070. Award of attorney's fees and witness fees to condemnee -- Conditions to award.  
(1) Except as otherwise provided in [a subsection of this statute not relevant to this case], if a trial is held for the fixing of the amount of compensation to be awarded to the owner or party having an

interest in the property being condemned, the court shall award the condemnee reasonable attorney's fees and reasonable expert witness fees in the event of any of the following:

(a) If condemnor fails to make any written offer in settlement to condemnee at least thirty days prior to commencement of said trial;  
or

(b) If the judgment awarded as a result of the trial exceeds by ten percent or more the highest written offer in settlement submitted to those condemnees appearing in the action by condemnor in effect thirty days before the trial.

RCW 8.25.070. Here, Sound Transit did not make any written offer for the “interest in the property being condemned.” It made a single offer, not explicit as to each easement, for a total taking that included the original TCE. Sound Transit then tried to the jury an altered TCE. Airport Investment was entitled to an award under (1)(a).

The mandatory nature of an award is well-established. In *State v. Roth*, 78 Wn.2d 711, 715-16 (1971), this Court reasoned that “may” in RCW 8.25.070 (1967) was mandatory. The dissent argued it was discretionary, allowing a trial court to look at the totality of the circumstances. *Roth, supra*, at 717-18 (dissent). The Legislature then amended the statute to “shall.” RCW 8.25.070 (1987). RCW 8.25.075(1) similarly employs “shall.” The Opinion contradicts these authorities by permitting trial court discretion when the statute allows none.

Alternatively, RCW 8.25.075 provides that fees and expert witness fees “shall” be awarded if “[t]he proceeding is abandoned by the

condemnor.” RCW 8.25.075(1)(b).<sup>2</sup> Sound Transit abandoned—or gave up or ceased performing—its proceeding to condemn *the original TCE* (and the terms on which it acquired Possession and Use) on the second day of trial when it changed the TCE. Both statutes support an award.

The Court should reject Sound Transit’s argument (approved by the Court of Appeals) that, because it made “any” offer, no fee award is due under RCW 8.25.070(1). Answer 13-14; Opinion 16-17. Sound Transit would like this Court to untie the “offer” from the “interest in the property being condemned.” Under Sound Transit’s view, a condemnor can make any offer, and can then try any taking, and no relationship need exist between two. This eviscerates the statute and cannot be a rational interpretation. The statute plainly requires that the “offer” be for the “interest in the property being condemned.” This language requires straightforward application. The statute does not invite parties to argue how much of a difference an alteration of the taking made to the verdict, which is speculative.

Sound Transit on appeal argues that fees were not due, because the

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<sup>2</sup> “Abandoned” is undefined in the statute, but a general dictionary definition is “to give up with the intent of never again claiming a right or interest in <abandon property> ” or “to cease intending or attempting to perform <abandoned the escape>.” Merriam-Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/abandon> (last visited November 22, 2015).

change to the TCE was not “material.” Answer 15; Resp.’s Brief 44. This argument contradicts Sound Transit’s position before the trial court in support of permitting Sound Transit to change the TCE when Sound Transit argued the change was “essential to determining the TCE’s fair market value.” CP 661. According to Sound Transit, then, the change is “not material” when this characterization might assist Sound Transit in avoiding a fee award, but is “essential” to determining the fair valuation of the TCE when this characterization will allow it to improve its posture before the jury. These contradictory positions by Sound Transit illustrate why a condemnor should not be allowed to play fast and loose with the statutory scheme regarding thirty-day offers.

Sound Transit offers no authority that the statute invites a court to consider materiality of the changes. Such an inquiry is not desirable because it leads to uncertainty and post-trial disputes. The statute does not contemplate such an inquiry. As drafted, and as this Court should enforce RCW 8.25.070(1)(a), either a condemnor failed to make a thirty-day offer for the landowner’s interest in the property being condemned or it did not.

Sound Transit’s argument also is wrong on the facts. The changes were material. This is immediately apparent from Sound Transit’s own evidence, which showed that its appraiser reduced the valuation of the TCE by \$7,154, or 9.6%, based exclusively on alteration of the physical

taking, not even considering the changes to the duration of exclusive use. *See* CP 1415 ¶ 10. Through the physical changes alone Sound Transit secured a \$7,154 cushion between its offer and its valuation of the reduced TCE.

Sound Transit argues that, because its presentation to the jury made no reduction to value based on the limit to the duration of exclusive use, this shows that the change was not material. Answer 10; Resp. Br. 44-46. That argument is not tenable. It simply shows that Sound Transit did not change its presentation. A taking reduced both physically and in duration is a lesser taking, regardless of the party's valuation theories.<sup>3</sup>

Further, materiality is shown where the original description allowed Sound Transit to exclusively use the TCE for 1,080 days, if it wished to do so (360 days times three years). But Sound Transit equally could have used the property for 1 day, 40 days, 200 days, 500 days, 778 days, 999 days, or 1,079 days. This large variation was possible under the terms of the original TCE. The new TCE limited that exclusive use to 160 days. This provided a low, concrete, identified number that informed the

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<sup>3</sup> The Court of Appeals also admits that it is material, explaining even while denying the appeal, “[Sound Transit’s] contractor was able to make changes later that enabled Sound Transit’s work to have less of an impact on AIC’s property.” Opinion 17. The Court acknowledges that by the second day of trial Sound Transit’s contractor was able to minimize the taking. This was too late to make a qualifying thirty-day offer.

jury of the actual scope of use and, conversely, the extent of the unavailability of Airport Investment's essential parking facilities. It was information that Sound Transit was required to provide thirty days prior to trial—if it was to avoid a fee award—so that AIC could evaluate settlement and the parties' respective presentations to the jury.

Sound Transit gained unfair advantage through its conduct. Having succeeded in reducing the TCE, Sound Transit presented the jury with its original valuation, and then argued to the jury the generosity of its valuation based on 1,080 days of exclusive use when Sound Transit only would use the easement for 160 days. 7/30/13 VR 1696: 5-1697:4. In the tug of war for the hearts and minds of the jurors, Sound Transit manipulated its alteration to improve its standing.

If the Court permits this conduct, a condemnor would always have a very strong potential to beat its thirty-day offer. If the condemnor became concerned about its valuation, the condemnor could simply reduce the taking at trial to ensure that the jury verdict comes in under the original thirty-day offer extended for a broader taking. This would improve the condemnor's chances to get a favorable result and reduce its fee exposure. The abuse this invites is patent.

Despite the bright-line requirements of the statutes, Sound Transit argues that other "factors" should control. It applauds the Court of

Appeals decision because it “illustrates the factors that guide the courts in evaluating a condemnor’s good faith compliance with the statutory requirements.” See Answer 19. But that statement concedes what Airport Investment argues: the Court of Appeals disregarded the bright-line test of the statute in favor of some sort of evaluative ruling about whether Sound Transit acted in good faith or is blameworthy. The Opinion in truth fails to “illustrate” the “factors” that a court properly may consider *under the statute*, and this is not surprising: The statute simply does not afford a condemnor the latitude that the Opinion gives.

In denying the appeal, the Court of Appeals accepted the irrelevant argument by Sound Transit that latitude is appropriate because Sound Transit could not fully delineate its needs prior to trial because of the design/build nature of its project. See Decision 17-18. The argument has no relevance under the statute. Under it, the consequences of delay caused by Sound Transit’s choice to do a design/build project fall on Sound Transit, not the landowner. As noted in the Petition for Review 14-16, three decisions in particular support this principle: *State v. Buckley*, 18 Wn. App. 798 (1977) (condemnor must bear risk of over-condemning),<sup>4</sup>

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<sup>4</sup> Sound Transit argues *Buckley* supports holding that it did not abandon condemnation of the original TCE because, like the condemnor in *Buckley*, it obtained a condemnation decree. Answer 16. Unlike the condemnor in *Buckley*, however, Sound Transit did not obtain a

*State v. Basin Development & Sales, Co.*, 53 Wn.2d 201, 204-05 (1958) (“the burden is on the condemnor to present sufficient construction plans to understand the extent of the loss to the owner.”), and *In re Municipality of Metro. Seattle v. Kenmore Properties, Inc.*, 67 Wn.2d 923, 928 (1966) (an adequate taking description must be presented that allows the landowner adequate time to prepare for trial). By allowing Sound Transit to amend the TCE at trial without awarding fees, the trial court and Court of Appeals improperly shifted those risks to Airport Investment. This Court should enforce the consequences of providing the description of the taking after the deadline for a thirty-day offer has passed.

The statutory scheme does not permit a condemnor to persist over weeks informally telling a landowner that the true scope of the taking is less than the pleadings state, refuse to formalize any reduction throughout pre-trial preparations, prevent a landowner from evaluating the settlement from the vantage point of a complete description of the taking, and commit itself to a final description only once the trial is underway. This Court should reject this bullish behavior.

Government has many tools for condemnation. The Legislature through enactment of RCW 8.25.070(1)(a) and RCW 8.25.075(1)(b)

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condemnation decree *of the property condemned in its Petition*. Sound Transit obtained a condemnation decree for a *different* TCE.

sought to even the playing field. The Legislature requires condemnors to make thirty-day settlement offers for the taking tried to the jury to facilitate settlement and save taxpayer dollars. These measures are meaningless if easily manipulated as Sound Transit has attempted here, or if courts are reluctant to enforce their bright-line rules. The Legislature did not require a landowner in order to recover to establish a condemnor's bad motive, intentional foot-dragging, tactical choice or simple incompetence. Landowners are not obligated to make a case within a case regarding how the tardy information influenced the trial outcome. Sound Transit advocates placing this type of burden between the landowner and a fee award because it advantages Sound Transit. Sound Transit, however, may properly avoid a fee award—and “cooperate” to mitigate its taking—by finalizing the taking thirty days before trial.

This Court should hold that Airport Investment's showing that Sound Transit failed to comply with the statutory scheme is sufficient to demonstrate a right to an award as a matter of law. This Court should reverse and remand for an award of fees.

**B. Admission of the valuation opinion of a non-testifying expert appraiser through a lay witness as her “belief”—even when the voir dire showed she held no personal opinion—was reversible error justifying a new trial.**

This Court should reverse and grant a new trial because the

admission of the July 2012 valuation by Airport Investment’s consulting, non-testifying appraiser through Ms. Oh, over a hearsay objection, was reversible error. This Court’s decision in *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 128 (2014), issued between the trial and the Court of Appeals’ decision, supports reversal.

The Court of Appeals’ and Sound Transit’s analysis of the admissibility of the consulting appraiser’s valuation through Ms. Oh is mistaken. Opinion 10-13; Answer 17-18. While Ms. Oh was on the stand for its case in chief, Sound Transit initially sought to introduce a July 6, 2012 letter—Unadmitted Exhibit 158—that contained the appraiser’s valuation of \$485,000. The failed attempt to introduce that letter has obfuscated the legal analysis because both Sound Transit and the Court of Appeals have focused on the letter, which is not the evidence at issue. The letter never was admitted, and therefore, no “admission of a party opponent” is at issue. Cf. Opinion at 11-12, addressing ER 801(d)(2). ER 801(d)(2) has no place in the analysis.<sup>5</sup> The evaluation, offered for the truth of its amount, was classic hearsay.

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<sup>5</sup> The misapprehension about the letter and the applicability of ER 801(d)(2) appears repeatedly in the Opinion. Even after the Court moves on from analyzing ER 801(d)(2) directly, it again incorrectly refers to the July 2012 statement of value as having been made by Ms. Oh, stating, “Oh’s testimony verified that in July when she made the statement of value she believed the statement.” Opinion 13. Ms. Oh was not the author of the July letter and she had made no prior statement of value.

The live, in-court testimony by Ms. Oh was not admissible because it contained not Ms. Oh's own belief of value, but the belief of value of an expert who was not in court. This was plainly shown at length in the voir dire. Ms. Oh repeated that she held no valuation opinion, stating she "based compensation on whatever the appraiser said." 7/25/13 VR 1205:21-22. She relied on her appraiser, testifying, "Whatever was in the appraisal and what the appraiser came up with..." *Id.* at 1202:6-7. She never expressed any expertise or method by which she came to personally believe that the property was worth any particular amount. She expressly testified she solely relied on her appraiser. *Id.* at 1202:16-17 ("Well, that was my belief from the information from the appraiser."). At the most, her testimony explains that she had no reason to disbelieve what the appraiser thought was the opinion of value in July 2012, but that state of mind cannot provide a foundation for admissibility of the appraiser's opinion of value itself.

Vexed with its ability to put the letter before the jury, Sound Transit (assisted by the judge) turned its attention to soliciting—live and in-court—an expression from Ms. Oh of the value of the property as of July 2012. But she held none. This did not dissuade them. The trial court overruled AIC's hearsay objection and required Ms. Oh to testify to the valuation by her appraiser because she had "believed" it. 7/25/13 VR

1202:4-1203:5; 7/25/13 VR 1205-1206:2. If this were an acceptable basis on which to admit out-of-court statements by third parties, i.e., simply showing that the witness repeating the testimony or opinion believes it (or has no reason to disbelieve it), the hearsay interdiction is meaningless.

This Court can readily contrast these circumstances with the circumstances when a landowner *can* opine about value, because he or she is familiar enough with the property to know its worth. *See Port of Seattle v. Equitable Capital*, 127 Wn.2d 202, 211-13 (1995); *State v. Wilson*, 6 Wn. App. 443 (1972) (affirming disallowance of owner's valuation testimony where it was improperly founded); WPI 150.15. Ms. Oh plainly testified that she did not hold this type of opinion of value. This makes sense considering the takings were not of the full parcel, but required formulation of how to value the unique easements.

Sound Transit persists in arguing that Airport Investment failed to preserve a hearsay objection. *See* Answer 17. The Court of Appeals partially agreed, finding that failure to object under ER 701 prevents Airport Investment's appeal. Opinion 13. This conclusion is wrong. The entire voir dire occurred, the court indicated it would allow the so-called "belief" testimony, and Airport Investment's lawyer stated, "I don't think we meet the hearsay exception." 7/25/13 VR 1203:12. The trial court overruled the objection, not by specifying any rule that permitted the

testimony or requiring Sound Transit to cite a rule, but by stating the rationale that the opinion was admissible as Ms. Oh's "belief." *Id.* at 1203:14-16. The jury returned, and the testimony was admitted exactly as it had been previewed in voir dire. Airport Investment was not required to re-assert its objection that the trial court had heard, considered and rejected moments before. *See State v. Thank*, 145 Wn.2d 630 (2002), citing *McCormick on Evidence* § 55 at 246 (John W. Strong ed., 5<sup>th</sup> 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.").

The Court of Appeals erroneously found the hearsay objection insufficient, reasoning that Airport Investment should have objected on the basis of ER 701 that an inadequate foundation had been laid for a valuation opinion by a lay witness. Opinion 13. But Airport Investment's objection viewed in context adequately notified the trial court that the testimony was objectionable because it contained not Ms. Oh's opinion of value but the opinion of a third party not in court. *See* ER 103(a)(1); *State v. Braham*, 67 Wn. App. 930, 934-35 (1992) (when basis for objection is apparent from the record, precision is not required). Nothing in the record indicates that the trial court did not understand—after having heard the voir dire—that Airport Investment objected because the valuation opinion

was not Ms. Oh's but her consulting expert's. The trial court understood and simply rejected it, stating, "She just said it was her belief."

As discussed at length in the Petition 18-20, both *SentinelC3* and *State v. Dan J. Evans Campaign Comm.*, 86 Wn.2d 503, 506-07 (1976), support recognizing a hearsay objection as a proper objection to prevent a witness from parroting what a third party has communicated. This Court in *SentinelC3* rejected admission of an expert witness's valuation opinion put into evidence through a party's testimony because "[the valuations] were based entirely on a consulting expert's valuation that 'constituted hearsay.'" 181 Wn.2d at 139 n. 5. *Dan J. Evans Campaign Comm.* contrasted evidence based on personal knowledge with evidence "hearsay in its nature," such as when a witness testifies based on television reports. 86 Wn.2d at 507. These two cases show a relationship between testimony based on personal knowledge or, in contrast, testimony based on hearsay. Either objection—lack of personal knowledge or hearsay—should suffice where the objections are the inverse of each other. The Court of Appeals' contrary, narrow view establishes that this Court should explain *SentinelC3* and guide the lower courts to recognize "hearsay" as a proper objection in these circumstances. Certainly, no authority supports the holding by the Court of Appeals that hearsay is an insufficient objection to convey that a witness is improperly being asked to repeat as true what

someone else said out of court.

Sound Transit succeeded in getting “through the back door” what it could not have achieved through the front: presentation to the jury of the \$485,000 valuation opinion of a consulting expert who was not called to testify. This was legal error based on incorrect construction of the evidence rules.

Sound Transit has never argued that the error was not harmful, and has waived any such argument. *See* Opening Brief 39-40 (demonstrating harm from Sound Transit’s closing argument referencing the consulting expert’s appraisal (7/30/13 VR 1761:21-1762:15) and the jury question whether it could consider the valuation from the “third appraiser” of “\$485,000” (CP 952)); Respondent’s Brief 34-38; Reply 20-21.

**C. Continuing request for attorney fees on appeal pursuant to statute.**

AIC’s request for fees incurred on appeal included in its Opening Brief at 46-7 is continuing under RAP 18.1(b). Sound Transit in its Respondent’s Brief offered no opposition on this issue. Where these events have occurred, the fees and expenses have been borne by AIC, and an award under RCW 8.25.070 and RCW 8.25.075 does not turn on a successful trial outcome, the Court should direct this award regardless whether it grants a new trial.

## V. CONCLUSION

The trial court and Court of Appeals made two errors. The first, substantive error involved a failure to enforce the statutes that establish the thirty-day offer concept, which the Legislature created to try to reduce trials in condemnation. The second error permitted the disguised use of hearsay to admit a third party's valuation opinion. Both errors, if not corrected, advantage condemnors over landowners in unfair ways easily repeated. AIC respectfully submits that reversal on either ground is merited.

Dated this 23<sup>rd</sup> day of November 2015.

SCHWABE, WILLIAMSON & WYATT, P.C.

By: Averil Rothrock

Averil Rothrock, WSBA #24248

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Company*

# APPENDIX

Appendix A

7/25/13 VR 1190-1207 (voir dire and testimony by Sandra Oh)

1 showing.

2 MS. LINDELL: Okay.

3 THE COURT: All right.

4 MS. LINDELL: Your Honor, at that  
5 point where I think I've made it, I just am going to  
6 ask you whether or not you're satisfied.

7 THE COURT: I'm not convinced that  
8 you've made showing either of apparent or actual  
9 authority, but since you have the principal here and  
10 she's denying the agent of authority, call her and see  
11 if she's willing to deny it under oath.

12 MS. LINDELL: Your Honor, my  
13 question's a little bit different. While she's under  
14 oath and on the witness stand in front of the jury,  
15 before I present the document, I just wanted to know  
16 whether you wanted me to check with you before I did  
17 that. That's all.

18 THE COURT: I think to get this  
19 document in you need to lay a foundation. I don't  
20 know how to be more clear than that. I don't read the  
21 case law as saying that apparent authority is enough  
22 to introduce a party admission.

23 The whole policy of the rule here is  
24 it needs to be the party's statement and there may be  
25 cases where the showing of apparent authority without

1 a denial is enough, but here I have, allegedly, a  
2 denial, okay, and I think you need to deal with that  
3 and lay a foundation.

4 MS. LINDELL: Understood. Thank you.

5 THE COURT: All right. Let's bring in  
6 the jury, unless there's something from respondent.  
7 I'm sorry. No. Okay.

8 MALE VOICE: All rise for the jury.

9 (JURY PRESENT)

10 THE COURT: Be seated, everybody.  
11 Good morning, ladies and gentlemen.

12 Sound Transit, you may call your next  
13 witness.

14 MS. LINDELL: Thank you, Your Honor.  
15 We call Ms. Sandra Oh.

16 THE COURT: Thank you. Come forward  
17 if you would, Ms. Oh. Please raise your right hand  
18 and face me.

19 Do you solemnly swear or affirm that  
20 the testimony you provide will be the truth, the whole  
21 truth, and nothing but the truth?

22 MS. OH: Yes, I do.

23 THE COURT: Is that a yes?

24 MS. OH: Yes.

25 THE COURT: Please be seated. Thank

1 you. Go ahead and help yourself to water, candy,  
2 tissue. I think the microphone is in a good place.  
3 You may inquire.

4 MS. LINDELL: Okay. Thank you.

5

6 DIRECT EXAMINATION

7 BY MS. LINDELL:

8 Q. Good morning.

9 A. Good morning.

10 Q. Ms. Oh, could you state your full name and  
11 spell your last name for the record, please.

12 A. Sandra Oh, O-h.

13 THE COURT: Actually, I think I'm  
14 going to ask you to pull that microphone by the holder  
15 toward you.

16 MS. OH: Oh.

17 THE COURT: Thank you. Go ahead.

18 Q. (BY MS. LINDELL) And Ms. Oh, you are  
19 president of Airport Investment Company LLC; is that  
20 right?

21 A. Yes. Actually, I think it's inc.

22 Q. Airport Investment Company, Inc.?

23 A. Yes.

24 Q. Okay. Are you also a managing member of  
25 Airport Investment Company LLC?

1 A. I don't think that that's active.

2 Q. Is the owner of the property that is at  
3 issue in this condemnation owned by Airport Investment  
4 Company, Inc.?

5 A. Yes.

6 Q. Okay. And you're the president of that  
7 company?

8 A. Yes.

9 Q. All right. And that's a family owned  
10 company; is that right?

11 A. Right. It's just my family.

12 Q. Okay. And your family owns three hotels;  
13 is that right?

14 A. I wouldn't call the third a hotel, but  
15 okay.

16 Q. Okay. One at LAX, one at SeaTac, and one  
17 in Ferndale, Washington, right?

18 A. Right. It's more like a motel.

19 Q. The Ferndale one is more like a motel?

20 A. Yes.

21 Q. You attended a meeting at the subject  
22 property on May 2, 2012 with Sound Transit's  
23 right-of-way agent to discuss the acquisition, didn't  
24 you?

25 A. I attended a meeting, but I don't remember

1 the exact date, yes.

2 Q. Okay. At that meeting, was it also -- it  
3 was also attended by Mr. Leigh Ewbank and Mr. Benjamin  
4 By for Airport Investment Company, correct?

5 A. I think so.

6 Q. Okay. And who is Mr. Ewbank?

7 A. He is the operations controller.

8 Q. For Airport Investment Company?

9 A. Right.

10 Q. Okay. And who is Mr. Benjamin By?

11 A. He's -- he's more like an assistant.

12 Q. And who is he an assistant to?

13 A. Airport Investment and to me for business  
14 operations.

15 Q. Okay. And what was his title as of May  
16 2012 at Airport Investment?

17 A. I believe his title was assistant.

18 Q. And at that meeting, Sound Transit's  
19 right-of-way agent Jennifer Corrigan was there?

20 A. Yes.

21 Q. And Ms. Corrigan identified herself to you  
22 as the Sound Transit representative for purposes of  
23 this acquisition; is that correct?

24 A. Yes.

25 Q. All right. And her role at that time was

1 to be Airport Investment Company's primary contact  
2 person for the acquisition, correct?

3 A. Yes. I think she stated that.

4 Q. Okay. And in May 2012, Jonathan Choi was  
5 also employed at Airport Investment Company?

6 A. I don't remember the exact date he came in,  
7 but yes, he was there for the summer.

8 Q. Okay. And at that meeting there was  
9 conversation about follow-up communications from Sound  
10 Transit with Airport Investment Company regarding the  
11 acquisition, correct?

12 A. Actually, I think so, but I don't remember  
13 who the contact person was supposed to be.

14 Q. Okay. Are you aware that following that  
15 meeting Mr. Jonathan Choi emailed Sound Transit,  
16 emailed the right-of-way agent Jennifer Corrigan  
17 representing that he and Mr. By would be the primary  
18 contact for Airport Investment Company with regard to  
19 this acquisition?

20 A. Just them? I may have received it, but I  
21 actually don't recall, because it's been over a year.

22 Q. Okay. Are you aware that following the  
23 meeting on May 2, 2012 with the property, Mr. Choi  
24 represented to Sound Transit's right-of-way agent that  
25 he would be the primary source for communication?

1 A. No.

2 Q. Are you aware --

3 A. I mean -- okay.

4 Q. No. I'm sorry. I didn't mean to  
5 interrupt. Go ahead.

6 A. No. I mean, I wasn't aware that he said he  
7 was going to be the sole primary source.

8 Q. Are you aware that he sent an email to  
9 Sound Transit that said Mr. By and I will be your  
10 contact with Airport Investment Company for purposes  
11 of the acquisition, and I will be the primary source  
12 for communication?

13 A. No, I wasn't aware. I mean, I might have  
14 something in my email, but I have a lot of email.

15 Q. Okay. Had you seen -- so you don't know,  
16 you don't remember if you saw that email or not?

17 A. No.

18 Q. Were you aware that Mr. Choi communicated  
19 after that with Sound Transit with regard to the  
20 acquisition on behalf of Airport Investment Company?

21 A. I think he did.

22 Q. Okay. And did you ever tell Sound Transit  
23 you should not communicate with Mr. Choi with regard  
24 to the acquisition?

25 A. I don't think I said anything.

1 Q. All right. And are you aware of -- at the  
2 time in May 2012 when Mr. Choi sent the emails to  
3 Sound Transit the signature block read, quote, SOIM,  
4 Airport Investment Company LLC, HR and legal counsel?

5 A. I wasn't aware of that title.

6 Q. Do you know what SOIM stands for?

7 A. No.

8 Q. It's on your letterhead, though, isn't it,  
9 for Airport Investment Company?

10 A. Actually, I thought we were just using  
11 regular heading, you know, for the hotel.

12 Q. All right. Do you have letterhead that  
13 reads SOIM Airport Investment Company LLC?

14 A. I think we have it for SOIM, and we use it  
15 mainly for just a form letter for employees.

16 Q. What does SOIM stand for?

17 A. I don't remember. Actually, I don't know.

18 Q. Okay. Is that something that your father  
19 would have put in place at the time he was in charge  
20 of the company?

21 A. No, I don't think so. I don't think he had  
22 any formal letterhead.

23 Q. Okay. So letterhead that reads SOIM  
24 Airport Investment Company LLC, and you're the  
25 president, you're not aware of what SOIM stands for?

1           A.     No.  But I know what Airport Investment  
2 Company and all of that other stuff is.

3           Q.     All right.  And are you aware --

4                   THE COURT:  The question is if you  
5 know what the meaning is of a logo on your letterhead.

6           A.     No, I don't know what the acronym stands  
7 for.  I don't recall.

8           Q.     (BY MS. LINDELL)  Okay.  And are you aware  
9 of an email sent --

10                   THE COURT:  Can I please have the jury  
11 step out.  Thanks.  Go ahead and head into the jury  
12 room if you would.

13                           (JURY NOT PRESENT)

14                   THE COURT:  Be seated.

15                   Ms. Oh, are you aware you're under  
16 oath?

17                   MS. OH:  Yes.

18                   THE COURT:  Are you aware that I just  
19 swore you in to tell the whole truth?

20                   MS. OH:  Yes.  I mean, I think it  
21 stands for Sandra Oh, but I don't know what IM stands  
22 for.

23                   THE COURT:  Okay.  Sandra Oh are your  
24 initials, correct?

25                   MS. OH:  Yes.

1 THE COURT: Okay. Who put this, this  
2 logo on your letterhead?

3 MS. OH: I don't know. It could have  
4 been Ben or it could have been John. To be honest, I  
5 didn't make the letterhead, so I don't know.

6 THE COURT: You are aware the first  
7 two letters are your initials?

8 MS. OH: I believe so, because that  
9 would be the only thing that makes sense to me, but I  
10 don't know what the IM stands for.

11 THE COURT: How long has this logo  
12 been on your letterhead?

13 MS. OH: Maybe a year. I don't know.

14 THE COURT: It preceded Mr. Choi, I  
15 assume? The existence of this letterhead preceded Mr.  
16 Choi?

17 MS. OH: I think we've only had it for  
18 about a year or two.

19 THE COURT: Okay. And where did it  
20 come from?

21 MS. OH: I think we just made it in  
22 the office so we would have something separate.

23 THE COURT: Okay. And what does it  
24 mean besides Sandra Oh?

25 MS. OH: I don't know what the I is.

1 I am just guessing that M is management.

2 THE COURT: Uh-huh.

3 MS. OH: I don't know what I is.

4 THE COURT: Okay. Tell me about Mr.  
5 Choi. When did you hire him?

6 MS. OH: We just hired him for the  
7 summer.

8 THE COURT: Okay. When? 2012?

9 MS. OH: I don't -- yes.

10 THE COURT: For what position?

11 MS. OH: He was just a summer intern.

12 He was just going to stay for a few months and then he  
13 was going off to school, which he did. He left in  
14 like -- I don't know -- end of July, perhaps, because  
15 --

16 THE COURT: Is he a lawyer?

17 MS. OH: No.

18 THE COURT: Was he going to law  
19 school?

20 MS. OH: Yes. I think he's starting  
21 law school now.

22 THE COURT: Was he working as a lawyer  
23 in your legal department?

24 MS. OH: We don't have a legal  
25 department. We don't have a lawyer. His job was just

1 to do research to help me find the people I need so I  
2 could hire the correct -- like, for instance, if I  
3 wanted to find a lawyer for a contract we were in  
4 dispute for, like, for instance, we were in dispute  
5 over the airport advertising, he would try to help,  
6 you know, determine what would be the best type of  
7 lawyer or what type. So that was his role.

8 THE COURT: Who was he an extern for?

9 MS. OH: Excuse me?

10 THE COURT: Who did he report to?

11 When he came to work, who did he talk to so he could  
12 find out what he was supposed do?

13 MS. OH: He kind of talked to all of  
14 us. I mean, there was --

15 THE COURT: Including you?

16 MS. OH: Right. There wasn't just one  
17 person.

18 THE COURT: Okay. Can you explain  
19 these letters we've got here?

20 MS. OH: I wasn't aware of that  
21 letter. What I was aware of, he told me that Sound  
22 Transit -- it was written somewhere that Sound Transit  
23 would reimburse for an appraisal if we didn't agree  
24 with their -- what do you call it -- compensation  
25 amount, and I said okay.

1 He said that we would just need to  
2 have someone appraise the property and, you know,  
3 bring it up to Sound Transit. But that, you know --

4 THE COURT: Was there a belief that  
5 you were entitled to \$485,000 for just compensation?

6 MS. OH: Whatever was in the appraisal  
7 and what the appraiser came up with with --

8 THE COURT: Is that an accurate  
9 statement, Ms. Oh? Did you believe you're entitled to  
10 \$485,000? When you said it in July, was that an  
11 accurate statement about what your belief was?

12 MS. OH: My belief was whatever the  
13 appraiser said was --

14 THE COURT: Yes. Focus on the letter  
15 and the date and tell me if this was your belief.

16 MS. OH: Well, that was my belief from  
17 the information from the appraiser.

18 THE COURT: Okay. Thank you. May I  
19 have this?

20 MS. OH: Oh, sorry.

21 THE COURT: I'm going to let you  
22 question her about this letter --

23 MS. LINDELL: Okay.

24 THE COURT: -- okay, directly. We  
25 don't need to get into whether Mr. Choi did or didn't

1 have authority, because I don't think we're ever going  
2 to get a clear answer on, but I do think it's clear  
3 that this is a statement of something that she  
4 believed at the time and you can bring it in as her  
5 party admission.

6 MS. LINDELL: Okay.

7 THE COURT: Are you clear? Is  
8 everybody? Mr. Hernandez?

9 MR. HERNANDEZ: Your Honor, I will  
10 object.

11 THE COURT: Based on?

12 MR. HERNANDEZ: I don't think we meet  
13 the hearsay exception.

14 THE COURT: She just said that this  
15 was her belief at the time. That's not hearsay. It's  
16 her belief. Let's bring in our jury. I'm not  
17 (unintelligible) but on her own.

18 MR. HANSEN: Maybe you should ask the  
19 court.

20 MS. LINDELL: Your Honor?

21 THE COURT: Uh-huh.

22 MS. LINDELL: (Unintelligible.) There  
23 is -- the full version of the letter includes a  
24 reference to Lam Hanson Lam appraisal.

25 THE COURT: You can ask her about her

1 belief based on Mr. Lam's report. Don't get into what  
2 Mr. Choi believed --

3 MS. LINDELL: I understand.

4 THE COURT: -- or what Mr. Choi's  
5 authorized to say, because frankly, I don't think I'm  
6 ever going to get a straight answer out of Ms. Oh  
7 about what Mr. Choi was doing or why he was writing  
8 these letters or what she knew about them, but I do  
9 think it's clear that this is a reflection of what she  
10 was saying and thinking at the time and that you can  
11 ask her about.

12 Let's bring in our jury.

13 The door opens up, obviously, Mr.  
14 Hernandez, for anything you want to get into with  
15 regard to earlier opinions by the (inaudible).

16 MR. HERNANDEZ: Maybe I'll take  
17 advantage of that, Your Honor.

18 MALE VOICE: All rise for the jury.

19 (JURY PRESENT)

20 THE COURT: Thanks for your patience,  
21 ladies and gentlemen. Be seated, everybody.

22 All right. Ms. Lindell, back to you.

23 MS. LINDELL: Thank you, Your Honor.  
24 Permission to approach, Your Honor.

25 THE COURT: Yes.

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CONTINUING DIRECT EXAMINATION

BY MS. LINDELL:

Q. Ms. Oh, I'm handing you what has been marked as Petitioner's Exhibit 158, and ask you if you recognize that letterhead, SOIM Airport Investment Company LLC?

A. Yes, I recognize the letterhead.

Q. And that's letterhead for your company, correct?

A. Yes, for that office.

Q. And the three hotels at the top are the three hotels that your family owns?

A. Yes.

Q. And this letter is dated July 16, 2012; is that right?

A. Yes, that's what it says.

Q. Okay. And as of July 16, 2012, was it Airport Investment Company's and your belief, strong belief, that Airport Investment Company was entitled to a total of \$485,000 for just compensation?

A. I based compensation based on whatever the appraiser said.

THE COURT: That's a yes or no question.

Q. (BY MS. LINDELL) That's a yes or no

1 question.

2 A. Okay. Yes.

3 Q. All right. Thank you.

4 MS. LINDELL: Your Honor, we'd move to  
5 admit Exhibit 158.

6 THE COURT: Denied. Okay. You have  
7 her testimony.

8 MS. LINDELL: Pardon me?

9 THE COURT: Denied. You have her  
10 testimony.

11 MS. LINDELL: Thank you.

12 Q. (BY MS. LINDELL) Was that opinion of value  
13 communicated to Sound Transit?

14 THE COURT: If you know.

15 A. Well, it says it was sent to Jennifer  
16 Corrigan.

17 Q. (BY MS. LINDELL) Okay. And that's Sound  
18 Transit's right-of-way agent that you met at the  
19 property, correct?

20 A. Yes. I met her, I think, once.

21 Q. And that opinion of value was sent to  
22 Jennifer Corrigan at Sound Transit --

23 THE COURT: Ms. Lindell, no. You have  
24 her admission. Move on.

25 MS. LINDELL: Thank you. No further

1 questions in terms of our case in chief, Your Honor.

2 THE COURT: Thank you.

3 Cross-examination, Mr. Hernandez.

4

5 CROSS-EXAMINATION

6 BY MR. HERNANDEZ:

7 Q. Good morning, Ms. Oh.

8 A. Good morning.

9 Q. I want to talk about the information you  
10 had when that letter was sent. What information about  
11 the project did you have at that point?

12 A. I didn't have much. I just had the amount  
13 of compensation Sound Transit was offering and X  
14 amount of land they were taking and, you know, the  
15 three years and that's about it.

16 Q. When you say three years, you mean the  
17 temporary construction easement?

18 A. Yes, I think that's what was recorded  
19 there.

20 Q. What was Sound Transit's offer that  
21 preceded that letter?

22 A. The offer was for about \$143,000.

23 Q. So they, Sound Transit, was offering  
24 \$143,000 just compensation at that point?

25 A. Yes, it was around that much.

Appendix B .

7/30/13 VR 1696-1697 (Sound Transit Closing Argument re  
TCE valuation)

1 days of exclusive use by Sound Transit for purposes of  
2 constructing its project.

3 Mr. Wong testified, and as the  
4 language indicates, Sound Transit is required to give  
5 a minimum of 14 days' activation notice before each  
6 phase or new phase of the construction. The  
7 activation notice also needs to identify the date of  
8 the expected construction and the expected duration of  
9 that construction and exclusive use by the contractor.

10 During that exclusive use, Sound  
11 Transit has the right to fence off the easement area.  
12 Sound Transit is doing that for the safety of others,  
13 for the contractors, for people coming by. It makes  
14 sense that they have to fence it off.

15 During those times that the contractor  
16 is not using the temporary construction area, however,  
17 in other words, the days not including the 160  
18 exclusive days, the temporary fencing will be moved  
19 back and AIC, Airport Investment Company, will have  
20 full use of the easement area.

21 If you do the math and if you do it  
22 back in the jury room, that equates to a little over  
23 two and a half years of nonuse by the contractor, for  
24 which Airport Investment Company has full use of that  
25 easement.

1                   Despite that, Mr. Brackett values it  
2 as a three year easement because of the unknown of  
3 when they're going to be there, and that's how you  
4 value easements.

5                   Access will be maintained to the  
6 property by the contractor at all times during  
7 construction. If the contractor and Airport  
8 Investment Company wish to make other arrangements  
9 regarding closure of the access, they're always free  
10 to do so; however, the contractor will be required to  
11 provide Sound Transit with written approval from  
12 Airport Investment Company before doing so. That's  
13 what Mr. Wong testified to.

14                   Other noneasement property. There was  
15 a lot of discussion in cross-examination about the  
16 aerial truss that could pass over the remainder  
17 property, but he didn't know for sure, because he  
18 doesn't know the size of the Gantry vehicle that the  
19 contractor will ultimately be utilizing in this case.

20                   Again, Mr. Brackett valued this as a  
21 4,000 square foot easement, almost twice the size of  
22 the actual easement area being inquired. That should  
23 be more than enough to compensate the owner for the  
24 potential passing over in the air of the property. In  
25 fact, the easement on the last page, or...

Appendix C

7/30/13 VR 1761-1762 (Sound Transit Closing Argument re  
non-testifying appraiser's valuation)

1 job when you go back to the jury room to make sure  
2 that other people are not being fooled by that  
3 information, by that argument.

4 Look at Exhibit 162. I apologize if  
5 you can't see that, but this will be going back with  
6 you, I believe, to the jury room. This is the exhibit  
7 that Ms. Lindell in cross-examination of Mr. Biethan  
8 had kind of reported his testimony. Remember it was  
9 the small changes in numbers? It's not such a big  
10 deal. You spread it out over all 130 rooms, doesn't  
11 make a real big impact.

12 I mean, after all, you're only talking  
13 about a 1.8 percent change in overall occupancy, and  
14 you're only talking about a \$1.50 in average daily  
15 rate, and you're only talking about a half a point,  
16 half a percentage point in a cap rate adjustment.  
17 Look what it does. It comes up with a dollar damage  
18 number of 1.457 million dollars. That's real dollars.  
19 Don't be fooled by how these small adjustments don't  
20 make big impacts.

21 Let's talk about other opinions in  
22 this case. Ms. Oh, the president of Airport  
23 Investment, testified that Airport Investment hired  
24 someone to come in and to research and locate the best  
25 appraiser they could find and to value this property

1 for the condemnation, and they did that. The  
2 appraiser came back with an opinion of value in the  
3 amount of \$485,000 as of July of 2012.

4 Airport Investment Company, after  
5 considering the appraisal, told Sound Transit that the  
6 \$485,000 accurately, quote, accurately reflects just  
7 compensation, end quote, and that Airport Investment,  
8 quote, strongly believes that we're entitled to a  
9 total of \$485,000 for just compensation, end quote.

10 Ms. Oh testified to that. Where is  
11 that appraiser? It's a matter of that appraiser not  
12 having enough information. Let's get that appraiser  
13 the information; he can update his report. Mr.  
14 Brackett updated his report for time. What prevented  
15 them from updating that report?

16 Today, we have Mr. Biethan and his  
17 opinion of value of 1.7 million dollars. Again, don't  
18 be fooled. We hear in this case -- I'm sorry. We are  
19 here in this case because the extreme differences in  
20 just compensation. As we discussed in voir dire,  
21 again in opening statement and later in Judge  
22 Shaffer's instructions, the sole issue for you to  
23 decide in this case is the just compensation for the  
24 taking of this property. It's the taking of the  
25 property for these easements.

**CERTIFICATE OF SERVICE**

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct: That on the 13<sup>th</sup> day of November, 2015, I arranged for service of the foregoing SUPPLEMENTAL BRIEF BY AIRPORT INVESTMENT COMPANY to the parties to this action as follows:

**Via Legal Messenger**

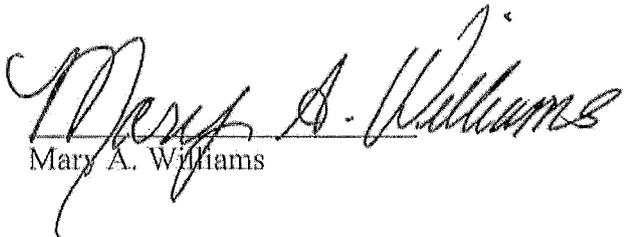
Marisa V. Lindell, WSBA #18201  
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**To:** Williams, Mary A.  
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**Subject:** Supreme Court No. 91653-5/Supplemental Brief by Airport Investment Company

Dear Clerk:

Attached please find *Airport Investment Company's Supplemental Brief* to be filed with the Court.

Thank you,

Mary

**MARY A. WILLIAMS | Legal Assistant**  
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