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5415-252  
PORTLAND, OREGON

IN THE CIRCUIT COURT OF THE STATE OF OREGON  
FOR THE COUNTY OF MULTNOMAH

URSULA WHITE, BRUCE N. REITER, and  
MARGARET RETZ,

Petitioners,

v.

PUBLIC EMPLOYEES RETIREMENT  
BOARD,

Respondent,

and

STATE OF OREGON, LANE COUNTY,  
CITY OF EUGENE, MULTNOMAH  
COUNTY, CITY OF PORTLAND, CITY OF  
ROSEBURG, CITY OF HUNTINGTON,  
CANBY UTILITY BOARD, and ROGUE  
RIVER VALLEY IRRIGATION DISTRICT,

Intervenors.

Case No. 0404-04118

**RESPONDENT PUBLIC  
EMPLOYEES RETIREMENT  
BOARD'S CORRECTED MOTION  
FOR SUMMARY JUDGMENT AND  
MEMORANDUM IN SUPPORT  
THEREOF**

(Oral Argument Requested)

URSULA WHITE, BRUCE N. REITER, and  
MARGARET RETZ,

Petitioners,

v.

PUBLIC EMPLOYEES RETIREMENT  
BOARD,

Respondent,

and

STATE OF OREGON, LANE COUNTY,  
CITY OF EUGENE, MULTNOMAH  
COUNTY, CITY OF PORTLAND, CITY OF  
ROSEBURG, CITY OF HUNTINGTON,  
CANBY UTILITY BOARD, and ROGUE  
RIVER VALLEY IRRIGATION DISTRICT,

Intervenors.

Case No. 0411-11848

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**UTCR CERTIFICATION**

Pursuant to UTCR 5.050(1), Respondent Public Employees Retirement Board ("PERB") requests one hour for oral argument on its motion for summary judgment. PERB requests court reporting services.

**MOTION FOR SUMMARY JUDGMENT**

Pursuant to ORCP 47, PERB moves the Court for an order granting summary judgment in favor of PERB on all of petitioners' claims because there is no genuine issue of material fact and PERB is entitled to judgment as a matter of law. This motion is based on the following memorandum, the declaration of Sarah C. Marriott, the declaration of Steven P. Rodeman, and the pleadings and file in this action.

**MEMORANDUM**

**I. INTRODUCTION**

Petitioners challenge PERB's<sup>1</sup> decision to settle a lawsuit that it lost in Marion County Circuit Court. They also challenge certain of PERB's subsequent actions to implement that settlement consistent with the Circuit Court judgment and 2003 PERS Reform Legislation.<sup>2</sup> Their challenge, couched as a claim that PERB violated its fiduciary duties to PERS members, is at heart simply an effort by a subset of PERS members to secure more retirement benefits than they are entitled to. Petitioners' challenge fails because PERB's decision to settle was objectively reasonable.

When PERB entered into the settlement agreements challenged by petitioners, it had twice been denied a stay of the Circuit Court's judgment against it in *City of Eugene*.<sup>3</sup> PERB faced a final judgment: PERB had to implement the Circuit Court's decision or be in

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<sup>1</sup> The current members of PERB began their service in September of 2003. Declaration of Sarah C. Marriott in support of PERB's Motion for Summary Judgment ("Marriott Decl."), Ex. 4 (Grimsley Depo. Tr. at 6:11-13). The current board is at times referred to herein as the "new board."

<sup>2</sup> House Bills 2003, 2004, and 3020, also known as the PERS Reform and Stabilization Act of 2003, see *Strunk v. Public Employees Retirement Board*, 338 Or 145, 150 (2005), will be referred to here as the "Reform Legislation."

<sup>3</sup> *City of Eugene v. PERB*, Marion County Nos. 99C-12794, 00C-16173, 99C-12838, 99C-20235, *appeal dismissed* 339 Or 113, 117 P3d 1001 (2005) ("*City of Eugene I*"), as modified by 341 Or 120, 137 P3d 1288 (2006) ("*City of Eugene II*").

1 contempt of court. In addition, the settlor of the PERS trust – the Legislative Assembly – had  
2 passed legislation demonstrating its agreement with the Circuit Court’s judgment. Under  
3 these circumstances, it was objectively reasonable for PERB to settle *City of Eugene* on terms  
4 that accommodated both the Circuit Court judgment and the directives from the Legislative  
5 Assembly.

6 Petitioners do not and cannot claim that PERB’s decision to settle the *City of Eugene*  
7 litigation damaged the retirement system as a whole. They merely claim that some PERS  
8 members would have received more money had the Legislative Assembly and the court not  
9 mandated the correction of errors in the past administration of PERS. But PERB’s reasonable  
10 decision to follow the law – law that PERB believed was in the best interests of the retirement  
11 system as a whole and PERS’ past, present, and future members – was not a violation of its  
12 fiduciary duties. PERB therefore respectfully requests that this Court grant its motion for  
13 summary judgment.

## 14 **II. STATEMENT OF UNDISPUTED FACTS**

15 In *City of Eugene*, several local government employers<sup>4</sup> petitioned the Circuit Court to  
16 review PERB’s orders setting 1998 and 2000 employer contribution rates and allocating the  
17 1999 earnings of the PERS fund to various accounts. *City of Eugene I*, 339 Or at 117. As the  
18 Circuit Court described it, “the petitioning employers contend[ed] that their contribution rate  
19 orders for 1998 and 2000 were set at an improperly high level as a result of the Board’s  
20 failure to follow various statutory directives of the legislature in administering PERS. They  
21 also contend[ed] that the 2000 earnings allocation order (distributing the 1999 earnings of the  
22 Fund) constitute[d] an improper abuse of the Board’s administrative discretion in several  
23 respects.” Marriott Decl., Ex. 1, at 3 (October 7, 2002, Opinion and Order). Several PERS  
24 members intervened to present their own challenge to the 1999 earnings allocation and to  
25 defend the 1998 and 2000 employer contribution rate orders. *City of Eugene I*, 339 Or at 117.

26 After trial and motion for summary judgment, the Circuit Court agreed with the local  
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28 <sup>4</sup> The local government petitioners in *City of Eugene* are intervenors here.

1 government petitioners. The court held: (1) PERB unlawfully failed to maintain the  
2 contingency reserve account; (2) PERB unlawfully required employers to match the earnings  
3 in PERS members' variable annuity accounts; (3) PERB unlawfully failed to adopt and  
4 implement updated actuarial factors to calculate member retirement benefits; and (4) PERB  
5 abused its discretion in its decision to credit Tier One members'<sup>5</sup> regular accounts with 1999  
6 earnings of 20 percent, well in excess of the 8 percent assumed earnings rate<sup>6</sup>, while failing to  
7 adequately fund the contingency and other reserve accounts. *Id.* at 119. The court also found  
8 that PERB breached its fiduciary duty to members by crediting employer accounts with  
9 earnings generated by members' variable accounts. *Id.* With these findings, the court vacated  
10 each of the challenged orders and directed PERB to issue new orders consistent with the  
11 judgment. *Id.*

12 PERB, the member-intervenors, and Eugene Water and Electric Board ("EWEB"), a  
13 late petitioner whose petition the trial court dismissed, appealed. *Id.* The Circuit Court and  
14 the Court of Appeals rejected PERB's motions to stay the judgment pending appeal. *Id.* at  
15 119-120. The trial court's judgment therefore remained enforceable during the pendency of  
16 the appeals. *Id.* at 123.

17 After the *City of Eugene* judgment was issued, the Legislative Assembly amended the  
18 PERS governing statutes by enacting the Reform Legislation. *Id.* at 120. The Reform  
19 Legislation was primarily motivated by the "fiscal status of the fund following poor  
20 investment performances in 2000, 2001, and 2002 – together with significant growth in fund  
21 liabilities and employer contribution rates." *Strunk*, 338 Or at 162-63. The Reform  
22 Legislation's preamble reflected the Legislative Assembly's desire to correct the erroneous,  
23 excessive benefits to some PERS members and to contain the costs of the system:

24 <sup>5</sup> Tier One PERS members are those who joined the system before January 1, 1996.

25 <sup>6</sup> "The assumed earnings rate is the rate of investment return that the Public Employees  
26 Retirement Fund is assumed to earn over 50 to 75 years. That earnings assumption facilitates  
27 the calculation of the funding necessary to maintain the system on an actuarially sound basis.  
28 The assumption has changed from time to time. From 1975 through 1978, the assumed  
earnings rate was seven percent. In 1979, the Public Employees Retirement Board (PERB)  
increased the assumed earnings rate to seven and one-half percent. In 1989, PERB increased  
the rate again, this time to its current level of eight percent." *Strunk*, 338 Or at 151 n 2.

1           Whereas as a result of errors by [PERB], some retirees are  
2           receiving benefits that exceed the benefits provided by law . . . .

3           Whereas the escalating costs threaten the stability of the Public  
4           Employees Retirement Fund and the security of benefits  
5           intended for members who have not yet retired; and

6           Whereas in the *City of Eugene* . . . the Marion County Circuit  
7           Court found that [PERB] paid benefits in excess of those  
8           authorized by law . . .

9           Whereas unless immediate steps are taken to reform and  
10          stabilize PERS, escalating pension costs will undermine the  
11          financial security of PERS, force massive cutbacks in essential  
12          government services, eliminate the jobs of many public  
13          employees and destroy the public's confidence and trust in the  
14          governmental institutions of the state; and

15          Whereas this 2003 Act is intended to reform and stabilize PERS  
16          . . .

17          HB 2003. The Supreme Court upheld the Legislative Assembly's efforts in most respects in  
18          *Strunk v. Public Employees Retirement Board*, 338 Or 145 (2005).

19          The Reform Legislation granted exclusive jurisdiction to the Supreme Court to hear  
20          the *City of Eugene* appeal. Or Laws 2003, ch 537, sec 1; *City of Eugene I*, 339 Or at 120.  
21          While the appeal to the Supreme Court was still pending, PERB and the petitioners in *City of*  
22          *Eugene* entered into a settlement agreement. *City of Eugene I*, 339 Or at 120; see Compl.,  
23          Exh 1. Later, PERB entered into a virtually identical settlement agreement with EWEB. See  
24          Compl., Exh 3.

25          The settlement agreements required PERB to issue orders that would comply with the  
26          Reform Legislation and implement the *City of Eugene* judgment. *City of Eugene I*, 339 Or at  
27          120. The settlements were described in detail in a public meeting of PERB on January 26,  
28          2004, and included the following elements:

- PERB would issue an order calculating the variable money match in  
accordance with the Circuit Court's statutory interpretation. Declaration of  
Steven Patrick Rodeman ("Rodeman Decl."), Ex. 1, at 2.



- 1           • PERB would remedy the 1999 earnings over-crediting via the method  
2           established in the Reform Legislation, applying the ruling of the Circuit Court  
3           only if that aspect of the Reform Legislation were struck down by the Oregon  
4           Supreme Court. *Id.*, Ex. 1, at 2.
- 5           • PERB would reallocate \$337.3 million from employer accounts to the  
6           contingency reserve to remedy what the Circuit Court had found to be its  
7           breach of fiduciary duty in crediting employer accounts with earnings  
8           generated by members' variable accounts (the "employer-in-variable" issue).  
9           *Id.*, Ex. 1, at 3.
- 10          • PERB would adopt and implement updated actuarial factors to calculate  
11          member retirement benefits. *Id.*, Ex. 1, at 3.
- 12          • PERB would adopt new contribution rates for the years 1998 and 2000 for the  
13          petitioning employers in the *City of Eugene* case. *Id.*, Ex. 1, at 3-4.<sup>7</sup>
- 14          • PERB would pay \$750,000 in attorneys' fees to the City of Eugene. *Id.*, Ex.  
15          1, at 4.
- 16          • PERB would dismiss its appeal of *City of Eugene*. *Id.*, Ex. 1, at 5.

17           After PERB and the *City of Eugene* petitioners settled, PERB dismissed its appeal and  
18           the local government petitioners moved to dismiss the member-intervenors' appeal on the  
19           grounds that the settlements rendered the controversy moot. *City of Eugene I*, 339 Or at 123.  
20           PERB joined the motion to dismiss. *Id.* The Supreme Court held the appeal was moot, *id.* at  
21           128, and later vacated the Circuit Court's order, *City of Eugene II*, 341 Or at 127.

22           Petitioners now claim that the settlement agreements as a whole, and two of the  
23           actions undertaken by PERB in connection with the settlement, violated PERB's fiduciary  
24           duties to them. Petitioners mainly object to the agreements and PERB's subsequent actions  
25           because they claim some members would have received higher benefits had PERB not acted

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27           <sup>7</sup> In accordance with the ruling of the Court, the City of Eugene, Lane County, and EWEB  
28           would have their contribution rates re-set for both 1998 and 2000, while the other petitioners  
          would have their rates re-set for 2000 only. Rodeman Decl., Ex. 1, at 3-4.

1 as it did. Compl., ¶¶ 18, 26.

2 **III. ARGUMENT**

3 **A. Legal Standard**

4 On a motion for summary judgment, the “court shall enter judgment for the moving  
5 party if the pleadings, depositions, affidavits, declarations and admissions on file show that  
6 there is no genuine issue as to any material fact and that the moving party is entitled to a  
7 judgment as a matter of law.” ORCP 47C. PERB is entitled to summary judgment here  
8 because the undisputed facts show that petitioners’ claims are unfounded – neither PERB’s  
9 decision to settle *City of Eugene* nor any actions PERB undertook in connection with that  
10 settlement violated any fiduciary duties.

11 **B. This Court Should Grant PERB Summary Judgment On Petitioners’**  
12 **First and Second Claims for Relief.**

13 **1. The Settlement Agreements Were Not “Final Orders” Under The**  
14 **Administrative Procedures Act.**

14 Under the Administrative Procedures Act, circuit courts have jurisdiction to review  
15 only “final” agency orders in other than contested cases. *Hawes v. State*, 203 Or App 255,  
16 262 (2005). Because the settlement agreements were not final orders, this Court does not  
17 have jurisdiction to review petitioners’ challenges to them.

18 An agency declaration or statement is not a “final order” if it either “(1) precedes final  
19 agency action, or (2) does not preclude further agency consideration of the subject matter of  
20 the statement or declaration.” *Hawes*, 203 Or App at 263. In *Hawes*, plaintiffs challenged a  
21 memorandum of agreement between the Department of Environmental Quality and the federal  
22 Environmental Protection Agency. The court of appeals held that the agreement did not  
23 constitute a final order giving rise to circuit court jurisdiction. Although some issues were  
24 resolved by the agreement, “the fact remains that there are still many more steps to be taken in  
25 the process of executing [DEQ’s] authority, and the DEQ has not yet taken final action.” *Id.*  
26 at 264-65. The agreement was a “blueprint” for how the agency would make certain  
27 decisions that simply preceded final agency action. *Id.* At 263. The appeals court therefore  
28

1 dismissed plaintiffs' claim. *Id.* at 270.

2 As in *Hawes*, the settlement agreements between PERB and *City of Eugene* petitioners  
3 were not "final orders" within the meaning of ORS 183.480(1). The settlements contemplated  
4 further action by PERB on the issues addressed in the agreements. Among other things, the  
5 agreements required PERB to adopt, in the future, a rule regarding the calculation of money  
6 match benefits for members participating in the variable account program. Compl., Ex. 1, ¶  
7 1.1. They also required PERB, in the future, to issue new rate orders and a new order  
8 allocating 1999 earnings. Compl., Ex. 1, ¶¶ 1.3, 1.5, 1.6. In light of the settlement  
9 agreements' express recognition that PERB would have to take further action on the same  
10 subject, the agreements cannot constitute final orders.

11 2. PERB's Decision To Settle *City of Eugene* Was A Reasonable  
12 Exercise Of Its Authority As Trustee Of The Fund.

13 In their first claim for relief petitioners assert that PERB violated its fiduciary duties  
14 by entering into a settlement agreement with the *City of Eugene* petitioning employers. Their  
15 second claim for relief asserts the same claims with respect to PERB's settlement agreement  
16 with EWEB. Both of these claims are meritless.

17 PERB, as trustee of the PERS fund, administers the retirement system. *Strunk*, 338 Or  
18 at 157; ORS 238.630; ORS 238.660. PERB sets employer contribution rates, adopts actuarial  
19 equivalency factors and assumed earnings and interest rates, establishes reserve accounts and  
20 allocates annual fund earnings to various accounts and reserves within the fund. *Strunk*, 338  
21 Or at 157; ORS 238.630. Like any trustee, PERB's primary obligation in administering  
22 PERS is to follow the terms of the trust instrument. Restatement (Second) of Trusts § 164  
23 (1959) (duties and powers of the trustee are determined by the terms of the trust). In PERB's  
24 case, the trust instrument is the statutes governing PERS. See Restatement (Third) of Trusts §  
25 4, comment g (2003) (regarding trusts created by statute, such as public retirement systems);  
26 see generally ORS Chapter 238. PERB's powers and duties are further defined by common  
27 law applicable to trustees. See 76 AmJur 2d, Trusts § 345 (2007) ("The powers and duties of  
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1 a trustee are controlled or defined by the terms of the trust instrument, as well as the common  
2 law and statutes.”).

3 Courts evaluate a breach of fiduciary duty claim by an objective standard of the  
4 reasonableness of the trustee’s judgment. *Rowe v. Rowe*, 219 Or 599, 609, 347 P2d 968  
5 (1959). As the Supreme Court said in *Rowe*, “[W]e have no right to substitute our judgment  
6 for that of the trustee.” *Id.* at 610. Rather, the court may “control the trustee only if [the  
7 Court] can say that no reasonable person vested with the power which was conferred upon the  
8 trustee . . . could have exercised that power in the manner in which it was exercised.” *Id.*  
9 (emphasis added).

10 PERB’s settlement of *City of Eugene* was an objectively reasonable exercise of its  
11 responsibilities as set forth in the PERS governing statutes. Those statutes make it clear that  
12 PERB owes PERS members a duty not to maximize the immediate benefits payable to  
13 petitioners, but rather to maintain the long-term stability and viability of the PERS fund. ORS  
14 238.601. The legislative findings and intent contained in the PERS governing statutes define  
15 the duty:

16 The Legislative Assembly finds that the maintenance of a solid,  
17 affordable public employees retirement plan is essential to  
18 providing effective, efficient services to the citizens of Oregon  
19 by allowing the state and political subdivisions of the state to  
20 hire and retain employees who are committed to providing those  
21 services. It is the intent of the Legislative Assembly that the  
22 Public Employees Retirement Board, in performing its duties as  
23 trustee of the Public Employees Retirement Fund, recognize that  
24 the continued stability and viability of the Public Employees  
25 Retirement System depends on the ability of public employers  
26 and taxpayers to pay the costs of the system. Consistent with  
27 this intent, the board shall administer the system to create and  
28 maintain long-term stability and viability in the system, and  
shall act to achieve full funding for the benefits provided by the  
system, giving equal consideration to the interests of the public  
employer and the employee to the extent that treatment does not  
violate the fiduciary duties of the board. Nothing in this section  
shall be construed to impose a fiduciary duty on the board to  
consider the interests of public employers, and the board shall  
consider the interests of public employers only with respect to  
matters unrelated to the board’s fiduciary duties as trustee of the

fund.

*Id.* (emphasis added). *See also* ORS 238.660.

Thus, the Legislative Assembly – the settlor of the PERS trust – believed that the prior PERB’s actions that had been invalidated by the Circuit Court in *City of Eugene* were violations of the prior board’s statutory obligations. The Reform Legislation referred explicitly to the *City of Eugene* case in finding that the system needed to be reformed to ensure its long-term stability and viability. *See* HB 2003 (“as a result of errors by [PERB], some retirees are receiving benefits that exceed the benefits provided by law . . . escalating costs threaten the stability of the [PERS] Fund . . . Whereas in the *City of Eugene* . . . the Marion County Circuit Court found that [PERB] paid benefits in excess of those authorized by law . . .”).<sup>8</sup>

PERB, like the Legislative Assembly, believed that the actions of the old Board that had been invalidated by the Court in *City of Eugene* had contributed in substantial part to the fiscal problems of the system, and that a settlement was in the best interests of the system. One of the members of PERB testified to this effect:

[O]n the merits, I thought [the *City of Eugene* Court] was right in the major finding, which was that the prior board had been . . . certainly in error, irresponsible may even be the right word, in . . . some of the crediting decisions they made, specifically the 1999 decision. I didn’t think that was in the best long-term interest of the system and I think it destabilized it.

*See* Marriott Decl., Ex. 2 (Dalton Depo. Tr. at 21:1-8). Another member testified:

I felt that there were decisions made by the prior board that were not in the best interests of the PERS system as a whole. And I felt it overall was important to us, as board members, to take a long-term view of the financial viability of the system and ensure the system’s viability for not just retirees and current members, but future members as well.

*See* Marriott Decl., Ex. 3 (Rocklin Depo. Tr. at 23:16-23). PERB acted reasonably and in the

<sup>8</sup> The Supreme Court’s factual findings in *Strunk* demonstrate the extent of the problems faced by PERS as a result of the prior administration of the system: “[A]t the end of 2002, the fund had a total [unfunded actuarial liability] of more than \$15 billion . . . . In January 2003, the [unfunded actuarial liability] reached \$16.41 billion. . . . over [the period between 1991 and 2000], the system’s funded ratio, which compares the value of fund assets to projected liabilities, declined.” *Strunk*, 338 Or at 163 (quoting Special Master’s report).

1 best interests of the system in settling the case.

2 Not only was it reasonable for PERB to conclude that settlement served the best  
3 interests of the system, it was also a reasonable response to the Circuit Court's and the Court  
4 of Appeals' rejection of PERB's attempt to stay the Circuit Court's judgment. Because the  
5 courts refused to grant a stay, PERB was subject to an enforceable judgment requiring it to  
6 implement or be in contempt, regardless of any appeal. *See* 76 AmJur 2d, Trusts § 346 (2007)  
7 (a trustee must comply with the order of a court that has jurisdiction over the trust); *City of*  
8 *Eugene I*, 339 Or at 122 (judgment was final until issuance of appellate judgment).

9 Furthermore, resolution via settlement was less painful for members than the  
10 combination of appeal plus implementation would have been. The *City of Eugene* judgment  
11 had vacated PERB's original order crediting Tier One members' accounts with 20 percent  
12 earnings for 1999, and ordered PERB to issue a new order reallocating 1999 fund earnings to  
13 properly fund reserves. *City of Eugene I*, 339 Or at 126. The Legislative Assembly had then  
14 determined that the appropriate allocation of 1999 earnings to member accounts was 11.33  
15 percent (the amount PERB agreed to credit in the settlement). *See Strunk*, 338 Or at 216  
16 (emphasis added). The Reform Legislation attempted to correct PERB's overcrediting of Tier  
17 One member accounts with 1999 fund earnings without reducing member account balances  
18 by suspending cost-of-living adjustments ("COLAs") for certain retirees. *Strunk*, 338 Or at  
19 220. But had PERB not settled *City of Eugene*, it would have been required to implement  
20 both the Reform Legislation provision suspending COLAs and the judgment requiring it to  
21 reduce the amount of 1999 fund earnings credited to Tier One members' regular accounts.  
22 The settlement permitted PERB act in a way it viewed as less painful for members – only  
23 suspending COLAs. As one PERB member has testified, "at that moment in time I felt the  
24 settlement was far better for our members than implementing [the *City of Eugene* order]. . . .  
25 The stays had been denied. We were under order to implement. To implement it on face  
26 could have been immediate and very painful for the members. By reaching the settlement, it  
27 was less so, although still painful."). *Marriott Decl.*, Ex. 4 (Grimsley Depo. Tr. at 20:10-12;

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1 19-22).

2 3. **PERB's Dismissal Of Its Appeal Of City of Eugene Did Not Violate**  
3 **Its Fiduciary Duties.**

4 Petitioners complain that PERB "abandoned its appeal" from the trial court ruling in  
5 *City of Eugene*. See Compl., ¶ 16(a). Contrary to petitioners' suggestion, however, PERB did  
6 not have a duty to appeal the judgment against it:

7 [The duty of a trustee] to defend claims of third persons against  
8 the trust estate . . . is . . . to do what is reasonable under the  
9 circumstances. He has a certain amount of discretion and is  
10 liable only if he abuses the discretion by failing to do what is  
11 reasonable under the circumstances. Ordinarily, he should  
12 defend actions brought against him that if successful would  
13 cause a loss to the trust estate. If he loses in the court below it  
14 may be his duty to appeal to a higher court, if under all the  
15 circumstances it would be unreasonable not to appeal. He does  
16 not necessarily act unreasonably in paying a claim, even though  
17 he believes that the claim is not well founded, if under all the  
18 circumstances, in view of the amount involved and the doubt as  
19 to the issue, it appears to be not unreasonable to pay the claim.

20 IIA SCOTT ON TRUSTS, § 178, at 495-96 (4th ed 1987) (emphasis added); *Seven G Ranching*  
21 *Co. v. Stewart Title & Trust*, 128 Ariz 590, 592, 627 P2d 1088 (1981) ("absent any contrary  
22 or limiting provisions in the trust instrument, the trustee can properly compromise, submit to  
23 arbitration or abandon claims affecting the trust property provided that in so doing he  
24 exercises reasonable prudence"); *Cogdell v. Fort Worth National Bank*, 544 SW2d 825, 828  
25 (Tex App 1976) (same); *Jones v. Jones*, 297 Mass 198, 211-212, 7 NE2d 1015 (1937) (same);  
26 *In Re Ludeke*, 54 NYS 121, 124, 33 AD 397 (1898) (holding that trustee's settlement of  
27 claims for breach of a property lease was valid, judicious, and proper, even though it was not  
28 certain that the non-breaching party would seek compensation for the breach). "The rule  
permitting a trustee to compromise and settle claims . . . is sound [because] [o]therwise, the  
administration of the trust would require litigation of every claim by or against the trust."  
*Cogdell*, 544 SW2d at 828.

As discussed above, PERB's decision to settle the *City of Eugene* litigation rather than  
to pursue an appeal was objectively reasonable in light of the unstayed Circuit Court

1 judgment vacating PERB's prior orders, a consideration reinforced by the PERB members'  
2 belief that settlement was in the best interests of the system.<sup>9</sup> PERB's decision to appeal  
3 cannot be the foundation for a claim of breach of fiduciary duty.

4           4.     Petitioners' Suggestion That PERB Had A Fiduciary Duty to  
5                   Maximize the Benefits Paid Individual PERS Members Is  
6                   Incorrect.

7           Petitioners do not and cannot claim that PERB's decision to settle the *City of Eugene*  
8 litigation damaged the system as a whole – they claim merely that some members would have  
9 gotten higher benefits had PERB not agreed, for instance, to implement updated actuarial  
10 factors or re-credit 1999 earnings. But PERB is required to abide by the intent of the Oregon  
11 legislature as expressed in the PERS governing statutes. *See* 76 AmJur 2d, Trusts § 300  
12 (2007) (“In the administration of a trust, the discovered intent of the trustor is of controlling  
importance. . .”).

13           The PERS governing statutes do not contemplate a duty to maximize benefits to any  
14 particular member. For example, in *Strunk*, the Supreme Court held that, under the PERS  
15 contract, members are entitled to have their member accounts credited with no more than the  
16 assumed earnings rate. *Strunk* 338 Or at 202. Petitioners' theory that PERB's fiduciary duty  
17 prevents it from taking any actions that reduce member benefits would effect an “end run”  
18 around the Supreme Court's holding. Under petitioners' theory, even though they are not  
19 contractually entitled to more than the 8 percent assumed earnings rate, PERB's alleged  
20 fiduciary duty to maximize petitioners' future benefits would require PERB to credit member  
21 accounts with more than their legal entitlement. This would both negate *Strunk* and the  
22 Legislative Assembly's mandate that PERB fund reserve accounts and maintain the long-term

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<sup>9</sup> As the Supreme Court recognized, every issue in the *City of Eugene* case, with the exception  
24 of the employer-in-variable issue, was resolved independently of the Circuit Court's judgment  
25 in *City of Eugene*, either by the Reform Legislation or by the Supreme Court in *Strunk*. *City*  
26 *of Eugene*, 339 Or at 125-27 (“[T]he 2003 legislative amendments combined with this court's  
27 decision in *Strunk v. PERB* . . . resolved all but one of the substantive issues in these appeals;”  
28 “the only substantive issue presented in these appeals that has not been resolved by the  
intervening legislative amendments to PERS or by this court's decision in *Strunk* is whether  
the trial court erred when it agreed with employers that PERB unlawfully had required  
employers to match the earnings on members' variable accounts.”). Accordingly, any appeal  
by PERB would have been pointless.



1 stability and viability of the PERS fund. *Strunk*, 338 Or at 164, 202 & 216; *see also*, e.g., HB  
2 2003 preamble; Or Laws 2003, ch 3, sec 1, *as amended by* Or Laws 2003, ch 67, sec 5; Or  
3 Laws 2003, ch 67, sec 8, *as amended by* Or Laws 2003, ch 625, sec 12; Or Laws 2003, ch 67,  
4 sec 5, *as amended by* Or Laws 2003, ch 625, sec 10.

5                   5.     PERB's Agreement To Correct The Erroneous Crediting of 1999  
6                             Earnings To Member Accounts Did Not Violate PERB's Fiduciary  
7                             Duties.

8             Petitioners challenge PERB's "agree[ment] to reduce the amount of 1999 earnings  
9 allocated to petitioners' accounts." Compl., ¶¶ 16(b), 24(b). Paragraph 1.3 of the Settlement  
10 Agreements provide in relevant part that, "[t]he new 1999 earnings allocation order . . . will  
11 provide that the appropriate earnings allocation to Tier 1 regular member accounts is  
12 11.33%." Compl., Exh. 1, Exh. 3.

13             PERB had originally credited Tier One members' accounts with 20 percent earnings  
14 for 1999 rather than the 8 percent assumed earnings rate. *City of Eugene*, 339 Or at 126. The  
15 Circuit Court found, however, that "PERB abused its discretion in allocating 1999 earnings of  
16 20 [percent] to Tier One regular employee accounts." *Id.* As described by the Supreme Court  
17 in *Strunk*, the Legislative Assembly determined that the appropriate allocation of 1999  
18 earnings to member accounts should have been 11.33 percent (the amount PERB agreed to  
19 credit in the settlement):

20                   Pursuant to the trial court's judgment [in *City of Eugene*], the  
21 Fiscal Services Division (FSD) of PERS recalculated the credits  
22 to Tier One members' regular accounts for 1999 and concluded  
23 that, if PERB properly had funded the contingency and gain-  
24 loss reserves in 1999, the appropriate credit to members' regular  
25 accounts for that year would have been 11.33 percent. Before  
26 FSD presented that figure to PERB for final approval, however,  
27 the legislature requested that information directly from FSD.  
28 The legislature subsequently enacted the 2003 PERS legislation.  
Or Laws 2003, ch 67, sections 9 and 10, *as amended by* Or  
Laws 2003, ch 625, section 13, effectively codifying the 11.33  
percent figure as the correct 1999 crediting decision.

338 Or at 216 (emphasis added).

           Petitioners cannot predicate a claim on PERB's compliance with the unstayed *City of*  
*Eugene* judgment and the Legislative Assembly's determination of the correct crediting

1 decision.

2 6. PERB's Transfer Of Funds From Employer Accounts To The  
3 Contingency Reserve Rather Than To Petitioners' Member  
4 Accounts Did Not Violate PERB's Fiduciary Duties.

5 Petitioners also challenge PERB's "agree[ment] to implement the trial court's ruling in  
6 the PERS litigation upholding intervenors' challenge to the 'employer-in-variable rule' by  
7 transferring the improperly-allocated amounts from the employer accounts to the contingency  
8 reserve . . . rather than by reallocating the funds according to PERB's then-existing allocation  
9 methods." Compl., ¶¶ 16(c), 24(c).

10 The Supreme Court, however, has held that PERB had no duty to use its "then-  
11 existing allocation methods." *Strunk*, 338 Or at 191 (PERB's historical use of a given  
12 calculation method does not promise members that the method will always be used). *See also*  
13 *id.* at 202 (PERB's practices in crediting earnings "do[] not alter the nature of the promises  
14 that the legislature made").

15 In any event, ORS 238.670(1) requires PERB to "set aside . . . such part of the income  
16 as PERB may deem advisable, not exceeding seven and one-half percent" to the contingency  
17 reserve account. Finding that PERB "failed to fund reserve accounts for many years prior to  
18 1998," the Legislative Assembly amended the PERS statutes to require PERB to fund the  
19 reserves. HB 2003 preamble; Or Laws 2003, ch 3, sec 1, *as amended by* Or Laws 2003, ch  
20 67, sec 5. The amendment provides that PERB may not credit members' regular accounts  
21 with earnings in excess of the assumed earnings rate until the reserve account reaches full  
22 funding and remains fully funded for three consecutive years. Or Laws 2003, ch 3, sec 1, *as*  
23 *amended by* Or Laws 2003, ch 67, sec 5. The Supreme Court recognized in both *Strunk* and  
24 *City of Eugene* that PERB has a statutory obligation to fully fund the contingency reserve.  
25 *Strunk*, 338 Or at 215 (noting that if PERB had fully funded the reserves in 1999, the earnings  
26 credit to member accounts would have been 11.33 percent); *City of Eugene*, 339 Or at 126.  
27 PERB's decision to transfer funds improperly allocated to employer accounts to the  
28 contingency reserve as part of the legislatively mandated funding of that reserve is consistent

1 with the law.

2 Finally, petitioners have no right to earnings in excess of the assumed earnings rate –  
3 8 percent. *Strunk*, 338 Or at 202. Under the terms of the settlement (and the 2003 Reform  
4 Legislation), Tier One member accounts received 11.33 percent, almost half again as much as  
5 the 8 percent assumed earnings rate. PERB had an obligation to use any earnings exceeding  
6 the 8 percent for other purposes mandated by law and the right to use the excess for any other  
7 purpose allowed by the statutes. *Id.*

8 The terms of the Settlement Agreements reflect the legislative mandates to PERB in  
9 Or Laws 2003, ch 67, secs 5 and 10. PERB's compliance with its governing statutes, as  
10 interpreted by the Supreme Court, cannot constitute a breach of fiduciary duty.

11 7. **PERB's Calculation Of Money Match Benefits For PERS Members**  
12 **Participating In The Variable Account Program Did Not Violate**  
**Its Fiduciary Duties.**

13 Petitioners also challenge PERB's "agree[ment] to promulgate an administrative rule  
14 governing the calculation of money match benefits for PERS members participating in the  
15 variable account, notwithstanding that such a rule will adversely affect PERS members."  
16 Compl. ¶¶ 16(d), 24(d). The Settlement Agreement provision to which petitioners refer  
17 provides that "PERB will adopt a rule governing the calculation of money match benefits for  
18 members participating in the variable account program that conforms to July 2001 Circuit  
19 Court order in the *City of Eugene*." Compl., Exh. 1, ¶ 1.1, Exh. 3, ¶ 1.1.

20 Petitioners allege that the PERB's agreement to comply with the Circuit Court's  
21 unstayed judgment with respect to the calculation of money match benefits for PERS  
22 members participating in the variable account program "will adversely affect PERS  
23 members." They do not, however, claim the court-ordered calculation of money match  
24 benefits conflicts with any statute. As discussed above, PERB does not have a fiduciary duty  
25 to maximize the future benefits of petitioners nor could it disregard an unstayed court order.

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1                   8.     **PERB's Agreement to Use Funds Available In the Contingency**  
2                             **Reserve To Cover Certain Costs Did Not Violate Its Fiduciary**  
3                             **Duties.**

4             Petitioners complain of PERB's agreement to "use funds available in the contingency  
5     reserve established by ORS 238.670(1) to cover all of the costs that PERS incurs with respect  
6     to [the employers'] current and retired employees that are not covered by [the employers']  
7     recalculated rates." Compl., ¶¶ 16(e), 24(e); Exh. 1, ¶ 1.5, Exh. 3, ¶ 1.5.

8             ORS 238.670(1)(c) allows PERB to use the contingency reserve "to provide for any  
9     other contingency that the board may determine to be appropriate." In agreeing to this  
10    provision of the Settlement Agreements, PERB was exercising the authority expressly given  
11    to it by the Legislative Assembly. Exercising an express grant of authority cannot violate any  
12    law.

13                   9.     **PERB's Payment of Attorney's Fees Did Not Violate Its Fiduciary**  
14                             **Duties.**

15            Finally, petitioners challenge PERB's agreement to pay the attorneys fees of the *City*  
16    *of Eugene* petitioners. Compl., ¶¶ 16(f), 24(f). But the Circuit Court had already determined  
17    that petitioners were entitled to attorneys' fees and costs from PERB. Marriott Decl., Ex. 5, at  
18    9 (January 16, 2003, Judgment). The Legislative Assembly has expressly authorized PERB to  
19    make such payments from the PERS contingency reserve. ORS 238.670(1)(b) provides that  
20    PERB may use the contingency reserve to "pay any legal expenses or judgments that do not  
21    arise in the ordinary course of adjudicating an individual member's benefits or an individual  
22    employer's liabilities." The legal expenses associated with the local government's successful  
23    challenge to the 1999 earnings crediting decision falls within this provision. PERB's exercise  
24    of its express statutory authority is not actionable.

25                   C.     **This Court Should Grant PERB Summary Judgment On Petitioners'**  
26                             **Third and Fourth Claims For Relief.**

27            Petitioners' third claim for relief asserts that PERB violated its fiduciary duties by  
28    recalculating employer rates for the petitioning employers for the years 1998 and 2000.  
Compl., ¶¶ 31, 32. Their fourth claim for relief challenges PERB's transfer of money from  
the contingency reserve to the employer accounts in connection with that recalculation of

1 rates. Compl., ¶¶ 36, 37. These claims fail because PERB's actions complied with the PERS  
2 governing statutes and the Circuit Court's unstayed order in *City of Eugene*.

3 The rate order changes – mandated by the Circuit Court's decision in *City of Eugene* –  
4 resulted in overpayments by employers for 1998 and 2000. PERB remedied those  
5 overpayments by transferring money from the contingency reserve to employer accounts. *See*  
6 *Marriott Decl.*, Ex. 4 (Grimsley Depo. Tr. 29:20-23; 30:23-31:6); *see also* Compl. Ex. 1 ¶ 1.5.  
7 PERB's decision to transfer the overpayment of funds from the contingency reserve to  
8 employer accounts to account for the overpayments complies with ORS 238.670(1)(c), which  
9 authorizes PERB to use the contingency reserve to "provide for any other contingency that the  
10 board may determine to be appropriate."

11 **D. This Court Should Grant PERB Summary Judgment On Petitioners'**  
12 **Fifth Claim For Relief.**

13 **1. This Court Lacks Jurisdiction To Consider Petitioners' Common**  
14 **Law Breach Of Fiduciary Duty Claims.**

15 The APA is the exclusive avenue for review of the validity of final agency orders for  
16 compliance with the law. ORS 183.480(2); *Mendieta v. State*, 148 Or App 586, 603 (1997);  
17 *Premier Technology v. Oregon State Lottery*, 136 Or App 124, 132 (1995). Petitioners'  
18 exclusive means for challenging the validity of the PERB orders referenced in their common  
19 law claim was a timely petition for review under ORS 183.480 and ORS 183.484. This court  
20 lacks jurisdiction to consider a common law breach of fiduciary duty claim that purports to  
21 challenge the validity of orders issued by PERB.

22 **2. PERB Did Not Breach Any Fiduciary Duties.**

23 Petitioners' fifth claim for relief asserts a common law claim of breach of fiduciary  
24 duty based on the same allegations in their first through fourth claims for relief. Compl. ¶ 45.  
25 These allegations fail for the same reasons petitioners' other claims fail.

26 Petitioners' fifth claim for relief asserts an additional challenge to PERB's actions not  
27 asserted in their other claims: a claim that PERB breached its fiduciary duty by allocating  
28 2003 earnings to the contingency reserve and the capital preservation reserve rather than to

1 individual member accounts. Compl., ¶ 45(d). As discussed above, however, this claim fails  
2 because PERB is permitted to use its discretion to direct to reserve accounts fund earnings in  
3 excess of the amounts to which PERS' members are statutorily entitled. ORS 238.670(3)  
4 ("The board may set aside . . . such part of the income as the board considers necessary,  
5 which moneys so segregated shall remain in the fund and constitute one or more reserve  
6 accounts."); *see also* ORS 238.670(1); ORS 238.670(2). PERB's decision to do so here was  
7 not a breach of fiduciary duty.

8 **IV. CONCLUSION**

9 Faced with an unstayed final judgment in a case that it had lost and actions by the  
10 Legislative Assembly supporting the Circuit Court's conclusion, PERB made the reasonable  
11 decision to settle *City of Eugene*. The settlement agreement allowed PERB to put into place  
12 the main elements of the Circuit Court judgment and at the same time implement the slightly  
13 different solutions of the Reform Legislation. Because this decision and the actions  
14 associated with it were an objectively reasonable interpretation of PERB's statutory mandate,  
15 petitioners' claim that PERB violated its fiduciary duties fails. For these reasons, PERB  
16 respectfully requests that this Court grant its motion for summary judgment.

17 Dated: June 5, 2008

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IN THE CIRCUIT COURT OF THE STATE OF OREGON  
FOR THE COUNTY OF MULTNOMAH

URSULA WHITE, BRUCE N. REITER, and  
MARGARET RETZ,

CASE NO. 0404-04118

Petitioners,

v.

PUBLIC EMPLOYEES RETIREMENT  
BOARD,

PROOF OF SERVICE

Defendant,

and

STATE OF OREGON, LANE COUNTY,  
CITY OF EUGENE, MULTNOMAH  
COUNTY, CITY OF PORTLAND, CITY OF  
ROSEBURG, CITY OF HUNTINGTON,  
CANBY UTILITY BOARD, and ROGUE  
RIVER VALLEY IRRIGATION,

Intervenors.

URSULA WHITE, BRUCE N. REITER, and  
MARGARET RETZ,

Case No. 0411-11848

Petitioners,

v.

PUBLIC EMPLOYEES RETIREMENT  
BOARD,

Respondent,

and

STATE OF OREGON, LANE COUNTY,  
CITY OF EUGENE, MULTNOMAH  
COUNTY, CITY OF PORTLAND, CITY OF  
ROSEBURG, CITY OF HUNTINGTON,  
CANBY UTILITY BOARD, and ROGUE  
RIVER VALLEY,

Intervenors.

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**PROOF OF SERVICE BY MAIL**

I am more than eighteen years old and not a party to this action. My business address is Orrick, Herrington & Sutcliffe LLP, 1120 NW Couch Street, Suite 200, Portland, Oregon 97209. On June 5, 2008, I served the following document(s):

RESPONDENT PUBLIC EMPLOYEES RETIREMENT BOARD'S CORRECTED  
MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT  
THEREOF

on the interested parties in this action by placing true and correct copies thereof in sealed envelope(s) addressed as follows:

<u>Attorneys for Petitioners</u>	<u>Attorneys for Intervenor Local Employers</u>
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I deposited such envelope(s) with postage thereon fully prepaid in the United States mail at Portland, Oregon on the date indicated above.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 5, 2008, at Portland, Oregon.

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Michele Harinski