21

FILED
SUPERIOR COURT
THURSTON COUNTY, WA

2026 JUN 25 AM 11:40

LINDA MYHRE ENLOW
THURSTON COUNTY CLERK

Hearing Date: May 29, 2026
Hearing Time: 9:00 A.M.
Judge/Calendar: Hon. Christine Schaller

05-2-00131-1
ORGSJ 492
Order Granting Summary Judgment
21151573

SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

JEFFREY PROBST and a class of similarly situated individuals, Plaintiffs, MICKEY FOWLER and LEISA MAURER, and a class of TRS Plan 3 members, Plaintiffs/ Class Representatives, v. DEPARTMENT OF RETIREMENT SYSTEMS, Defendant.	No. 05-2-00131-1 (Consolidated with No. 05-2-02141-9) **ORDER GRANTING SUMMARY JUDGMENT FOR THE PLAINTIFFS AND DENYING SUMMARY JUDGMENT FOR THE DEFENDANT** AND FINAL ORDER

Matter Before the Court

This longstanding case is before the Court on remand by the Court of Appeals.

The plaintiffs Mickey Fowler, Leisa Maurer, and a class of Teachers Retirement System (TRS) Plan 3 members (hereafter collectively "the teachers") move for liability under the Takings Clause of the United States and Washington Constitutions, the formula for relief for that violation, and the calculation of the amounts to be transferred from TRS Plan 2 to the teachers' TRS Plan 3 accounts for that violation. The Department of Retirement Systems (DRS) concedes liability under the Ninth Circuit opinions in the parallel federal case, *Fowler v. Guerin*, 899 F.3d 1112 (9th Cir. 2018) and *Fowler v. Guerin*, 2024 WL 4891016 (9th Cir. 11/26/24). DRS's liability is accordingly established. The remaining issue for the Court to decide is the formula for relief for the admitted violation. DRS moves for summary judgment on two issues concerning the formula for relief to be decided by the Court.

The parties agree that the formula for relief has three components—(1) interest withheld, which requires determining daily interest withheld and correcting the compounding of interest; (2) increase in transfer payment under RCW 41.32.8401 due to the withheld interest; and (3) compensation for the long time period while the teachers' withheld interest remains in the Commingled Trust Fund.

For Component 1, the parties disagree on the interest rate and when the teachers' contributions should start earning interest. Once interest is calculated, the parties agree on how to calculate Component 2. For Component 3, the parties agree that the teachers' withheld interest made annual earnings in the Commingled Trust Fund. But the parties disagree on who is entitled to those earnings—the teachers or the State.

The teachers also move for a determination that the Rebuttal Report by Thomas Terry submitted by DRS is inadmissible and to strike the testimony of Sarah Blocki.

The Court heard argument on the motions on May 1, 2026. The teachers were represented by David F. Stobaugh and Alexander F. Strong of Stobaugh & Strong, P.C. DRS was represented by Phillip M. Guess and Emaan R. Jaberi of K&L Gates LLP.

<u>Matters Brought to the Court's Attention Under CR 56(h)</u>

1. Plaintiffs' Motion for Summary Judgment;
2. Declaration of John D. Marshall (February 5, 2026) and spreadsheet of amounts owed to class members;
3. Declaration of David F. Stobaugh (February 5, 2026);
4. DRS Motion for Summary Judgment;
5. Declaration of Phillip M. Guess (February 5, 2026) with attached exhibits A-G;
6. Plaintiffs' Response to DRS Motion for Summary Judgment;

7. Declaration of John D. Marshall (March 9, 2026) responding to Thomas Terry Report dated February 4, 2026;

8. Declaration of David F. Stobaugh (March 9, 2026) attaching Declaration of Seth Miller dated March 15, 2021, Fed. Dkt. 99;

9. Deposition of Thomas Terry (February 27, 2026) with exhibits;

10. DRS Response to Plaintiffs' Motion for Summary Judgment;

11. Declaration of Phillip M. Guess (March 9, 2026) with Expert Rebuttal Report dated March 9, 2026 by Thomas Terry;

12. Declaration of John D. Marshall (March 20, 2026) responding to Thomas Terry's Rebuttal Report;

13. Declaration of David F. Stobaugh (March 20, 2026) responding to Thomas Terry's Rebuttal Report;

14. DRS Reply on its Motion for Summary Judgment;

15. Declaration of Thomas S. Terry (March 20, 2026);

16. Plaintiffs' Motion to Strike Inadmissible Testimony;

17. Declaration of John D. Marshall (April 8, 2026);

18. DRS Response to Motion to Strike;

19. Declaration of Emaan R. Jaberi (April 28, 2026) with exhibits;

20. Plaintiffs' Reply on their Motion to Strike;

21. Other records in the court file cited by the parties in their motions and responses to the motions;

22. The five appellate decisions in this case and the parallel federal case, Western District of Washington Case No. 3:15-cv-05367-BHS:

a. *Probst v. DRS* (*Probst I*), 167 Wn.App. 180 (2012);

b. *Probst/Fowler v. DRS* (*Probst II*), Case No. 45128-0-II, 2014 WL 7462567 (Wn.App. 12/30/14) (unpublished);

c. *Fowler v. Guerin* (*Fowler I*), 899 F.3d 1112 (9th Cir. 2018), rehearing denied, 918 F.3d 644 (9th Cir. 2019), cert. denied 140 S.Ct. 390 (2019);

d. *Fowler v. Guerin* (*Fowler II*), Case No. 23-35414, 2024 WL 4891016 (9th Cir. 11/26/24) (unpublished);

e. *Probst/Fowler v. DRS* (*Probst III*), Case No. 59097-2-II, 2025 WL 2779961 (Wn.App. 9/30/25) (unpublished).

History of the Case

The lengthy history of this case and the parallel federal case involving the same parties and same taking issue is important as it relates to how the parties are before the Court.

It is over twenty years since the action was filed in this court, and well over twenty years since the action at issue happened—withholding of interest by DRS when the teachers transferred from TRS Plan 2 to their TRS Plan 3 individual defined contribution accounts. Most of these transfers occurred in 1996-97. When the teachers transferred to TRS Plan 3, DRS was supposed to transfer the teachers' employee contributions and accrued interest at the promised rate, but DRS did not transfer all the interest. There are over 26,000 class members who have had interest withheld and this interest remains in the Commingled Trust Fund where it continues to accrue earnings.

This case was filed as a class action in January 2005. It was brought by Jeff Probst and thus the caption of this case is *Probst v. DRS*. Mr. Probst and the class he represented settled their portion of the case long ago. They were replaced in this case by Mickey Fowler and Leisa Fowler (her last name is now Maurer) as class representatives for a class of teachers. But the caption for the case remains the same. Consequently, the state court proceedings in this order are generally referred to as *Probst*, whereas the parallel federal case proceedings are referred to as *Fowler* because that action was brought by Mickey Fowler and Leisa Maurer and the defendant is the Director of DRS sued in her official capacity, initially Marcie Frost, then Tracy Guerin, and now Kathryn Leathers. Although the state and federal captions are different, the parties here and in federal court are functionally the same.

The Court is the seventh Superior Court Judge assigned to this case through its long history of going through the Superior Court, the Washington Court of Appeals, the Washington Supreme Court, and the proceedings in the federal courts.

The case was initially assigned to Judge Paula Casey in 2005 at filing, and that first filing was a class action complaint that alleged, in general, the taking issue. In October 2005, a petition for judicial review was filed related to the decision by DRS to deny a claim for interest that Jeff Probst alleged was owed, and that case was pursuant to the Administrative Procedure Act (APA).

The cases were consolidated in March 2006, but they were not merged. Two separate case scheduling orders were entered because the issues are different—the first case, a class action lawsuit, and the second, a petition for review under the APA of an administrative decision by DRS to deny a claim for interest.

In January 2007, the case was reassigned to Judge Richard Hicks. In November 2007, the parties agreed to a class action settlement agreement correcting TRS Plan 3 accounts for part of the plaintiff groups represented by Mr. Probst, *i.e.*, employees who had transferred from Plan 2 to Plan 3 after January 20, 2002.

The case was reassigned to Judge Anne Hirsch in December 2007. The *Probst* class settlement was preliminarily approved by the court, and new plaintiffs Mickey Fowler and Leisa Fowler (now Maurer) were designated as the representatives for the remaining class of TRS Plan 2 members who transferred to TRS Plan 3 before January 20, 2002. Most of the employees transferred in 1996-97. The settlement allowed DRS to assert a statute of limitations defense against the new plaintiffs and the proposed class of teachers.

In December 2007, the case was reassigned from Judge Anne Hirsch to Judge Chris Wickham. The preliminary settlement was approved by Judge Wickham, and an order was entered in November 2008 allowing a supplemental class action complaint. The supplemental complaint clarified the taking issue for the class action brought by Fowler and Maurer for the teachers.

In May 2009, there was an order that certified the remaining class of teachers—those who transferred before January 20, 2002. The Court of Appeals issued a decision on September 14, 2009 affirming the settlement of the Probst class within this case.

After the Court of Appeals decision, the case was reassigned back to Judge Paula Casey in 2010. Judge Casey rejected DRS's statute of limitations defense, finding that the discovery rule applied and therefore the teachers' case is timely. Judge Casey made substantive rulings in this case as it related to the APA petition for review. She affirmed the DRS administrative decision that no interest was owed, and she dismissed the amended supplemental complaint. The teachers appealed that decision. DRS did not appeal Judge Casey's decision rejecting its statute of limitations defense.

On March 12, 2012, the Court of Appeals issued a published opinion, which is *Probst I.* The Court of Appeals reversed the dismissal of the case. The Court of Appeals found that DRS had statutory authority to determine the amount of interest to be credited when a transfer is made from Plan 2 to Plan 3, that the TRS statutes did not require necessarily daily interest, but found that DRS's interest-crediting practice, denying daily interest under the rate established by the DRS Director, was arbitrary and capricious under the APA. The Court of Appeals thus reversed the granting of summary judgment for DRS and remanded the case for further proceedings. The Court of Appeals noted that the teachers raised a constitutional takings issue, but the Court of Appeals did not reach the issue because it decided the case on other grounds. *Probst I*, 167 Wn.App. at 183 n.1.

On remand from the Court of Appeals, the case was assigned to Judge Chris Wickham. Judge Wickham entered an order in June 2013 remanding the administrative decision back to DRS for it to make a rule on interest for employee contributions. Judge Wickham did not decide the constitutional takings issue raised in the supplemental class action complaint.

There was another appeal by the teachers, and in December 2014, the Court of Appeals issued an unpublished opinion, *Probst II*. The Court of Appeals affirmed the remand to DRS for rulemaking and found as part of its decision that the teachers' Fifth Amendment Takings Clause argument is premature and speculative because DRS had not yet made or applied a new rule resulting in an unconstitutional taking. *Probst II*, 2014 WL 7462567 at *6.

After that ruling, the plaintiffs brought an action in federal court in 2015. The case was initially was filed as *Fowler v. Frost* because at that time Marcie Frost was the Director of DRS. Because a State has Eleventh Amendment sovereign immunity under the United States Constitution, one cannot sue the State in federal court. Instead, in federal court, one must sue a state officer for prospective injunctive relief when the officer has violated the Constitution. That is what Fowler did. The federal court taking case is based upon an allegation of a violation of the Fifth Amendment's Takings Clause applied through the Fourteenth Amendment, and it sought a prospective injunction for return of property. It was brought under 42 U.S.C. § 1983. The case was dismissed without prejudice in 2015 because DRS had not yet issued a rule on interest that Judge Wickham had remanded for DRS to do in 2013. Therefore, the district court ruled the taking issue was premature until DRS issued its new rule on interest.

Shortly before oral argument in the Ninth Circuit in 2018, DRS issued its rule on interest retroactive to 1977, reaffirming its prior interest-crediting practice denying daily interest. *Fowler I*, 899 F.3d at 1116. The Ninth Circuit described the DRS interest-crediting practice at issue in federal court and here as follows, *id.* at 1115:

> Since 1977, DRS has credited Plan 2 accounts with a 5.5% annual rate compounded quarterly. DRS determines the amount of interest to credit to Plan 2 accounts based on the accounts' balances at the end of the prior quarter. Therefore, DRS does not credit accounts with the interest earned on the funds in the account during that quarter. In addition, if a Plan 2 account has a zero balance at the end of a quarter, the account is not credited with interest earned on any funds in that account during either that quarter or the prior quarter.

The Ninth Circuit reversed and remanded for the district court to reconsider class certification agreed to by the parties and, if necessary, to permit further discovery before deciding if the class shall be given the requested prospective injunctive relief—return of the interest withheld by transferring funds from TRS Plan 2 to the teachers' TRS Plan 3 accounts. *Fowler I*, 899 F.3d at 1120-21. The Ninth Circuit decided DRS is constitutionally required to pay daily interest because that interest is a core property right protected by the United States Constitution. *Id.* at 1118. The Ninth Circuit found DRS committed a per se taking, because withholding of interest earned on funds in interest-bearing accounts is a direct appropriation of private property, *id.* at 1117, and it found that the teachers state a taking claims for daily interest withheld by DRS. *Id.* at 1119.

In 2019, based on the Ninth Circuit ruling, the teachers filed a motion in this case to set aside DRS's 2018 rule denying daily interest and for an independent accounting of the interest owed. The motion and case were assigned to Judge Chris Lanese, and he entered an order denying that relief without prejudice.

Upon remand, the federal district court granted class certification (the same class as here). And in January 2021, the DRS Director moved in the federal case to amend her answer to add a statute of limitations defense and, over the teachers' objection, she was allowed to amend her answer to assert that defense. Previously her defense was that the taking issue was premature.

Later, in July 2021, the district court granted summary judgment for the teachers on the taking claim. It found that the teachers had established the taking claim as a matter of law. The issue of whether or not the statute of limitations defense could apply was reserved because the district court sent to the Washington State Supreme Court a question related to equitable tolling and needed that court's answer before it could address that issue.

Meanwhile, in July 2022, DRS adopted a new administrative rule for interest, accruing interest daily for TRS Plans 1 and 2, and repealed its prior rule adopted in 2018 denying daily interest retroactive to 1977 for these plans.

On August 18, 2022, the Washington State Supreme Court answered the question about equitable tolling for the federal case. *Fowler v. Guerin*, 200 Wn.2d 110 (2022). The Supreme Court said that equitable tolling in a civil case requires bad faith on the part of a defendant, which would interfere with a timely filing. That decision answered the equitable tolling question for the federal court.

In early May 2023, in light of the district court's favorable decision for the teachers on the taking issue, the teachers sought to enforce that order as collateral estoppel in this case. The case and motion were assigned to Judge Allyson Zipp.

On May 19, 2023, the district court granted summary judgment for DRS, finding that the teachers' taking claim was barred by the statute of limitations because there was no equitable tolling.

Both the teachers and DRS filed motions in this court for summary judgment based on the federal court proceedings. After multiple rounds of briefing and argument, in November 2023 Judge Zipp entered an order denying without prejudice DRS's motion for summary judgment on jurisdiction and claim preclusion and the teachers' motion for liability based on collateral estoppel. She ruled the matter was not properly before the court for adjudication on the merits. Judge Zipp found the court did not have subject matter jurisdiction to rule on the issues presented because the administrative issue was back with DRS, and the taking issue was in federal court. Judge Zipp also denied DRS's request to close the case for lack of jurisdiction. Both sides appealed Judge Zipp's order denying without prejudice the parties' motions.

While the appeal was pending, the Ninth Circuit ruled in *Fowler II* on November 26, 2024. The Ninth Circuit affirmed in part and reversed in part. The Ninth Circuit determined that it had previously specifically remanded only for the reconsideration of the agreed class certification that the district court had erroneously rejected and for determination of whether the teachers should receive prospective injunctive relief for the return of their property. Therefore, the district court should not have allowed DRS to amend the answer to include a statute of limitations defense. The Ninth Circuit reversed the dismissal based on the statute of limitations.

Fowler II, 2024 WL 4891016 at *1-2.

The Ninth Circuit affirmed the district court's ruling that the teachers "have established a pecuniary loss and a complete per se takings claim as a matter of law" and affirmed the district court's ruling rejecting DRS's argument that the teachers had suffered no net loss because of the transfer payment. *Id.* at *2. The Ninth Circuit remanded for the district court to again specifically address the remaining issue of prospective injunctive relief for the return of the teachers' property. The Ninth Circuit found that the only remaining issue for the district court to resolve is whether to approve the teachers' proposed formula to correct the teachers' accounts and, if approved, the district court should then order DRS to correct the teachers' accounts by transferring funds from TRS Plan 2 to their TRS Plan 3 accounts. *Id.* at *3 and n.2.

The Ninth Circuit's *Fowler II* decision was issued while the appeal was pending before Division II on the parties' 2023 appeal of Judge Zipp's ruling. In light of the Ninth Circuit's decision, the Court of Appeals requested supplemental briefing from the parties. On September 30, 2025, the Court of Appeals issued an unpublished opinion, *Probst III*. The Court of Appeals affirmed Judge Zipp's order as it related to the APA. It found that the court lacked subject matter jurisdiction over the APA claim and the court should enter an order dismissing the APA claim.

The Court of Appeals reversed Judge Zipp on subject matter jurisdiction over the taking claim and found that this court does have subject matter jurisdiction over the constitutional taking claim under both United States and Washington Constitutions.

The Court of Appeals opinion (even though its caption is under Probst) refers to Fowler. It says: "the liability portion of Fowler's takings claim now has been resolved...[I]f Fowler establishes takings liability through collateral estoppel or otherwise, the class members will be entitled to recover damages for the value of the property DRS took from them...[T]he trial court has not had the opportunity to address the merits of Fowler's takings claim, including the parties' collateral estoppel arguments. And the Ninth Circuit's decision in *Fowler II* had not been issued when the trial court denied the summary judgment motion." *Probst III,* 2025 WL 2779961 at *14.

The Court of Appeals said: "We remand for the trial court to consider Fowler's summary judgment motion in light of the recent developments." *Id.* The Court of Appeals also held that the priority of action rule did not apply and remanded for further proceedings. *Id.* at *12.

After the Court of Appeals issued its decision, the district court decided that it would stay any further action in the federal case so that relief on the taking issue could be decided by this court. *Fowler v. Leathers*, 2025 WL 3181730 (W.D. Wash. 11/14/25).

The mandate from the Court of Appeals decision in *Probst III* was issued in December 2025. The undersigned was assigned the case when the Court took over Judge Zipp's civil caseload upon a change of rotations.

In February 2026, the parties entered an agreed order before the status conference ordered by the Court indicating that both parties would file motions for summary judgment. Even though the mandate from the Court of Appeals remanded for the court to consider Fowler's updated summary judgment motion, the parties agreed that the Court could hear summary judgment motions from both sides, and the May 1, 2026 hearing date was established by the Court.

<u>Evidentiary Rulings</u>

The teachers' moved to exclude Mr. Terry's March 9, 2026, Rebuttal Report because it is inconsistent with his earlier deposition testimony on February 27, 2026. The Court does not find that Mr. Terry's Rebuttal Report should be struck. That would be an extraordinary remedy.

Although it appears that there are inconsistencies and discrepancies between his deposition and his Rebuttal Report, in the context here that goes to credibility, not admissibility. Mr. Terry completed his work consistent with the direction of DRS, which hired him. He used certain formulas, methodologies, and assumptions in his work, presuming that those were correct.

Mr. Terry refers to Sarah Blocki's testimony in his Report and his Rebuttal Report.

Experts such as Mr. Terry can rely on inadmissible evidence such as hearsay for the purpose of gathering information for which they can form an opinion. Mr. Terry can refer to Blocki's testimony even though it is inadmissible, but he and DRS cannot rely on it for the truth of the matter asserted because that is substantive evidence, *i.e.*, DRS and Mr. Terry can use Blocki's testimony in Mr. Terry's reports only as an assumption accepted by Mr. Terry, not as a fact.

The teachers moved to exclude testimony by Sarah Blocki as substantive evidence for DRS in this case. Ms. Blocki was one of the lawyers for DRS during a large portion of the litigation in this case, from 2003 to 2017. She retired in 2017. DRS now wants and has used Ms. Blocki as a fact witness based upon information that she gained while she was a lawyer on this case.

A lawyer's knowledge of facts of a case obtained in litigation is not personal knowledge. Those "facts" would be based on things that Ms. Blocki heard or read, which is hearsay. Ms. Blocki is not an expert and so she cannot offer opinions about what should happen, what did happen, what DRS did or did not do. She has not been offered as an expert. And, therefore, her information in that regard is not relevant and is not admissible.

Further, if Ms. Blocki were to provide testimony, there could be issues of waiver of attorney-client privilege, and the teachers could be entitled to discovery on the information or documents that formed her basis of knowledge of facts or opinion. The Court is not addressing the waiver of attorney-client privilege since it is striking Ms. Blocki's testimony as to any substantive issues before the Court.

Ruling on Summary Judgment Motions

DRS concedes liability and therefore the issue for the Court to decide is the formula for relief. The parties agree that there are three components.

1. Component I – Withheld Interest

Component I is the interest amount withheld or taken by DRS at the time of transfer. The interest owed for this component is the difference between the contributions plus interest that should have been transferred and the amount that DRS actually transferred to the teachers' TRS Plan 3 accounts. The parties agree that calculating the missing interest requires crediting interest daily for contributions from the time the contributions are made and correcting the compounding for that omitted interest.

A. Component I – Interest Rate

The parties disagree on the interest rate.

The teachers' position is that the interest rate is 5.5% annual interest compounded quarterly. This follows the Director's 1977 memo setting the interest rate as 5.5% annual interest with quarterly compounding. The teachers argue that 5.5% annual interest compounded quarterly is the law of the case.

The appellate opinions in state and federal court refer to the interest rate as 5.5% annual interest compounded quarterly. However, the Court does not read those opinions as establishing a conclusion of law about the interest rate. It is of note, however, that 5.5% annual interest compounded quarterly is discussed as the interest rate throughout the entire life of this case, including in the *Fowler litigation*. DRS admitted this fact in its Answer in this case (Dkt. 10, ¶7), and it is stated as the interest rate in DRS's 2018 regulation that denied daily interest at that rate retroactive to 1977. The Ninth Circuit relied on this regulation in *Fowler I*, 899 F.3d at 1116.

DRS argues that their expert, Mr. Terry, applied the interest rate used by the Director, as shown by the payroll data analyzed by Mr. Terry. DRS argues that the Court should adopt Mr. Terry's conclusion about the interest rate as set forth in his February 4, 2026 Report at page 11, involving a lower interest rate and longer compounding period. This is a new argument.

The 1977 memo is from the Director of DRS. It was in effect during the period that encompasses this case and the calculation of Component I. The Director established that the interest rate for TRS employee contributions is 5.5% annual interest compounded quarterly. The Director established that this rate will be used as the established rate by DRS. The fact that DRS did not follow the Director's and its own established policy does not change the interest rate. It means only that, at times, DRS was using the wrong interest rate.

Accordingly, the Court agrees with the teachers that the interest rate for calculating Component I is 5.5% annual interest compounded quarterly.

B. Component I – Interest Accrual Date

The parties disagree on when interest should begin to be earned for the employee contributions.

In making a reasonable estimate of the loss to the class, the teachers' expert actuary John Marshall uses the end of the earnings period (the pay date) when their contributions begin earning interest.

DRS argues that the Court should adopt the approach used by their expert, Mr. Terry, which uses the transaction date sometimes and the end of the earnings period (pay date) sometimes, as is explained in Mr. Terry's Report, p. 11.

The Court finds appropriate and reasonable that the interest calculated for Component I is based on the end of the earnings period (pay date), which was how Plaintiff's expert John Marshall made his calculation.

Mr. Marshall's use of the end of the earnings period (pay date) as the interest accrual date is a reasonable way to calculate the daily interest withheld. It is reasonable because the transaction date is not the date when the contributions are actually received by DRS and there are contributions that do not show a transaction date. DRS agrees the records used by DRS and provided to the teachers do not show when the teachers' contributions were actually received. DRS has other records from a different system, an accounting system, that could possibly show when contributions are received, but DRS agrees that it is not feasible to use these records.

Mr. Marshall accordingly chose the end of the earnings period (pay date) as the date interest begins accruing because it is when the teachers' contributions are taken from their paychecks, it is the only reliable and consistent date in DRS's records from which to calculate interest, and because DRS agreed that the end of the earnings period (pay date) is a possible date to use for interest accrual.

The Court finds that Mr. Marshall's approach is reasonable and consistent with the appellate opinions in state and federal court, as week as the mandate that this court has received related to the issue of daily interest.

2. Component II – Increase in Transfer Payment

Component II of the formula for relief is an increase in the transfer payment under RCW 41.32.8401 because the withheld interest calculated in Component I was not included in the payment. The parties agree on how to calculate Component II. DRS records show for each employee the transfer incentive payment percentage applied to the missing interest. Therefore, there is nothing for the Court to decide.

3. Component III – Compensation Since Transfer

Component III concerns the long period of time since the teachers transferred from TRS Plan 2 to their individual TRS Plan 3 accounts, which occurred in the mid to late 1990 fiscal years for most class members. The parties acknowledge that the teachers' funds remain in the Commingled Trust Fund since the time of transfer. Those funds have made annual earnings in the Commingled Trust Fund.

The teachers argue that the interest withheld by DRS and the earnings that their withheld interest made in the Commingled Trust Fund are their property. The State argues that it should keep the earnings, and the teachers should receive "just compensation," sort of like prejudgment interest. To calculate just compensation, DRS argues that the test is a "prudent investor standard." The prudent investor standard relied on by DRS is what a reasonable person would receive investing funds so as to produce a reasonable rate of return while maintaining the safety of principal. According to DRS, the prudent investor standard here would be a 3.6% rate of return. DRS's prudent investor argument is based on *Schneider v. County of San Diego*, 285 F.3d 784 (9th Cir. 2002). The *County of San Diego* case does not involve, as the case here does, the withholding or taking of funds that continue to be withheld, and with the withheld funds actually accruing earnings, as they do here while they remain in the Commingled Trust Fund.

Instead, the *County of San Diego* case involves removal of junk vehicles from Schneider's property, which were a public nuisance. The County got rid of those vehicles. The Ninth Circuit found that there had been a due process violation, because Schneider had not been notified that his property was going to be destroyed or sold off. The Ninth Circuit ruled that a taking had occurred in violation of the United States Constitution, and both the Ninth Circuit and Schneider recognized that the vehicles themselves could not be returned. Accordingly, the Ninth Circuit addressed just compensation for the loss of the vehicles.

The district court in *Schneider v. County of San Diego* awarded prejudgment interest for the just compensation for Mr. Schneider for the loss of his vehicles. The Ninth Circuit reversed the district court because it determined that the prejudgment interest rate that that district court used was too low and explained that upon remand the district court should apply an interest rate (the prudent investor rate) that would be generated by investment in a diverse group of securities, including treasury bills.

In its calculation to the Court and in oral argument DRS argued that the Court should order the "prudent investor" rate of return used by its expert Mr. Terry, *i.e.*, about 3.6%. But 3.6% is not a prudent investor standard for investing retirement funds. Mr. Terry stated that he used 3.6% with the sole investment goal of maintaining the safety of the principal. But the issue for the teachers is investing retirement funds, and so maintaining the safety of principal is not the paramount goal for retirement investments over a nearly 30-year period. Moreover, 3.6% would not be what would be generated by investment in a diverse group of securities since the late 1990s when the teachers transferred.

The members of this class, who are current and former employees, have experienced an actual loss, not a hypothetical loss, by the State's withholding of their funds at the time when they transferred from Plan 2 to Plan 3, and the time period is roughly from 1996-97, nearly 30 years.

The State argues that it is entitled to all amounts earned in the Commingled Trust Fund above its proposed 3.6% rate, and that the class members should not get a "windfall" by receiving the earnings that their funds actually accrued while they remain in the Commingled Trust Fund. But it is the State which would receive the windfall because the interest is the teachers' property. The State's argument is contrary to the Supreme Court's decision in *Moore v. HCA*, 181 Wn.2d 299 (2014). There, the Supreme Court explained that once the fact of loss is established, as it is here, the plaintiffs need only make a reasonable estimate of the loss based on available data, the defendant bears the risk of any uncertainties, and the defendant cannot obtain a windfall. DRS's proposal would provide it with a windfall, contrary to *Moore*.

The teachers' entitlement to the actual earnings their funds made while in the Commingled Trust Fund is based on controlling law about interest, *i.e.*, *Fowler I* and *Fowler II*, the *Schneider v. California Dept. of Corrections*, 151 F.3d 1194 (9th Cir. 1998), relied on by *Fowler I*, and *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), relied on by *Fowler I*. These cases establish that the interest withheld from the teachers is their property. Under these cases, income generated by funds in government-managed accounts is the private property of the owner of the principal. In *Phillips*, the Supreme Court found that "the earnings of the fund are incidents of ownership of the fund itself and are property just as the fund itself is property." 524 U.S. at 167, quoting *Webbs' Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 164 (1980). The *Phillips* and *Webb's* holdings mean that the teachers own their funds' earnings that have accrued while they remain in the Commingled Trust Fund.

Not only does the Court find that the interest cases referred to above require that a calculation of actual earnings accrued by the teachers' funds be included in the formula for relief, but the Court also finds that if the Court were not to include those actual earnings as part of Component III, the Court would be ordering a second taking in violation of the United States and Washington Constitutions.

A. Component III – Average Rate of Earnings

The teachers' withheld funds have remained in the Commingled Trust Fund since the time of transfer. During this long period of time, the teachers' funds have made earnings in the Commingled Trust Fund. These earnings belong to the teachers. The teachers propose that for Component 3, the calculation of their loss should be based on the average analyzed rate of earnings/investment returns made by the Commingled Trust Fund from 1996-97 to the time that the teachers' funds are finally transferred to their TRS Plan 3 defined contribution accounts. The Court agrees that this is a reasonable method to calculate the loss to the teachers for Component III of the formula for relief.

The teachers initially calculated the average annualized rate of return as 9%. However, DRS provided in Mr. Terry's Rebuttal Report the actual annual returns for the Commingled Trust Fund, which the teachers' expert Mr. Marshall did not have. Based on this new information, Mr. Marshall lowered the average annualized return to 8.65% in his calculation. The Court adopts this as the average annualized return to be used to calculate the loss for the teachers for Component III. It is a reasonable method by which to estimate the loss to the class.

The teachers' expert actuary John Marshall has calculated the loss to the teachers for Components I, II, and III using the legal standards adopted by the Court, *i.e.*, for Component I, 5.5% annual interest compounded quarterly with interest accruing for the employee contributions at the end of the earnings period (pay date) until the time of transfer, for Component II including the missing interest in the transfer payment, and for Component III the earnings that the teachers' funds made while they are in the Commingled Trust Fund measured by the Commingled Trust Fund's average annualized earnings—8.65%.

The Court does not adopt Mr. Marshall's calculations at that time in order to give the State an opportunity to have their expert do a calculation under the calculation rules decided by the Court.

The Court set a presentation of order for May 29, 2026, to "give the State enough time to look at its calculations and for the parties to have a discussion. If there continues to be a disagreement, at that time [presentation of order], the court can look at a scheduling order as it relates to remaining issues in the case."

4. DRS's Calculation and the Teachers' Response

As suggested by the Court, DRS did its own calculation. Applying the Court's rulings for Components I and II, DRS agrees with Mr. Marshall's calculation except for a small number of class members with anomalous data (without waiving its objection to the court's ruling). The teachers agree to DRS's approach for class members with anomalous data. Thus, the total owed to the class for Component I is $10,001,641, and the total owed to the class for Component II is $3,259,278.

For Component III, DRS calculated the actual earnings the teachers' funds—Components I and II ($13,260,919)—made in the Commingled Trust Fund. Those earnings through March 31, 2026 are $104,930,851. The Court found that the actual earnings should be calculated based on the average rate of return of 8.65% applied regardless of when the teachers' funds were deposited. DRS instead applied the actual annual returns for each year starting with the date of transfer, and separately for each of the two relevant transfer payments. The teachers, in the interest of finality, agree to DRS's method. Mr. Marshall had suggested this as a possible approach. He said it would be more complicated but DRS could do that calculation. DRS has done that calculation and the teachers accept it.

The teachers' funds continue to make earnings in the Commingled Trust Fund until such time as DRS completes the transfer of their funds from TRS Plan 2 to the teachers' TRS Plan 3 accounts. The $118,191,770 owed to the teachers as of March 31, 2026 will continue to accrue daily earnings at the 8.65% average annualized return rate until the transfer occurs, *i.e.*, 0.0237% (8.65% divided by 365 days) daily interest.

JUDGMENT SUMMARY

The Court enters this final injunction in favor of the plaintiff's Mickey Fowler, Leisa Maurer, and the class of over 26,000 teachers (hereafter "the teachers") against the defendant Department of Retirement Systems (DRS). The Court also awards – to be paid by the fund the injunction creates – a common fund attorney fee to class counsel, expert fees paid by class counsel, and plaintiff awards for the representative plaintiffs Mickey Fowler and Leisa Maurer.

FINAL ORDER & INJUNCTION

The Plaintiffs' motion to exclude Mr. Terry's March 9, 2026, Rebuttal Report is denied.

The Plaintiffs' motion to exclude testimony by Sarah Blocki as substantive evidence for DRS in this case is granted.

The Defendant's Motion for Summary Judgment is denied.

The Plaintiff's Motion for Summary Judgment is granted. Plaintiff is granted a final injunction against DRS.

After deducting class counsel's common fund fee, expert fees and plaintiffs' awards, DRS is ordered to transfer the teachers' funds from the TRS Plan 2/3 portion of the Commingled Trust Fund to the teachers' TRS Plan 3 accounts. The teachers' funds include the amounts owed for Component 1, Component 2 and Component 3 (see findings and conclusions above).

Based on DRS's calculation, accepted by the teachers, the amount owed to the class is \$10,001,641 for Component 1, \$3,259,278 for Component 2 and \$104,930,851 for Component 3 as of March 31, 2026. However, the actual amount owed for Component 3 is increasing and will continue to increase until DRS actually transfers the teachers' funds. To account for this, the \$118,191.720 owed to the teachers as of March 31, 2026, will continue to accrue daily earnings at the 8.65% average annualized return rate until the transfer occurs, *i.e.,* 0.0237% (8.65% divided by 365 days) daily interest.

The Court's injunction is effective immediately, unless a stay is granted by the Court of

Appeals. The Court retains jurisdiction to implement the injunction and to decide issues concerning its implementation and application (unless the Court loses such jurisdiction based upon an appeal).

In the Order on Common Fund Attorney Fees, Expert Expenses, and Plaintiff Service Awards entered this same date, the court approved class counsel's common fund fee of 30%, expert expenses and plaintiffs' awards. These items will be deducted by DRS proportionally from the teachers' funds when the funds are transmitted by DRS to the teachers' TRS Plan 3 accounts and paid as directed by class counsel. When the transfer occurs, the teachers will be provided by DRS with a court-approved notice explaining the transfer.

DATED this 25th day of June 2026.

Honorable Christine Schaller
Thurston County Superior Court Judge

Christine Schaller

Presented by:

/s/ David F. Stobaugh
David F. Stobaugh, WSBA #6376
Stephen K. Strong, WSBA #6299
Alexander F. Strong, WSBA #49839
STOBAUGH & STRONG, P.C.
126 NW Canal Street, Suite 100
Seattle, Washington 98107
(206) 622-3536
Attorneys for Plaintiffs

Attorneys for Defendant appeared Remotely
For Presentation