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SUPERIOR COURT
THURSTON COUNTY, WA

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THURSTON COUNTY CLERK

Hearing Date: June 25, 2026
Hearing Time: 9:00 A.M.
Judge/Calendar: Hon. Christine Schaller

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 ON COMMON FUND ATTORNEY FEES, EXPERT EXPENSES, AND PLAINTIFF SERVICE AWARDS**

Class counsel, Stobaugh & Strong, P.C., moved for a common fund attorney fee, expert expenses, and plaintiff service awards.

COMMON FUND FEES

The Washington Supreme Court decided the approach to fee awards in common fund class actions in a similar case involving increased pension benefits. *Bowles v. Department of Retirement Systems*, 121 Wn.2d 52, 70-74 (1993). There, the Court decided that in common fund cases, such as here, because "the size of the recovery constitutes a suitable measure of the attorneys performance," the common fund attorney fee is based on the percentage of recovery under which "25 percent is the benchmark" and "20 to 30 percent is the usual common fund award." 121 Wn.2d at 72-73; *accord, Lyzanchuk v. Yakima Ranches*, 73 Wn.App. 1, 9 (1994) (in a common fund case, a fee award "under *the percentage of recovery approach [is] required by Bowles*" [emphasis added]). "Under the percentage of recovery approach, the attorneys are compensated according to the size of the judgment, not the actual hours expended." *Bowles*, 121 Wn.2d at 75.

Here, class counsel seeks 30% of the ultimate amount owed to the class as the common fund attorney fee. The amount owed to the class is $118,191,171 as of March 31, 2026. That amount increases as the teachers' funds continue to make earnings in the Commingled Trust Fund until they are transferred by DRS from TRS Plan 2 to the teachers' TRS Plan 3 accounts.

The Court agrees that the requested fee percentage of 30% is reasonable under the circumstances of this lengthy and protracted case, as explained below.

Class counsel obtained complete relief for the class, *i.e.*, injunctive relief for the actual amount owed for Components 1, 2, and 3. This is an exceptional result. There has been no compromise settlement; class counsel had to litigate to the end to obtain complete relief.

To obtain the exceptional result here for the class, extensive labor was required over 23 years. Class counsel had to litigate in two separate court systems, state and federal. These extensive and complicated proceedings are briefly summarized by the Court of Appeals in *Probst III* and by this Court.

Class counsel's ultimately successful theory here for recovery is that daily interest is required by the United States and Washington Constitutions as a protected property right. This was a novel theory. Although the theory is the logical outgrowth of Supreme Court and Ninth Circuit cases concerning the taking of interest, no court had ever held that daily interest was a property right protected by the U.S. and Washington Constitutions.

Because federal court is a court of limited jurisdiction and the State has Eleventh Amendment sovereign immunity in federal court, obtaining monetary relief in federal court is not possible. Class counsel avoided the sovereign immunity issue by carefully drafting a complaint that sought only prospective injunctive relief, allowing the class to obtain the money that DRS withheld from them. Also, getting the Ninth Circuit to agree that the class could obtain this relief in a FRCP 23(b)(2) class action presented a difficult issue that class counsel successfully resolved.

Class counsel undertook this litigation on a contingency fee basis, *i.e.*, a common fund attorney fee based on a percentage of recovery if the case were successful. The case had to be taken on a contingency fee basis because no ordinary schoolteacher could possibly pay counsel an hourly rate for the case over 23 years.

Here, the contingency fee representation was also extremely risky for class counsel, warranting the percentage fee requested. Not only was the daily interest legal theory novel, but class counsel had to defeat DRS's statute of limitations defense twice, first in state court and second in federal court after the district court dismissed the action on statute of limitations grounds. In federal court, class counsel had to defeat DRS's procedural defenses—(1) the taking was a regulatory taking, not a per se taking; (2) issue preclusion; (3) the *Rooker-Feldman* doctrine—as well as winning on the merits of the novel taking issue and getting the denial of class certification reversed, overcoming the district court's decision that the relief sought could not be obtained in a CR 23(b)(2) class action. After the Ninth Circuit panel ruled in the teachers' favor, class counsel had to defeat DRS's motion for *en banc* review by the Ninth Circuit and DRS's petition for certiorari to the U.S. Supreme Court. DRS relied on a dissent to *en banc* review as the basis for the Supreme Court to accept review.

After the Supreme Court denied review, class counsel successfully got the class certified and got the district court to agree on the merits of the taking issue and reject DRS's transfer payment offset defense. However, after a detour to the Washington Supreme Court on equitable tolling, the district court dismissed the action on statute of limitations grounds, but class counsel got the Ninth Circuit to reverse the dismissal, restoring the action and affirming that the teachers' funds withheld by DRS are their property.

In superior court, after Judge Zipp dismissed the action without prejudice, class counsel asked the Court of Appeals to reverse, and it affirmed that the teachers' action belongs in this court.

These proceedings highlight that the case was extremely risky.

Recognizing the risks and complexities inherent in a class action, Washington courts routinely award a percentage of fund recoveries in excess of the 30% sought here. Class counsel's requested fee here is 30%, below the 33.3% often awarded. It is also below the one-third contingency fee percentage agreed to by the class representatives when they retained class counsel.

This case placed substantial burden on class counsel, often requiring them to devote substantial resources—two and sometimes three lawyers working on the case at the same time. This required effort prevented class counsel from pursuing other work because the law firm is small with only three lawyers doing litigation. Non-partner lawyers had to be paid salaries to do this work, and the two partners had to forgo salaries. DRS was always represented by multiple lawyers from the Attorney General's Office and private law firms, most recently (since 2020) K&L Gates, a very large nationwide firm that assigned multiple lawyers to the case.

Also, class counsel had an additional burden because it paid nearly $200,000 for expert fees without any assurance that those fees would be recouped. Similarly, it hired at its own expense appellate co-counsel to assist with appeals in state and federal court.

Class counsel David Stobaugh and Stephen Strong have been practicing law for over 50 years and each has nearly 45 years of experience litigating class actions for employees for pay and benefits. Alexander Strong has been litigating class actions for 10 years. The 30% fee is needed to compensate for these risks of nonpayment and substantial delay in payment. It took great skill and perseverance for class counsel to succeed in this extremely long-lasting case. Accordingly, for all these reasons, class counsel's requested fee percentage—30% of the ultimate recovery—is reasonable. and approved.

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EXPERT EXPENSES

In addition to the reasonable fee, class counsel seeks reimbursement for their expenditure on behalf of the class for the expert services of actuary John Marshall and his associate Craig Neumon. These total $199,139.37. Their services were essential in obtaining relief for the class. These costs are reasonable and are to be deducted from the common fund.

SERVICE AWARDS

Service awards compensate class representatives for representing the class, account for financial and reputational risks associated with litigation, and promote the public good. The service awards sought here—$10,000 each for Mickey Fowler and Leisa Maurer—are reasonable, particularly given the fact that the litigation has taken so long. The Court approves them, and they will be deducted from the common fund.

DATED this 25 day of June, 2026.

Honorable Christine Schaller
Thurston County Superior Court Judge

Christine Schaller

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