IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of the Consolidated Public	**)**	**Strunk**	**S50593 (Control)**
Employees Retirement System (PERS)	**)**	**Dahlin**	**S50645**
Litigation	**)**	**Sartain**	**S50686**

SPECIAL MASTER'S FINDINGS AND RECOMMENDATIONS ON ATTORNEY FEES

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I. INTRODUCTION

Following its decision in *Strunk v. PERB*, 338 Or 145, 108 P3d 1058 (*Strunk I*), the court found that petitioners requesting an award of attorney fees were entitled to such an award under the common fund doctrine. *Strunk v. PERB*, 341 Or 175, ___ P3d ___ (*Strunk II*). The court concluded that

> "the petitioners' legal efforts preserved two funds that directly benefit a substantial segment of PERS members and retirees: (1) the restored eight percent annual earnings allocation for current Tier One PERS members; and (2) the restored COLA adjustments for members who retired between April 1, 2000, and March 31, 2004. Petitioners therefore are entitled to an award of attorney fees under the common fund doctrine from those two funds."

Id. at 184-85.

Because other factors remained to be established, the court referred the matter to the undersigned to make findings and recommendations on several questions:

> (1) Whether or not the beneficiaries of the two funds are benefitted the same or differently In my discussion of this, the first fund described by the court will be referred to as the Tier One 8 Percent Fund and the second will be referred to as the Restored COLA Fund.
>
> (2) The proper method of apportioning litigation costs among all the benefitted parties.
>
> (3) The extent of benefits resulting from the legal services for which reimbursement is being sought, i.e. the nexus between those services and benefits procured, together with evidence of the reasonable value of the services.[1]
>
> (4) Other objections raised by respondents concerning the petitions for fees and petitioners' responses to those objections.

[1] The court observed that, as to this last point, it is possible some services did not contribute directly to creating the fund to be charged or might reflect an overlap of labor among multiple attorneys might exist.

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II. THE PARTIES

Petitioners who remain in this proceeding are Strunk, Dahlin, and Sartain.[2] Respondents are the State of Oregon and certain state agencies (State Defendants), various other public employers (Non-State Defendants), and the Public Employees Retirement Board (PERB).[3]

III. STIPULATIONS OF THE PARTIES ON ALLOCATION

Subject to approval by the court, the parties agreed on a method for charging any award made in respect of the Tier One 8 Percent Fund to the beneficiaries of that fund and a method for charging any award made in respect of the Restored COLA Fund to the beneficiaries of that fund. Implicit in this stipulation (Stipulation One), and fully supported in the entire record of this case, is that the funds preserved and beneficiaries affected are separate as between the Tier One 8 Percent Fund and the Restored COLA Fund.[4]

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[2] The Burt petitioners initially participated in this proceeding but settled their claims prior to hearing on this matter. The amount of the settlement was not revealed to the special master. However, the magnitude of the claim filed by the Burt petitioners indicates the settlement would have been such that it does not materially affect the analysis of the overall fee award to the other counsels.

[3] Some respondents made objections different from those of the other respondents. For convenience, I refer to any objection as being from the respondents.

[4] References to "the entire record" include the record in this fee proceeding as well as the prior proceedings in *Strunk I*.

Stipulation One also contains an agreed upon methodology for charging accounts of Tier One 8 Percent fund beneficiaries for fees allocated to that fund. The stipulation, in this respect, recognizes that some members who had a benefit from the litigation, but retire before the charge occurs, will not share in the economic cost of any award. The entire record in this case indicates that such a marginally imperfect method is necessary and reasonable because the complexity and cost of achieving a "perfect" allocation outweighs the benefits of such a method. This is especially true given the relatively modest amounts to be charged to accounts under any outcome of the fee dispute.

Stipulation One also contains an agreed-upon methodology for charging payments to be made to beneficiaries of the Restored COLA Fund. Again, the methodology falls short of perfection in that members who have died without beneficiaries will have benefitted from the legal efforts but will not share in the economic burden of any fee award. As with the Tier One 8 Percent Fund, the scope of this shortfall from perfection, as well as the complexity and cost of alternatives, renders this approach necessary and reasonable.

As to both methods of charging economic burden, I find the agreements in Stipulation One to be eminently reasonable and equitable, albeit somewhat imperfect. I recommend the methods set forth in Stipulation One and approval of Stipulation One to the court.

IV. ASSIGNMENT OF FEE AWARDS AMONG FUNDS

Of the remaining petitioners, petitioner Dahlin proceeded and prevailed as to the Tier One 8 Percent Fund, petitioner Sartain proceeded and prevailed as the Restored COLA Fund, and petitioner Strunk proceeded and prevailed as to both funds. The parties have not provided me with a stipulation allocating the fees of counsel between funds, if awarded. However, again considering the complexity necessarily involved in any precise answer to this problem and the

relatively modest absolute economic impact of any conclusion, I conclude and recommend the following:

> (1) Any fees and costs awarded to counsel for petitioner Dahlin should be charged to beneficiaries of the Tier One 8 Percent Fund;
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> (2) Any fees and costs award to counsel for petitioner Sartain should be charged to beneficiaries of the Restored COLA Fund; and
>
> (3) Any fees and costs awarded to counsel for petitioner Strunk should be charged: 75 percent to beneficiaries of the Tier One 8 Percent Fund and 25 percent to beneficiaries of the Restored COLA Fund.

This allocation was suggested by counsel for petitioner Strunk, who acted as lead counsel in this matter. Lead counsel clearly understood the work of all other counsel and most especially the nature of its own work. Respondents presented no other proposed allocation approach.

V. THE EXTENT OF BENEFIT RESULTING FROM THE LEGAL SERVICES

The court has already concluded "that the petitioners' legal efforts have preserved two funds that directly benefit a substantial segment of PERS members and retirees." *Strunk II*, 341 Or at 184. The court also has charged me with making findings and a recommendation on "the extent of the benefits resulting from the legal services for which reimbursement is sought * * *" *Strunk II*, 341 Or at 185.

The parties have a significant disagreement about the extent of benefit resulting from the litigation in *Strunk I*. The major disagreement relates to the extent, if any, to which other and arguably related events or developments, which have occurred or might occur, are to be considered in measuring the extent of benefits produced in *Strunk I*.

A. *Tier One 8 Percent Fund*

As to the Tier One 8 Percent Fund, the parties have stipulated that, as a result of the decision in *Strunk I*, accounts of current Tier One members were credited with approximately

$448.5 million, which would not have been credited to the accounts if the petitioners had been unsuccessful. In that stipulation (Stipulation Two), the parties also agreed that the $448.5 million credit would compound through the allocation of future earnings and will increase the annuity portion of the retirement allowances that are calculated on a member's account balance.

However, the respondents argue that the apparent benefit of $448.5 million is overstated for two reasons. The first of these is that at the same time as the credit to member accounts of $448.5 million, PERB reduced the same accounts by an aggregate amount of $388.9 million. The reduction was not made by reason of the decision in *Strunk I*, but rather pursuant to a settlement agreement between PERB and the non-state employers, relating to the case of *City of Eugene v. PERB*, 339 Or 113, 117 P3d 1001 (2005), *adh'd to as modified on recons*, 341 Or 120, ___ P3d ___ (2006). The legality of the reduction in account balances is the subject of pending litigation. In its reconsideration in *City of Eugene,* the court acted to remove a potential bar to the challenge to the propriety of the actions of PERB in making the $388.9 million in account reductions.

In my view, the existence of unresolved litigation about the legality of the action of PERB means that such action cannot be considered as valid in measuring the amount of benefit obtained in *Strunk I*. Nor would it be appropriate to wait for the outcome of the pending litigation before determining the amount of a fee award and the allocation of the economic cost of that award.[5] Prompt resolution of this fee matter is appropriate so that attorneys can be compensated for completed successful work. Further, the allocation and charging methods agreed to are concededly imperfect. They become increasingly imperfect as time passes.

[5] I note that the court in *Strunk I* did not address matters then subject to pending litigation relating to adjustment of the Tier One member accounts and 1999 crediting decisions. 338 Or at 154.

Finally, the positive effect on member account balances, even if considered as offset by the challenged PERB action, would justify awards in the range of the claims made here.[6]

[6] All counsel in this matter have behaved professionally and with proper cooperation. That is undoubtedly due to the fact that many of them have been worthy adversaries in many battles over this very important benefit program and over many years. I expect further battles will occur. It would be inequitable to wait for a final net calculation of wins and losses to be done before making fee awards otherwise justified.

The second argument of the respondents, about the size of the economic victory of petitioners, is premised on a view that augmented account balances will be increasingly irrelevant in determining actual member benefits. The entire record in this matter demonstrates that member account balances, although important in calculating some alternative benefit awards, do not affect the benefits determined under the so called "full formula" calculation. Respondents assert that, in part by reason of their victories in *Strunk I*, Tier One members will increasingly retire under the full formula and will, therefore, not benefit from increases in account balances achieved in *Strunk I*. Respondents characterize that victory as a pyrrhic victory of petitioners Strunk and Dahlin. Those petitioners argue that the respondents have failed to show to an appropriate level of certainty that their victory was pyrrhic. They point to the assumption made in the materials of a PERS actuarial document upon which respondents' argument is based, that the PERB reallocations made under the *City of Eugene* settlement, currently being challenged, will be upheld. They further criticize the actuarial estimate because it does not take into account the overall economic effect given the differential effect on large account and small account participants. Finally, petitioners point out that even under the actuarial calculation, a significant number of retirees will retire under a benefit formula positively affected by account balance, and hence, by the litigation victory as to the Tier One 8 Percent Fund.[7]

[7] Importantly, petitioners also point out that those members retiring under full formula will not, in fact, bear an economic cost from the fee awards that are, after all, charged to the annuity accounts of the Tier One members.

I am of the opinion that petitioners' position on this issue is the better one. The support for respondents' position is a limited amount of material that was admitted, by agreement, without cross examination of the persons preparing the estimate. Petitioners view the material as improperly used by respondents to attack their own stipulations. In any case, the nature and extent of the material on the future effects of current account credits is highly speculative. Especially considering my view on the propriety of making assumptions about pending litigation, which the actuarial study does, I cannot confidently conclude that, in the future, retirements will occur under circumstances in which there will not be material benefit for retirees from the victory of petitioners as to the Tier One 8 Percent Fund.[8]

B. *Restored COLA Fund*

The parties have stipulated that the petitioners victory in this regard initially created a fund of approximately $700 million. Respondents argue, however, that the COLA reduction at issue in *Strunk I* was one method, but not the only method, of recovering excess credits to the accounts of retirees in earlier years, specifically 1999. PERB has begun to attempt to recoup benefit overpayments from the beneficiaries of the Restored COLA Fund, proceeding under ORS 238.715. If PERB's actions in this regard are found to be valid, it is argued that the economic benefit obtained by the beneficiaries of the Restored COLA Fund would be eliminated. However, Petitioners do not agree that PERB has authority to so proceed, and that question is the subject of pending litigation.

For the same reasons as discussed with respect to the effect of pending litigation on the benefit measurement for the Tier One 8 Percent Fund, I am of the view that the benefit to the

[8] In using the term "material", I mean to say that the benefit would be such as to support an award of fees in the magnitude requested, subject to possible reduction for other reasons.

Restored COLA Fund should be considered to be $700 million.

Accordingly, the benefit created by the victories of the petitioners in *Strunk I* are approximately $450 million as to the Tier One 8 Percent Fund and $700 million as to the Restored COLA Fund.

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VI. CONNECTION OF SERVICES TO CREATION OF FUNDS

The court directed me to consider the "nexus between [the attorneys' services] and benefits procured as well as the reasonable value of services." The court specifically called out for review the questions of whether some service did not contribute directly to the fund to be charged, and whether there was overlap of effort. Those directions might be viewed as pointing to the preferred use of the lodestar or "fee shifting" analysis. *See generally* Alba Conte, *Attorney Fee Awards*, (3d ed rev 2006). However, the basis of any common fund award is an equitable award primarily considering the value of the benefit procured. In such cases, if the overall fee is a reasonable one for a given result, the attorneys, in effect, pay the price for duplicate efforts and lost arguments in that their effective hourly rate is lower than what it would have been.

The parties have also argued this case using a combination of concepts from the lodestar/fee shifting approach and from the common fund approach. This mixture of common fund and lodestar concepts is fully consistent with the developing law in attorney fees disputes arising out of common fund situations. A good summary of those developments is found in *Goldberger v. Integrated Resources,* 209 F3d 43 (2000), a case suggesting that it is prudent to combine the methods to help insure that the ultimate goal—award of a reasonable fee—is achieved. I recommend to the court this blended approach, applied as now discussed.[9]

[9] It is also interesting that the results obtained under either approach in many cases converge. Conte

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In this case, the initial requests for fees and costs were as follows:

Party	**Fees**	**Costs**
Strunk	$998,005.50	$23,922.34
Sartain	$637,774.00	$ 480.00
Dahlin	$730,620.00	$10,099.64

The protected or recovered fund is approximately $1.1 billion. This size of fund, and the size of each component part, raises two interesting points. First, any "standard" percentage approach, with percentages ranging from six percent to twenty-five percent, would produce an award of more than $60 million and that would raise serious questions of windfall. *See* Conte, *Attorney Fee Awards* § 2:9. At the same time, even a very modest percentage, and here that percentage is 0.24 percent based on the full request, could yield a fee amount that, although extremely modest in percentage terms, could still reward or camouflage legal activity or billing practices that should not be countenanced, especially where many of the PERS members and retirees did not or could not bargain for or enforce limitations and protections.

Attorney Fee Awards §2:6. This is undoubtedly because allowed multipliers tend to account for less objective factors in the same way that percentage estimates do. Conte, *Attorney Fee Awards* § 2:6

I believe an equitable and reasonable approach is to tentatively accept the full percentage requested as presumptively reasonable, given its extremely modest size,[10] but nonetheless, review the factors identified by the court and the parties to determine if even a very modest percentage serves to disguise one or more concern areas.[11]

A.. *Unsuccessful Claims*

[10] I conclude that the percentage is modest both in absolute and relative terms. In absolute terms it is less than one quarter of one percent of the recovered fund. To determine its relative size, consider that for funds of $100 million percentage, awards may be reduced from "benchmarks" of 25 percent to as little as six percent. Six percent of $1 billion is $60 million. If one did an inverse gradation because of, for example, economies of scale, and reduced the six percent amount by 10 percent for each $100 million of recovery in excess of $100 million, one would still have an award of 10 percent of 6 percent or 0.6 percent at $1 billion. That level, 0.6 percent, is still over twice the percentage requested here.

[11] I would note that this starting point is another way of accepting, at least initially, the multipliers suggested by petitioners in their application—hours, rates, and multipliers that I find to be eminently reasonable for the reasons detailed below.

The first area of major dispute is that respondents argue no fees should be awarded for work done on theories or claims that were unsuccessful. Whatever equity and logic that approach may bring to a fee shifting case, I find it would be inequitable and illogical to apply as respondents urge here.[12] First, as to equitable considerations, the underlying theory of the common fund doctrine is one of *quantum meruit* or prevention of unjust enrichment. The PERS members who have benefitted from this litigation take the benefit of the work done and would have taken even more benefit if other claims had been successful. As they would have enjoyed the benefit of greater victory, so they must equitably bear the cost of reasonable but unsuccessful attempts to gain even greater victory.

[12] In addition, petitioner Sartrain points out that she only raised claims as to the COLA issue and succeeded on that claim. This discussion focuses, accordingly, on the work of other counsel.

This equitable analysis must be tempered with the cross-check that arguments, although unsuccessful, must have been reasonable. If a case was weighed down with unreasonable or frivolous arguments, a downward adjustment to even a modest percentage could be warranted. But no showing has been made that the losing arguments were unreasonable or frivolous.[13] Instead, as the court appreciates, this case involved a spectrum of claims, all designed to challenge a comprehensive body of legislative action that was defended with a comprehensive mixture of defenses. There was a very limited time frame within which these claims could be brought and the stakes were such that a failure to raise a challenge could have practical, if not legal, preclusive effect. The context was in many ways unique in Oregon legal history, and being thorough cannot be said to have been unreasonable.

Respondents cite *Hensley v. Eckerhart*, 461 U.S. 424, 103 S Ct 1933, 76 L Ed 2d 40 (1983), in support of their theory on unsuccessful claims. However, *Hensley* is a statutory fee shifting case where the court showed particular concern for the congressional intent behind the particular, and often used, fee award statute at issue. Although simply labeling as case as "fee-shifting" does not necessarily dispose of it, the statutory concern of the court in *Hensley*, and the lack of *quantum meruit* concerns and a preserved fund, indicate *Hensley* does not help here.[14] Further, even under the narrower fee shifting test in *Hensley*, efforts on unsuccessful claims that related to successful claims may be rewarded. The case law developments, summarized in

[13] In fact, several of the arguments, although not successful, did garner the agreement of three members of the court. *See Strunk I*, 338 Or at 239-66.

[14] To further illustrate: *Hensley* permitted an award for fees incurred to collect fees. That is permitted in fee shifting cases but not common fund cases and respondents object to any such award here. Respondents cannot equitably seek some benefits from *Hensley* but renounce burdens. As to their unsuccessful claims argument,

respondents seek the benefit of the rule that it is not appropriate in common fund cases or appropriate only at the extremes.

section 4:17 of Conte's *Attorney Fee Awards*, strongly suggest that even under *Hensley* all claims in this case should be considered related.

The major effort of respondents in this fee proceeding, other than that related to questioning the size of the fund created or preserved, has been in applying a seemingly objective and quantitative test to allow or disallow compensation.[15] This approach is similar to a ratio approach rejected under *Hensley*. *Cf. Brodziak v. Runyon*, 145 F3d 194, 197 (4th Cir 1998). Where claims arise out of a core of common facts and are based on related legal theories, fees are recoverable even where some claims are unsuccessful. *Reed v. A. W. Lawrence & Co., Inc.*, 95 F3d 1170, 1183 (2d Cir 1996). Here the challenges all related to one comprehensive legislative action and involved common and related claims as to contract impairment or breach.[16] Additionally, much of the work on the necessary background of the case and some complex defenses, such as impossibility, related to several claims, some of which were successful. In this posture, there is no theoretically or quantitatively reasonable way to separate various work elements.[17] Legal disputes and theories of the type involved here do not come with nice

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[15] Whatever logic that approach has in fee shifting cases, it is fundamentally at odds with common fund awards.

[16] Note also that several claims or theories that were rejected by the court, nonetheless, went to the related questions of the terms of the contract for Dahlin and Whitty claims on roles of handbooks and other materials, *Strunk I*, 338 Or at 172, and Burt and Strunk claims regarding the Chess Settlement. *Id*. at 176.

[17] My conclusion on reasonableness takes into consideration the significant additional amount of court and

demarcations. In my opinion, the quantitative method attempted by respondents is flawed in its assumptions and inequitable in its results, considering the benefit resulting to those who will pay these fees.

Respondents' approach is also not supported by the authorities cited in its defense. Respondents cite to *In re Petroleum Products Antitrust Litigation*, 109 F3d 602 (9th Cir 1997) (*PPAL*), for the proposition that detailed reviews of hours charged should be done in order to determine if the work benefitted the class of beneficiaries. *Id.* at 608. However, *PPAL* concerned itself with a situation where the court found the one attorney in question did little of value in the litigation, maintained no detailed records, in fact did not do certain work billed, and spent time unreasonably. *Id*. at 605-06. The character of representation by the attorneys in this case, as demonstrated in the entire record, is in no way comparable to the woefully inadequate, if not fraudulent, behavior involved in *PPAL*. Descriptive or explanatory language from that case cannot fairly be lifted and applied here. In this case, counsels have maintained and submitted adequate records. Here, unlike in *PPAL*, no counsel has been described by co-counsel as dangerous or damaging. Nothing in the record here supports a finding that unsuccessful arguments were of a type no reasonable lawyer would have made. Finally, there is absolutely no evidence that hours submitted for consideration were not in fact worked.

Respondents also rely on *Freedland v. Trebes,* 162 Or App 374, 986 P2d 630 (1999). *Freedland* was, however, a pure fee shifting case whose approach on unsuccessful claims cannot overcome the equitable concerns applicable in this and other common fund cases.

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counsel time that would be necessary to minutely analyze the expenditures of time in this case. Respondents attempt to argue that the lack of such detail in the bills themselves should be held against petitioners. Whatever logic that approach has in fee shifting cases, it is fundamentally at odds with common fund awards.

Respondents rely on *Detroit v. Grinnell Corp.*, 560 F2d 1093 (2d Cir 1977), a case cited for the proposition that "the touchstone for the fee" is "actual effort made by the attorney to benefit the class." *Id*. at 1099. *Detroit* has been abrogated in many aspects as to attorney fees by the *Goldberger* decision. However, even if, as respondents assert, it was not abrogated on this general statement, the case does not help respondents. *Detroit* was a lodestar case where a lawyer in one city "piggy-backed" on government and other legal pursuits of a defendant company for violation of antitrust laws. *Id*. at 1100-01. The lawyer in question was not in the counsel leadership committee of the multi-district litigation and was found to have done very little work on a matter that involved little complexity, novelty, or risk. *Id*. The appellate court was, frankly, shocked by the size of the district court's fee award, based as it was on a substantial multiplier.

My review of the case law in this area leads to the conclusion that the language of particular cases in explaining results is much less helpful than a review of the facts of those cases. Further, as suggested by the recommended approach in this case, what appears to be a "moderate" fee result will be followed unless special circumstances spelled out in the analysis caused courts to retreat. The relationship of the attorney to the case in *Detroit* was so materially different from the relationship of the attorneys to this case that the explanatory language of *Detroit*, even if it survived *Goldberger*, is simply inappropriate. Counsel here did not sail in the wake of a committee of other counsel, they were the committee. Counsel here did not "piggy-back" on other significant government or private actions, briefs and depositions, they were the vanguard, and as such faced the novelty, complexity and risk of these claims.

Respondents place reliance on *Van Vranken v. Atlantic Richfield Co.*, 901 F Supp 294 (ND Cal 1995), for the proposition that where class counsel is unsuccessful on some claims, the

attorney fee award must account for that lack of success. *Id*. at 293. However, in *Van Vranken*, the court:

> (1) Rejected a request for a 40 percent fee award but determined a fee based on 25 percent of fund guidelines, yielding approximately $19,000,000 on a total recovery of $76, 000,000;
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> (2) Determined a lodestar amount after deducting one-half of the hours charged, based on an estimate that one-half of the time spent was spent on a losing argument;
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> (3) Determined a lodestar multiplier that would yield a $19,000,000 result when applied to the one-half lodestar amount, that multiplier being 3.6;
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> (4) Concluded that the multiplier of 3.6 was within the range of reasonable multipliers; and therefore,
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> (5) Left untouched the award of 25 percent of the fund, or $19,000,000.

Id. at 297-99.

Van Vranken seems to prove only that where you end up depends on where you start—in that case the court started with the 9th Circuit's benchmark common fund percentage of 25 percent. For reasons discussed above relating to the fund size in this case, I could not recommend starting with a benchmark of 25 percent. However, the fee request here amounts to a percentage of less than one quarter of one percent. This is moderate by any measure. Nothing in *Van Vranken* calls such a fee into question. This is especially so considering that although the court in *Van Vranken* reduced the number of hours recoverable, it did so after finding that the recovery on the successful claims was only one-tenth of the amount of the potential recovery on the unsuccessful claim and that latter claim was far more complex than the winning claims. Here, the successful and unsuccessful claims were much more intertwined, most involved variations on a theme of contract breach or impairment, with common defenses raised to most if not all claims. That fact is demonstrated by the organization and style of the *Strunk I* opinion

itself. Under the heading of "Petitioners' State Law Contractual Claims" the vast majority of the Discussion section of the opinion is found, stretching for some 65 pages. Although some of the contract claims were unsuccessful, it appears that much of the same work was needed for all claims.[18] I do not find any reasonable way to separate this work and no necessity to do so, even under the more restrictive fee-shifting *Hensley* rule about unsuccessful but related claims.

Finally, PERB cites to *In re Washington Public Power Supply System Securities Litigation*, 19 F3d 1291 (9th Cir 1994) (*WPPSS*), as authority for reductions to lodestar fee requests for duplicative work, excessive time spent on activities, vague time sheet entries, travel time, and time spent pursuing a fee award. *Id.* at 1298-99. However, on all points except the last, the court upheld a discretionary decision of the trial court but did not set down a requirement or limit. *Id.* at 1299. Ultimately, the court affirmed discretionary decisions of the trial court, which had produced a fee of $32 million on a recovery of $687 million, but remanded the case because the district court had abused its discretion in (1) not applying a risk multiplier to increase the fee award, (2) not making an upward adjustment for delay in payment, and (3) not considering additional time records that were submitted in making a valuation to the lodestar for one firm. *Id.* at 1306.

The award of the district court was 4.66 percent of the fund and would, logically, only have been enhanced on remand. *Id.* at 1294. The fee requested was $103 million. *Id.* The total reduction in hours for excessive or duplicate work was from 157,000 hours to 137,000 hours. *Id.*

[18] The age discrimination claim did not appear to have occupied much effort and was made only by petitioner Dahlin. Other constitutional claims were disposed of based on the conclusion the court reached on the contract claims and were intertwined with that basic source of challenge.

at 1298. A review of the opinion of the district court judge, found at 779 F Supp 1063 (1990), and comprising 178 pages, indicates two things. First, the district court judge was quite concerned that clearly excessive and duplicate work had occurred. Second, the detailed lodestar approach can result in a tremendous expenditure of time by counsel and the court. In this case, my review of the record does not indicate that there is a significant risk of excessive or duplicate time having occurred. *Id.* at 1094-97. There appears to have been an appropriate division of tasks among the various counsel such that improper duplication did not occur.

As to excessive time, I consider it to be significant that counsel for both the Strunk and Sartain petitioners were on a partial contingency, where the client paid for hours spent at a reduced rate. Therefore, the clients themselves had an economic interest in the amount of time spent and were presumably providing some review and check on work performed, a situation often not present in the class action contingency cases such as *WPPSS.* Finally, the scope of work and fee requests involved in *WPPSS* , both in the case on the merits and the fee dispute indicates that the approach used there is not needed here. Rather than the 157,000 hours spent in *WPPSS*, total time claimed here is in the range of 5,000 hours. The fund here is larger but somewhat similar to that in *WPPSS.* However, the percentage requested is approximately 1.6 percent of the percentage requested in *WPPSS* (0.24 percent here and 15 percent in *WPPSS*). This latter fact is crucial because the percentage method is most suspect where fund sizes are very large and percentage benchmarks are not appropriately reduced. However, where, as here, the fee request, as a percentage of benefit, is very modest, the type of concern for windfall awards that drove the district judge in *WPPSS* to a detailed lodestar approach is not present - nor is there need to undertake such a detailed lodestar approach. *Cf. Goldberger*, 209 F3d at 48-51.

B. *Duplicative and Overlapping Work*

The record in this case, as well as my review of the billing statements, indicates that although several counsel participated in the matter for the petitioners, there was not the type of duplication or overlapping work that would support an adjustment. Given the magnitude of the issues involved here, the time frame and probable finality of the litigation, and the scope of the defense to the comprehensive set of statutory changes, it is my opinion that it is not reasonable to conclude a material amount of duplication or overlap occurred. Further, given the number and quality of opposing counsel and the efforts spent by each counsel in defense, I believe it inequitable to now suggest petitioners did too much to advance their claims. The issue of overlap and duplication could only be definitively answered if a much more detailed analysis of each decision, each suggestion, each idea—in both origin and development—were analyzed. That is not the approach that I took or that I recommend when, as here, the fee claimed is relatively modest and lead counsel raised no concern about duplication or overlap from co-counsel. In reaching this conclusion, I take into account that lead counsel has a long and significant relationship with labor organizations that represent the interests of many of the PERS members who will bear this fee award.[19] Those institutional considerations support a conclusion that lead counsel had good reason to manage and co-ordinate counsel so that waste did not occur.

C. *Compensation for Time Spent Seeking Fees*

This report is premised, as it must be, on the equitable considerations involved in a common fund case. Petitioners benefit from that premise on several matters. On this issue—

[19] That client group, the so called PERS Coalition, a consortium of public employee unions, did in fact review fee requests, even for other counsel. One result was that counsel for petitioner Dahlin made a significant reduction in his requested fee.

compensation for time spent in these fee proceedings—respondents prevail because, under a common fund theory, fees to obtain fee awards are not allowed. *See WPPSS*, 19 F3d at 1299. The fundamental basis of this rule is that fees to collect fees do not benefit or enrich the beneficiaries of the fund in question. In this case, an argument could be made that because the litigants, or institutions that represent them, have been and likely will be opponents in future matters of legislation, administration, and litigation, any victory is of value insofar as it could serve as a deterrent to future adverse action. However, just as the future consequences of pending litigation regarding *City of Eugene* issues are not considered appropriate concerns in this proceeding, future potential deterrent value of petitioners' victory here is not an appropriate concern.

D. *Objections to Block Billing*

Respondents argue that time entries they describe as block billings, meaning entries reflecting time spent on two or more activities, should be excluded or reduced. The premise for this position must be that the respondents' position on unsuccessful arguments is correct. That premise has been rejected in this report and the block billing objection should also be rejected.

E. *Reduction for Travel Time*

Respondents argue travel time for attorneys should be halved, relying on a statement from *WPPSS* that "the distractions associated with travel * * * likely reduced the attorney's effectiveness while en route." 19 F3d at 1299. In that case the travel involved was cross country travel, often after full work days. The trial judge took what he described as a common sense approach given those facts and the appellate court did not find that to be an abuse of discretion.

Here the total amount of travel time was much more modest, if not insignificant, compared with that in *WPPSS.* Rather than being cross-country travel, most travel time here is

for Portland to Salem round trips. Further, counsel have established that they often traveled together to use time en route for conferences.[20] Neither this record nor the respondents' proposed reduction methodology would support adjustments.[21]

VII. LACK OF NECESSITY TO SPREAD COST-PAYMENT BY OTHER ORGANIZATIONS

Respondents argue that because many of the beneficiaries of the created or protected funds are members of unions or retiree groups that paid reduced fee amounts to some counsel, there is no need to award amounts. Respondents have not asserted that there is a complete identity between benefitted members and union membership or retiree group membership and in the record there is not sufficient material to indicate that there is even a substantial identity. In addition, counsel are entitled to awards in addition to the partial contingency fees that have been paid by union or retiree groups. There is a need to spread cost among the members and retirees who will bear the fee burden under the stipulated process. Respondents' argument in this regard is rejected.

VIII. REDUCTION BASED ON FEES ACTUALLY BILLED

Counsel for petitioners Strunk and Sartain had partial contingency agreements with their clients. The rates claimed in the petitions for these attorneys are higher than the rates charged to

[20] That is credible considering the fact, of which I take judicial notice, that there is little scenic distraction on the trip.

[21] The respondents methodology is especially troublesome. It removes all time for any entry of Portland-based counsel traveling to Salem where travel is mentioned, even though travel between those cities could not involve the amount of time for the entry, unless travel was by bicycle.

the clients, but the agreements with the clients permit the attorneys to retain amounts recovered in excess of the billed rate. In a common fund case this is an accepted approach, again based on the fact that unjust enrichment is to be avoided. *See Central Railroad and Banking Co. v. Pettus,* 113 US 116, 125-28, 5 S Ct 387, 28 L Ed 915 (1885). Although a reduced rate may be used to make the risk to the attorney lower, the market rate for services should be the basis for evaluating the fee award. The risk limitation should be considered separately in connection with appropriate multipliers or evaluation of percentages to be applied to the fund.

IX. REASONABLENESS OF HOURLY FEE AMOUNTS REQUESTED

This record included expert testimony supporting the hourly rates requested as part of any lodestar analysis.[22] Respondents have not provided contrary expert evidence. And, although there has been a challenge on duplication, respondents have offered no testimony or other evidence that time claimed was not actually worked. To the extent it is relevant to either a fee determination under the lodestar approach or a cross-check of a percentage award, I find that the hourly rates claimed by counsel are reasonable market rates. In making this finding I have considered the complexity of this litigation (very high), the time demands of the expedited proceedings in *Strunk I* (very high), the value of institutional memory and experience on the part of counsel for petitioners Strunk and Sartain (extremely high), the experience of counsel for petitioner Dahlin in benefit litigation (high), the levels of risk involved,[23] and the effect of these proceedings on other employment opportunities (very high).

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[22] Petitioners Strunk and Dahlin introduced specific expert testimony. That testimony also serves as a basis, along with other evidence submitted, for an inference as to the reasonableness of the rates requested by counsel for petitioner Sartain.

[23] I have specifically considered that counsel for petitioner Dahlin had a full contingency agreement with his client. Risk was high for counsel for petitioners Strunk and Sartain and very high for counsel to petitioner Dahlin.

I believe that a special factor is present in this case—the importance of these issues to the people of the state of Oregon and those among them who have worked or are working as employees of the state and non-state public employers. All of these citizens, and their elected representatives, were faced with major economic and legal problems relating to PERS. The legislature recognized the need for a rapid and authoritative judicial statement regarding its resolution of the economic and legal interests. No one would have been well served by a half-hearted or incomplete presentation of issues and claims, especially considering the fact that other proceedings were not foreclosed because of the special jurisdiction conferred on this court. Skilled and zealous representation on both sides of the matter was needed and achieved. A grudging approach to compensation for those services is not appropriate.[24]

X. LIABILITY OF CLIENTS FOR FEES

Respondents suggest that the clients here must be liable for the full amount of any fee awarded and, if they are not, fees should not be awarded. That is not the rule for common fund cases, based as it is on equitable principles of unjust enrichment. Respondents have cited no case law supporting their contention.

XI. COSTS

Each of the petitioners request an award to reimburse certain costs incurred in connection with the underlying litigation in *Strunk I*. Respondents take the position that the court rejected any such reimbursement, pointing to this sentence in *Strunk II* describing *Strunk I*: "In its

[24] Respondents suggest that petitioners theories were rejected by the court even when petitioners prevailed. I have not undertaken an analysis of these arguments because I believe the court was aware of all such issues when it designated petitioners as prevailing parties entitled to a reasonable fee award.

decision, this court designated petitioners as the prevailing parties but denied an award of costs." *Strunk II*, 341 Or at 180.

My review of *Strunk I* indicates the court did not address the matter of reimbursement for litigation costs such as photocopy expenses, travel expenses, and court reporters' fees. Rather, in the cover sheet the court on its opinion, denied the type of costs potentially recoverable by a prevailing party under ORS 20.310, that is such items as filing fees, bond costs, etc. *Strunk II* also stated:

> "Under the common fund doctrine, plaintiffs whose legal efforts create, discover, increase or preserve a fund of money to which others also have a claim, may recover the *costs* of their litigation, *including* their attorneys fees from the created or preserved fund."

Strunk II, 341 Or at 181 (emphasis added). The court noted the basis of the rule to be prevention of unjust enrichment. The costs in question were a necessary part of the successful litigation and members would be unjustly enriched if the costs were not reimbursed. I do not read the court's language in Stunk II as barring an award to reimburse costs of the underlying litigation.

It appears to be widely accepted that the types of costs requested here are to be awarded even in statutory fee shifting cases. It follows they should be allowed in common fund cases where they are reasonable. *See* Conte, *Attorney Fee Awards* § 2:19. No objection to reasonableness has been made and I find all costs requested in these petitions to be reasonable and necessary.

XII. NON-LEGAL TASKS

Respondents object to the fact that counsel for petitioners engaged in activities such as communicating with client groups. Even under the more restrictive statutory fee shifting rules, time spent in public relations and communications with affected parties has been allowed where

the activities relate to the judicial proceedings. *See* Conte, *Attorney Fee Awards* § 4.20. Nothing in the scope of that activity here appears unreasonable. In a case of this magnitude and with the public and political features of the case, I cannot see any reason to disallow compensation for such activities.

XIII. ERRORS IN TIME RECORDS; OTHER ENTRY SPECIFIC ITEMS

Discussed here are specific objections of respondents not addressed elsewhere in this report.

There was one entry in the time records for counsel to petitioner Dahlin that appears to be for work on an unrelated case. As the review of specific objections is to test the fairness of the overall award determined in the aggregate, I do not believe an adjustment for one item in the magnitude of $1,000 should be made.

Other objections to specific items were not significant.[25]

XIV. PAYMENT AND CREDITING

In this case counsel for petitioners Sartain and Strunk have received partial payment from groups supporting their clients and have agreements with those groups regarding the handling and refund of money received in this attorney fee and cost proceeding. In both cases the attorneys are only to retain amounts collected in excess of amounts already paid. I recommend that the appropriate counsel be paid the full amount awarded, on the condition that they undertake to satisfy their agreements relating to refunding money received in this proceeding to

[25] One category included was work following the ruling of this court in *Strunk I*. The detail supplied with that objection is not clear. More importantly, the expenditure of some time on post-decision matters relating to, for example, reconsideration, is not unreasonable and should be considered under the common fund approach.

the groups supporting the clients.

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XV. CONCLUSION

I find or recommend that:

(1) The amounts listed here are reasonable awards for attorney fees and costs of litigation:[26]

Party	**Fees**	**Costs**
Strunk	$983,798*	$39,972.34**
Sartain	$606,974***	$ 480.00
Dahlin	$716,820****	$10,099.64

* $998,005.50 requested minus $14,207.50 for work on fee request.

** This amount was requested in a motion to amend and supplement the fee petition. The additional amount was for costs of actuarial expert assistance. I recommend that request be granted.

*** $637,774 requested minus $30,800 for work on fee request.

[26] Counsel for each petitioner made requests for fees in addition to the amounts initially requested. The requests were based on requests for fees incurred to collect fees as well as interest on fee awards. The matter of fees to collect fees is covered above and I recommend they not be awarded. I do not recommend that interest be separately awarded. However, delay between time of service and time of payment is considered in my recommendation that the amounts requested initially are reasonable.

**** $730,620 requested minus $13,800 for work on fee request.

(2) The ultimate question is whether any award of fees and costs is reasonable. The fee amounts listed above, both individually and in the aggregate, are reasonable whether determined under either a percentage of fund basis or on the basis of lodestar with multiplier.

(3) Both the hours claimed and rates claimed, as well as the overall claimed amounts, are reasonable considering the nature, novelty, and complexity of the case; the skill, experience, and contributions of these attorneys; the risks of adverse outcome; the time period between performance of service and payment; and the impact of this litigation on other gainful activities. All of these considerations are reasonably reflected in the multipliers requested or in the aggregate percentages of funds created or protected.

(4) No fees should be awarded for the work in this fee proceeding and amounts listed in paragraph 1 above do not include such claims.

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(5) If analyzed on a lodestar basis, a somewhat higher multiplier for counsel to Sartain (2.0 rather than 1.5 claimed by other counsel) is warranted, primarily based on the outcome of the COLA claims and the responsibility of such counsel.

(6) The funds beneficiaries should be charged, and the method for charging those beneficiaries should be as stipulated by the parties in Stipulation One, discussed at the beginning of this report, taking into account the allocation recommended in section IV of this report.

Respectfully submitted,

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Henry C. Breithaupt
Special Master