UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

NICK SUNYAK, *et al.*,	:	Case Nos.: 1:11-cv-445 and 1:12-cv-329
Plaintiffs,	:	
	:	Judge Michael R. Barrett
vs.	:	
	:	
CITY OF CINCINNATI, *et al*,	:	**JOINT MOTION FOR PRELIMINARY APPROVAL OF PROPOSED SETTLEMENT, CONDITIONAL CLASS CERTIFICATION, APPOINTMENT OF CLASS REPRESENTATIVES AND CLASS COUNSEL AND APPROVAL OF PROPOSED CLASS NOTICE**
Defendants.	:	
	:	
(City of Cincinnati Pension Litigation)	:	
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NOW COME Plaintiffs, Intervening Plaintiffs, and Defendants, who hereby jointly move the Court for: (i) preliminary approval of the proposed Settlement of this matter as detailed in the Collaborative Settlement Agreement attached as Exhibit A and the Proposed Consent Decree attached as Exhibit B; (ii) conditional certification of the proposed Classes for purposes of settlement; (iii) appointment of class representatives and class counsel for purposes of settlement; (iv) approval of, and authorization to issue, the proposed Class Notice attached as Exhibit C; (v) entry of an Order with respect to the foregoing and setting a date for a Fairness Hearing (proposed Order attached as Exhibit D); and (vi) entry of an Order granting Final Approval of the proposed Class Action Settlement (proposed Order attached as Exhibit E) .

Respectfully submitted,

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MEMORANDUM

I. BACKGROUND

The named Plaintiffs and proposed Classes consist of approximately 2,900 current employees of the City of Cincinnati and/or their Dependents (the "Current Employees Class") and 4,700 former employees of the City of Cincinnati (and/or Surviving Beneficiaries entitled to pension benefits) (the "Retirees Class"). These two Classes allege that the Defendants improperly revoked and impaired their vested retirement benefits by adopting and enforcing City Ordinance No. 84-2011 (the "Ordinance"), which was effective July 1, 2011.

The Ordinance substantially modified the future retirement benefits and eligibility rules for the Current Employees Class by requiring the majority of them to contribute more of their earnings to the Cincinnati Retirement System ("CRS") and work longer than previously required to obtain lower retirement benefits than previously provided by the CRS. The Ordinance also modified the health benefits available to individuals who were already retired by increasing deductibles and out-of-pocket caps for healthcare and prescriptions.[1] Plaintiffs also allege that Defendants have sought to further suspend or significantly curtail their pension and retiree health benefits pursuant to a proposed Ordinance introduced on February 18, 2014.

The City of Cincinnati (the "City"), one of the Defendants, is an Ohio municipal corporation that has maintained an ERISA-exempt defined benefit pension plan for its employees – the CRS – since 1931. For a host of reasons, the City and the CRS are in a position of substantial fiscal challenge that may adversely affect the City's long-term ability to sustain the CRS.[2] To avoid the burden, expense, inconvenience, and uncertainty of continued litigation, the

[1] With respect to its impact on retirees, the Ordinance was upheld by Ohio state courts. *Gamel v. Cincinnati*, 2012-Ohio-5152, 983 N.E.2d 375 (Ohio App. 1st Dist. 2013), appeal not allowed by 134 Ohio St. 3d 1487 (2013).

[2] As of December 31, 2013, the CRS has assets with a market value of $2.3 billion and was 63.2 percent funded with an unfunded liability in excess of $800 million. *See* 2013 Valuation Report

Parties concluded that it is in their best interests and the public's interest to resolve and settle this Litigation pursuant to the Collaborative Settlement Agreement and Consent Decree attached hereto as Exhibits A and B.

A. Status of the Litigation Prior to Proposed Settlement

This action has been actively litigated in two consolidated cases pending before this Court: (1) *Sunyak v. City of Cincinnati*, Case No. 1:11-cv-445, and (2) *Harmon v. City of Cincinnati*, Case No. 1:12-cv-329.[3] The original plaintiffs in the *Sunyak* and *Harmon* cases are: (1) Nick Sunyak, (2) Jeffery Harmon, (3) Jill Algeyer, (4) Kim Kappel, (5) Waleia Jackson, and (6) Richard Ganulin (the "Current Employees Plaintiffs"). The Current Employees Plaintiffs seek to represent all City employees vested in the CRS who were affected by the Ordinance and include individuals who are members of each of the subgroups adversely affected by the Ordinance (i.e., Groups C, D, E and F as defined by Cincinnati Municipal Code § 203-1-MI(b),(c),(d), and (e)).[4] The Defendants include: (1) the City, (2) the Mayor of Cincinnati, (3) the City Manager, (4) the Vice-Mayor, (5) the City Council Members, (6) the CRS; and (7) the appointed Board of Trustees of the CRS ("Board").

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dated May 1, 2014, available at http://www.cincinnati-oh.gov/retirement/financial-information/2013-valuation-reports/2013-pension-valuation-report/. There is considerable debate and disagreement about the cause of these circumstances, but the principle reasons are generally considered to be 2008 investment losses of 27.5 percent of the CRS, failure of the City to pay the required annual contribution to the CRS and the grant of an unsustainable three percent retroactive compounding cost of living allowance to retirees in or around 1999.

[3] A related state court action brought by AFSCME -- *State ex rel. Council 8 AFSCME, et al. v. City of Cincinnati, et al.*, Hamilton County Common Pleas Case No. A1104791 (the "AFSCME Case") – addresses various aspects of the City's obligation to fund the CRS. AFSCME is not a party to this action, but will be a party to the settlement of this action if it is approved because the dismissal of the AFSCME Case is an express condition of Defendants' agreement to settle this matter. Accordingly, upon final approval of the proposed Settlement Agreement and the Settlement achieving Finality, AFSCME shall dismiss the AFSCME Case with prejudice. Consistent with the foregoing, an express condition of the proposed Settlement is that AFSCME shall be entitled to enforce the Court's Order in this matter.

[4] The Settlement Agreement adds Finley Jones to represent Group E Sub-group.

The *Sunyak* and *Harmon* cases were consolidated on May 21, 2012 (Doc. 26). An Amended Consolidated Complaint was filed on October 1, 2012 (Doc. 31). Defendants moved to dismiss the Amended Consolidated Complaint on November 5, 2012 (Doc. 33). A comprehensive response was filed by Plaintiffs on December 10, 2012 (Doc. 39), and Defendants replied on January 7, 2013 (Doc. 42).

A group of retired City employees who currently receive pension annuity and retiree healthcare benefits from the CRS ("Retirees Plaintiffs") filed a Motion to Intervene in the consolidated actions on March 17, 2014. The Intervening Plaintiffs are: (1) Thomas A. Gamel, Sr., (2) Paul Smith, (3) Mark K. Jones, (4) Dennis Davis, (5) Ely Ryder, and (6) Ann DeGroot. The Intervening Plaintiffs seek to represent approximately 4,700 retired employees.

B. The Settlement Negotiations

Court-supervised settlement discussions began in earnest on August 26, 2013 and continued until December 30, 2014 when the Parties signed a Memorandum of Understanding (the "MOU"). (Attached as Exhibit F). In addition to many conferences with counsel and individual parties, the Court conducted a total of eight mediation sessions attended by representatives of all Parties (August 26, 2013, October 21, 2013, March 24, 2014, July 17, 2014, August 15, 2014, September 9, 2014, October 20, 2014 and December 30, 2014), culminating in the signing of the MOU.

Prior to several of the mediation sessions, counsel for the Parties submitted detailed mediation statements setting forth their respective positions. In addition, the Defendants provided Plaintiffs' counsel with voluminous CRS data, compilations, reports, and projections and facilitated Plaintiffs' counsel's direct consultation with the CRS actuaries for additional calculations, projections and follow up questions.

Though mediation was adversarial, the Parties eventually reached a settlement in principle and executed the MOU generally outlining the terms of the agreement. One key provision of the MOU required the Defendants to provide Plaintiffs' counsel with supporting documentation regarding the projected costs and savings associated with the Settlement, which condition was satisfied prior to filing the instant motion.

II. TERMS OF THE PROPOSED SETTLEMENT

The proposed Settlement will subject the CRS to a 30-year consent decree during which time the City will make a regular annual contribution of 16.25 percent of payroll to the CRS. In addition, several provisions of the Ordinance restricting retirement eligibility and reducing retirement benefits will be inapplicable to members of the Current Employees Class, and retiree health care will be preserved at the current levels for members of the Retirees Class, subject to change in the future only with Court approval.

The proposed Collaborative Settlement Agreement is attached hereto as Exhibit A and will not be restated at length herein, however, some material terms are summarized as follows:

1. Effective January 1, 2016, the Cost of Living Adjustment ("COLA") for the Current Employees Class Members upon retirement and the Retirees Class Members will be 3.00 percent fixed simple.

2. Current Employees Class members and Retirees Class members are both subject to a three-year COLA suspension period, to begin on the date of retirement for members of the Current Employees Class and on January 1, 2016 for the Retirees Class.[5] The Retirees Class members will be entitled to a payment of 3% of the pension annuity capped at $1,000 in the third year of the COLA suspension period.

3. Current Employees Class members with at least five years of service as of July 1, 2011 can retire with full benefits upon reaching 30 years of service, or at age 60 with five years of service.

[5] Any member of either Class who has retired or retires in the future with 25 years of service with household income lower than 150 percent of the federal poverty level will not be subject to a COLA suspension period and will continue to receive the prior three-percent compounding COLA until household income exceeds 150 percent of the poverty level.

4. Current Employees Class members' retirement benefits will be computed with a 2.5 percent multiplier for the greater of 20 years of service, or the number of years prior to July 1, 2011 for members of Group F, and prior to January 1, 2014 for members of Group E. A multiplier of 2.2 percent will apply to all other years, including years of service in excess of 30 years unless a higher multiplie would apply under Ordinance No. 84-2011, in which case the higher multiplier shall apply. The final average salary calculation will continue as provided for in the Ordinance.

5. For Current Employees Class members, the early retirement options for individuals age 55 with 25 years of service and age 60 with at least five years of service that existed prior to the Ordinance will be reinstated.

6. Current Employees Class members in Groups D, E, and F who have retired and who retire prior to January 1, 2016 will have their future pension benefits increased on January 1, 2016 to the amount such benefits would have been had the Settlement Agreement been in effect on the date of their retirement, and such individuals will receive a lump sum payment reflecting amounts they would have received from their date of retirement until January 1, 2016.

7. The City will contribute 16.25 percent of its payroll to CRS annually during the 30 year duration of the Consent Decree.

8. A voluntary Deferred Retirement Option Plan ("DROP") will be implemented for members of the Current Employees Class which will allow them to cease accruing more service credit in, and contributing to, the CRS when they obtain 30 years of service and to defer and accrue their retirement benefits on a pre-tax basis for up to five years.

9. Members of the Retirees Class will continue to receive healthcare benefits according to the plan in effect on December 31, 2014, subject only to change as specifically provided for in the proposed Settlement Agreement. In addition, the City will implement an Employee Group Waiver Plan ("EGWIP") for retirees to maximize reimbursement from federal healthcare programs, and a voluntary medical expense reimbursement program ("MERP") will be implemented for retirees.

10. Members of the Current Employees Class who retire in the future will be eligible for retiree healthcare benefits under the most favorable terms available to current employees of the City (except for members of Group C, who shall be entitled to the same retirement healthcare benefits as members of the Retirees Class if they retire with at least 15 years of creditable service).

If approved, the foregoing represents significant value to members of the Current

Employees Class who are subject to the limitations of the Ordinance on retirement eligibility and benefit calculation. In addition, the preservation of significant healthcare benefits for members of both Classes represents significant value because, under Ohio law, in the absence of the proposed settlement, Defendants could reduce or entirely eliminate such benefits.

These provisions come at a significant cost to the CRS. Under the proposed Settlement Agreement, the City will offset such costs by making a fixed annual contribution for 30 years to the CRS Pension Fund and transferring the assets in the CRS's 401(h) health care plan to a new section 115 Healthcare Trust, with the remainder transferring to the CRS Pension Fund.

The proposed Collaborative Settlement Agreement and Consent Decree include comprehensive enforcement provisions under which the Parties can compel other Parties to comply with the terms of the Agreement, including through the attachment of City revenues if necessary. Provision is also made for the consideration of future modifications due to changing circumstances so that no Party can unilaterally implement any changes without agreement from all other Parties or Court approval for the duration of the Consent Decree.

III. SETTLEMENT ADMINISTRATION

A. The Settlement Administrator

The Parties agree that Class Action Administration, Inc. will be employed as the Settlement Administrator. The Settlement Administrator will (i) oversee the provision of Notice to the Current Employees Class and Retirees Class; (ii) oversee and maintain the settlement website; (iii) audit, and confirm the issuance of payments made to all eligible Current Employees Class members; and (iv) provide a certification to the Court regarding the issuance of Notice as set forth herein. Defendants will pay the reasonable costs of administering the Settlement once preliminary approval is granted by the Court. Such costs include, for example, the reasonable

costs of notifying the Current Employees Class members and the Retirees Class members, mailing the Class Notice, creating and maintaining a settlement website, and creating and maintaining an automated toll free telephone number to answer frequently asked questions. The Settlement Website and toll-free number will be created and placed into operation within 30 days from entry of the Preliminary Approval Order.

B. Notice to Members of the Classes

Notice of the proposed Settlement will be given to each member of the Current Employees Class and the Retirees Class by First Class U.S. mail within 30 days of the entry of the Court's Order granting Preliminary Approval (the "Notice Date"). The proposed Notice is attached as Exhibit C. The proposed Notice: (a) summarizes the terms of the proposed Settlement; (b) informs Class members of their right to object and how to do so; (c) identifies the Settlement Website where Class Members can obtain complete copies of all settlement documents including the Settlement Agreement; and (d) provides a toll-free number where answers to frequently asked questions can be obtained.

C. Objections

Any Class Member who wishes to object to the fairness, reasonableness, or adequacy of the proposed Collaborative Settlement Agreement or to the requested amount of attorneys' fees and expenses must do so in writing within 60 days of the Notice Date. Objectors must mail to designated Class Counsel and Defendants' Counsel, and file with the Court, a written statement of their objections, which must state the specific reason(s) for objecting, including any legal support and any evidence the Class member wishes to introduce in support of their objections. Any Class member who fails to file a timely written objection forfeits any and all rights that

Class member has to object, or to take any appeal of the orders of judgment including but not limited to the Order Granting Final Approval.

D. Attorneys' Fees and Expenses

The Settlement Agreement provides that the Current Employees Class Counsel will seek an award of attorneys' fees based on the value of the benefits conferred on the Current Employees Class and that the Current Employees Class Counsel will seek a maximum award of $5,000,000. Current Employees Class Counsel will request that any award of attorneys' fees and expenses approved by the Court be paid by the CRS on behalf of the Current Class members. The CRS Pension Fund would recoup such amounts from future benefits paid to the Current Employees Class members over 20 years in a fair manner.

The Retirees Class Counsel will seek an award of attorneys' fees based on the time spent on the Litigation with an enhancement. The Retirees Class Counsel will seek a maximum award of $500,000 and will request that the City pay this amount from its General Fund. The City objects to paying any amount from the General Fund.

Class Counsel's requests for attorneys' fees and expenses will be filed with the Court no later than 21 days prior to the deadline for Class Members to object to this Settlement. The amount of either fee award is subject to the approval and discretion of the Court.

IV. LEGAL ANALYSIS SUPPORTING THE RELIEF REQUESTED

A. The Proposed Settlement Satisfies The Standards Governing Approval of Class Settlements.

The settlement of class actions is generally favored and encouraged. *Franks v. Kroger Co.*, 649 F.2d 1216, 1224 (6th Cir. 1981). Pursuant to Fed.R.Civ.P. 23(e)(2), the Court must consider whether the proposed settlement is "fair, reasonable, and adequate." In making this determination, the Court should consider several factors: "(1) the risk of fraud or collusion; (2)

the complexity, expense and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest." *Poplar Creek Dev. Co. v. Chesapeake Appalachia, L.L.C.*, 636 F.3d 235, 244 (6th Cir. 2011) (quoting *UAW v. Gen. Motors Corp.*, 497 F.3d 615, 631 (6th Cir. 2007)). In considering these factors, the task of the court "is not to decide whether one side is right or even whether one side has the better of these arguments. The question rather is whether the parties are using settlement to resolve a legitimate legal and factual disagreement." *UAW*, 497 F.3d at 632.

B. The Settlement Agreement Should Be Preliminarily Approved Because It Is Fair, Reasonable, and Adequate.

In evaluating whether a proposed settlement merits court approval, "[t]he ultimate question is whether the plaintiffs are better served if the litigation is resolved by the settlement rather than pursued. The Court is not required to determine if the settlement is the fairest possible resolution of the claims of each plaintiff, but rather whether the settlement taken as a whole is fair, adequate, and reasonable." *Gentrup v. Renovo Servs., LLC*, No. 1:07CV430, 2011 WL 2532922, at *3 (S.D. Ohio June 24, 2011). Because the CRS is drastically underfunded, if this case is not settled it is likely that the City will be unable to sustain the CRS and that adverse action that has been threatened at the state level will be taken, adversely affecting the CRS, the Classes, the City of Cincinnati and the general public. Accordingly, the proposed Settlement is essential to the continued solvency of the CRS and the City of Cincinnati. This Court has approved pension settlements under similar circumstances. *See e.g. Shy v. Navistar Int'l Corp.*,

No. C-3-93-33, 1993 WL 1318607 (S.D. Ohio May 27, 1993) (approving settlement providing for reduction of post-retirement benefits to avoid bankruptcy for distressed company).[6]

1. There is no evidence that the Settlement was tainted by fraud or collusion.

This case was actively and vigorously litigated by all sides. The Parties engaged in a spirited and lengthy mediation that was directly overseen by the Court. Under these circumstances, there is simply no evidence of fraud or collusion.

2. Absent a settlement, this case will likely continue for an extended period of time and require the expenditure of substantial resources.

The second factor for the Court to consider is the complexity, expense, and likely duration of litigation. Consideration of this factor strongly favors approval of the proposed Settlement. "Most class actions are inherently complex and settlement avoids the costs, delays, and multitude of other problems associated with them." *In re Telectronics Pacing Sys., Inc.*, 137 F. Supp. 2d 985, 1013 (S.D. Ohio 2001) (quoting *In re Austrian & German Bank Holocaust Litig.*, 80 F.Supp.2d 164, 174 (S.D.N.Y.2000)). In this case, the difficulty Plaintiffs would encounter in proving their claims, the substantial litigation expenses, and the extensive delay in recovery due to the appellate process provide ample basis for the Court to approve the proposed Settlement.

[6] "The Court is now faced with one of the most difficult decisions presented it in nearly a quarter century on the Bench, nothing less than a classic lose/lose proposition. Does the Court approve a settlement agreement negotiated between the parties in this class action which will result in the payment of post-retirement health and life insurance benefits at a lower level than which they are currently being paid, or does the Court reject that settlement agreement with the inevitable result being, even were the retires to succeed in convincing a court that the company had made to each of them a valid, lifetime promise of health and life insurance benefits, that such a decision to reject will force Navistar to file a petition under Chapter 11 of the Bankruptcy Code, a proceeding from which it is not likely to emerge, an option which will result in even greater hardship imposed upon Navistar's retirees?" Id., at *1. The Sixth Circuit recently revisited the 1993 settlement approved in *Shy v. Navistar* and upheld its continued enforcement. *See Shy v. Navistar Int'l Corp.*, 710 F.3d 523 (6th Cir. 2012).

The claims in this case are complicated and intertwined. There are two Classes – current employees and retirees – with subgroups within the Current Employee Class based on years of service, age and dates of employment as defined by the Ordinance. Litigation of the many claims at issue, for over 7,200 individuals, would necessarily require the Parties and the Court to unravel the long history of the CRS. Moreover, the legal issues presented are complex and highly contested, and would almost certainly be litigated to the fullest extent possible – including lengthy appeals. Accordingly, there is tremendous value to the Class Members in resolving this matter presently and without the delay that is likely to be associated with continued litigation, such that delaying this matter further will not substantially benefit the Classes. *See Brotherton v. Cleveland,* 141 F.Supp.2d 894, 903 (S.D. Ohio 2001).

3. Substantial data and documentation was analyzed prior to Settlement.

When reviewing the proposed Settlement, the Court should also consider the stage of the current litigation and the amount of discovery completed. These cases have been actively and aggressively litigated for nearly five years. Initial formal discovery was conducted prior to the commencement of settlement discussions, and, as discussed above, a very significant amount of informal discovery was conducted during the course of the mediation process. Voluminous data regarding the CRS and the effects of the Ordinance was provided and analyzed. Indeed, much of the relevant information regarding the finances and performance of the CRS is public record and was obtained and reviewed by counsel and their consultants without need for formal discovery. In addition, to facilitate the Parties' settlement discussions and assess possible resolutions, dozens of actuarial projections were prepared and evaluated to consider the Parties' competing proposals. Moreover, after the MOU was signed, additional confirmatory information has been provided to the satisfaction of all counsel.

4. The likelihood of success balanced against the amount and form of relief offered by the proposed Settlement weigh in favor of approval.

"The most important of the factors to be considered in reviewing a settlement is the probability of success on the merits." *In re General Tire & Rubber Co. Sec. Litig.,* 726 F.2d 1075, 1086 (6th Cir.1984). Recent decisions of the U.S. Supreme Court raise questions about some of the claims set forth in the complaints, particularly the claims advanced on behalf of the Retirees Class. *See e.g. M & G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926 (2015) (vacating Sixth Circuit decision upholding district court decision in favor of retirees who objected to changes in retiree health care contributions, and abrogating *International Union, United Auto., Aerospace, & Agricultural Implement Workers of Am. v. Yard–Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983)). In the absence of a settlement, this matter would be litigated to the fullest extent possible in every court available at great expense with uncertain outcomes on all sides, but with the distinct possibility of unfavorable outcomes for the Classes. The proposed Settlement, while very much a compromise, represents real and significant value for the Classes.

5. The judgment of experienced trial counsel weighs in favor of approving the Settlement.

The next factor for consideration is the professional judgment of the experienced trial counsel participating in this litigation. When "[b]oth Plaintiffs' and Defendants' counsel believe that the settlement is fair and reasonable, [that] weighs in favor of approving the settlement." *Gentrup, LLC*, 2011 WL 2532922, at *3. The Current Employees Class Plaintiffs have been represented by a team of experienced attorneys including counsel with expertise in public sector pension matters, civil rights and constitutional litigation, labor and employment, and complex class action litigation. Similarly, the Retirees Class Plaintiffs have been ably represented by a counsel experienced in municipal matters and a firm that has handled much of the litigation that

has ensued since passage of the Ordinance. The City and other Defendants have been represented by the City Solicitor and highly competent outside counsel. All of these counsel participated directly in the lengthy negotiations in this matter, and it is their judgment after carefully weighing all the evidence that the proposed Settlement is in the best interest of their clients and the public.

6. The reaction of plaintiffs weighs in favor of approving the Settlement.

This factor may be more appropriately considered once the Class Members receive the Notice and have the opportunity to decide whether to support the proposed Settlement or object to its terms. However, counsel for the Current Employees Class has conducted informational meetings regarding the proposed Settlement which have been attended by hundreds of Class members. The overwhelming majority of those in attendance enthusiastically supported the settlement, and even applauded. (See Declarations of Christian A. Jenkins, Robert D. Klausner, Marc D. Mezibov and Jeffrey S. Goldenberg filed concurrently).

7. The public interest weighs in favor of approving the Settlement.

The public interest generally favors the resolution of litigation through compromise. *See Dillworth v. Case Farms Processing, Inc.*, 5:08-CV-1694, 2010 WL 776933, at *6 (N.D. Ohio Mar. 8, 2010) ("[T]he certainty and finality that comes with settlement also weighs in favor of a ruling approving the agreement. Likewise, such a ruling promotes the public's interest in encouraging settlement of litigation.") *See also Stotts v. Memphis Fire Dept*., 679 F.2d 541, 555, n.11 (6th Cir. 1982) (rev'd on other grounds), 467 U.S. 561 (1984) ("[S]ettlement agreements should ... be upheld whenever equitable and policy considerations so permit. By such agreements are the burdens of trial spared to the Parties, to other litigants waiting their turn before

overburdened courts, and to citizens whose taxes support the latter. An amicable compromise provides the more speedy and reasonable remedy for the dispute.").

The public's interest is particularly implicated in this Litigation. In the absence of a settlement, the taxpayers of the City of Cincinnati will continue to bear the cost and uncertainty associated with a severely underfunded public pension system. While the City of Cincinnati's population has been slowly declining, its pension obligations have been increasing. Unlike private sector pensions backed by the Pension Benefit Guarantee Corporation ("PBGC"), the taxpayers of Cincinnati would shoulder the risk associated with the CRS[7] because benefit levels and healthcare costs remain consistent regardless of whether the market rises or falls. Thus, the proposed Settlement, which harnesses the value of a long term funding commitment by the City and eliminates any discretion whether to make such contributions, is very much in the public interest.

C. The Proposed Notice Comports With Rule 23(e)(1).

Before approving a proposed settlement agreement, a district court must "direct notice in a reasonable manner to all class members who would be bound" by the settlement. Fed.R.Civ.P. 23(e)(1)(B). "The notice should be 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Int'l Union, United Auto., Aerospace, & Agr. Implement Workers of Am. v. Gen. Motors Corp.*, 497 F.3d 615, 629-30 (6th Cir. 2007), citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950); *see also In re Gen. Tire & Rubber Co. Sec. Litig.*, 726 F.2d 1075, 1086 (6th Cir. 1984) (upholding notice that "described the terms of the settlement, the reasons for [class representatives' decision to settle], the legal effect of the settlement and the rights of the [class members] to voice their objections").

[7] As a public pension fund, the CRS does not qualify for and is not covered by the PBGC.

The proposed Notice attached as Exhibit C satisfies this requirement. It accurately summarizes the material terms of the proposed Settlement and provides information about how interested class members can obtain complete copies of all settlement-related documents through the Settlement website operated by the Settlement Administrator or by calling the Settlement Administrator. The proposed Notice clearly apprises the members of the Classes of their right to object and the procedure to be followed if they wish to do so. The proposed Notice will be issued to each individual Class Member by First Class U.S. Mail to the address provided by Defendants, which should in the vast majority of cases be correct because the Class Members are either current employees of the City of Cincinnati or retirees (or their dependents) currently receiving retirement benefits from the CRS. "[T]he express language and intent of Rule 23 (c)(2) leave no doubt that individual notice must be provided to those class members who are identifiable through reasonable effort. *** For these class members, individual notice is clearly the 'best notice practicable' within the meaning of Rule 23 (c)(2) and our prior decisions." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 175 (1974).

D. Conditional Certification Is Appropriate Because the Requirements of Rule 23(a) and 23(b)(1) and (2) Are Satisfied.

Conditional certification and appointment of representatives and class counsel for settlement purposes and issuance of Notice "is only the first step in an extensive and searching judicial process, which may or may not result in final approval of a settlement," and, as such, can be properly granted based on an informal presentation of the parties' proposals to the Court. *See, e.g., In re Inter-Op Hip Prosthesis Liability Litigation*, 204 F.R.D. 330, 337 (N.D. Ohio 2001) citing *Manual for Complex Litigation*, § 30.41, at 236. This standard is satisfied here.

The parties request conditional certification of two Classes, defined as follows:

Current Employees Class: All individuals (and/or their Dependents or Surviving Beneficiaries) who participated in the Cincinnati Retirement System with at least five years of creditable service and who were actively employed otherwise qualified for benefits on July 1, 2011, and who are members of "Group C," "Group D," "Group E," or "Group F" as these terms are defined by Cincinnati Municipal Code § 203-1-Ml (b), (c), (d), and (e).[8]

Retirees Class: All individuals (and/or their Dependents or Surviving Beneficiaries) formerly employed by the City of Cincinnati, the University of Cincinnati, the University Hospital f/k/a General Hospital and Hamilton County, who retired on or before July 1, 2011, and have received retirement benefits from the City of Cincinnati and their dependents and/or their Surviving Beneficiaries who are entitled to those benefits.

1. The Classes are So Numerous that Joinder of All Members is Impracticable.

The Current Employees Class numbers approximately 2,900 individuals. The Retirees Class is estimated at 4,700. "As the Court of Appeals has explained, there is no strict numerical test in order to establish numerosity." *Castillo v. Morales, Inc.*, 302 F.R.D. 480, 487 (S.D. Ohio Sept. 4, 2014) (quoting *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 541 (6th Cir. 2012)). Instead, courts adopt a flexible approach that considers the particular circumstances of each case. *Id.* However, when class size reaches "substantial proportions," the numerosity requirement is usually satisfied by the numbers alone. *Ross v. Abercrombie & Fitch Co*., 257 F.R.D. 435, 442 (S.D. Ohio 2009); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1079 (6th Cir. 1996) (citing 1 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions*, § 3.05, at 3-26 (3d ed. 1992)). "Often, a class of 40 or more members is sufficient to meet the numerosity requirement." *Castillo*, 302 F.R.D. at 487 (quoting *Snelling v. ATC Helthcare Servs. Inc.*, 2012 WL 6042839, at *5 (S.D. Ohio Dec. 4, 2012)). Thus, the numerosity requirement of Rule 23(a)(1) is satisfied.

2. There are questions of law and fact common to the Classes.

[8] The Current Employees Class also includes: (a) veterans who purchase service credit sufficient to satisfy the five years of service requirement prior to July 1, 2011; and (b) City employees who had at least five years of creditable service prior to July 1, 2011 and who retired on or after January 1, 2012.

Common questions of law and fact pervade the proposed Classes. The common questions for the Current Employees Class include: (1) whether Current Employees Class were fully vested in their CRS benefits on July 1, 2011; (2) whether Defendants improperly revoked and/or impaired Current Employees Class members vested CRS benefits when they enforced the Ordinance; (3) whether Defendants breached or impaired the contractual rights of the Current Employees Class when they enforced the Ordinance; (4) whether Defendants are estopped from enforcing the Ordinance so as to prevent the revocation and/or impairment of the contractual rights of the Current Employees Class; and (5) whether Defendants' enforcement of the Ordinance operated as an unconstitutional taking of the vested property interest of the Current Employees Class.

The claims of the Retirees Class raise similar common questions of law and fact: (1) whether Defendants' offer of retirement benefits to the Retirees Class created a fundamental property right, giving each of them a vested right in those retirement benefits which cannot be reduced, impaired, revoked, or eliminated; (2) whether Defendants' actions constitute an unlawful taking of the Retirees Class members' property rights in violation of the United States Constitution and/or the Ohio Constitution; (3) whether the Defendants' have a contractual obligation to provide the Retirees Class with certain retirement benefits, which cannot now or afterwards be reduced, impaired, revoked, or eliminated; (4) whether the unilateral reduction, impairment, revocation, and/or elimination of the Retirees Class members' retirement benefits constitutes a breach of the Defendants' fiduciary duty; and (5) whether the Defendants are estopped from reducing, impairing, revoking, or eliminating the retirement benefits owed to the Retirees Class members.

"[T]he commonality requirement will be satisfied as long as the members of the class have allegedly been affected by a general policy of the Defendant and the general policy is the focus of the litigation." *Bovee v. Coopers & Lybrand*, 216 F.R.D. 596, 608 (S.D. Ohio 2003) (citing *Putnam v. Davies*, 169 F.R.D. 89, 93 (S.D. Ohio 1996); *Mayo v. Sears, Roebuck & Co*., 148 F.R.D. 576, 580 (S.D. Ohio 1993)). "Although Rule 23(a)(2) speaks of 'questions' in the plural, there need be only one question common to the class." *Id.* (citing *Sprague v. Gen. Motors Corp*., 133 F.3d 388, 397 (6th Cir. 1998)). The mere fact that questions peculiar to individual class members could remain does not defeat a finding of commonality. *Id*. (citing *Sterling v. Velsicol Chem. Corp*., 855 F.2d 1188, 1197 (6th Cir. 1988)). The class representatives must simply enumerate a question of law or fact common to the class, "the resolution of which will advance the litigation." *Id.* (quoting *Sprague*, 133 F.3d at 397). Therefore, "[t]he commonality requirement is satisfied if there is a single factual or legal question common to the entire class." *Powers v. Hamilton Cnty. Pub. Defender Comm'n*, 501 F.3d 592, 619 (6th Cir. 2007) (citing *Am. Med. Sys*., 75 F.3d at 1080).

Here, where there are numerous common questions of law and fact, the commonality requirement of Rule 23(a)(2) is satisfied as to the Classes.

3. The Plaintiffs' claims are typical of the claims of the Classes.

The named Plaintiffs' claims are typical of the members of the Classes. With respect to the Current Employees Class, individuals representing each subgroup as defined by the Ordinance are included as representative Plaintiffs. (See Ex. A pp. 13-14). The Retirees Plaintiffs representing the Retirees Class are all individuals who retired before the effective date of the Ordinance. (Id. pp. 14-15).

The Sixth Circuit has noted that a plaintiff's claim is typical "if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory." *In re Am. Med. Sys.,* at 1082 (6th Cir. 1996) (citing 1 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions*, § 3.13 (3d ed. 1992)). Because the conduct of Defendants that gives rise to the named Plaintiffs' claims is the same as that which gives rise to the claims of the Classes, the typicality requirement of Rule 23(a)(3) is satisfied.

4. Plaintiffs have fairly and adequately protected the interests of the Classes.

Rule 23(a)(4) permits certification if "the representative parties will fairly and adequately protect the interests of the class." The adequacy requirement "serves to uncover conflicts of interest between named parties and the class they seek to represent. A class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 562 (6th Cir. 2007) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-26 (1997)). In *Senter*, the Sixth Circuit articulated two criteria for determining adequacy: (1) "[t]he representative must have common interests with unnamed members of the class" and (2) "it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel." *Senter v. Gen. Motors Corp.*, 532 F.2d 511, 525 (6th Cir. 1976). "Class representatives are adequate when it appear[s] that [they] will vigorously prosecute the interests of the class through qualified counsel, which usually will be the case if the representatives are part of the class and possess the same interest and suffer the same injury as the class members." *Beattie*, 511 F.3d at 563 (quoting *UAW v. GMC*, 497 F.3d 615 (6th Cir. 2007) (alterations in original; citations and internal quotation marks omitted)).

The named Plaintiffs have been actively involved in the preparation, prosecution, and settlement of this action. Indeed, several of them attended one or more of the mediation sessions with the Court, and there is no indication that any of the named Plaintiffs have any interests that are odds with the members of the proposed Classes they seek to represent. Further, as discussed below, Class Counsel is adequate and qualified to assume this responsibility.[9]

Thus, the adequacy requirement of Rule 23(a)(4) is satisfied.

5. The requirements of Rule 23(b)(1) and (2) are satisfied.

The proposed classes also satisfy the requirements of Rule 23(b)(1) and (2). According to Rule 23(b)(1), a class action may be maintained when "prosecuting separate actions by or against individual class members would create a risk of: (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interest." A class action may be maintained pursuant to Rule 23(b)(2) when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."

Here, Rule 23(b)(2), 23(b)(1)(a), and 23(b)(1)(b) are satisfied because the essence of the claims asserted by the Classes is that the Defendants have, by passing and implementing the Ordinance, imposed or threatened to impose changes to the CRS in a manner that affects the Classes in a common manner.

[9] For a more thorough discussion of the qualifications of Plaintiffs' Counsel, see Section IV.E. at p. 22.

In short, this case is the epitome of a Rule 23(b)(1) and (2) class action. Indeed, the central tenet of the proposed Settlement is a 30-year Consent Decree governing all aspects of the CRS from its funding to its benefit administration to its governance. Such injunctive relief is wholly consistent with the requirements of Rule 23(b)(1) and (2). *See, e.g., Adams v. Anheuser-Busch Companies, Inc.*, No. 2:10-CV-826, 2012 WL 1058961, at *10 (S.D. Ohio Mar. 28, 2012) ("A class action is appropriate under Rule 23(b)(1)(A) when the party is obliged by law to treat the members of the class alike."); *Patrick v. AK Steel Corp.*, No. 1:05CV681, 2008 WL 4758673, at *6 (S.D. Ohio Oct. 27, 2008) (noting that "a classic 23(b)(2) case" is one in which the "defendant's alleged actions are generally applicable to the class as a whole and injunctive relief would be appropriate if entitlement to relief is established.") (internal citation omitted); *Bailey v. AK Steel Corp.*, No. 1:06-cv-468, 2008 U.S. Dist. LEXIS 16704, *23 (S.D. Ohio Feb. 21, 2008); (stating that "retiree health benefit class actions are routinely brought as mandatory classes, not as opt-outs.")

Specifically, Rule 23(b)(2) is satisfied because this Settlement provides both Classes with declaratory and injunctive relief. For example, the City is providing prospective relief by agreeing to make a yearly 16.25 percent fixed contribution to the CRS fund for the next 30 years.

Rule 23(b)(1)(b) also is satisfied because this Settlement provides both Classes with injunctive CRS Fund-wide relief including revisions to how the City contributes to the CRS Fund, how the city calculates benefits for employees and retirees, and how the City will provide healthcare. As such, the class wide relief provided by this Settlement to each individual plaintiff is necessarily and practically dispositive of all other Class Members and impacts each such Class Member's ability to protect its own interest.

For many of the same reasons, Rule 23(b)(1)(a) is also satisfied. Conflicting rulings on whether certain pension benefits are vested property interests would force the City to impose incompatible standards of conduct upon any number of CRS beneficiaries. This class action Settlement will avoid such conflicts by applying the same uniform relief to the thousands of members in each Class.[10]

E. Appointment of Class Counsel is Appropriate Pursuant to Rule 23(g).

Finally, the appointment of Class Counsel for the proposed Classes is appropriate under Rule 23(g). The qualifications and experience of the proposed Class Counsel are detailed in their declarations filed in support of this Motion. Each is fully qualified to serve as class counsel, and the Court, having supervised the lengthy mediation process in this case, is acquainted with all of the proposed counsel. Accordingly, the parties respectfully request that the Court conditionally certify the proposed Classes and appoint the proposed class representatives and class counsel to represent the Classes, all for the limited purpose of Settlement.

F. Scheduling The Final Fairness Hearing Is Appropriate.

The last step in the settlement approval process is the fairness hearing, at which time the Court may hear all evidence and arguments necessary to conclusively evaluate this Settlement to determine whether final approval is warranted. Accordingly, the Parties request that the Court set a date no earlier than September 14, 2015 for the Fairness Hearing.

V. CONCLUSION

Based upon the foregoing, the Parties respectfully move the Court for: (i) preliminary approval of the proposed Settlement of this matter detailed in the Settlement Agreement attached

[10]Moreover, considering all of the class Members are drawing benefits from the same CRS Fund, relief to one Class Member could have had a deleterious practical effect on the City's ability to provide global relief to all beneficiaries. *See also* *Yost v. First Horizon Nat'l Corp.,* No. 08-22293-STA-cgc, 2011 U.S. Dist. LEXIS 6000, *63-68 (W.D. Tenn. June 3, 2011) (explaining 23(b)(1) certification in the benefits and pension context.).

as Exhibit A and the Consent Decree attached as Exhibit B; (ii) conditional certification of the proposed Classes for purposes of settlement; (iii) appointment of class representatives and class counsel for purposes of settlement; (iv) approval of, and authorization to issue, the proposed Class Notice attached as Exhibit C; and (v) entry of an Order with respect to the foregoing and setting a date for a Fairness Hearing in the proposed form attached as Exhibit D.

Dated: May 7, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 7, 2015, I electronically filed a true copy of the foregoing using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Christian A. Jenkins

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