UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

NICK SUNYAK, et al.,	:	**Case No. 1:11cv445**
Plaintiffs,	:	
	:	
v.	:	
	:	**CITY OF CINCINNATI'S**
CITY OF CINCINNATI, et al.,	:	**MEMORANDUM IN OPPOSITION**
	:	**TO CURRENT EMPLOYEES' CLASS**
Defendants.	:	**MOTION TO HOLD THE CITY OF**
	:	**CINCINNATI AND THE CINCINNATI**
(City of Cincinnati Pension	:	**RETIREMENT SYSTEM IN**
Litigation)	:	**CONTEMPT AND FOR AN AWARD**
	:	**OF ATTORNEY FEES**

Introduction

The City of Cincinnati respectfully requests that the Court deny the Motion to Hold the City in Contempt and for Attorney Fees ("Contempt Motion") filed by the Current Employees Class (Doc. 140) because the City's actions to date have not violated the plain language of the Collaborative Settlement Agreement ("CSA") (Doc. 100-1).

While the Contempt Motion is grounded in an interpretation of the CSA that is not supported by its words, the discussions leading to the filing of the Contempt Motion—some of which were attached as exhibits to the motion—and the subsequent conversations among and filings by the parties have demonstrated the urgency in examining the cost of the Deferred Retirement Option Program ("DROP") to the Pension Trust. If, as the Cheiron analysis indicates, the impact on the liability of the Pension Trust is anywhere near $12 million, then DROP cannot be considered "cost neutral." (Doc. 140-1 PageID 2335-2336). As the Retirees Class response highlights, the

CSA requires DROP to be cost neutral to the CRS Pension Trust Fund or it shall be reformed or closed. (Doc. 149 PageID 2362-2363, citing the CSA).

On the other hand, it is undisputed that the Cheiron analysis was not facilitated by the Parties to the CSA, and so it cannot, alone, form a basis for either reform or closure of the DROP, and it does not fulfill the requirements of Paragraph 21 of the CSA. (Doc 100-1, ¶21). Notably, the City did not file or attempt to file the Cheiron analysis in this case, rather, it was submitted by the Current Employees Class Counsel. More than that, counsel for the City expressly clarified to the Current Employees Class Counsel prior to the filing of the Contempt Motion that the Cheiron analysis did not fulfill the CSA's requirements. (Doc. 140-1 PageID 2342). But rather than continue discussions about the meaning of "independent evaluation," Current Class Counsel persisted in filing this motion. Because there was no agreement about withdrawing the Contempt Motion while working with all the Parties to either correct the perceived deficiencies of the Cheiron analysis or to facilitate an independent analysis, the City now files this opposition.

Analysis

The City does not dispute this Court's broad authority to enforce the terms of the CSA. Here, the Current Employees Class argues that the City is in contempt of the CSA because it did not comply with the terms of Paragraph 21, which requires an independent evaluation of the DROP. More specifically, the Contempt Motion argues that the City has failed to comply with the following:

> The Parties agree to facilitate an independent actuarial analysis of the DROP during the fifth year of its implementation. If, based upon that analysis, the program is not cost-neutral to the CRS Pension Trust Fund, the Parties shall then submit the matter to the Court for possible

> reformation or closure of the DROP, as warranted by the facts and determined by the Court to assure the DROP is cost neutral, provided that any individual who has entered the DROP shall be entitled to participate in the DROP for five full years.

(Doc. 100-1 PageID 1537). As the Contempt Motion notes, citing to the Joint Status Report filed by the Parties, the DROP "was implemented effective January 1, 2017." (Doc. 117 PageID 2107). Whether the City is in contempt of the CSA requirements is a matter of interpreting the words of the CSA.

"[T]he interpretation of a consent decree or judgment is a question of contractual interpretation." *G.G. Marck Assocs. v. Peng*, 309 Fed. Appx. 928, 934 (6th Cir. 2009) (internal citations omitted). "The court's task in interpreting a consent decree is to ascertain the intent of the parties at the time of settlement. However, 'the instrument must be construed as it is written,' and 'the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it.'" *Id.*, citing *United States v. Armour Co.*, 402 U.S. 673, 682 (1971) (internal citations omitted).

Here, the four corners of the CSA require the "Parties" to "facilitate an independent actuarial analysis" "during the fifth year of [the DROP's] implementation." (Doc. 100-1, ¶21). The dictionary defines "implementation" as "an act or instance of implementing something; the process of making something active or effective." https://www.merriam-webster.com/dictionary/implementation?src=search-dict-box. In other words, the DROP's "implementation" is when it became effective. According to the 2017 Joint Status Report, which was drafted with the specific language of the CSA known to all the Parties, the Parties stated that the DROP "was implemented effective January 1, 2017." This means that 2017 was the first year of

DROP's implementation, and 2021 is the fifth year of DROP's implementation. The Contempt Motion was filed in 2020. This year, not last, is the year during which the Parties are to facilitate the review of DROP.

The Current Employees Class argues that because participation in DROP was made retroactively available for a limited period of time to people who were eligible after January 1, 2016. (Doc. 117 PageID 2112). Essentially, their argument is that there is five years of data available upon which to analyze the impact of DROP, so the Parties' obligation was for an analysis in 2020. But a retroactive eligibility period does not change the fact that DROP was not implemented in 2016. No one in 2016 could sign up to be in DROP. No one in 2016 could read the details of the DROP plan. It simply was not active until 2017. The interpretation requested by the Contempt Motion requires this Court to add words to the four corners of the CSA that are simply not there—an act the Court is not permitted to take.

Moreover, this interpretation is insufficient to find the City in contempt. Simply put, the plain language of the four corners of the CSA requires a review of the DROP this year. The City has not and will not use the Cheiron analysis dated August 20, 2020 for the review that Paragraph 21 contemplates. While that analysis is clearly urgently needed to ensure that the DROP is cost-neutral to the Pension Trust, the City is not in contempt at this time.

Conclusion

It is clear that the Parties, and at times the Court, are frustrated by the length of time it has taken to implement parts of the CSA. Those frustrations are not entirely unwarranted. However, on the matter that is before the Court—whether the City is in

contempt of the CSA for not doing an analysis of the DROP in 2020—the basis for the motion is an argument unsupported by the plain language of the CSA. Because the City has not violated the CSA, the City respectfully requests the Court to not find it in contempt and to deny the motion for attorney fees.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2021, a true and accurate copy of the foregoing Notice of Appearance was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system and copies will be emailed to those parties who are not served via the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Emily Smart Woerner
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