UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

SUNYAK, et al.,	:	**Case Nos.: 1:11-cv-445**
	:	
v.	:	**Judge Michael R. Barrett**
	:	
CITY OF CINCINNATI, et al.,	:	**REPLY IN SUPPORT OF MOTION TO HOLD THE CITY OF CINCINNATI AND THE CINCINNATI RETIREMENT SYSTEM IN CONTEMPT AND FOR AN AWARD OF ATTORNEY FEES**
	:	
(City of Cincinnati Pension Litigation)	:	

As set forth in greater detail in the Affidavit of Christian Jenkins [Doc. 140-1], Class Counsel have gone to great lengths to offer the City of Cincinnati (the "City") and the Cincinnati Retirement System ("CRS") (collectively "Defendants") every opportunity to fulfill their duties under the Collaborative Settlement Agreement ("CSA") [Doc. 100-1] by cooperating with Class Counsel to facilitate an independent actuarial analysis of the Deferred Retirement Option Plan ("DROP") during the fifth year of its implementation.

On February 24, 2020, Class Counsel sent a letter to the City's counsel highlighting the independent actuarial analysis requirement set forth in section 21 of the CSA. *See* Jenkins Aff. Ex. A ("In preparation for fulfilling our duty to facilitate an independent actuarial analysis of the DROP plan, we need to obtain information and records relating to DROP participation…."). That letter also requested a copy of the actuarial review CRS was required to perform after the close of 2017 as part of the DROP plan. *Id.* ("[P]lease consider this a public records request under R.C. 149.43 et seq."). Class Counsel followed up that letter with emails on April 27, May 22, May 29, August 26, November 11, and November 23, 2020. *See* Jenkins Aff. Exs. B, C, E, F. Although Defendants eventually admitted that no actuarial review was performed after the close of 2017 as

required by the DROP plan, Class Counsel still have not received any of the information or records they have requested regarding DROP participation.

When these extended efforts failed, Class Counsel's responsibilities under the CSA forced them to involve the Court by moving to hold the City and CRS in contempt. *See generally* Motion [Doc. 140]. The City (but not CRS)[1] has filed a memorandum opposing the Motion. *See generally* Opposition [Doc. 151] ("Br."). Notably, the City does not dispute Class Counsel's description of the events. For instance, the City does not deny that no actuarial review of DROP participation and costs was performed within 60 days after the close of calendar year 2017 as required by the DROP plan. Nor does the City deny that CRS unilaterally engaged its own actuary to perform an analysis of the DROP program without any involvement of Class Counsel. Nor does the City offer any explanation for why it has steadfastly refused to produce the information Class Counsel has been requesting since February 24, 2020.

Instead, the City takes the position that Defendants could not have breached the CSA when the Motion was filed in 2020 because 2021, not 2020, is the fifth year of DROP's implementation. Br. at 3-4. But prior to the filing of Class Counsel's contempt motion, neither the City nor CRS had ever suggested that any year other than 2020 was the fifth year of DROP's implementation. Indeed, on August 18, 2020, CRS Executive Director Paula Tilsey publicly acknowledged that the CSA requires an evaluation at five years and told the CRS Board of Trustees that "the actuaries are actually working on that and we hope to have something in the next four or five weeks."[2] The Court should reject the City's post-hoc, 11th hour, lawyer-created rationalization for Defendants' actions.

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[1] CRS has not filed a memorandum opposing the Motion and therefore presumably does not oppose it.

[2] The video is available at https://archive.org/details/crs-board-of-trustees-8-18-20 (last visited Feb. 24, 2020). The discussion of the DROP evaluation begins at the 32:28 mark. Counsel for the City also agreed during a telephone conversation with former Class Counsel Christian Jenkins that 2020 is the fifth year of the DROP implementation.

The Court should also reject the City's post-hac rationalization because it was the City's delays that led to the January 2017 start date for the DROP. To address the delayed start date,[3] the parties agreed to make the DROP retroactive to January 2016. Accordingly, because of the retroactive start date, 2020 is the fifth year for the DROP.

Besides the City's novel fifth-year-of-implementation argument, it offers no defense for its conduct. Rather, the City criticizes Class Counsel for (1) filing a contempt motion "rather than continu[ing] discussions about the meaning of 'independent evaluation,'" and (2) refusing to withdraw the contempt motion to "work[] with all the Parties to either correct the perceived deficiencies of the Cheiron analysis or to facilitate an independent analysis." Br. at 2. But Class Counsel spent *nine months* trying to discuss facilitating an independent analysis with Defendants. It was not until this contempt motion was filed that Defendants became remotely receptive to the idea. The City should not be heard to complain now.

For the foregoing reasons, the Court should: (1) grant the Motion because no party to the CSA should have to expend so much time, effort, and resources to simply get the attention of another party; (2) enforce the CSA by ordering the City and CRS to provide the requested information and cooperate in the facilitation of an independent actuarial review of the DROP program; and (3) award Class Counsel reasonable attorneys' fees incurred in ensuring compliance with the CSA.

Respectfully submitted,

/s/Jeffrey S. Goldenberg

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[3] The DROP was required to be in effect on January 1, 2016 but was delayed by the City. *See* Joint Status Report [Doc 117] at PAGE ID 2112.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was electronically filed with the Clerk of Courts using the CM/ECF system on February 23, 2021, which will send notification of such filing to all counsel of record.

\s\Jeffrey S. Goldenberg