UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

SUNYAK, et al.,	:	**Case Nos. 1:11-cv-445**
	:	**1:12-cv-329**
v.	:	
	:	**Judge Michael R. Barrett**
CITY OF CINCINNATI, et al.,	:	
	:	
(City of Cincinnati Pension Litigation)	:	

OPINION AND ORDER (CURRENT EMPLOYEES CLASS)

This matter came on for hearing on September 24, 2015 to address the parties' joint motion for final approval of the proposed class action settlement (Doc. 92) and class counsels' motions for attorneys' fees and expenses (Docs. 65 and 72). The Court granted final approval of the settlement on October 5, 2015 (Doc. 100) and reserved consideration of attorneys' fees and expenses for the instant Order.

Section 34 of the Collaborative Settlement Agreement granted final approval by this Court provides, in pertinent part, that:

> Defendants and the Current Employees Plaintiffs acknowledge and agree that Current Employees Class Counsel fees shall be based upon the value of the pension and healthcare benefits conferred upon the Current Employees Class as determined by the Court. The Defendants and Current Employees Class Plaintiffs stipulate that said benefit is at least $40 million.

(Doc. 100-1 p. 37).

Current Employees Class Counsel agreed that they would seek no more than $5,000,000 in attorney fees (Doc. 59-1 p. 82), which is precisely what they requested with $26,723 in expenses on July 30, 2015 (Doc. 72). Following the hearing on September 24, 2015, Current Employees Class Counsel updated their expenses to include $83,017.65 for the actuarial

consulting services of Segal Co. and travel expenses associated with the fairness hearing, for a total expense amount of $109,740.65.

Consistent with section 34 of the Collaborative Settlement Agreement, which requires attorney fees and expenses to be paid within 20 days of the Effective Date, Current Employees Class Counsel request that their fees and expenses be paid by the Cincinnati Retirement System ("CRS") and then recouped from the members of the Current Employee Class upon their retirement in amounts of $5-$10 per month for up to 20 years. Under this formulation, no member of the class would pay more than $2,400 in attorney fees. Defendants do not specifically object to the fee request of Current Employees Class Counsel, but urge the Court to scrutinize it. (Doc. 89). The Retirees Class (through Retirees Class Counsel) and a single Current Employees Class member object and argue that Current Employees Class Counsel's fees should be paid by the City of Cincinnati and that the value of the benefits conferred on the Current Employees Class by the settlement should be reduced by the amount of any savings realized by the CRS as a result of the Settlement. (Docs. 69, 87, 88).

A recounting of the factual background of this case is helpful to understand these fee requests and the Court's decision thereon.

I. Background

The Cincinnati Retirement System ("CRS") was established in 1931. The CRS is a defined benefit pension plan in which most non-uniformed employees of the City of Cincinnati are required to participate. The CRS is governed by Chapter 203 of the City of Cincinnati's municipal ordinances which vest general administrative authority over the CRS in a Board of Trustees. *See* CMC Sec. 203-65.

The CRS's consulting actuary, Mr. Ed Kobel of the Cavanaugh MacDonald consulting firm,

testified at the fairness hearing that the lowest funding level at which a public sector pension plan may be regarded as "healthy" is 80 percent. According to Mr. Kobel, the CRS pension fund was 64% funded as of December 31, 2014. *See* Stipulated Joint Exhibit 17. The CRS's underfunded status has been a persistent issue for the City of Cincinnati for many years, and while there is no single cause, the parties all agree that the principle reasons are: 1) the grant of an unsustainable three percent compounding COLA in 1999; 2) the City's failure to make annual required contributions; and 3) the CRS's loss of 27.5% of its value in 2008. (Doc. 92 n. 5).

In 2011, Cincinnati responded to the CRS underfunding crisis with Ordinance Nos. 84-2011 and 85-2011 (the "Ordinances"), which enacted sweeping changes to the future pension benefits that would be available to then active employees and modified the healthcare benefits available to existing retirees. These measures were designed to reduce the CRS's liabilities by more than $300 million. *See* Stipulated Joint Exhibit 4 p. 2. The major elements of these reforms were as follows:

1. COLA reduction: Existing retirees continued to receive a compounding three percent annual cost of living allowance, but Ordinance 84-2011 eliminated the compound COLA for then active City employees and replaced it with a simple COLA tied to the annual inflation rate and capped at two percent. *See* Stipulated Joint Exhibit 3 p. 13.

2. Final Average Salary Change: Ordinance 84-2011 changed the "Final Average Salary" used to compute pension benefits for active employees to the average of their *five* highest paid years of City Service rather than the highest *three* years of service that had been used in the past. *Id.*

3. Benefit Accrual Change: Ordinance 84-2011 changed the "Multiplier" component of the basic pension benefit formula with respect to years of service after 2011 from

2.5 to 2.2. The Ordinance also reduced the Multiplier to 2.0 on years of service over 30 years. *Id.* at 14.

4. Retirement Eligibility Change: Ordinance 84-2011 ended retirement eligibility with 30 years of City service regardless of age and added a minimum age requirement of 60 to be eligible for unreduced pension benefits. *Id.* at 15. The testimony of Nick Sunyak and Jeff Harmon at the fairness hearing demonstrated that, for many active employees, this was the most significant change to the CRS because it created a choice between retiring with a significantly reduced pension benefit or working more years than planned to receive a "full" pension benefit, thereby significantly reducing the total value of the pension benefits they were likely to receive during their lives.

5. Elimination of Death Benefits: Ordinance 84-2011 eliminated all death benefits for active employees and reduced the death benefits for current retirees from $7,500 to $5,000. *Id.* at 17.

6. Modification of Retiree Healthcare Benefits: Ordinances 84-2011 and 85-2011 did not modify the monthly pension benefits or the compounding COLA received by existing retirees. However, these measures did impact retirees by increasing their deductibles and out of pocket expenses, eliminating Medicare Part B subsidies for retirees and spouses and any subsidies for dental and vision benefits. *Id.* at 31.

The Ordinances went into effect on July 1, 2011. *See* Stipulated Joint Exhibits 1 and 2. This lawsuit was filed the same day.

In 2009, active employees contributed 7.0 percent of their pay to the CRS. This amount was increased to 7.5 percent in 2010, 8.0 percent in 2011, 8.5 percent in 2012, and then 9.0 percent in 2013. CMC sec. 203-73. As Jeff Harmon, a City employee and class representative testified at the

fairness hearing, active employees were paying more to work more years and receive reduced benefits.

Although the Ordinances reduced the pension benefits that active employees would receive in the future, they left the benefits received by retirees largely untouched except for a reduction in death benefit from $7,500 to $5,000. However, in 2009 the City had begun reforming retiree healthcare benefits by adding co-pays and deductibles to benefits that previously had been essentially free to retirees. For more than a decade, the Retiree Plaintiffs have been aggressively challenging any attempt on the part of the City of Cincinnati ("City") to reduce any retirement benefits which the retired members of the CRS have been receiving. Those challenges have included political campaigns as well as legal challenges to repeated reductions in retirement benefits. A group of retirees, represented by the same individuals representing the Retirees Class in this matter, challenged the City in state court for the reduction in health care benefits. On September 1, 2011, two months after the effective date of the Ordinances, the Hamilton County Court of Common Pleas rejected the retirees' claims and held that the retirees did not have vested rights with respect to healthcare benefits. *See* Joint Stipulated Exhibit 5. The Court of Appeals affirmed. *Id.* Ex. 6. The Ohio Supreme Court declined review. *Id.* Ex. 7. As a result, the City could modify, or even revoke, retiree healthcare at any time. Following that litigation, the City threatened to further suspend or significantly curtail retiree health benefits, reduce the cost of living adjustment ("COLA") from the current 3% compounding COLA to a simple indexed COLA not to exceed 2% and to suspend that COLA for a period of years. Additionally, the City reduced the death benefit to which retirees had been eligible from $7,500 to $5,000.

The 2011 changes slowed the growth of the CRS's unfunded liability, but did not arrest it. *See* Joint Stipulated Exhibit 8 p. 2. In June 2013, Moody's Investor Service downgraded the City of Cincinnati's bond rating and revised its outlook to "negative" due to its pension liability. *Id.* Ex. 9.

In response, the CRS Board began to evaluate new measures to achieve additional reductions in CRS unfunded liability. *Id.* Ex. 10. On September 5, 2013, the CRS Board approved additional reforms including a two percent simple COLA for all retirees and active employees and a three year "COLA holiday" for all retirees and future retirees. *See* Joint Stipulated Exhibit 11. In the meantime, this litigation had progressed to an advanced stage with a dispositive motion and class certification briefed and pending.

Exacerbating these reductions, Retiree Plaintiffs became alarmed that the adjudication of the claims filed in this litigation could prejudice them by "adversely affecting" the financial viability of and the ability of the CRS to pay benefits and any settlement related to those claims could prejudice any ability of a class of retirees to independently assert their own claims at a later date. Consequently, the Retiree Plaintiffs moved to intervene in this litigation on behalf of themselves and approximately 4,400 individuals 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 and their Dependents and/or Surviving Beneficiaries who are entitled to those benefits (the "Retirees Class"). Therefore, the Retirees filed a motion to intervene on March 10, 2014.

The City of Cincinnati elected to engage in a collaborative mediation process overseen by this Court rather than implement the benefit cuts for current and future retirees that had been approved by the CRS Board. *See* Joint Stipulated Exhibit 14. But as City Manager Harry Black testified at the fairness hearing, the City held tremendous leverage because of its ability to terminate all retiree healthcare benefits – a step Mr. Black indicated the City was fully prepared to take if necessary.

II. Negotiations and the Resulting Settlement

The Court directly supervised the complex negotiations in this matter with the agreement of

all parties and their counsel. Negotiations began in earnest in August 2013 with an initial mediation session attended by the parties, their counsel, and the Court. At least seven subsequent formal mediation sessions were conducted, as well as many other less formal meetings, culminating in a marathon session on December 30, 2014 that resulted in the execution of a Memorandum of Understanding early in the morning of December 31, 2014. Five months of subsequent negotiations produced the Collaborative Settlement Agreement recently granted final approval by the Court. (Doc. 100).

Having supervised the negotiations, this Court is aware of their complexity and the significant amount of attorney time and effort involved in reaching and finalizing the agreement. The parties were not individuals simply negotiating an amount to be paid to settle a claim. Rather, each of the three major factions involved in the negotiations (i.e., the City, Retirees and Current Employees) was itself a large and diverse group with its own internal politics and divisions that counsel had to navigate in order to reach agreement. Positions on particular issues often changed unexpectedly, complicating these efforts. The fact that an agreement was eventually reached is no small achievement as there were numerous moments at which it appeared very unlikely.[1] At times, the various class representatives were hesitant to accept or consider alternative proposals from the City. However, with the assistance of the Court, Class Counsel was able to bring about solutions to the negotiation stalemate with creative alternatives to realize the objectives of the City and the Class Members. The Court recognizes that the agreement is due in large part to the tenacious and diligent efforts of all the counsel involved.

Without the successful mediation process there would not have been a resolution which brought finality to all parties and stability to the CRS. The Collaborative Settlement Agreement confers

[1] As policy expert, Cathie Eitelberg testified at the fairness hearing, the failure to reach similar agreements has been extremely costly in other cities such as Detroit where the attorney fees associated with the city's bankruptcy topped $200 million.

valuable benefits on the members of both classes. As a result of the settlement, the CRS will receive a cash infusion of approximately $215 million plus an additional $39.1 million for payoff of the Early Retirement Incentive Plan ("ERIP"). (Docs. 100-1 p. 22, 100-2 p. 4; Joint Stipulated Exhibit 17 p. 17).[2] In addition, the City's binding commitment to increase its CRS funding to 16.25 percent of payroll for the 30 year duration of the settlement has a present value of $67 million. (Joint Stipulated Exhibit 17 p. 18). This increase in CRS value of approximately $321.1 million redounds to the benefit of all members of both classes by solidifying the CRS's solvency. Indeed, in direct response to the announcement of the proposed settlement in this matter, Moody's Investor Service upgraded the City of Cincinnati's bond rating and revised its outlook from "negative" to "stable." (Joint Stipulated Exhibit 15). This benefits the City of Cincinnati and its taxpayers in ways the Court will not even attempt to quantify here.

A. Current Employees Class

The particular benefits for the two classes are very significant. The settlement confers the following significant benefits on Members of the Current Employees Class:

1. Pension Benefit and Eligibility Changes: The settlement increases the COLA on retirement benefits for Current Employees Class members from an indexed COLA capped at two percent to a three percent annual COLA, regardless of inflation. The CRS actuary values this benefit at $26 million. (Joint Stipulated Exhibit 17 p. 18). The settlement makes unreduced pension benefits available once again at 30 years of service without any age requirement, and at age 60 with at least five years of service. The CRS actuary values this benefit at $30 million. *Id.* The settlement restores the 2.2 multiplier on years of service over 30 years, and provides a compromise under which the 2.5 multiplier applies to the greater of 20

[2] The Collaborative Settlement Agreement secures the use of these new funds and all other amounts held by the CRS pension fund as "trust funds" that can only be used for the benefit of the members of the CRS. (Doc. 100-1 §§ 1-2, p. 21).

years or the number of years of service an employee had as of July 1, 2011. The CRS actuary values this benefit at $7.5 million. According to the Segal Co. consulting actuaries who testified at the fairness hearing, when these are aggregated actuarially, which does not equate with simply totaling the three components, the total value of the these benefits for the Current Employees Class is $65.9 million.[3]

2. Vested Retiree Healthcare Benefits. As a result of the settlement, members of the Current Employees Class will enjoy a vested right to retiree healthcare benefits, a right that would not exist without the settlement. For members of the Current Employees Class hired before January 9, 1997, the settlement means that, at the time of their retirement, they will be entitled to the same health care benefits afforded to then active employees at a cost of no more than ten percent of premium. Those hired on or after January 9, 1997 will be entitled to subsidized retiree healthcare at a cost varying between five and seventy-five percent of premium under the "point system." The Segal Co. consulting actuaries valued this benefit in preparation for the fairness hearing at $130 million.

3. "Catch-Up" Payments. Members of the Current Employees Class who retired after July 1, 2011 but before the implementation of the settlement will receive lump sum payments for the amounts they would have received had the terms of the settlement been in effect when they retired. In addition, their annuity payments will be adjusted upwards going forward. The CRS actuary did not value these payments "due to insufficient information."

[3] The Court notes that, if this amount is reduced by the "savings" that will be experienced by the CRS as a result of the three year "COLA holiday," the resulting amount would be lower. The CRS actuary testified at the fairness hearing that the resulting value of the pension benefits conferred on the Current Employees Class after such a reduction would be $34.1 million. The record establishes that a three year COLA holiday was approved by the CRS Board and would have been implemented in the absence of this settlement. Indeed, the City Manager's authority to resolve this case included a mandate that any settlement must include a COLA holiday of up to *five* years. (Joint Stipulated Exhibit 14 p. 2).

(Joint Stipulated Exhibit 17 p. 16). However, the record includes a conservative estimate of the "catch up" payments of $1.23 million. (Doc. 72-1).

Under section 34 of the Collaborative Settlement Agreement, the Court is charged with determining "the value of the pension and healthcare benefits conferred upon the Current Employees Class" in order to award an appropriate attorney fee. Based on the foregoing, the analyses on record and the testimony at the fairness hearing, the Court concludes that the value of the pension and healthcare benefits conferred upon the Current Employees Class by the settlement is, at minimum, $165 million. This amount results from adding the lowest value of the pension benefits conferred supported by the record ($34.1 million), the value of the retiree healthcare benefits ($130 million), and the estimated value of the "catch up" payments ($1.23 million). The Court notes that greater numbers of $197 million and even $260 million can be supported by the record if the value of pension benefits conferred is not reduced by the savings associated with the COLA holiday and if the present value of the City's increased contributions over the next 30 years is included. However, the Court finds it unnecessary to address such matters as the evidence clearly and unequivocally supports a minimum valuation of at least $165 million, which, as discussed below, amply supports the fees approved by the Court.

B. Retiree Class

The Retiree Plaintiffs set specific goals to be realized in this litigation. Having contested for years the City's previous reductions to retirement benefits, the Retiree Plaintiffs set as their goals: (1) elimination of political influence of the Cincinnati Retirement System; (2) stabilizing funding for the Cincinnati Retirement System; (3) preservation of pensions including cost of living adjustments; (4) preservation and restoration of healthcare benefits lost in prior state court litigation; (5) preservation of the death benefit; and (6) reformation of the Cincinnati Retirement

System to be more responsive to and a fiduciary for the members of the Cincinnati Retirement System. With those goals in mind, the Retiree Plaintiffs and the Retirees Class have realized virtually all of their objectives. For the Retiree Plaintiffs and the Retirees Class, the Collaborative Settlement Agreement assures stability for the Cincinnati Retirement System, guarantees a level of funding for pensions, preserves a cost of living adjustment, restores healthcare benefits lost in previous state litigation, assures continuing healthcare benefits at current levels, commits the City to continue funding healthcare benefits which had previously ceased, preserves the death benefit for the Retirees Class and reforms administration of the Cincinnati Retirement System. Having faced uncertainty in the past, stability of retirement benefits was crucial for the Retiree Plaintiffs and the Retirees Class. This Collaborative Settlement Agreement eliminates that uncertainty and provides the members of the Retirees Class with the assurance that they can live out the remainder of their lives with promised benefits.

In addition to the foregoing, there are numerous less tangibly measurable benefits conferred on both classes by the settlement. For example, members of the Current Employees Class will be eligible to participate in the Deferred Retirement Option Plan ("DROP"), which will allow 30 year employees to continue in their City jobs for up to five years while accruing their pension benefits in a qualified account. Both classes also benefit greatly from the City's enforceable obligation to consistently fund the CRS and the de-politicization of CRS benefits, which cannot be modified without Court approval during the 30 year duration of the settlement. Indeed, Ely Ryder, one of the Retirees Class Representatives, testified to the immense significance of the sense of security that retirees will now enjoy with respect to their pension and healthcare benefits as a result of the settlement.

III. Analysis of Current Employees Class Counsel Fees

Current Employees Class Counsel seek a fee award of $5,000,000 plus costs and expenses in the amount of $109,344.75. In support of this request, they assert that the requested attorneys' fee represents less than ten percent of the value of the benefit conferred and is reasonable in view of their current and anticipated future lodestar subject to a reasonable multiplier.

Defendants do not specifically object to the requested award, but urge the Court to scrutinize the request. Defendants raise numerous arguments at odds with the Collaborative Settlement Agreement in which they expressly agreed that Current Employees Class Counsel's attorney fees "shall be based upon the value of the pension and healthcare benefits conferred upon the Current Employees Class as determined by the Court." (Doc. 89 p. 5). The Collaborative Settlement Agreement has been finally approved by this Court at the urging of all parties, including Defendants. Accordingly, Defendants are bound by the Collaborative Settlement Agreement, and, while the Court agrees that it must scrutinize Current Employees' Class Counsel's fee request, the Court rejects Defendants' other arguments to the extent they are inconsistent with the Agreement.

The Retirees Class and a single objector contend that the settlement is not a "common fund," dispute the valuation of the benefit conferred, and contend that the City of Cincinnati should be obligated to pay all attorneys' fees in this matter. (Docs. 69, 87, 88). Current Employees Class Counsel respond that the Retirees Class does not have standing under Rule 23(h)(2), which provides that "[a] class member, or a party from whom payment is sought, may object to the motion [for an award of attorney's fees]." Current Employees Class Counsel is correct. The Retirees Class is neither a member of the Current Employees Class, nor a party

from whom payment is sought by Current Employees Class Counsel. Indeed, under the Collaborative Settlement Agreement all amounts paid to Current Employees Class Counsel from the CRS as attorney fees and expenses are to be recouped from the Current Employees Class members. However, even though the Court concludes that the Retirees Class lacks standing to object to Current Employees Class Counsel's fee request, the arguments advanced by the Retirees Class are given full consideration herein because they are essentially identical to the arguments advanced by another objector.

In a certified class action, the Court may award reasonable attorney's fees and costs that are authorized by law or by the parties' agreement upon motion under Rule 54(d)(2) and 23(h). In the Sixth Circuit, district courts have the discretion to determine the appropriate method for calculating attorneys' fees in light of the unique characteristics of class actions in general, and the particular circumstances of the case before the Court, using either the percentage or lodestar approach. *See Swigart v. Fifth Third Bank*, No. 1:11-cv-88, 2014 WL 3447947, at *5 (S.D. Ohio July 11, 2014) (Black, J.)citing *In re Cardinal Health Inc. Sec. Litigation*, 528 F.Supp.2d 752, 761 (S.D. Ohio 2007).

All parties agree that Courts usually employ one of two methods in analyzing a request for attorneys' fees in class actions – the 'lodestar' analysis or "percentage of the fund" analysis. *Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 515-516 (6th Cir. 1993). "To determine the "lodestar" figure, the Court multiplies the proven number of hours reasonably expended on the litigation by a reasonable hourly rate." *Lonardo v. Travelers Indem. Co.*, 706 F. Supp.2d 766, 788 (N.D. Ohio 2010) (citing *Reed v. Rhodes*, 179 F.3d 453, 471 (6th Cir. 1999)). "The Court may then adjust the lodestar figure up or down based on a number of factors designed to account for case-specific circumstances." *Id.* at 788-789 (citation omitted). "In contrast, under the percentage of the fund method, the court simply determines a percentage of the settlement to award the class counsel."

Lonardo, 706 F. Supp.2d at 789 (citation omitted). In general, the percentage of the fund method is used "...where there is a single pool of money and each class member is entitled to a share (i.e., a 'common fund')." *Id.*

In this case, Defendants and Current Employees have expressly agreed that Current Employees Class Counsels' fee should be based upon the value of benefits conferred upon that class. *See* Doc. 100-1 § 34, pp. 36-37. In the Southern District of Ohio, the percentage of the fund method, with reference to the lodestar and the resulting multiplier as a cross check, is the preferred method. *Swigart. 2014 WL 3447947, at *5 (S.D. Ohio July 11, 2014)*(citing *Connectivity Systems, Inc. v. National City Bank*, No. 2:08-cv-1119, 2011 WL 292008, at *13 (S.D. Ohio Jan.26, 2011)) (Watson, J.). This is the method the Court will apply to the current class counsel's fee request because of the unique circumstances presented by this case including that the settlement requires Defendants to, among other things, deposit into the CRS Pension Trust Fund an amount in excess of $250 million, make increased contributions (with a present value of $67 million) to the CRS Pension Trust Fund over the next 30 years, and "fully fund" the new "115 Trust Fund" for retiree healthcare benefits. Under the Collaborative Settlement Agreement, the Current Employees Class is now legally entitled to increased pension benefits from the CRS Pension Trust Fund and retiree healthcare benefits from the "115 Trust Fund." The *minimum* combined value of these benefits conferred on the Current Employees Class is $165 million. "In determining whether a requested multiplier is appropriate, the Court seeks guidance from the six factors identified by the Sixth Circuit in *Ramey v. Cincinnati Enquirer, Inc.*, 508 F.2d 1188, 1196 (6th Cir. 1974), *cert. denied*, 422 U.S. 1048, 95 S.Ct. 2666, 45 L.Ed.2d 700 (1975)." *Lonardo*, 706 F.Supp.2d at 795. The *Ramey* factors are:

> (a) the value of the benefits rendered to the class: (b) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others; (c) whether the services were undertaken on a contingent fee basis; (d) the value of the

> services on an hourly basis; (e) the complexity of the litigation; and (f) the professional skill and standing of all counsel.

Id. "There is no formula for weighing these factors. Rather, the Court should be mindful that each case presents a unique set of circumstances and arrives at a unique settlement, and thus different factors could predominate depending on the case. *In re: Cardinal Health Inc. Securities Litigations*, 528 F. Supp.2d at 764 (citing *Rawlings*, 9 F.3d at 516). These factors are discussed below.

Current Employees Class Counsel agreed to seek a fee of not more than $5 million, which represents three percent of the value of the benefit conferred as determined by the Court. This percentage is substantially lower than the percentages typically approved in class action settlements. *See, e.g., Bowling v. Pfizer, Inc.*, 102 F.3d 777, 780 (6th Cir. 1996) (fee award of 10% of settlement valued at more than $100 million was reasonable and not an abuse of district court's discretion); *In re Broadwing, Inc. ERISA Litigation*, 252 F.R.D. 369, 380 (S.D. Ohio 2006) ("Attorneys fees awards typically range from 20 to 50 percent").

The lodestar figure is used to confirm the reasonableness of the percentage award. *Id.* at 381. At the fairness hearing, Current Employees Class Counsel updated their lodestar and reported a total of 3,345 attorney and staff hours for a lodestar of approximately $1,500,000.00. "Because the courts in this circuit favor the use of the percentage-of-the-fund method, the court need not rigorously examine class counsels' statement of its hours expended and hourly rates." *In re National Century Financial Enter., Inc. Investment Litigation*, No. 2:03-md-1565, 2009 WL 1473975, at *3 (S.D. Ohio May 27, 2009) (citations omitted). In this case, however, the Court is directly aware of a significant portion of counsels' hours because many of them were spent in the Court's presence during negotiations that spanned nearly two years. Indeed, one of the Defendants' witnesses at the fairness hearing, City Manager Harry Black, likened the negotiations in this case to collective bargaining, only more lengthy and intense. Moreover, the

attorney and staff time reported by Current Employees Class Counsel is comparable to the amount reported by Defendants' counsel, a private firm retained by the City of Cincinnati and paid from the CRS as an administrative expense. (Doc. 72-3 ¶ 16). In addition, respected Cincinnati-based class action attorney Bill Markovitz has submitted a declaration opining that the hours and rates of Current Employees Class Counsel are reasonable in view of the duration and complexity of this case. (Doc. 72-6). Accordingly, the Court finds Current Employees Class Counsels' hours through the date of the fairness hearing to be reasonable with nominal adjustment for repetition.

Current Employees Class Counsel estimates that additional, uncompensated, attorney and staff time will be required of them in the future. No doubt this is true, because the Collaborative Settlement Agreement specifically requires the parties to attempt to negotiate several open issues such as the "Point System" for determining the percentage of premium paid by employees hired after January 9, 1997 for retiree healthcare benefits. (Doc. 100-1 sec. 24.ii. p. 31). If the negotiations do not result in agreement, the parties are to submit the issue to the Court for resolution. Similarly, the Agreement provides for "re-openers" under numerous specific circumstances that may arise over the thirty year duration of the consent decree. (*Id.* sec. 35 pp. 37-41). There is no provision in the Collaborative Settlement Agreement to compensate counsel for their work on such matters. The sole source of potential future compensation for Class Counsel under the Agreement is limited to $5,000 per year for monitoring and annual reporting requirements and additional attorneys' fees that may be awarded by the Court in connection with an action to enforce the Agreement. (*Id.* secs. 52 and 53). However, while there will clearly be additional work required of Current Employees Class Counsel for which they will not receive additional compensation, the actual extent of that work cannot be estimated with any precision at

this time. Accordingly, the Court finds that the fee awarded in this Order is adequate to compensate counsel for a reasonable amount of expected additional of time.[4]

The Court also finds that the hourly rates used by Current Employees Class Counsel to compute their lodestar are reasonable in view of the complexity of this matter. Current Employees Class Counsel consists primarily of four experienced attorneys including: 1) Robert Klausner, a national expert on public sector pension law and the author of the definitive treatise in that area; 2) Marc Mezibov, a highly respected Cincinnati attorney with more than forty years of experience litigating in state and federal courts, including several matters before the U.S. Supreme Court; 3) Jeffrey Goldenberg, a Cincinnati-based attorney with more than twenty years of experience focusing on complex and class action matters, including multi-district litigation; and 4) Christian Jenkins a Cincinnati-based attorney with more than twenty years of experience litigating labor and employment, consumer, and other matters in both individual cases and class actions. Current Employees Class Counsel's rates are objectively reasonable as they are quite similar to those charged by Retirees Class Counsel in this case. Moreover, the Court recognizes the expertise, knowledge, and experience that Class Counsel brought to bear in this matter through the prolonged litigation and negotiations. This case involved the intersections of many different areas of law, including U.S. and Ohio Constitutional law, Ohio public sector labor and employment law, municipal law, and public sector pension law. Accordingly, the Court finds Current Employees Class Counsel's rates are reasonable considering the magnitude and complexity of this matter.

[4] The Court does not mean to suggest that Class Counsels' continuing obligation is unlimited. For example, in the event a re-opener is triggered and submitted to the Court for approval, nothing in the Agreement would preclude Class Counsel from seeking additional fees. Of course, Class Counsel would have to convince this Court that any such request is warranted.

Class Counsel's requested award of $5,000,000 results in a multiplier of 3.33 with respect to their lodestar of $1,500,000. Multipliers of between two and five are in the "normal range." *Bailey v. AK Steel Corp.*, No. 1:06-cv-468, 2008 WL 553764, at *2 (S.D. Ohio Feb. 28, 2008) (Black, J.). In the context of the lodestar cross-check, the multiplier serves as a tool to assess the reasonableness of the requested fee award, ensure adequate compensation in view of the risk undertaken, and prevent unreasonable windfalls. Consistent with these principles, multipliers of slightly more than three (i.e., 3.04 and 3.06) have been considered "very acceptable" and "fully warranted." *See, e.g., Bailey*, 2008 WL 553764, at *2; *Lowther v. AK Steel Corp.*, 2012 WL 6676131, at *5 (S.D. Ohio Dec. 21, 2012) (Dlott, C.J.). This case was quite complex. Obtaining a result involved years of work and considerable risk of non-payment.

Accordingly, the Court concludes that a multiplier of 3.0, which is modest by widely accepted standards, is warranted in view of all the circumstances and class counsel's continuing obligation to the Current Employees Class. This results in a total attorneys' fee award of $4,500,000.00 to Current Employees Class Counsel.

The Court further approves Current Employees Class Counsel's suggested method of recouping this amount from the benefit conferred on the Current Employees Class through small reductions in future pension benefits received by class members ranging from $5 to $10 per month for no more than 20 years. This is consistent with the goal of preventing "inequity by assessing attorneys' fees against the entire fund, thus spreading fees proportionately among those benefited by the suit." *See Connectivity Systems, Inc.*, 2011 WL 292008, at *12 (citing *Boeing v. Van Gemert*, 444 U.S. 472, 478 (1980)) (Watson, J.). Indeed, this precise method has been approved by other courts faced with very similar circumstances. *See Bowles v. Washington,* 121 Wash.2d 52, 847 P.2d 440 (Wash. 1993) (requiring public pension fund to pay attorney fees and

then recoup from prospectively increased benefits paid to class members). Accordingly, Defendants shall pay the amounts awarded in this Order in accordance with section 34 of the Collaborative Settlement Agreement and formulate a reasonable process by which to recoup such amounts from members of the Current Employees Class by reducing future pension benefits paid out after January 1, 2016 consistent with the request of Current Employees Class Counsel.[5] Finally, without ultimate acceptance of the final acceptance of the Collaborative Settlement Agreement, the mediation process would not have resulted in a resolution which brought finality to all parties and stability to the CRS.

The $4.5 million fee is also supported by the six Ramey factors. First, the value of the benefit conferred on the Current Employees Class is, at minimum, $165 million. Class Counsel's fee reflects a very modest percentage of this value. Second, society's stake in rewarding attorneys who produce such benefits clearly favors the award in this case. Third, the services rendered were undertaken almost entirely on a contingent basis such that this factor supports the award. Class counsel disclosed the small amount of start up funds amounting to less than two percent of their lodestar that they received to investigate this case, which will be refunded upon receipt of payment of the award. There was significant risk of non-payment to Class Counsel such that this factor supports the award. *See, e.g., Basile v. Merill Lynch, Pierce, Fenner & Smith, Inc.*, 640 F. Supp. 697, 702 n.5 (S.D. Ohio 1986). Fourth, as discussed above, the "lodestar crosscheck" demonstrates that the value of the services on an hourly basis supports the award. Fifth, this case was truly complex, involving many different substantive areas of state and federal law, complicated actuarial issues, complicated and adversarial relationships among

[5] Based on information supplied by the CRS Director, Current Employees Class Counsel estimated that reductions in the range of $5-$10 per month for up to 240 months from the approximately 2,400 class members would be adequate to reimburse the CRS for the $5,000,00 fee requested. As the Court has reduced that amount to $4,500,000, it is expected that the monthly amount recouped will decline proportionately to approximately $4-$8.

the parties, and a lengthy and convoluted history. This factor clearly supports the award. Sixth, the professional skill of the attorneys involved also clearly supports the award. The professional skill and standing of all counsel involved in this matter is substantial. Current Employees Class Counsel are all highly qualified and highly experienced, and they brought their skills to bear in this case in a diligent and professional manner. Accordingly, a review of the *Ramey* factors reinforces the Court's finding that its award in this case is fair and appropriate.

Turning to the objections placed on record and discussed at the fairness hearing, the Court finds them to be without merit. Richard Ganulin, a member of the Current Employees Class, particularly subgroup D thereof, filed two objections (Docs. 69 and 87).[6] Mr. Ganulin's first objection is that the class members, rather than the City of Cincinnati, will be effectively paying their attorneys' fees from the benefit conferred. In considering this objection, it is helpful to consider the value of the benefit conferred on an individual basis. The record includes a projection comparing the pension benefits received by a member of subgroup D with and without the settlement. (Joint Stipulated Exhibit 23 attachment 2). According to this estimate, the gross cumulative increase in pension benefits to be received under the settlement by the sample individual exceeds $160,000, including a lump sum "catch up" payment of more than $4,000 on January 1, 2016. The attorneys' fee to be borne by such an individual is, at most, $1,200 in monthly reductions of $5 over 20 years. The Court has no difficulty concluding that this is an entirely reasonable fee. The Court's conclusion is supported by the testimony at the fairness hearing of Jeff Harmon, an officer of a union representing more than 850 City

[6] The Court notes that Mr. Ganulin's objections express the same concerns as counsel for the Retirees Class. (Doc. 88). Accordingly, even though the Retirees Class lacks standing to object to the attorneys' fee paid by a different class, the issues raised by Retirees Class counsel are fully addressed and resolved as if on the merits.

employees, who testified that the fee was "very fair" when the value of the results obtained was considered.[7]

Moreover, there is no basis on which to require the City of Cincinnati to pay attorneys' fees in this case. There is no "prevailing party" in this case, and the City has not agreed to pay such amounts in the Collaborative Settlement Agreement. Accordingly, the Court is without authority to require the City of Cincinnati to pay any portion of the attorneys' fees or expenses in this case.

Mr. Ganulin also contends that the settlement in this case is not a common fund because the amounts being paid are to be deposited into the CRS Pension Trust Fund and the new 115 Trust Fund to provide increased benefits to class members in the future. Mr. Ganulin argues that the settlement in this case does nothing more than require the Defendants to restore some pension benefits that they previously took away. The Court disagrees as this contention misconstrues the benefits provided by the settlement. Since July 1, 2011, members of the Current Employees Class who retired, such as Mr. Ganulin, have been receiving an annual COLA indexed to inflation up to two percent per year. In three of the last four years, the COLA has been less than two percent. (Doc. 72-2, Ex. B). As a result of the settlement, Mr. Ganulin and all other Current Employees Class Members will receive an increase in their annual COLA of *at least* 50 percent. The significant monetary impact of this change is illustrated in the record. (Doc. 94-3 Exhibit 2).

The common fund doctrine is not as limited as Mr. Ganulin suggests. Indeed, courts in this District have held that it can be properly applied in a variety of circumstances, such as where attorneys' fees are paid separate from the benefit conferred on the class. *See Lowther v. AK Steel Corp.*, 2012 WL 6676131, at *1 ("Although this case is not precisely a common fund case (as

[7] Objector Byrd's concerns about attorneys' fees are also addressed by this analysis. (Doc. 83)

the funds going to pay for attorney fees and costs are to be paid under the Settlement Agreement separate and apart from the money that goes to the VEBA to provide health benefits to the class members), the common fund properly applies.") (Dlott, C.J.). Likewise, the funding of a trust fund, such as the CRS Pension Trust Fund and the 115 Trust Fund, to pay benefits to class members is properly treated as a common fund. *Id.*; *Bailey v. AK Steel Corp.*, 2008 WL 553764, at *1 (approving attorneys' fees on common fund basis where fund to pay health benefits was funded as a result of settlement). There is ample authority for a common fund award where the settlement provides future benefits to class members where the value of those benefits can be reasonably ascertained even if a "fund" per se is not created. *See, e.g., Enterprise Energy Corp. v. Columbia Gas Trans. Corp.*, 137 F.R.D. 240, 249-250 (S.D. Ohio 1991); *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 333-34 (3d Cir. 1998); *College Retirement Equities Fund, Corp. v. Rink*, No. 2012-CA-002050, 2015 WL 226112, at *6 (Ky. Ct. App. Jan. 16, 2015); *Shaffer v. Continental Cas. Co.*, 362 Fed. App'x 627, 631-32, 2010 WL 106816 (9th Cir. 2009).

The application of the common fund doctrine in this case is not nearly so attenuated. Defendants will deposit more than $250 million into the CRS Pension Trust Fund, make *increased* annual contributions over the next 30 years with a present value of $67 million, and fully fund a new retiree healthcare trust, all of which will enable class members to receive increased pension benefits and enjoy vested healthcare benefits for the duration of the settlement. For these reasons, the Court is satisfied that the application of the common fund doctrine is appropriate. However, even if it were not, the Court would retain the discretion to award a fee on a lodestar and multiplier basis, which would lead it to the same conclusion as to what constitutes an appropriate fee in this case.

The final objection advanced by Mr. Ganulin is that the value of the benefit conferred on the Current Employees Class should be reduced by the amount of "savings" on retiree healthcare reflected in Defendants' calculations. The Court overrules this objection as well. Prior to this settlement, no retiree participating in the CRS had an enforceable right to retiree healthcare benefits. The settlement creates a new, enforceable right to retiree healthcare benefits. The Collaborative Settlement Agreement specifically imposes on the City of Cincinnati the obligation to fully fund the new 115 Trust Fund which will pay for retiree healthcare benefits. (Doc. 100-1 sec. 3 p. 21 and sec. 26 p. 32). The City cannot legislate away this new obligation, and it can be enforced in this Court, as necessary. (*Id.* sec. 45 p. 51). Thus, the "savings" to which Mr. Ganulin refers are amounts that the City could have saved at any time by unilaterally implementing changes to retiree healthcare.[8] Prior to the settlement in this case, the City could eliminate retiree healthcare altogether. And the Court is satisfied that, in the absence of the Collaborative Settlement Agreement, it very well may have done so. The fact that the new, enforceable, right to retiree healthcare available under the Agreement comes with a lower price tag than the current retiree healthcare (that could have been modified or eliminated by the City at will prior to the settlement) does not diminish the value of the benefit conferred by the settlement.

Finally, the Court grants Current Employees Class Counsels' request for expenses in the amount of $109,740.65. The majority of these expenses ($80,621.75) represent fees charged by Segal Co., an independent consultant hired to (1) review and evaluate the calculations of the CRS actuaries, and (2) value the settlement and assess its viability and fairness relative to other

[8] The Court notes that much of the "savings" to which Mr. Ganulin refers is actually structural reform and new efficiencies in the delivery of retiree healthcare designed to produce savings, such as the Employer Group Waiver Program ("EGWHP") and Medical Expense Reimbursement Program ("MERP") without reducing the benefits obtained by participants. (Doc. 100-1 sec. 25.i.).

situations and settlements in the public sector pension arena across the country. Two witnesses from Segal Co. testified at the fairness hearing and the Court is satisfied that this expense is reasonable and was necessary to the prosecution of this action. The balance of Current Employees Class Counsels' expense request relates to travel expenses, parking, copies and electronic research. The Court has reviewed the details of these expenses and finds them reasonable and necessary for the prosecution of this action.

IV. Conclusion

The settlement in this case confers valuable benefits on both classes and their counsel should be fairly compensated. Cathie Eitelberg, a nationally recognized policy expert on public sector pensions, testified at length at the fairness hearing and described the settlement in this case as unparalleled with respect to the restoration of retiree benefits and preservation of retiree healthcare. The Court agrees and is satisfied that the award set forth above is fair and reasonable in view of the complexity and risk involved in this case and awards Employee Class Counsel fees in the amount of $4.5 million dollars and expenses in the amount of $109,740.65, such amounts to be paid from the CRS Fund as set forth above.

Accordingly, Plaintiffs' Motion for Attorneys' Fees and Expenses (Doc. 72) is **GRANTED.**

IT IS SO ORDERED.

Michael R. Barrett, Judge
United States District Court