

**ROBERT F. CHERRY, JR., ET AL.**

**Plaintiffs**

**v.**

**MAYOR & CITY COUNCIL OF  
BALTIMORE CITY**

**Defendant.**

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**IN THE**

**CIRCUIT COURT**

**FOR**

**BALTIMORE CITY**

**Civil Case No.: 24-C-16-004670**

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**MEMORANDUM OPINION**

The court has before it the Application for an Award of Attorneys’ Fees, Costs and Expenses for Class Counsel, and Incentive Award for Class Representative Houser and Memorandum of Law in support thereof, the Memorandum of Law in Support of Baltimore Fire Officers, Local 964, IAFF Application for an Award of Attorneys’ Fees (filed October 1, 2021; docketed collectively as Doc. No. 219; hereafter the “Application”),<sup>1</sup> and The City’s Response to Plaintiffs’ Fee Application (filed November 17, 2021; Doc No. 219/1). No hearing is necessary.

Preliminarily, the court observes: 1) the City “takes no position” on the Application; and 2) Michael Mancuso, President of the Baltimore City Fraternal Order of Police, Lodge No. 3, and Richard Langford, President of the Baltimore City Firefighters IAFF, Local 734, support all relief requested by Saul Ewing Arnstein & Lehr LLP. (Exs. A and B to the Application.) Further, the court finds credible and accepts as true all assertions of fact set forth in the affidavits of Charles

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<sup>1</sup> In an abundance of caution, the court has not considered or relied upon unreported opinions cited in the Application. MD. RULE 1-104; *see also Oliveira v. Sugarman*, 226 Md. App. 524, 553 (2016) (holding that “prohibition on the citation of unreported opinions applies even when the jurisdiction in which the unreported opinion was decided permits the citation of unreported opinions”), and *Smith v. Warbasse*, 71 Md. App. 625, 634-35 (1987) (warning that even where the trial court’s determination is correct as a matter of law notwithstanding reliance upon an unreported opinion, a case may be remanded for proceedings in compliance with Rule 1-104).

O. Monk, II, Esquire, as Lead Class Counsel (Ex. C of the Application), and Robert D. Klausner, Esquire, counsel to Baltimore Fire Officers, Local 964, IAFF (appended to the Memorandum of Law submitted on behalf of Baltimore Fire Officers, Local 964, IAFF).

## **I. COMMON FUND DOCTRINE GENERALLY**

The Common Fund Doctrine (“CFD”) is an exception to the American Rule on attorneys’ fees.<sup>2</sup> *Bontempo v. Lare*, 217 Md. App. 81, 134 (2014); *Garcia v. Foulger Pratt Dev., Inc.*, 155 Md. App. 634, 661-63 (2003). A creature of equity, under the CFD, “a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney’s fee from the fund as a whole.” *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). “The doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched at the successful litigant’s expense. Jurisdiction over the fund involved in the litigation allows a court to prevent this inequity by assessing attorney’s fees against the entire fund, thus spreading fees proportionately among those benefited by the suit.” *Id.* Application of the CFD lies without the discretion of the trial judge, however, whether a prevailing party is entitled to its application is a question of law. *Garcia*, 155 Md. App. at 662, 667.

## **II. APPLICATION OF THE CFD TO THE INSTANT CASE**

In the instant case, there is a common fund by virtue of the court’s award of monetary damages in excess of \$30 Million to two of the three Plaintiff sub-classes; and the Application seeks an award directly and exclusively from the fund, not an outside third party or opposing party.

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<sup>2</sup> Under the American Rule, “in the absence of a statute, rule or contract expressly allowing recovery of attorneys’ fees, a prevailing party in a lawsuit may not ordinarily recover attorneys’ fees.” *Bontempo v. Lare*, 217 Md. App. 81, 134 (2014) (quoting *Bausch & Lomb Inc. v. Utica Mut. Ins. Co.*, 355 Md. 566, 590–91 (1999)).

The court therefore finds that the CFD applies a matter of law. Further, the court agrees with movants that the percentage-of-recovery method is appropriate in this case, subject to a cross-check by the lodestar method as well as review of the factors set out in Maryland Attorneys' Rule of Professional Conduct 19-301.5 (hereafter "Rule 1.5"), which are mirrored in Maryland Rule 2-703(f)(3) *Attorneys' fees allowed by law*.<sup>3</sup> Therefore, the court will apply the CFD using the percentage-of-recovery method to arrive at a reasonable and appropriate award.

**A. Percentage-of-Recovery Factors**

**1. Results Obtained for the Class**

Following a decade of complex litigation, including trials and appeals in both federal and state courts, Application counsel won a significant monetary award for the Plaintiff class.

**2. Quality, Skill, and Efficiency of Counsel**

Throughout this action, all counsel demonstrated exceptional legal skills (both courtroom and written), worked deliberately and with purpose to create efficiencies through civil courtesy and stipulation where possible, appeared to the court never to engage in wasteful litigation tactics or activities, and impressed the court as among the finest counsel this court has had the pleasure to observe and serve.

**3. Risk of Nonpayment**

Based on the description of fee arrangements set forth in the Application, the financial capacity of the unions that took on the responsibility of funding the non-contingency portion of

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<sup>3</sup> Under the percentage-of-recovery method, the court applies case-specific factors to determine what percentage of the of the common fund will be awarded in fees, costs, and expenses. The lodestar method calls on the court to determine the number of hours counsel reasonably expended on the case multiplied by a reasonable hourly rate for those legal service (as determined by the court). This calculation produces the lodestar figure, which the court may then adjust by application of a set of factors similar to those utilized in the percentage-of-recovery approach and set forth in Rule 2-703(f)(3) and Rule 1.5

counsel fees and litigation expenses, the history of outstanding receivables counsel's firms absorbed for various periods during the litigation (at time in excess of \$1 Million), the on-going risk that a change in union leadership may result in a withdrawal or reduction of union financial support, and the general backdrop of opportunity cost to the firms, the court finds the risk of nonpayment significant.

#### **4. Objections by Class Members**

The court is aware of no class member objections. *See also*, page 1, *supra*, regarding Exs. A and B to the Application.

#### **5. Awards in Similar Cases**

The court concurs with the analysis and comparators set forth in the Application, and finds that the requested 15% fee by Lead Class Counsel is fair and reasonable, as it falls in the low end of fees awarded in similar cases. The court further finds that the 3% fee requested by Mr. Klausner, in view of the scope of work he performed on behalf of Baltimore Fire Officers, Local 964, IAFF, is likewise fair and reasonable in comparison to awards in similar cases known to the court.

#### **6. Complexity and Duration of the Case**

This case was litigated over the course of a decade, traversed the state and federal trial and appellate courts of Maryland and the Fourth Circuit, presented exceptionally complex, esoteric and important public interest questions. Nothing about this case was easy except for the courtesy among counsel.

#### **7. Public Policy Considerations**

There is no question public policy supports the Application. The rights vindicated and advanced by movants would most assuredly have gone unprotected had counsel not litigated on behalf of the Plaintiff class. Further, ensuring that the City can attract and maintain quality law

enforcement officers, firefighters, and other first responders, is of paramount importance to the health and well-being of City residents. Surely, the rights vindicated in this litigation stabilize and promote these important considerations. Further, ensuring that counsel as sophisticated and skilled as are Mr. Monk and Mr. Klausner (and their co-counsel) remain willing to engage in litigation and representation of the sort at issue here is a key public policy consideration.

**B. Cross-Check of Lodestar Factors, Rule 1.5, and Maryland Rule 2-703**

The court has closely reviewed all lodestar factors, the important mandate and factors recited in Rule 1.5, as well as the overlapping factors set forth in Maryland Rule 2-703(f)(3). The court concurs entirely with the thorough analysis set forth in the Application at pages 23 through 30, and finds that the 15% and 3% fee requests are supported and corroborated by these cross-checks.

**III. CONCLUSION**

By accompanying order of court, the court will grant the Application in its entirety.

November 23, 2021

*[SIGNATURE OF JUDGE APPEARS ON ORIGINAL]*

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Judge Julie R. Rubin

*Madam Clerk: Please mail copies to all counsel and named parties of record.*