ROBERT F. CHERRY, JR., ET AL.	*	**IN THE**
Plaintiffs	*	**CIRCUIT COURT**
v.	*	**FOR**
MAYOR & CITY COUNCIL OF BALTIMORE CITY	*	**BALTIMORE CITY**
	*	
Defendant.	*	**Civil Case No.: 24-C-16-004670**

*** * * * * * * * * * * * ***

MEMORANDUM OPINION

SYNOPSIS

1. The court certifies this action as a class action under Maryland Rules of Court. There is a Plaintiff Class and three sub-classes. The sub-classes divide the Plaintiff Class among categories of employee as of the effective date of Ordinance 10-306: Active, Retired, and Retirement-Eligible Sub-Classes;

2. The court makes several declarations of the parties' respective rights and obligations under the Fire and Police Employees' Retirement System of the City of Baltimore (referred to as the "Plan") with respect to Ordinance 10-306. These declarations are set out throughout the Memorandum Opinion and are stated more succinctly in the Declaratory Judgment and Order;

3. The court finds that, by enacting Ordinance 10-306, the City breached its pension contract with Retired and Retirement-Eligible Sub-Classes. The court directs that notification be sent to members of these Sub-Class regarding, among other things, individual damages to which they may be entitled; and

4. The court finds that, by enacting Ordinance 10-306, the City did not breach its pension contract with Active Sub-Class members because Ordinance 10-306 was a lawful exercise of the City's legislative power. Maryland law allows the City to make forward-looking, reasonable changes to the Plan affecting employees who have not yet reached retirement eligibility, provided the Plan was changed to preserve the financial integrity of the pension system and the employee retains substantially the pension program he had at the start of employment.

**This Synopsis is for the reader's convenience.*
The substantive content of the Memorandum Opinion and associated orders are controlling.

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I. INTRODUCTION

This case has taken an unusual and long path. The history of the dispute and its legal foot print is briefly set out in the court's Memorandum Opinion issued January 2, 2018 (Docket Entry 20/2), so it will not be recited here.[1] Suffice it to say that following a journey through federal trial and appellate courts,[2] the parties came to this court. Because their dispute is largely, if not entirely, confined to historic, objectively verifiable facts not subject to debate,[3] and because the parties developed a fulsome record of discovery and evidence before the United States District Court, the parties jointly requested to submit dispositive motions in advance of litigating class certification. (*See* Modified Scheduling Order of March 17, 2017.) The court adjudicated the parties' cross-motions for summary judgment by memorandum opinion and orders issued January 2, 2018, which included, among other things, declaratory judgment that Defendant Mayor & City Council of Baltimore City (hereafter the "City") breached its contract with Plaintiffs Christopher Houser, Charles Williams and Robert Sledgeski; and that the City is entitled to make prospective and reasonable unilateral modifications to the Fire and Police Employees' Retirement System of the

[1] For efficiency of space and time, the court incorporates by reference herein defined terms, the Introduction, Procedural Background and Status sections of the Memorandum Opinion issued January 2, 2018. While those sections of the January 2018 opinion are not substantively material to this Memorandum Opinion, those sections will help a stranger to this case appreciate the context of this opinion and the complete story of this case.

[2] Plaintiffs' constitutional Takings Clause and Contract Clause claims are stayed in the United States District Court, Civil Action No. MJG-10-1447.

[3] On request of the court to aid its consideration of the parties' cross-motions for summary judgment, the parties submitted Joint Statement of Stipulations of Fact and Other Matters and Stipulation Regarding Certain Allegations in First Amended Class Action Complaint (filed May 3 and December 14, 2017, as Docket Entries 19 and 38, respectively). The Joint Statement of Stipulations of Fact and Other Matters is hereafter referred to as the "Stipulations of Fact." The Stipulation Regarding Certain Allegations in First Amended Class Action Complaint is hereafter referred to as "Stipulation of Plaintiff Status."

City of Baltimore (the "Plan"). *See* Memorandum Opinion, Order, and Declaratory Judgment and Order, issued January 2, 2018 (Docket Entries 20/2, 21/3, and 21/5).

This matter next came before the court on Plaintiffs' Motion for Class Certification (filed February 15, 2018; Docket Entry 45; hereafter the "Motion"), Defendant's Response to same (filed March 19, 2018; Docket Entry 45/1), and Plaintiffs' Reply in support of the Motion (filed April 6, 2018; Docket Entry 45/2). The parties appeared for oral argument on the Motion on April 26, 2018. Thereafter, as set forth in the Amended Scheduling Order issued May 22, 2018, the court discussed with the parties the remainder of the pretrial schedule, including several issues necessary to resolving the matter of class certification and consideration of efficiencies regarding trial on the merits. As a practical matter, and as the parties have acknowledged, the court's declaratory judgment as to Plaintiffs Houser, Williams and Sledgeski resolved the liability merits of Counts II and III for breach of contract by enactment of Ordinance 10-306 (Retired and Retirement-Eligible Plaintiffs, respectively).

Following conference with and input from the parties, the court determined, in no small measure due to the configuration of Plan funds and mechanics pre- and post-10-306, that resolution of whether remedies are subject to class treatment called for, among other things, consideration of the basis and measure of damages. Moreover, the adequacy of class notice (should it be ordered) and related due process rights of absent potential class members were, and remain, material considerations. The court concluded that determination of the proper form(s) of remedy (or remedies), including the bases and measure(s) of any monetary damages, would, as a practical matter, call upon the parties to present, and the court to consider, evidence of Plan modifications embodied in Ordinance 10-306. In turn, this body of evidence would necessarily overlap with the

evidence regarding why the City adopted 10-306 and whether the benefits offered through the Plan as modified by 10-306 pass muster under applicable law regarding reasonableness.[4]

Therefore, for economy of resources of all involved, including the expense and challenges associated with scheduling expert witnesses to travel and testify, the imposition on fact witnesses, and because it just made good sense, the court scheduled trial beginning October 29, 2018, on the following issues: "(a) whether the prospective Plan modifications contained in Ordinance 10-306 with respect to 'Active' Plaintiffs Cherry and Lake were 'reasonable' in accordance with applicable law (and as articulated in this court's Memorandum Opinion of January 2, 2018, and cases cited therein); (b) measures of damage as to 'Retired' Plaintiffs Houser and Williams and 'Eligible to Retire' Plaintiff Sledgeski; and (c) whether damages are subject to class/sub-class treatment and, if so, how so and on what basis." (Amended Scheduling Order of May 22, 2018.)

Trial began October 29, 2018; closing arguments were made January 4, 2019.[5] On inquiry of the court following the parties' closing argument presentations (on the record at the bench), the parties confirmed that no further hearing or trial is required for the court to adjudicate the above-quoted matters identified in Paragraph 1 of the Amended Scheduling Order of May 22, 2018. Therefore, in Section II of this memorandum opinion, the court addresses Plaintiffs' Motion for Class Certification. Section III sets forth the court's findings of fact. In Sections IV and V, the court addresses liability on Counts II, III and IV for breach of contract based on legislative modification of the Plan (through Ordinance 10-306) and alleged underfunding of the Plan, respectively. Section VI is dedicated to the merits of Count I for Declaratory Judgment. Section

[4] These issues are fundamental to resolution of Count IV for breach of contract. *See generally City of Frederick v. Quinn,* 35 Md. App. 626 (1977), *passim.*

[5] Closing arguments were originally scheduled for December 5, 2018, and were rescheduled due to an administrative state-wide court closing.

VII addresses requests for relief and the measure of damages arising from Plaintiffs' contract claims. Finally, in Section VIII, the court's Conclusion itemizes the orders to be issued in accordance with the court's analysis and determinations.

II. MOTION FOR CLASS CERTIFICATION

Plaintiffs' Amended Class Action Complaint (filed November 28, 2017; Docket Entry 37; hereafter the "Amended Complaint") states a class action claim under Rule 2-231 and defines the "Class" as "All members and beneficiaries of the Plan as of June 30, 2010." Plaintiffs break the class into three sub-classes, as defined at Paragraphs 32(A) through (C) of the Amended Complaint: the "Retired Sub-Class" (represented by named Plaintiffs Houser and Williams), which includes "All members and beneficiaries of the Plan, who, as of the effective date of Ordinance 10-306, were entitled to (and receiving) retirement benefits under the Plan"; the "Retirement-Eligible Sub-Class" (represented by named Plaintiff Sledgeski), which includes "All members of the Plan who, as of the effective date of Ordinance 10-306, were eligible to retire but were not entitled to receive benefits because they were continuing to work"; and the "Active Sub-Class" (represented by named Plaintiffs Robert F. Cherry, Jr., and Thomas S. Lake), which includes "All members of the Plan who, as of the effective date of Ordinance 10-306, were working and not yet eligible to receive benefits under the Plan."[6] The Amended Complaint also includes organizational plaintiffs referred to as "FOP," "Local 734," and "Local 964" on behalf of their members by way of associational standing.

[6] Plaintiffs identify sub-classes for class management, not to resolve a conflict of interest among class members.

The Amended Complaint states four causes of action: Count I for Declaratory Judgment, Count II for Breach of Contract (Contractual Rights of Retired and Disabled Plaintiffs),[7] Count III for Breach of Contract (Contractual Rights of Retirement-Eligible Plaintiffs), and Count IV (Contractual Rights of Active Plaintiffs). The City "does not oppose class certification under Rule 2-231(b)(1) for the purpose of litigating liability on Plaintiffs' breach of contract or Plaintiffs' equitable claims" but opposes class certification of Plaintiffs' damages claims. (City Response, p. 2.)

As set forth in the Introduction, resolution of the Motion calls upon the court to "look beyond the pleadings to determine whether class certification is appropriate" as it pertains to calculation and measure of damages. *Creveling v. Government Employees Ins. Co.,* 76 Md. 72, 88-89 (2003). The court did not, however, "conduct a review of the merits of the lawsuit … 'in determining the propriety of a class action.'" *Id.* at 89 (quoting *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 177-78 (1974)).[8] Per the parties' request, the court first adjudicated the parties' cross-dispositive motions; Plaintiffs' Motion was filed thereafter. Further, the body of evidence presented at trial regarding whether 10-306 was "reasonable"[9] does not bear upon the merits of the

[7] The Amended Complaint does not identify a proposed "Disabled" sub-class. The parties stipulate that Plaintiff Houser was entitled to and receiving Plan benefits as of the effective date of Ordinance 10-306. (Stipulation of Plaintiff Status, ¶ 4.) Plaintiffs allege at Paragraph 26 of the Amended Complaint that Plaintiff Houser retired in 2005 due to a line-of-duty disability and the City does not contested this allegation. The court construes Count II to state a claim for the Retired Sub-Class of which Plaintiff Houser is a member.

[8] *See also Amgen, Inc. v. Connecticut Retirement Plans and Trust Funds,* 568 U.S. 455, 465-66 (2013), and *Wal-Mart Stores, Inc. v. Dukes,* 564 U.S. 338, 350-52 (2011), William Rubenstein *et al*., *Newburg on Class Actions,* §§ 7:18, 7:23 (5th ed. 2018) (hereafter, "*Newburg*") (all regarding the necessity for a "rigorous" analysis of class certification requirements and the potential for consideration of facts and evidence in the process).

[9] In this case, "reasonable" has come to be the abbreviated articulation of the standard enunciated by *City of Frederick v. Quinn,* 35 Md. App. 626, 629-31 (1977), and discussed in this court's Memorandum Opinion of January 2, 2018, regarding the City's limited entitlement to make "reasonable modifications" to the Plan.

Motion and was presented at that time over no objection for the efficiency of all involved. Finally, the Amended Scheduling Order of May 22, 2018, provides in pertinent part: "The court will consider argument as to whether to adjudicate [following the 2018 trial] the 'reasonable' dispute in lieu of holding it *sub curia* pending further proceedings." As mentioned above, the parties confirmed that no further hearing or trial is required for the court to adjudicate the matters identified in Paragraph 1 of Amended Scheduling Order of May 22, 2018.

For the reasons set forth below, the court will grant the Motion and establish a hybrid class action, which is to say that the court will certify this matter as a class action under different provisions of Maryland Rule 2-231 for particular purposes of the Amended Complaint.

A. Class Certification – Overview of Maryland Rule 2-231

Maryland Rule 2-231(a) requires that the following four threshold requirements be met in order for a class to qualify for certification: "(a) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." MD. RULE 2-231(a). A party must affirmatively prove that there are "in fact sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Moreover, although not required by Maryland law, this court will take the added step of evaluating whether Plaintiffs satisfy the "implicit requirements" that the class be definite or ascertainable, and that the class representatives be members of the class. *Newburg*, § 3.1.

If a proposed class satisfies Rule 2-231(a), the court considers next whether a class action can be maintained under any of the rubrics of 2-231(b) (addressed in detail below). Under

subsection (d) of the rule, "when appropriate . . . a class may be divided into subclasses and each subclass treated as a class." MD. RULE 2-231(d). Rule 2-231(e) requires that specific notice be made to class members in actions maintained under subsection (b)(3), and authorizes the court to require notice under any other class maintenance provision.

Although Maryland law is plain that the "party moving for class certification bears the burden of proving that the requirements of certification have been met," the court has not identified controlling law on the level of that burden (and neither side addresses it). *Philip Morris Inc. v. Angeletti*, 358 Md. 689, 726-7 (2000). The court is content that the national trend (including district courts within the Fourth Circuit), favors imposition of a preponderance of the evidence standard.[10] Guided by this trend and neighboring persuasive authority, the court holds Plaintiffs to a preponderance of evidence standard on the Motion.

B. Requirements of Maryland Rule 2-231(a)

The court is satisfied that the proposed class, including each proposed sub-class, satisfies Rule 2-231(a) and the implicit requirements of definiteness and that the identified sub-class representative plaintiff be a sub-class member.

[10] "The trend in recent cases has been a move from lighter or loosely defined burdens towards adoption of a preponderance of the evidence standard to facts necessary to establish the existence of a class. Nonetheless, some circuits have yet to specify a particular burden of proof when deciding class certification issues while others explicitly articulate a standard lower than the preponderance standard." *Newburg*, §7.21. *See, e.g., In re Mills Corp. Securities Litig.*, 257 F.R.D. 101 (E.D. Va. 2009) (applying a preponderance of evidence standard to a motion for class certification).

1. Numerosity – Maryland Rule 2-231(a)(1)

The proposed Plaintiff Class, as defined, includes approximately 10,600 individuals. The proposed Retired Sub-Class, as defined, includes approximately 6,000 individuals. The proposed Retirement-Eligible Sub-Class, as defined, includes approximately 1,034 individuals. The proposed Active Sub-Class, as defined, includes approximately 3,550 individuals. (Amended Complaint, ¶ 34; Pl. Federal Litigation Trial Ex. 96-J, Thomas Taneyhill & David A. Randall, Fire & Police Employees' Ret. Sys., Comprehensive Annual Financial Report for the Year Ended June 30, 2010 (dated December 2010),[11] which was admitted in the 2018 trial in this court as Trial Ex. 100.)[12] The court finds that the proposed Plaintiff Class, and each proposed Sub-Class evaluated separately and apart from the proposed Class, "is so numerous that joinder of all members is impracticable." MD. RULE 2-231(a)(1).

2. Commonality – Maryland Rule 2-231(a)(2)

The commonality prerequisite requires the existence of questions of law and fact common to each member of the proposed class (and sub-class). This requirement is intended to promote "[c]onvenience, uniformity of decision, and judicial economy." *Philip Morris, Inc. v. Angeletti*, 358 Md. 689, 734 (2000). "The threshold of commonality is not a high one and is easily met in

[11] With the court's agreement and appreciation, the parties relied upon the record developed in the Federal Litigation for purposes of discovery, motions and other proceedings in this action in advance of the 2018 trial, and provided the court with the record of the Federal Litigation at the start of this action. Although the parties relied on documents contained within the Federal Litigation record at the 2018 trial in this court, any such documents admitted in evidence before this court were assigned a trial exhibit number bearing no relation to the Federal Litigation in order that the record before this court would be independent and complete, and subject to appellate review without need to reference the Federal Litigation record.

[12] Comprehensive Annual Financial Reports admitted in evidence at the 2018 trial are hereafter referred to as "CAFR" and will be distinguished by the fiscal year covered for each such report.

most cases. It 'does not require that all, or even most[,] issues be common, nor that common issues predominate, but only that common issues exist.' Although the standard for commonality varies among jurisdictions, a common articulation requires that the lawsuit exhibit a 'common nucleus of operative facts.'" *Bergmann v. Bd. of Regents of Univ. Sys. of Md.*, 167 Md. App. 237, 287-88 (2006) (quoting *Philip Morris, Inc.*, 358 Md. at 734).

Several questions of fact and law are common to each member of the proposed Plaintiff Class, including chiefly (i) whether, by adopting Ordinance 10-306, the City unlawfully diminished and impaired pension benefits of Plan members and their beneficiaries; and (ii) whether class members are entitled to restoration of pre-10-306 Plan benefits.

Several questions of fact and law are common to each member of the proposed Retired Sub-Class, including (i) whether, by adopting Ordinance 10-306, the City unlawfully withdrew Retired Plan members' rights to the Variable Benefit feature of the pre-10-306 Plan; and (ii) whether Retired Plan members are entitled to restoration of the pre-10-306 Variable Benefit. These questions are also common to each member of the proposed Retirement-Eligible Sub-Class.

Several questions of fact and law are common to each member of the proposed Active Sub-Class, including without limitation: (i) whether Ordinance 10-306 was reasonably intended to preserve the integrity of the pension system through (restoration of) actuarial soundness; (ii) whether Ordinance 10-306 provides Active Plan members substantially the pension program that existed at the time of their employment; and (iii) whether Active Plan members are entitled to restoration of pre-10-306 terms and benefits, including for example, return to pre-10-306 terms of service requirements for benefit entitlement.

The court finds that the proposed Plaintiff Class satisfies the commonality requirement of Rule 2-231(a)(2), as does each proposed Sub-Class (evaluated separately and apart from the proposed Class and other proposed Sub-Classes).

3. Typicality – Maryland Rule 2-231(a)(3)

A class may be maintained only if the claims or defenses of the representative parties are typical of the claims or defenses of the class. MD. RULE 2-231(a)(3). Typicality is established when a class representative's claims "arise from the same event or practice or course of conduct that gives rise to the claims of other class members, and [ ] the claims are based on the same legal theory." This is the case "irrespective of varying fact patterns which underlie individual claims." *Bergmann*, 167 Md. App. at 288 (quoting *Philip Morris, Inc.*, 358 Md. at 737).

> [T]ypicality insists that the class representative be a member of the class and have claims similar to those of other class members, and the requirement rests upon the belief that such a representative, pursuing her own interests, will pursue the class's as well. … "A plaintiff's claim is typical if it arises from the same event, 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." … The test for typicality is not demanding and "focuses on the similarity between the named plaintiffs' legal and remedial theories and the theories of those whom they purport to represent." A court will deny class certification "when the variation in claims" between the plaintiff and the absent class members "strikes at the heart of the respective causes of actions." However, the plaintiffs' claims need not be identical to those of the class; typicality will be satisfied so long as "the named representatives' claims share the same essential characteristics as the claims of the class at large."

Newburg, §§ 3.28, 3.29 (internal citations omitted).

The court does not find persuasive the City's argument that Plaintiffs cannot meet the typicality prong of 2-231 on the basis that Plaintiff Lake "is not typical of most of the active Fire Department members of the proposed class" because he planned to retire upon completing 20 years of service (versus more than 25, which the City urges is the norm) and because Plaintiff Houser's "experiences" are "abnormal and do not reflect the Ordinance's effect on the average Plan

member." (City Response, p. 15.) These, and similar, factual differences do not impair typicality for purposes of the Rule. The claims of Plaintiffs Lake and Houser and the Class members' claims arise from the same event and culminating circumstances, and the legal theories on which their claims rest are the same. (This also holds true with respect to the claims of their respective Sub-Classes.)

Each of the named Plaintiffs was a Plan member as of the effective date of Ordinance 10-306; each seeks a declaration that the City breached its statutory pension contract with Plan members when it adopted Ordinance 10-306. Therefore, each named Plaintiff is a member of the proposed Class; the claims of each named Plaintiff arise from the same event that gives rise to the claims of other Class members; and the claims are based on the same legal theory. Further, Plaintiffs Houser and Williams fall within the membership definition of the Retired Sub-Class; Plaintiff Sledgeski falls within the membership definition of the Retirement-Eligible Sub-Class; and Plaintiffs Cherry and Lake fall within the membership definition of the Active Sub-Class.

All claims of all Class members arise from the City's replacement of the pre-10-306 Plan with the Plan as modified by Ordinance 10-306 and the City's alleged underfunding of the Plan. Plaintiffs Houser and Williams, as Retired Sub-Class representatives, pursue a cause of action alleging that, prior to 10-306, they had satisfied all conditions precedent to receipt of, and were receiving, the Variable Benefit, and that they are entitled to monetary damages and equitable relief to render them whole from the harm caused by the City's breach of contract. Plaintiff Sledgeski, as the Retirement-Eligible Sub-Class representative, pursues a cause of action alleging that, as of the effective date of Ordinance 10-306, he was eligible to retire, having satisfied all conditions precedent, and that he is entitled to monetary damages and equitable relief to render him whole from the harm caused by the City's breach of contract. Plaintiffs Cherry and Lake, as Active Sub-

Class representatives, have sued alleging that, as of the effective date of 10-306, they had contractual rights to the pension terms, conditions and benefits offered and accepted as of their dates of employment, and that they are entitled to restoration of pre-10-306 terms of service retirement qualifications, member contribution requirements, the Variable Benefit, and other Plan features. Finally, all Plaintiff Class Representatives allege the City is liable for breach of contract for underfunding the Plan.

The claims of each named Plaintiff fall within the same or similar legal and remedial theories as those of the proposed Class, and the court is satisfied that each named Plaintiff shares the same essential characteristics of the claims of the proposed Class at large, as well as their respective Sub-Classes. Said another way, the court is satisfied that none of the named Plaintiffs' claims is different from those of the absent Class (or respective Sub-Class) members such that their claims will not be advanced by the Plaintiffs' proof of their individual claims, or that any variations between the claims of a class representative and an absent Class member strike at the heart of the matters before the court. *Deiter v. Microsoft Corp.*, 436 F.3d 461, 466-67; *Newburg, supra*, § 3.29.

4. <u>Fair and Adequate Representation – Maryland Rule 2-231(a)(4)</u>

Rule 2-231(a)(4) calls upon the court to consider whether "the representative parties will fairly and adequately protect the interests of the class." MD. RULE 2-231(a)(4). This inquiry serves to uncover conflicts of interest between class representatives and the class, and to test the quality, experience, and overall adequacy of class counsel. The determination of class counsel suitability includes a conflict of interest evaluation to ensure the class is represented by counsel aligned with, and compelled to serve, all members' interests, and to ensure an absence of collusion with class

representatives to serve interests in conflict with those of absent class members. *Philip Morris, Inc. v. Angeletti*, 358 Md. 689, 740-41(2000) (quoting *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625-26 (1997)).[13]

a. Class Representatives

The City argues that "conflicts among the [R]etirees preclude the determination of damages as a class-wide issue," averring that some members of the Retired Sub-Class "would have no injury from the adoption of Ordinance 10-306 and no damages" and that some Retirees might prefer to stick with the 0-1-2 COLA of Ordinance 10-306 simply for its stability as a guaranteed benefit (unlike the Variable Benefit). (City Response, pp. 6, 18.) The City also argues that the "unusual nature of [Plaintiff] Houser's situation" as a line-of-duty disability Retiree creates a conflict of interest rendering him inadequate as a Class (and Retired Sub-Class) representative for purposes of Rule 2-231(a)(4):

> Mr. Houser joined the Baltimore City Police Department in 1998 and is now 45 years old. He was involuntarily retired from the Police Department in 2005, when he was in his early 30s, after being shot in the line of duty in 2012. He is one of a minority of Police Department members who retire in their early 30s with only seven years of service. By contrast, the average length of service for retirees in the Police Department is twenty-five or twenty-six years. … As of June 30, 2005, when Mr. Houser retired, … only 15% [of Plan members] were retired due to line-of-duty disability. And of that subset of retirees, only 29% were under 55. … Thus, unlike Mr. Houser, for the significant majority of line-of-duty-disability retirees, Ordinance 10-306 did not change their eligibility for a COLA.

(City Response, pp. 19-20.)

The court is not persuaded by this argument. The particular facts of Plaintiff Houser's line-of-duty-disability retirement status and its impact on his COLA entitlements do not pose a 2-

[13] The court evaluates adequacy of representation for purposes of class certification under Rule 2-231 only and does not purport to address constitutional adequacy (applicable, *e.g.*, to an after-the-fact preclusion question), although they may well lead to the same result.

231(a)(4) conflict of interest with Class members (including absent members of the Retired Sub-Class) who may secure (or have secured) greater financial benefit from the COLA than the Variable Benefit, or prefer the COLA for its reliability, or both. Rule 2-231(a)(4) does not demand mirror imagery between class representative and absent class member in nature of injury, damages, or even preferred relief, provided the court is satisfied that representatives will pursue absent class members' interests and entitlements. "Put another way, to forestall class certification the intra-class conflict must be so substantial as to overbalance the common interests of the class members as a whole." *Matamoros v. Starbucks Corp.*, 699 F.3d 129, 138 (1st Cir. 2012) (relying on *Newburg*, § 3.58). In the instant case, Class members' interests are not imperiled by a class representative who will seek to maximize one type of relief that redounds to his benefit while minimizing another that might benefit the class as a whole. To the contrary, as a member of the proposed Retired Sub-Class who alleges financial injury as a result of the substitution of the Variable Benefit for the COLA, Plaintiff Houser has incentive and motivation to secure both monetary and equitable relief for himself and absent Class/Retired Sub-Class members.

Assuming (without finding) that some Class members have not sustained financial injury from 10-306 and/or do not want to return to pre-10-306 Plan terms and benefits does not imbue or encumber Plaintiff Houser with a conflict of interest with their rights and entitlements as contemplated by the protections of Rule 2-231. To be sure, some courts across the nation decline (on 2-231(a)(4) grounds) to certify a class where some class members prefer to maintain the challenged *status quo* rather than pursue the ends of the litigation; other courts do not decline to certify on that basis, particularly where the *status quo* is the result of an illegal action or conduct.[14]

[14] *See, e.g.*, *Matamoros v. Starbucks Corp*., 699 F.3d 129 (1st Cir. 2012) (affirming trial court's class certification where some class members would benefit from the *status quo* on the basis that the challenged action was an unlawful employment practice); *Ruggles v. WellPoint, Inc*., 272

Here, the court already found that the City breached its contract with Plaintiffs Houser, Williams and Sledgeski (the proposed representatives of the Retired and Retirement-Eligible Sub-Classes) when it swapped the Variable Benefit for the COLA upon adopting 10-306. (Declaratory Judgment and Order issued January 2, 2018.) "It will almost always be the case" that some class members might prefer the *status quo*; "only where the conflict is real and significant should a single class member be foreclosed from adequately representing the full class." *Newburg*, ¶ 364 (citing *Matamoros v. Starbucks Corp.*, 699 F.3d 129, 138 (1st Cir. 2012)).

Any inconsistency or conflict between Plaintiff Houser's interests and those of absent class members is reasonably manageable. Indeed, the City's request that the court award monetary damages reduced to present value in lieu of specific performance (reinstitution of the Variable Benefit) to Plaintiffs Houser, Williams and Sledgeski (the proposed Retired and Retirement-Eligible Sub-Class representatives) demonstrates well that there is nothing intractable about any inconsistency or conflict between the desired outcomes and interests of Plaintiff Houser and absent Class members who may prefer the COLA to the Variable Benefit. Extending the City's request to its logical conclusion, depending on the measure of damages (*i.e.*, the formula) to be applied to

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F.R.D. 320, 338 (N.D. N.Y. 2011) (holding that representatives were adequate in a wage and hour case although some of the employee class members did not share the goals of the litigation, particularly because "[a]dequacy is not undermined where the opposed class members' position requires continuation of an allegedly unlawful practice"); and *Srail v. Village of Lisle*, 249 F.R.D. 544, 552, (N.D. Ill. 2008) (holding class representative adequate despite the fact that only 162 out of 403 potential class members demonstrated an interest in injunctive relief because the potential class members' "lack of interest in injunctive relief would … 'not [be] relevant … because a judge may not refuse to certify a class simply because some class members may prefer to leave the violation of their rights unremedied.'") (internal citations omitted). *See also In re Potash Antitrust Litigation*, 159 F.R.D. 682, 692 (D. Minn. 1995) (holding that the fact that an illegal course of conduct "tends to favor the long-term interests of several large members of the putative class is not sufficient to prevent class certification. This is not an interest the law is willing to protect.").

Retired and Retirement-Eligible Sub-Class members on Counts II and III, some may be awarded $0 and some may be awarded sums of money (for past and future damages); and the City will not face the prospect of reinstituting the Variable Benefit for Retired and Retirement Eligible Sub-Class members while operating the COLA for others. Finally, as acknowledged by the 1st Circuit addressing a similar argument by Starbucks on appeal of class action certification, if a class member "is uncomfortable with the attack launched by the plaintiff class . . . she – like every other class member – has the right to opt out of the class." *Matamoros,* 699 F.3d at 138-39.

The court is satisfied by a preponderance of evidence that each named Plaintiff is an adequate representative for the Class as a whole and with respect to his respective Sub-Class. Each named Plaintiff is a fair and adequate representative of the Class because each is situated and motivated to pursue the interests and entitlements of the Class as a whole – both with respect to their demands for, and alleged entitlement to, equitable and monetary relief. Moreover, having observed the testimony of each of the Plaintiffs during trial, the court finds that each named Plaintiff is qualified to serve as a representative of the Class, as well as his respective Sub-Class, with respect to his knowledge and understanding of the claims and facts set forth in the Amended Complaint.

b. Proposed Plaintiffs' Class Counsel

The only other 2-231(a)(4) fairness and adequacy argument forwarded by the City flows from its argument regarding conflicts within the proposed Class (and Sub-Classes) and the proposed Class Representatives. Specifically, the City argues that "[t]his may be a situation where it would be appropriate for separate counsel to represent those proposed Class members who prefer Ordinance 10-306 because of its stability … or the segments of the proposed Plaintiffs' Class who

fared better under Ordinance 10-306 …." (Defendant's Response, P. 21.) For the reasons set forth immediately above, the court is not persuaded by this argument.

Regarding the competence-based inquiry regarding the suitability of Plaintiffs' counsel to serve as Class counsel, Defendant "does not challenge the qualifications of proposed Plaintiffs' Class Counsel." *Id.* Neither does the court. The court finds that proposed Class counsel is qualified, competent, and free from conflicts of interest with the Class (including all Sub-Classes). Plaintiffs' counsel have been engaged as such for nearly 9 years as of this writing and have developed incomparable institutional knowledge of the case as a result – both the facts and applicable law. Further, all counsel of record (for Plaintiffs and the City) have time and again demonstrated to this court an exceptional level of integrity, preparedness, civility, intelligence and diligence throughout this case.

5. Implicit Requirements of Definiteness and Representative Class Membership

The court is satisfied that the Plaintiff Class and each proposed Sub-Class has been objectively defined and is administratively ascertainable, which is to say the members of the Class and each Sub-Class are defined and identifiable based on objective criteria, with exactitude and certainty. The court is satisfied, therefore, that absent Class members' due process rights will be protected by "enabling notice to be provided where necessary and by defining who is entitled to relief" and, further, that the City's rights will be protected "by enabling a final judgment that clearly identifies who is bound by it." *Newburg*, ¶ 3.1 (citing *Marcus v. BMW of North America*, LLC, 687 F.3d 583 (3d Cir. 2012), and various district court authorities). Further, as set forth above in the section addressing typicality, the court is satisfied that the proposed Class and Sub-Class representatives are members of the class and sub-classes they seek to represent.

Plaintiffs satisfy all prerequisites of section (a) of Rule 2-231.

C. Maintenance of Classes/Sub-Classes Pursuant to Maryland Rule 2-231(b)

Maryland Rule 2-231(b) states:

> **Class Actions Maintainable.** Unless justice requires otherwise, an action may be maintained as a class action if the prerequisites of section (a) are satisfied, and in addition:
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
> (A) inconsistent or varying adjudications with respect to individual members of the class that would establish incompatible standards of conduct for the party opposing the class, or
> (B) adjudications with respect to individual members of the class that would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions, (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class, (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum, (D) the difficulties likely to be encountered in the management of a class action.

MD. RULE 2-231(b).

The court has closely evaluated and considered the parties' positions with respect to each proposed Sub-Class and how, if it is to be done at all, the Sub-Classes and the claims at issue might pair with the various treatments available under Rule 2-231(b). Following examination of the proposed Sub-Classes and the various claims, and bearing in mind the importance of ensuring due process for all absent Class members, the court will exercise its discretion to certify hybrid sub-

classes through application of different portions of Rule 2-231(b).[15] In short, the court will certify three sub-classes and will utilize several portions of Rule 2-231(b) in doing so.

1. Declaratory Judgment

Count I for Declaratory Judgment seeks 14 declarations (A through N, Amended Complaint, pp. 54-55). Requested declarations A, B, C, F, G, K, L, M, and N pertain to all members of the Plan, and therefore to all individual Plaintiffs (including the proposed Class and all proposed Sub-Classes). Requested declaration D applies to the proposed Active Sub-Class only. Requested declarations E and H apply to the proposed Retired and Retirement-Eligible Sub-Classes only. Requested declaration I applies to the proposed Retired Sub-Class only. Requested declaration J applies to the proposed Active and Retirement-Eligible Sub-Classes only. By enacting Ordinance 10-306, the City acted in a manner and on grounds generally applicable to the proposed Class, and Plaintiffs seek declaratory judgment regarding the parties' respective rights and entitlements in connection with the enactment of Ordinance 10-306 and the Plan generally. As such, the proposed Class members are a cohesive group joined together in a singular interest to have their rights and entitlements declared with respect to the pre-10-306 Plan, as articulated and alleged in the Amended Complaint.

[15] The court has organized the proposed Class and Sub-Classes in a manner it finds more manageable and appropriate than the proposals of either side. *See Lundquist v. Security Pac. Auto. Servs. Fin. Corp.,* 993 F.2d 11, 14-15 (2d Cir. 1993) (holding the trial court did not abuse its discretion in declining to certify in accordance with plaintiff's complaint; and explaining that "the district court 'is not bound by the class definition proposed in the complaint and should not dismiss the action simply because the complaint seeks to define the class too broadly.' And we also recognize that the court is empowered … to carve out an appropriate class – including the construction of subclasses.")(citing, *inter alia,* 7B Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure* § 1790, at 270-71 (1986)).

The court therefore finds it appropriate to consider Plaintiffs' request for declaratory judgment on a class basis. In view of the requested declarations and their application to the proposed Sub-Classes (as set out above), for purposes of Count I, the court will certify the Class under Rule 2-231(b)(2) and will likewise certify Active, Retired, and Retirement-Eligible Sub-Classes, each of which individually satisfies Rule 2-231(b)(2).[16]

2. Liability – Counts II, III and IV

The court agrees with the parties that prosecution of separate actions by individual Class members against the City "would create a risk of inconsistent or varying adjudications with respect to individual members of the class that would establish incompatible standards of conduct for" the City with respect to its contract obligations to Class members and whether it was entitled to make the changes to the Plan brought about through enactment of Ordinance 10-306. Because the parties' rights and obligations depend a great deal upon a given Plan member's employment/retirement status as of the effective date of 10-306 (*see* Memorandum Opinion issued January 2, 2018), for purposes of Counts II, III and IV, the court will certify Retired, Retirement-Eligible, and Active Sub-Classes (for Counts II, III and IV, respectively), each of which individually satisfies Rule 2-231(b)(1)(A).

[16] It would also be appropriate to certify a Declaratory Judgment Class divided into Active, Retired, and Retirement-Eligible Sub-Classes. Given that Plaintiffs have already pleaded Counts II through IV by proposed Sub-Class, the court will instead certify each Sub-Class under (b)(2) for purposes of Count I. Regardless, the same end is reached.

3. Relief – Counts II, III and IV

Plaintiffs' demands for relief in Counts II through IV include monetary damages and equitable relief. Although Counts II through IV all recite the same general categories of requested relief,[17] the nature of requested relief (*i.e.*, monetary versus equitable) and the specific measure and method of application of the requested relief depend in large measure upon which Sub-Class a Class member falls into and the particularized alleged harms at issue for each Sub-Class. For example, the Active Sub-Class (Count IV) demands a return to the pre-10-306 terms of service for retirement eligibility and average final compensation ("AFC"), and money damages for increased Plan contributions, while the Retired and Retirement-Eligible Sub-Classes focus largely on post-retirement benefit increases.[18] For these reasons, as to Plaintiffs' requested relief in Counts II through IV, the court will evaluate the proposed Sub-Classes individually for class maintenance under Rule 2-231(b).

a. Active Sub-Class

As set forth above, through Count IV, the proposed Active Sub-Class seeks predominantly equitable relief in the form of a return to the pre-10-306 Plan for purposes of terms of service, AFC, contribution rates and other features of the Plan. The Active Sub-Class also demands monetary damages for increased member contributions (from six percent of regular pay to seven percent effective July 1, 2010, and increasing by one percent annually to reach 10% of regular pay

[17] "Plaintiffs respectfully request … judgment … and … monetary damages in an amount to be determined at trial, equitable relief, specific performance, attorneys' fees, costs, and interest." Amended Complaint, *ad damnum* for Counts II, III, and IV, pp. 56, 57 and 58.

[18] This description is intended only to draw out differences in requested relief for purposes of discussion in the context of 2-231(b) and is not a finding of the court regarding Plaintiffs' demand for relief.

effective July 1, 2013) and other alleged entitlements. The requested monetary relief is incidental to, and flows directly from, the requested equitable relief (including the declaratory relief requested in Count I). Further, any money damages for which the City may be liable to members of the Active Sub-Class do not necessitate individualized treatment and proof, but rather are subject to class-wide determination and calculation, rendered yet even more manageable given the closed nature of the class. Therefore, the court will certify the Active Sub-Class under 2-231(b)(1)(A) for purposes of all relief requested through Count IV. *See Newburg*, §§ 4.13-4.15, on the availability of money damages in a (b)(1)(A) class; *see also Harris v. Koenig*, 271 F.R.D. 383 (D.D.C. 2010), and *Hilton v. Wright*, 235 F.R.D. 40 (N.D. N.Y. 2006) (same).

b. Retired and Retirement-Eligible Sub-Classes

The Retired and Retirement-Eligible Sub-Classes, through Counts II and III respectively, demand relief that focuses chiefly on post-retirement benefit increases through the pre-10-306 Variable Benefit. Specifically, these Sub-Classes demand, alternatively, specific performance in the form of reinstitution of the Variable Benefit or money damages equal to the present value of the Variable Benefit increases to which these members (or their beneficiaries) would be entitled pursuant to the pre-10-306 Plan (going forward post-judgment).[19] These Sub-Classes also demand money damages in the amount of the Variable Benefit each would have received (or been entitled to receive in the case of the Retirement-Eligible Sub-Class members) from the effective date of 10-306 through the date of final judgment.[20] The City cautions that "the Court should consider whether the plaintiffs' proposed damages model is susceptible to class-wide proof in determining

[19] Based on the court's ruling as to the proper measure of same.
[20] Again, determination of that figure for each member of these Sub-Classes depends on the court's decision regarding the applicable measure of same.

whether there are common issues, and in determining whether common issues predominate under paragraph (b)(3), in particular." (City Response, p 11.) As set forth above, the court is satisfied by a preponderance of evidence that all pre-requisites of Rule 2-231(a) are met for the proposed Class and Sub-Classes. With the benefit of the testimony and related evidence submitted on the issue of damages during the 2018 trial, the court finds by a preponderance of evidence that all requested relief requested through Counts II and III for the Retired and Retirement-Eligible Sub-Classes is susceptible to class treatment pursuant to Rule 2-231(b)(3).[21, 22]

> Maintenance under (b)(3) is not appropriate unless:
>
> > the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions, (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class, (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum, (D) the difficulties likely to be encountered in the management of a class action.

[21] The court is also persuaded that the Retired and Retirement-Eligible Sub-Classes satisfy Rule 2-231(b)(1)(A) for purposes of relief (through Counts II and III). Courts are well-advised to exercise caution in certifying a class through (b)(1)(A) where the risk of "incompatible standards of conduct" is rooted in the rabbit warren of individualized damages, but this case does not present that concern. The risk of "incompatible standards of conduct" presented in the instant case is rooted in the City's statutory obligation to treat all Class members alike pursuant to a statutory public pension contract. *See, e.g., Harris v. Koenig*, 271 F.R.D. 383, 393-95 (D.D.C. 2010), and *Hilton v. Wright*, 235 F.R.D. 40, 53-54 (N.D. N.Y. 2006) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997)). In the court's view, the weight and proper evaluation of authority establishes that money damages are appropriate and available through (b)(1)(A) maintenance; Rule 2-231(e)'s allowance for notice alleviates concern regarding the due process rights of absent class members. In any event, the court will certify the Retired and Retirement-Eligible Sub-Classes for purposes of requested relief pursuant to 2-231(b)(3) because it seems overall a happier fit than (b)(1)(A) and, for whatever it's worth, in line with a more customary class maintenance scheme involving money damages.

[22] The forms and measures of relief and damages are addressed in Section VII, *infra*.

MD. RULE 2-231(b)(3).[23]

i. Predominance – Rule 2-231(b)(3)

The predominance requirement is similar to, but more stringent than, the commonality requirement of Rule 2-231(a). It demands that questions of law or fact common to the class predominate over individual issues. Its purpose is to flesh out whether class members' interests are "sufficiently cohesive to warrant adjudication by representation" such that judicial efficiencies will be had by litigating claims in the aggregate versus individually. *Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 623 (1997); *see also Tyson Foods, Inc. v. Bouaphakeo,* ___ U.S. ___, 136 S. Ct. 1036, 1045 (2016)(quoting *Newburg,* § 4.49 to instruct that the "predominance inquiry 'asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues.'").

The predominance test breaks down into a two-step inquiry: 1) what are the common issues; and 2) do they predominate? *Newburg,* § 4.50; *Coleman through Bunn v. District of Columbia,* 306 F.R.D. 68, 85 (D. D.C. 2015). In the first inquiry, the court examines the nature of the evidence to evaluate whether it is susceptible to general, class-wide proof or tends to require presentations that will vary from class member to class member. In the second inquiry, the court does a qualitative comparison of issues subject to common proof versus those necessitating

[23] Classes managed under Rule 2-231(b)(1) and (2) are not put through the predominance and superiority tests presumably because the very premise of those portions of the rule assumes an inter-relatedness, a cohesion, among class members that may not be present among class members who are joined solely by virtue of a money damages pursuit, which is typically the driving force behind a (b)(3) certification. In the instant case, the fact that the court has determined maintenance is proper under (b)(1) and (2) (for breach of contract liability and declaratory relief, respectively) fairly obviates the purpose of the predominance and superiority tests woven into (b)(3). Regardless, the court will complete the necessary examination.

individualized proof to conclude whether common issues predominate. *Tyson Foods*, 136 S. Ct. at 1045; *Coleman*, 306 F.R.D. at 85.

When "one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members." 7AA C. WRIGHT, A. MILLER, & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 1778, pp. 123-24 (3d ed. 2005). "In actions for money damages under Rule 23(b)(3), courts *usually* require individual proof of the amount of damages each member incurred. When such individualized inquiries are necessary, if common questions predominate over individual questions as to liability, courts generally find the predominance standard of Rule 23(b)(3) to be satisfied." *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 428 (4th Cir. 2003)(quoting 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 23.46[2][a] (1997))(emphasis in original).

> Common questions do not predominate if "a great deal of individualized proof" would need to be introduced or "a number of individualized legal points" would need to be established after common questions were resolved. Nor do common questions predominate if, "as a practical matter, the resolution of … [an] overarching common issue breaks down into an unmanageable variety of individual legal and factual issues." Common issues will predominate if "individual factual determinations can be accomplished using computer records, clerical assistance, and objective criteria – thus rendering unnecessary an evidentiary hearing on each claim." In addition, common issues predominate when adding more plaintiffs to the class would minimally or not at all affect the amount of evidence to be introduced.

Newburg, § 4.50 (citations omitted).

The court finds that common issues predominate across the Retired and Retirement-Eligible Sub-Classes. The nature of the claims (Counts II and III for breach of contract) is subject to class-wide proof both with respect to the existence and terms of a contract (the pre-10-306 Plan) and the alleged breach of that contract (effected through Ordinance 10-306 and underfunding of

the Plan). The requested relief is also subject to class-wide (and sub-class-wide) treatment inasmuch as money damages for lost (*i.e.*, past) post-retirement benefit increases are subject to calculation through a formula; specific performance in the form of reinstitution of the Variable Benefit would be a class-wide (and sub-class-wide) remedy, as would the alternative of present value money damages through a formula selected by the court based on evidence and argument presented at trial. With respect to proving, for example, when a Retired or Retirement-Eligible Sub-Class member satisfied all conditions precedent to receipt of the Variable Benefit, and the like, the court notes as a practical matter that the parties have a history of stipulating to such evidence, and, in any event, this type of evidence is provable through clerical and computer records. *See Newburg*, § *4.50, supra.* Qualitatively, common questions clearly outweigh individual issues, which are largely, if not entirely, confined to populating the variables in a damages formula. *See supra*, FEDERAL PRACTICE AND PROCEDURE, § 1778, pp. 123-24; *Gunnells*, 348 F.3d at 428.

ii. Superiority – Rule 2-231(b)(3)

The superiority test requires the court to consider whether litigation through representatives (a class action) is a better mechanism than available alternatives for the fair and efficient adjudication of the dispute. Rule 2-231(b)(3) calls upon the court to consider four factors in conducting this evaluation: "(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions, (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class, (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum,

[and] (D) the difficulties likely to be encountered in the management of a class action." MD. RULE 2-231(b)(3).[24]

- *(A) The interest of members of the class in individually controlling the prosecution or defense of separate actions.*

Plaintiffs represent that "[m]embers of the proposed Class have not expressed a strong interest in individual litigation" and the City does not challenge that. (Motion, p. 33.) The court is aware of no individual class member who wishes to pursue or control a separate action.

- *(B) The extent and nature of any litigation concerning the controversy already commenced by or against members of the class.*

Plaintiffs represent that "no other party has brought suit regarding these issues" and the City does not challenge that. (Motion, p. 33.) The court is aware of no other litigation concerning this controversy.

- *(C) The desirability or undesirability of concentrating the litigation of the claims in the particular forum.*

At present, this court is the only available forum. This dispute has been litigated since 2010 (as a class action since 2011), beginning in the United States District Court for the District of Maryland, which (by order issued July 22, 2016) declined to extend supplemental jurisdiction over Plaintiffs' state law breach of contract claims (as set forth in more detail in the Memorandum Opinion issued January 2, 2018, p. 3). Concentration of the litigation will inure to the benefit of

[24] It is generally accepted that the four factors apply to the superiority test, not the predominance test. Newburg, § 4.64; MANUAL FOR COMPLEX LITIGATION, FOURTH, § 22.921 at 452 n.1478 ("The rule lists four factors that might affect superiority.").

all parties so that final resolution may at long last be had. From the perspective of the court, in view of the crowded dockets of the Circuit Court for Baltimore City, concentrating litigation of the claims is far preferable to expending duplicative judicial and other court resources to reach similar ends in individual cases.

- *(D) The difficulties likely to be encountered in the management of a class action.*

The court neither observes nor predicts difficulties in the management of this case as a class action and none has been suggested.

Upon consideration of the above factors, the court finds that a class action is superior to other means of litigating the parties' disputes. Plaintiffs, therefore, satisfy both the predominance and superiority tests of Rule 2-231(b)(3).

D. Conclusion and Summary of the Class and Sub-Classes

For the reasons set forth above, by accompanying order, the court will grant the Motion for Class Certification identifying a Class and three Sub-Classes, appointing Class and Sub-Class Representatives, and appointing Charles O. Monk, II, Esquire, to serve as lead Class counsel. The Class will be defined as *All members and beneficiaries of the Fire and Police Employees' Retirement System of the City of Baltimore (the "Plan") as of June 30, 2010*. The court will certify the following Sub-Classes:

1. Active Sub-Class to be defined as follows: *All members of the Plan who, as of June 30, 2010, were working and not yet eligible to receive benefits under the Plan.* The Active

Sub-Class will be certified under Rule 2-231(b)(2) for purposes of Count I (Declaratory Judgment) and under Rule 2-231(b)(1)(A) for purposes Count IV (Breach of Contract);

2. Retired Sub-Class to be defined as follows: *All members and beneficiaries of the Plan who, as of June 30, 2010, were entitled to, and receiving, retirement benefits (including line-of-duty and non-line-of-duty disability retirement benefits) under the Plan.* The Retired Sub-Class will be certified under Rule 2-231(b)(2) for purposes of Count I (Declaratory Judgment), under Rule 2-231(b)(1)(A) for purposes of liability under Count II (Breach of Contract), and under Rule 2-231(b)(3) for purposes of relief under Count II (Breach of Contract); and

3. Retirement-Eligible Sub-Class to be defined as follows: *All members of the Plan who, as of June 30, 2010, were eligible to retire but not entitled to receive benefits because they were continuing to work.* The Retirement-Eligible Sub-Class will be certified under Rule 2-231(b)(2) for purposes of Count I (Declaratory Judgment), under Rule 2-231(b)(1)(A) for purposes of liability under Count III (Breach of Contract), and under Rule 2-231(b)(3) for purposes of relief under Count III (Breach of Contract).

The court will appoint the named Plaintiffs to serve as Class Representatives; Plaintiffs Cherry and Lake to serve as Active Sub-Class Representatives; Plaintiffs Houser and Williams to serve as Retired Sub-Class Representatives; and Plaintiff Sledgeski to serve as Retirement-Eligible Sub-Class Representative. The accompanying order will also require Rule 2-231(e) notice to the Retired and Retirement-Eligible Sub-Classes for purposes of relief under Counts II and III, the requisite content of which is set forth in the accompanying order. No other notice shall be required.

III. FINDINGS OF FACT

Having considered all testimony and other evidence in the record, stipulations of the parties,[25] and argument of counsel, and in light of the court's findings on the Motion for Class Certification, the court finds as follows:

1. The Charter of the City of Baltimore confers upon the City the authority to establish and maintain the Plan, a defined benefits plan under which retirement, disability, and death benefits are a function of a formula tied to factors including, without limitation, employee length of service or disability, and employee earnings. (Stipulations of Fact ¶¶ 1, 5, 6, with internal citations to BALT., MD., CHARTER and BALT., MD., CODE art. 22.)[26]
2. In 1962, the Mayor and City Council of Baltimore City adopted the Plan, which was incorporated into Article 22 of the Baltimore City Code. (Stipulations of Fact ¶ 2, with internal citations to BALT., MD., CODE art. 22.)
3. The Plan covers all uniformed officers of the Baltimore Fire and Police Departments, as well as certain other public safety workers. (*Id.* ¶ 7.)
4. Participation in the Plan by covered workers is mandatory during their employment. (*Id.* ¶ 8.)
5. The Plan, at Article 22, Section 36 of the City Code, requires that the City make annual contributions to fund the Plan. (*Id.* ¶ 9.)
6. The City is required to balance its budget. (*Id.* ¶ 27.)

[25] The Stipulations of Fact and Stipulation of Plaintiff Status. *See* footnote 3, *supra*.

[26] The court will endeavor to avoid confusion as to whether citation or reference to Article 22 refers to Article 22 before or after Ordinance 10-306. Where no distinction is made, the reader may assume adoption of the Ordinance did not affect a change in such provision. The full text of Article 22 as it stood prior to Ordinance 10-306 was admitted in evidence as Trial Exhibit ("Trial Ex.") 1.

7. The City operates on a July 1 fiscal year. For example, FY 2011 began July 1, 2010 and closed June 30, 2011. (*Id.* ¶ 28.)

8. The Ordinance of Estimates (the City budget) for FY 2007 was adopted by the City Council and signed by the Mayor on June 16, 2006 (Trial Ex. 96, CAFR for FY 2006). The Ordinance of Estimates for FY 2008 was adopted by the City Council and signed by the Mayor on June 11, 2007. The Ordinance of Estimates for FY 2009 was adopted by the City Council and signed by the Mayor on June 16, 2008. The Ordinance of Estimates for FY 2010 was adopted by the City Council and signed by the Mayor on June 17, 2009. The Ordinance of Estimates for FY 2011 was adopted by the City Council and signed by the Mayor on June 24, 2010.[27]

9. There are three categories of retirement benefit eligibility under the Plan: Service Retirement; Non-Line-of-Duty Disability Retirement; and Line-of-Duty Disability Retirement. (Stipulations of Fact ¶ 13, with internal citations to BALT., MD., CODE art. 22.)

10. Each year, the Plan actuary develops an Actuarial Valuation Report, which sets forth the actuary's opinion and recommendation to the Plan's Board of Trustees (hereafter the "Board") regarding the required annual contribution amount. The Board is responsible for the general administration and operation of the Plan, and enforcement of Article 22. The Actuarial Valuation Report is based on, among other things, the interest rate set forth in Article 22, Section 30 of the City Code, and mortality and other statistical tables accepted by the Board. (*Id.* ¶¶ 9-11.)

[27] The court takes judicial notice of the dates on which the City Council adopted and the mayor signed budgets for FY 2008 through 2011, as such dates are adjudicative facts subject to judicial notice pursuant to Maryland Rule 5-201. These facts may also be considered legislative facts properly noted by the court. MD. RULE 5-201*; Dashiell v. Meeks*, 396 Md. 149, 175 n.6 (2006) (citing *Montgomery County v. Woodward & Lothrop, Inc.*, 280 Md. 686, 711 (1977)).

11. The pre-10-306 Plan included two interest rate assumptions for valuing liabilities: 8.25% for pre-retirement and 6.8% for post-retirement. Prior to the passage of 10-306, those rates had been in place since FY 1995.[28] (Trial Ex. 1, Pre-10-306 BALT., MD., CODE art. 22 § 30(9).)
12. Changes to the Plan can only be made by legislation passed by the City Council and signed into law by the Mayor.
13. Following the Board's approval of the assumptions and methods on which the Actuarial Valuation Report is based, as well as the Plan actuary's recommendation and advice regarding the required contribution, the Board certifies the amount of the City's annual Plan contribution, which is then incorporated into the City's operating budget. (*Id.* ¶ 11.)
14. In 1983, what is referred to as the "Variable Benefit" feature was added to the Plan as section 36A to provide post-retirement cost-of-living benefit increases for retirees and beneficiaries with more than two years of retirement. (Stipulations of Fact ¶¶ 3, 21, with internal citations to pre-10-306 BALT., MD., CODE art. 22.)
15. Prior to Ordinance 10-306, the Variable Benefit was contingent upon the annual investment performance of Plan assets as follows: any and all earnings between 7.5% and 10%, plus half the earnings in excess of 10% (if any), of the two funds that held assets earmarked for retiree payments would be allocated and transferred to the Paid-Up Benefit and Contingency Reserve Funds – the two Plan funds established to hold Variable Benefit assets. The amount of earnings formed the basis to calculate the annual increase to the

[28] From FY 1983 through FY 1984, the pre- and post-retirement rates were six percent. From FY 1985 through FY 1989, the pre-retirement rate was eight percent and the post-retirement rate was 6.75%. From FY 1990 through FY 1994, the pre-retirement rate was 8.5% and the post-retirement rate was seven percent. (Trial Ex. 357.)

pension benefit to be paid for the expected life of each eligible member or beneficiary in accordance with the statutory rate. (*Id.* ¶¶ 22-23, with internal citations to pre-10-306 BALT., MD., CODE art. 22 (2009).)

16. Before the Variable Benefit was instituted in 1983, the Plan had no provision for post-retirement benefit increases which meant that Plan members received raises on an *ad hoc* basis after lobbying and winning over the City Council. (10/30/18 AM Trial testimony of former Board Chair, Fire Captain Stephan Fugate, pp. 42-43.)

17. Robert Bolton of Bolton Partners actuarial firm, who served as an actuarial consultant to the fire and police unions for many years, presented the concept of a post-retirement cost of living increase derived from shared excess earnings to a pension committee of fire and police workers. Bolton Partners' proposal eventually became the Variable Benefit of Article 22.[29] (*Id.* at 44; 11/1/18 PM Trial testimony of Thomas Taneyhill, pp. 133-34.)

18. When what became the Variable Benefit was presented for consideration by the City Council, the City Council was told the Variable Benefit would provide Plan members post-retirement benefit increases and "was not really going to cost the system anything." (10/30/18 AM Trial testimony of former Board Chair, Fire Captain Stephan Fugate, p. 46.)

19. Variable Benefit payments were not guaranteed by the City. (The pre-10-306 Code enunciated that any benefit increase "is not and does not become an obligation of the City of Baltimore.") Instead, once the retiree assets reached the defined performance threshold

[29] Plaintiffs' expert witnesses Thomas Lowman and Colin England are employed by Bolton Partners. Mr. Lowman is the Chief Actuary at Bolton Partners and testified in Plaintiffs case as an expert actuary in public pension plans including the Actuarial Standards of Practice. Colin England is a Consulting Actuary at Bolton Partners and testified in Plaintiffs' case as an expert in "defined benefit plans sponsored by state and local governments, and gainsharing features of public plans." (10/31/18 AM Trial testimony of Thomas Lowman, pp. 115, 124; 10/30/18 PM Trial testimony of Colin England, p. 12; Trial Ex. 285, *curriculum vitae* of Mr. England.)

to invoke the Variable Benefit, such enhanced pension benefits would be paid so long as the Paid-Up Benefit and Contingency Reserve Funds permitted. (*Id.* ¶ 24.)

20. "One hazard with the [Variable Benefit] is that investment performance is calculated each year. Each year is new and stands on its own. Negative performance (performance below 7.5%) is not carried forward and averaged with future years." (Trial Ex. 65, email correspondence of May 28, 2009, from Thomas Taneyhill (Plan Executive Director) to Douglas Gallagher (City Finance Director).)

21. Following adoption of the Variable Benefit in 1983, fire and police unions continued with success to lobby the City Council for enhanced pension benefits, including a reduction in the basic term of service requirement, three increases in the basic pension benefit, improved transfer credits, military credits, the Deferred Retirement Option Plan, and the Benefit Improvement Fund/Employer Reserve Fund system. (10/30/18 AM Trial testimony of Stephan Fugate, pp. 46-50; *see infra* ¶¶ 22-32.)

22. July 1, 1996 marked the start of the Deferred Retirement Option Plan, commonly referred to as "DROP." *See* BALT., MD., CODE art. 22, § 36B.

23. DROP was developed to enable retirement-eligible members to continue in active service without sacrificing the pension benefits they would have received in retirement. (DROP also enabled the City to retain and benefit from the skills and experience of senior F&P members.) Under the original DROP, those with 20 or more years of service (and therefore eligible for normal Service Retirement) who remained active in service received their regular salaries plus the sum of what would have been their retirement benefit. The would-be retirement benefit was deposited into an interest-bearing "DROP account" held for the benefit of the member until he or she retired. Upon a DROP member's retirement, the

DROP account funds were available to the member for full withdrawal or as an add-on to monthly benefit payments. (Stipulations of Fact ¶ 39.)

24. DROP was adopted by the City at the request of Plan members' labor organizations. (10/30/18 AM Trial testimony of Stephan Fugate, p. 22; 11/1/18 PM Trial testimony of Thomas Taneyhill, p. 135.) When the unions proposed DROP to the City Council, lobbyists represented that it would cost the City a one-time payment of $6 million. (10/30/18 AM Trial testimony of Stephan Fugate, pp. 48-49; 11/1/18 PM Trial testimony of Thomas Taneyhill, p. 135.) In its original machination, DROP was adopted on a five-year trial basis entitling the City to discontinue the program if cost estimates did not bear out. (11/1/18 PM Trial testimony of Thomas Taneyhill, pp. 137-38.)

25. At the conclusion of the initial five years, the program was not changed. Later review established that the cost of DROP to the City far exceeded estimates. In 2005, the City made "[l]ump sum DROP payments" totaling $22,253,341. In 2006, that number was $14,025,599. (Trial Ex. 96, CAFR FY 2006.) Rather than discontinue the program altogether, the City renegotiated with Plan members (through labor organization representatives) to develop DROP 2 in 2009. (10/30/18 AM Trial testimony of Stephan Fugate, pp. 22-23; *see infra* ¶ 26.)

26. On August 26, 2009, the City adopted a modification to the DROP benefit structure, which is commonly referred to as "DROP 2." As set forth below, Ordinance 10-306 modified DROP 2. (Stipulations of Fact ¶¶ 39-41, with internal citations to pre-10-306 BALT., MD., CODE art. 22 (2009).)

27. Prior to Ordinance 10-306, the Service Retirement Benefit for a member retiring with more than 20 years of service was 50% of the member's AFC as then (*i.e.*, before adoption of

Ordinance 10-306) defined in Article 22, Section 30(11). (Stipulations of Fact ¶¶ 14, 16, with internal citations to pre-10-306 BALT., MD., CODE art. 22.)

28. Prior to Ordinance 10-306, members who commenced employment prior to July 1, 2003, were eligible for Service Retirement upon attaining age 50 or upon accruing 20 years of service. Members who commenced employment on or after July 1, 2003, were eligible for Service Retirement upon attaining age 50 with 10 years of service as a contributing member or upon accruing 20 years of creditable service with 10 years of service as a contributing member. (*Id.* ¶ 15.)

29. Prior to Ordinance 10-306 (and following enactment of Ordinance 93-262), active Plan members contributed six percent of their regular annual compensation to the Plan via automatic pay deduction. (*Id.* ¶ 17.)

30. Line-of-Duty Disability Retirement benefits are provided to members who are incapacitated for the performance of duty as defined in Article 22, Sections 34(e-1) and (f-1). As of the effective date of Ordinance 10-306, 720 of 4,565 retired members were receiving Line-of-Duty Disability Retirement benefits as defined in Section 34(e-2) or (f-2), depending on the nature and extent of the member's incapacitation. (Stipulations of Fact ¶¶ 18, 19, with internal citations to BALT., MD., CODE art. 22; Trial Ex. 40, The Fire and Police Employees' Retirement System of the City of Baltimore, Actuarial Valuation Report for June 30, 2010 (dated October 2010).)

31. Non-Line-of-Duty Disability Retirement benefits are available for members who have completed five years of service and are incapacitated as defined in Article 22, Section 34(c). As of the effective date of Ordinance 10-306, 290 of 4,565 retired members were

receiving Non-Line-of-Duty Disability Retirement benefits as defined in Section 34(d). (Stipulations of Fact ¶ 20.)

32. In 1997, the City Council passed Ordinance 97-164, which modified the Plan by creating the Benefit Improvement Fund ("BIF"), the Employer Reserve Fund ("ERF"), and the Minimum Stabilization Fund. This legislation "established actuarial reserves in which 'excess unallocated earnings' (gains and losses) were accumulated each year separate from the reserves maintained for funding purposes. The accumulated gains and losses were shared by the City and the [Plan's] members according to a formula in the provisions." Specifically, the ERF "could be used by the City to reduce or eliminate its required contributions to the [Plan]." Likewise, the BIF could be used by Plan members to provide contribution relief and "to improve benefits." (Trial Exs. 96 and 120, CAFR FY 2006.) Specific portions of the BIF and the ERF went toward the Minimum Stabilization Fund, which was intended as a safety net; its funds were "restricted in use for application against future deficit earnings of the System." Pre-10-306 BALT., MD., CODE art. 22, § 36(j)(6)-(7).

33. For the first several years, the BIF and the ERF operated as intended to everyone's benefit. During that period, the City took advantage of excess earnings to reduce or eliminate its contribution requirements (these elections became known as "contribution holidays") and Plan members took advantage by "purchasing" benefit improvements. The dot-com or tech bubble burst of the early aughts had a devastating impact on the BIF, the ERF, and the Minimum Stabilization Fund. "As of June 2005, accumulated net losses amounting to $412.8 million remained." (Trial Ex. 120, CAFR FY 2006.). The Minimum Stabilization Fund was wiped out, and the BIF and the ERF absorbed about 80% of the remaining losses.

34. The BIF/ERF legislation included a sunset provision of June 30, 2005, which required the Board to apply the accumulated losses (the negative combined balance) "in accordance with an appropriate asset valuation method, as recommended by the system's actuary" – which meant, in reality, that the City bore responsibility for the entirety of the negative combined balance. Pursuant to Ordinance 97-164, Plan members did not share in the losses and retained the financial benefit provided while the BIF and the ERF functioned in the black. In other words, Plan members were not required to make contributions the BIF had entitled them to avoid. BALT., MD., CODE art. 22, § 36(14).

35. The Plan provides for phased-in recognition of investment gains and losses for purposes of actuarial valuation of the Plan to regulate the City's annual funding (contribution) requirement. *See* BALT., MD., CODE art. 22, § 36(14). This is known as "smoothing." In the wake of the tech bubble burst, and shouldering a negative combined balance of well in excess of $400 million, based on a recommendation by the Plan's actuary, the City implemented two layers of smoothing ("double smoothing") whereby the City phased in the losses over successive 10- and five-year periods. As losses were recognized by the first layer of smoothing (10% for each of the 10 smoothing years), they underwent a second smoothing period of five years (20% for each of the 5 smoothing years). This had the effect of smoothing the tech bubble negative combined balance for actuarial valuation purposes over a 15-year period. (Trial Ex. 120, CAFR FY 2006.)

36. Smoothing is not the same thing as amortizing. Smoothing is a method of phasing in recognition of losses (or gains) for a given year for purposes of the actuarial value of Plan liabilities (or assets) to arrive at the City's annual contribution obligation. Amortization, for this purpose, is the gradual reduction of debt over a given period, allowing the City to

gradually fund its unfunded pension liability. As the BIF/ERF losses were smoothed, they were then amortized over a 20-year open-ended amortization period.

37. There were no Variable Benefit increases paid in 2000, 2001, 2002, 2003 or 2004. (10/29/18 PM Trial testimony of Robert Cherry, p. 51; Trial Ex. 114, January 2, 2004 Report to Ad Hoc Task Force of the Plan Board of Trustees.)

38. The conversion rates used to calculate the Variable Benefit payments effective January 1, 2006, 2007 and 2008 were not tethered to the 6.8% post-retirement earnings assumption rate (which correlates to the City's contribution obligation), because, according to the advice of the Plan actuary (Douglas Rowe of Mercer) and investment advisors at the time, the bond market (in which post-retirement assets were largely invested for purposes of stability) was no longer yielding annual returns at that level. Further, the Plan actuary determined that the Plan did not require the conversion rate to be tethered to the earnings assumption rate, and so advised the Board. Therefore, the annuity conversion rates for 2006 through 2008 were, respectively, 5%, 5.4%, and 5.25%, reflecting the market rates for bonds and similar products in those years. The Board approved this method of Variable Benefit calculation. For example, at the November 2005 meeting of the Board, chaired by Captain Stephan Fugate (*see* ¶ 43, *infra*), the Board unanimously approved use of the market-based conversion rate of 5% (instead of 6.8%) for calculation of the Variable Benefit effective January 2006. (Trial Ex. 32, The Fire and Police Employees' Retirement System of the City of Baltimore, Actuarial Valuation Report for June 30, 2004 (dated October 2004); Trial Ex. 33, The Fire and Police Employees' Retirement System of the City of Baltimore, Actuarial Valuation Report for June 30, 2005 (dated November 2005); Trial Ex. 36, The Fire and Police Employees' Retirement System of the City of Baltimore,

Actuarial Valuation Report for June 30, 2006 (dated, and revised in, November 2006); Trial Ex. 37 The Fire and Police Employees' Retirement System of the City of Baltimore, Actuarial Valuation Report for June 30, 2007 (dated October 2007); Trial Ex. 218, letter of May 14, 2009, from Douglas Rowe to Thomas Taneyhill; Trial Ex. 232, Board meeting minutes of November 15, 2005, p. 5.)

39. In 2009, acting on behalf of the fire and police labor unions, Thomas Lowman of Bolton Partners,[30] by letter to Thomas Taneyhill, questioned use of a market-based conversion rate for calculation of the Variable Benefit. Mr. Taneyhill requested that Plan actuary Douglas Rowe address the matter, which Mr. Rowe did by correspondence to Mr. Taneyhill in May 2009 in which Mr. Rowe rejected the notion that the Plan required the conversion rate to be tethered to the earnings assumption rate, and further disagreed that it made sense to do that. (Trial Ex. 218.) Mr. Rowe's approach, which had been unanimously approved by the Board (chaired by Fire Captain Fugate) in 2005, was again documented in Mercer's (Mr. Rowe's) November 2009 Multi-Year Projections report presented to the Board. (Trial Ex. 223, confirming use of a five percent Variable Benefit conversion rate at p. 8 and continuing throughout to recommend a downward adjustment to the post-retirement assets earnings assumption rate from 6.8% to five percent.)

40. Beginning in February 2002, the Plan's actuary, Douglas Rowe, concerned about the negative impact of the Variable Benefit on the Plan's assets, advised the City to consider alternatives to the Variable Benefit and "whether to lower the assumed investment return for retirees," which would have the effect of increasing the City's annual Plan contribution.

[30] As mentioned earlier, Mr. Lowman would later testify at trial as an actuarial science expert on behalf of Plaintiffs.

Beginning in 2003 and continuing through 2009, Mr. Rowe specifically recommended reducing the post-retirement earnings assumption rate, which was 6.8% during that period. "The problem was that the Variable Benefit provisions were taking too many assets away from the base benefits . . . . And that would occur because of . . . volatility in the markets." The Variable Benefit was drawing assets away from the assets required to pay basic retirement benefits and "[t]here wouldn't be enough money to pay benefits over time." (Stipulations of Fact ¶ 25; Trial Ex. 6, Letter of February 11, 2002, from Douglas Rowe to Thomas Taneyhill; Trial Ex. 24, Actuarial Review and Recommended Assumption Changes to the Fire and Police Employees' Retirement System dated January 2003; Trial Ex. 256, Federal Litigation testimony of Thomas Taneyhill, pp. 8-26; Trial Ex. 218, letter of May 15, 2009, from Douglas Rowe to Thomas Taneyhill; 11/1/18 PM Trial testimony of Thomas Taneyhill, pp. 152-53.)

41. On January 2, 2004, a report prepared by Thomas Taneyhill, Executive Director of the Plan, was presented to the Plan's Board of Trustees Benefits Study Task Force to "assist the Benefits Study Task Force to understand" how the Variable Benefit worked, and to address "issues" regarding the Variable Benefit. The Task Force was chaired by Vernon Wilhelm, President of the Baltimore Retired Police Benevolent Association, Inc. Among other things, the Report states that the City's contribution to the Plan increased from $34.4 million in FY 2003 to $48.3 million in FY 2005. The report advises the Task Force, and the court finds: "The System's actuarial consultant has advised the F&P Board of Trustees that the current plan provisions for post-retirement increases are harmful to the System. If the current provisions remain in place, there could be insufficient assets to provide the base retirement benefits." (Trial Ex. 114, January 2, 2004 Report to Ad Hoc Task Force.)

42. Despite Mr. Rowe's repeated recommendations over several years, the Board did not approve a reduction in the post-retirement assets earnings assumption rate until 2009. Beginning in 1995, the earnings assumption rate on post-retirement assets stayed at 6.8% until the Variable Benefit was removed altogether by way of Ordinance 10-306. Because the post-retirement earnings assumption rate was not lowered, the City did not owe or make corresponding increased contributions to the Plan.

43. Beginning in 1974, Stephan Fugate was employed in the Baltimore City Fire Department for 39.5 years and retired holding the rank of officer. During his tenure, he held membership in Local 734 and, upon promotion to the rank of officer, in Local 964 union. Captain Fugate was president of Local 964 for 15 years. (10/30/18 AM Trial testimony of Stephan Fugate, pp. 15-19, 42.) For 12 years beginning July 1, 1998, Captain Fugate served as a trustee on the Plan Board and chaired the Board for 10.5 of those 12 years. (*Id*. at 29-32.)

44. By letter dated December 8, 2006, from Captain Fugate warned "All Members, Retirees, and Beneficiaries" of the Plan that "we have clearly reached a point where changes must be considered to maintain basic Plan solvency. As mentioned in this Annual Report a year ago, changes to DROP and the current Variable [Benefit] will soon be considered and we trust that ALL plan participants will follow the legislative process and stay informed through their various representative groups." (Trial Ex. 120, CAFR FY 2006.)

45. In 2004, Plaintiff Cherry was elected vice-president of Baltimore's lodge of the Maryland Fraternal Order of Police. In 2008, he became its president. In that capacity, Mr. Cherry advocated for the interests of the union members before the Mayor's staff and administration, as well as the City Council, the members of which he knew on a first-name

basis. Further, Mr. Cherry "made it clear to the City Council members that we were speaking to what the concerns were from the police officers that were protecting them and were employed by the Baltimore Police Department." (10/29/18 PM Trial testimony of Robert Cherry, pp. 43-50.)

46. The City and the unions came to an agreement on reductions in DROP and, in August 2009, the City Council unanimously passed legislation amending DROP. (*See supra* ¶¶ 22-26.)

47. Prior to adopting Ordinance 10-306, the City proposed several legislative amendments to the Plan's post-retirement benefit increase structure. Those amendments failed due to lack of support, including from Baltimore police and firefighter unions. (*See, e.g.,* Trial Ex. 369, March 2006 Proposed Amendments to Post-Retirement Benefit Increases; Trial Ex. 131, October 2008 City Council Bill 08-0220; 11/01/18 PM Trial testimony of Thomas Taneyhill, pp. 157-64.)

48. "At the beginning of FY 2009, the City closed a $68.5 million deficit by imposing significant cuts. …Because of the severe decline in tax revenues that resulted from the Great Recession in 2008 and 2009, the City confronted a new, $120 million deficit going into FY 2010." The City addressed the FY 2010 crisis with additional cuts to core services, but "unforeseen reductions in State aid and revenue shortfalls resulted in an additional, mid-year deficit of $60.2 million" which necessitated more cuts including unpaid furloughs. The record snow fall that season required still more cuts to City services and personnel, and use of $30 million of emergency reserves. As a result of these conditions, "the City confronted a $121 million budget deficit for FY 2011." "In spring 2010, the City faced its third consecutive year of declining revenues and multi-million dollar budget deficits as it prepared its budget for FY 2011." The FY 2011 recommended budget

included a $101 million contribution for the Plan, but the deficit did not take into account the "additional $64 million contribution that the City would be required to make if it retained the Variable Benefit and followed the Board's recommendation to reduce the investment-return assumption on certain assets." As a result, the City eked out still more cuts and raised $50 million with new taxes. (Stipulations of Fact ¶¶ 26, 29-33.)

49. In April 2009, then City Council President Stephanie Rawlings-Blake sought advice from the Greater Baltimore Committee (the "GBC") on how the Plan might be fixed. In response, the GBC formed a Fire and Police Pension Task Force, which produced a 33-page report and recommendations (exclusive of attachments) regarding modifications to the Plan to rectify what it observed was an "urgent" crisis. (Trial Ex. 42, Legislative File for Baltimore City Ordinance 10-306 at Tab 13, GBC report titled *Task Force on Sustainable Funding of Baltimore City's Fire and Police Pension System*.)

50. In May 2009, the Board (through Plan Executive Director Thomas Taneyhill) made it known to City Finance Director Edward Gallagher that the Board would accept the Plan actuary's[31] recommendation to lower the post-retirement earnings assumption rate at its October meeting: "Perhaps more convincing on the need to terminate the V/B provisions and work towards a less costly substitute, if amending legislation is not passed by the time the 6/30/2009 actuarial valuation is completed in October 2009, the F&P Board will have no choice but to request an additional $62.5 million to pay for the existing V/B provisions. If the V/B provisions are not terminated, the projected contribution due July 1, 2010 will be $168.5 million." (Trial Ex. 65, email correspondence of May 29, 2009, between Messrs. Taneyhill and Gallagher.) By email sent eight minutes later, Mr. Taneyhill advised City

[31] Douglas Rowe of Mercer, LLC.

Deputy Budget Director Thomas Driscoll (copying Mr. Gallagher) that the City's estimated Plan contribution for FY 2011 was $106 million "if the variable benefit provisions are terminated and no other post-retirement increase provisions are put in place" and $168.5 million "if the variable benefit provisions are not terminated." The $168.5 million figure accommodated Mr. Rowe's recommendation to lower the post-retirement earnings assumption rate from 6.8 to five percent. (Trial Ex. 374, email correspondence of May 29, 2009, from Thomas Taneyhill to Messrs. Driscoll and Gallagher.)

51. The GBC report confirmed what everyone knew to be true (and what the court finds was true at the time): "The City of Baltimore is facing a serious fiscal challenge. Current contributions to fund the [Plan] are inadequate to fully cover the existing and anticipated liabilities required under the pension system." Quoting from the CAFR for the year ended June 2009 (authored by Plan Executive Director Thomas Taneyhill and Plan Accounting Manager David A. Randall), the report explained that the combination of "'negative investment performance of 21.9%, the recognition of additional accumulated losses from the [BIF and the ERF] used in previous years to provide benefit improvements to members and retirees, contribution reductions by the City, and costly post-retirement benefit increase provisions [(the Variable Benefit)], will drive the employer contribution requirements to unsustainable new highs.'" (Trial Ex. 42, Legislative File for Baltimore City Ordinance 10-306, Tab 13, GBC report titled *Task Force on Sustainable Funding of Baltimore City's Fire and Police Pension System*, p. 3.)

52. The GBC noted the stark contrast between the Plan's actuarial valuation, which indicated a funded ratio of 84%, and its market value of 58.2%, and warned (and the court finds) that these problems threatened the City's financial stability, its ability to provide "basic public

services," and will "ultimately threaten the ability of the [Plan] to fulfill the commitments that have been made to retirees." The report further averred that a failure to fix the Plan might impair the City's ability to attract new fire and police employees, as well as new businesses, and "may increase the cost of borrowing – a consequence that could result in higher taxes or further budgetary pressures on the City." (*Id.* Tab 13, pp. 3-5.)

53. Following the GBC report, when it appeared inevitable that legislative changes would be made, police and firefighter union representatives acknowledged that the City could not afford to repair the funding level of the Plan by reducing the post-retirement assumed rate of return to five percent. The unions (through Thomas Lowman) proposed scrapping the Variable Benefit entirely in favor of plan that included a fixed two percent COLA[32] and increasing employee contribution requirements by three percent (to nine percent) spread over an equal number of years. Ultimately, the unions amended their proposal in June 2010 to include extending the 20-year open, level dollar amortization period (then in place) to a 30-year open, level percent of pay amortization period; the unions proposed not only to extend the amortization period, but also to change the method in a way that would allow for smaller funding payments at the front end of the period, further exacerbating the City's unfunded Plan liabilities. (Trial Ex. 46, 2009 Union Proposal for Funding Reform; 10/29/18 PM Trial testimony of Robert Cherry, pp. 32-38, 106-107.) The City found the unions' overall proposal unappealing because it did not repair the problem but rather

[32] Under the unions' 2009 proposal, the COLA would bump up to two and a half percent upon the earlier of the Plan being funded at 75% (presumably market not actuarial value) or January 1, 2031. (Trial Ex. 46, 2009 Union Proposal for Funding Reform, p. 5.) (The Union Proposal for Funding Reform is also known as the "Six-Point Plan.")

delayed it for another day and another administration. (11/5/18 AM Trial testimony of former Mayor Stephanie Rawlings Blake, p. 38.)

54. In October 2009, the Board voted to adopt the Plan actuary's recommendation to reduce the post-retirement earnings assumption rate from 6.8 to five percent. (Trial Ex. 129, Minutes of Board meeting of October 13, 2009.)

55. Edward Gallagher was concerned that if the City did not take legislative measures to modify the Plan by the close of FY 2010, the City's bond rating would be downgraded. (Trial Ex. 103, 1/20/11 Federal Litigation deposition testimony of Edward Gallagher, p. 180.)

56. Then Mayor Rawlings-Blake believed that absent legislative modification of the Plan by the close of FY 2010, the "financial health of the City" would be "changed" because of the City's inability to meet its increased contribution obligation brought about by a drop in the post-retirement assets earnings assumption rate per the Board's recommendation – and the bond rating agencies would view that as "irresponsible."[33] But that was not the impetus for her mayoral approval of 10-306. Mayor Rawlings-Blake believed that 10-306 was necessary to get the City on the path of pension plan sustainability, which was her priority and central objective in signing 10-306 into law. (Trial Ex. 275, 2/2/12 AM Federal Litigation trial testimony of Stephanie Rawlings-Blake, pp. 102-103.)

57. In May 2010, the City presented its Rating Agency Presentation for purposes of the City's bond rating. The presentation described the City's "FY 2010 Budget Issues" and "Budget Actions" to include: 1) a "$60.2 million operating shortfall" which "threatened core services;" 2) December 2009 revised revenue projections of "an $88 million shortfall for

[33] The transcript reads "responsible." This appears to be a transcription error.

the combined General Fund and Motor Vehicle Fund … due primarily to deteriorating income tax revenue;" 3) "Cleanup from historic snowstorms … cost the City an estimated $33 million;" 4) September 2009 "$60.2 million Post-Adoption Budget Reduction Plan" including $20.5 million from a hiring freeze, $13.5 million from furloughed workers, $12.9 million in various agency cuts, and $2.3 million and $11 million from PAYGO capital and an undesignated fund balance, respectively; 5) January 2010 "additional $13 million of reductions in agency spending;" 6) "[T]hird quarter budget projection shows a $45 million shortfall for the two funds;"[34] 7) including $20.5 million resulting from a hiring freeze, $13.5 million from furloughed workers, and $12.9 million in various agency cuts. (Trial Ex. 88, The Mayor and City Council of Baltimore Rating Agency Presentation, May 2010, pp. 13-15.)

58. The Rating Agency Presentation included bullet points of the FY 2011 proposed budget and plan, including "$121 million combined General Fund and Motor Vehicle Fund budget gap" and identified various "cost savings" to include continuation of the 2010 furlough plan, fire company closures, elimination of certain police units, recreation center closures, reduction of street repairs, cessation of bulk trash removal, and "abolish[ment of] nearly 1,000 positions." (*Id.* at 24-26.)

59. The Rating Agency Presentation included a section titled "Pension Reform," which itemized GBC's core recommendations, described the pending "Reform Bill" that was submitted to the City Council, and included a graph of the City's annual "Pension Contributions" beginning with FY 2001. The FY 2011 contribution is identified as $101

[34] "Two funds" refers to the Motor Vehicle Fund and General Fund.

million. (*Id.* at 32-34.) That figure excludes the estimated cost to the City of the Variable Benefit for FY 2011, and appears to assume the benefit is legislatively terminated.

60. As of June 30, 2009, the balance in the Pension Accumulation Fund[35] showed a deficit of $514,413,177 based on a 6.8% post-retirement earnings assumption rate. (Trial Ex. 39, The Fire and Police Employees' Retirement System of the City of Baltimore, Actuarial Valuation Report for June 30, 2009 (dated October 2009), p. 12.) At a five percent assumption rate, the Pension Accumulation Fund would have been $799,133,666 in the hole as of that date, and the pre-10-306 Plan would have required more than all of the earnings attributed to active and retiree Plan member assets to be transferred to the Paid-Up Benefit Fund for a FY 2010 Variable Benefit increase.[36]

61. As of June 2010, Plan assets totaled $1,295,823,326. The liabilities owed to retired Plan members as of that date exceeded Plan assets by more than $200 million. (10/31/18 AM Trial testimony of Colin England, pp. 34-37; Trial Ex. 305, Iterative Process at 6.8%.)

62. The Plan was unsustainable in its own right. The design of the Variable Benefit was fundamentally flawed from the start – posing a potential independent annual financial obligation unafflicted by past years' market performance and the impact such performance might have on the City's ability to fund the basic benefit in any given year. That design made the Variable Benefit particularly ill-suited to operating the Plan in a volatile market.

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[35] "The Pension Accumulation Fund shall be the fund in which shall be accumulated all reserves for the payment of all pensions and other benefits payable from contributions made by the City of Baltimore and from which shall be paid all pensions and other benefits on account of members with prior service credit and lump sum death benefits for all members payable from the said contributions." BALT., MD., CODE art. 22, § 36(d)(1) (2009), Trial Ex. 1.

[36] Section 36(d)(2)-(7) (2009) sets forth how "[c]ontributions to and payments from the Pension Accumulation Fund shall be made." The reader will recall that the Paid-Up Benefit and Contingency Reserve Funds are the two Plan funds established to hold Variable Benefit assets. (Findings of Fact ¶ 15, *supra*.)

In the wake of the nightmarish results of the BIF and the ERF encountering the dot-com bubble burst in the early aughts, followed then by the recession beginning in December 2007, the Variable Benefit threatened to dismantle the City's already weakened capacity to provide basic, core services to City residents – not to mention its ability to keep pace with its basic benefit Plan obligation.

63. City Council Bill 10-0519, introduced June 7, 2010, proposed changes to the retirement benefits provided under the Plan. (Trial Ex. 3.)

64. At the June 2010 hearing on Bill 10-0519 convened before the Taxation, Finance and Economic Development Committee of the City Council, Mr. Cherry testified that the unions acknowledged well before that time that the Plan had systemic problems requiring change. "We did submit a proposal back in March 2009, so … although we have been recently meeting to come up with an alternative, … it was the Unions … who first recognized that this Plan, or the problem with the Plan is a lot more systemic and going forward we recognize that we need to increase our contributions. We recognize that, you know, eliminating the Variable Benefit was something our retirees will be willing to do if, in turn, you'd give them a COLA that they can live with and their widows can live with." (Trial Ex. 43, transcript of hearing on Bill 10-0519, City Council, Taxation, Finance and Economic Development Committee, June 10, 2010, pp. 60-61.)

65. The unions' actuary (and Plaintiffs' expert witness), Mr. Lowman, presented the unions' counterproposal at the June 2010 hearing, which included a fixed two percent COLA (with no half point bump as had been proposed in 2009) and an annual one percent increase in employee contribution up to nine percent in July 2012. "[G]oing back to March of last

year[37] … the Union knew that the Plan had troubles. The Union said, 'We don't want any variable, just scrap it.' We were the first one to say, you know, 'Just get rid of the whole thing' but we wanted COLA …. We all agree it's going to cost $64 million if we don't do anything. …. I think we were probably the first ones that recommended increases in employee contributions. … [W]e have a new proposal and … One is, yes, a fixed COLA 2%. You know forget about the 2½% 20 years from now, whenever it would have kicked in, please give us 2%. … You can't afford what GBC recommended; we know that. So yes, we would like to have 2% and again that will solve most of the $64 billion dollar problem. It won't solve all of it so we would like to raise employee contributions. … So we are proposing … an increase from 6% to 7% this July and 7% to 8% July of 2011 and then 8% to 9% July of 2012. … We acknowledge the plan is in trouble; we acknowledge that that trend line has to come down." Mr. Lowman further acknowledged that the City was unable to fund the "true cost" of the Plan if the post-retirement investment assumption were dropped to five percent: "$165 million; that's the true cost of the benefits if you don't do anything.[38] We know you can't afford that." (Trial Ex. 43, transcript of hearing on Bill 10-0519, City Council, Taxation, Finance and Economic Development Committee, June 10, 2010, pp. 66-67.)

66. In April 2010, the City engaged PFM Group Consulting, LLC ("PFM")[39] to develop recommendations regarding potential changes to the Plan to render it sustainable in the

[37] Referring to March 2009.
[38] *See* ¶ 48, *supra*.
[39] PFM's Michael Nadol testified as a fact and expert witness (in the field of "municipal budgeting") in the Federal Litigation and as a defense expert in municipal budgets and municipal finance at the 2018 trial before this court. (11/5/18 AM Trial testimony of Michael Nadol, p. 97.)

long-term future. PFM presented its evaluation to the City Council at the June 2010 hearing.

67. The City's bond rating – including any risk to same should the post-retirement assets earnings assumption rate be lowered per the Board's recommendation – was not discussed at the June 2010 City Council hearing on City Council Bill 10-0519.

68. On June 21, 2010, the City Council voted to adopt Bill 10-0519. Then Mayor Stephanie Rawlings-Blake signed Bill 10-0519 into law as Ordinance 10-306, effective June 30, 2010. (Stipulations of Fact ¶¶ 34-36.)

69. The Preamble to Bill 10-0519 (later Ordinance 10-306) announces its purpose and factual underpinnings, including, but not limited to, the following:

> WHEREAS, Article 22 of the City Code currently includes a variable post-retirement benefit formula that provides increases to F&P retirees and beneficiaries in years in which the system achieves positive investment performance, but makes no provision for negative investment performance years.
>
> WHEREAS, the current formula results in a diminished asset base under which the F&P cannot fully benefit . . . .
>
> WHEREAS, it is now estimated that the annual F&P contribution needed to maintain the current variable post-retirement benefit increase structure is an additional $64 million on top of the budgeted $101 million required annual contribution, which would bring to $165 million the total annual contribution to F&P by the City for FY2011.
>
> WHEREAS, in its FY2011 budget the City projects a $121 million budget gap which is presently projected to be closed only after reducing basic services, closing facilities, and furloughing and laying off employees or by raising City taxes.
>
> WHEREAS, the City's Fiscal 2011 Preliminary Budget Plan reports that "The major driver of cost growth is the City's pension contributions . . . ."
>
> WHEREAS, a task force of the Greater Baltimore Committee . . . found the current contributions to fund the F&P are inadequate to fully cover its existing and anticipated liabilities, that the funded ratio of the F&P based on the June 30, 2009 market value is only 58.2%, and that the F&P underfunding problem "threatens the

> City's fiscal stability … and could result in immediate and long term financial burdens on the City and its citizens."
>
> WHEREAS, an independent actuary and an independent financial consultant have confirmed that the F&P, as presently constituted, is unsustainable . . . and have recommended changing the F&P's benefit structure in order to reduce the F&P's present and future actuarial liability and the City's concomitant annual contribution to the F&P.
>
> . . .
>
> WHEREAS, the City Council has concluded that it is necessary and reasonable to implement the recommendations of the independent actuary and financial consultant by modifying the current F&P structure in order to restore the actuarial soundness of the F&P in a manner that minimizes diminution of benefits to F&P members.

(Stipulations of Fact ¶ 35, with internal citations to BALT., MD., ORDINANCE 10-306; Trial Ex. 3.)

70. Ordinance 10-306 replaced the Variable Benefit feature with a tiered cost-of-living adjustment ("COLA"). Prior to 10-306, retirees (and beneficiaries of deceased retirees) who received periodic benefit payments for two or more years as of June 30 each year (beginning in 1986) were eligible to receive the Variable Benefit. The Variable Benefit was market driven, payable annually in January, and was not an obligation of (*i.e.*, not guaranteed by) the City.

Under Article 22 as amended by Ordinance 10-306, retirees (and beneficiaries of deceased retirees) who receive periodic benefit payments for two or more years as of June 30 of a given fiscal year are eligible for an age-dependent, zero to two percent COLA, payable in January immediately following eligibility. A retiree member (or beneficiary) age 54 or younger on June 30 shall receive no increase; a one percent increase is paid to

those aged 55 to 64 years as of June 30; a two percent increase is paid to those age 65 and older as of June 30.[40] (Stipulations of Fact ¶¶ 37, 43-44.)

71. After the City's actuaries advised that the City could not afford a two percent COLA, as requested by the unions, Thomas Taneyhill developed the 0-1-2 COLA in an effort to ensure retirees who are least likely to have other income streams receive a raise when most needed in their stage of life. "And if you're trying to get to a place that's affordable that we can sustain that tries to get the best benefit for the most people, that's why that was picked." (Trial Ex. 275, 2/2/12 AM Federal Litigation testimony of Mayor Stephanie Rawlings-Blake, p. 48; 11/1/18 PM Trial testimony of Thomas Taneyhill, pp. 169-72.)

72. Under 10-306, for the first time, the City became a guarantor of all COLAs and past Variable Benefit increases. "Ordinance 10-306 also permitted the City to transfer assets previously held in the Paid-Up Benefit Fund and Contingency Reserve Fund to the Plan's general asset account." (Stipulations of Fact ¶¶ 37, 43-44.)

73. Prior to 10-306, assets dedicated for distribution under the Variable Benefit were held in specific funds separate and apart from general Plan assets. The assets held in the Variable Benefit dedicated funds were "invested in fixed-income securities and managed to match the payout streams of the post retirement increases." (Stipulations of Fact ¶ 47, with internal citation to Trial Ex. 100, CAFR FY 2010.)

74. In the recent and relevant time frame before Ordinance 10-306, the Plan included no benefit floor for retiree members or their beneficiaries. Ordinance 10-306 amended Article 22 to

[40] No COLA was payable in January 2011 for service and disabled retirees ages 55 to 64. (ART. 22, as amended by 10-306, §36(B)(h)(1); Stipulations of Fact ¶¶ 37, 43.)

include a $16,000 minimum annual benefit for spousal beneficiaries of pre-July 1, 1996 retirees who completed 20 or more years in service. (Stipulations of Fact ¶ 47.)

75. Prior to Ordinance 10-306, Service Retirement eligibility depended on the date an employee became a Plan member. For those who became Plan members before July 1, 2003, Service Retirement was available upon the earlier of reaching age 50 or completing 20 years of service. For those who became Plan members after June 30, 2003, Service Retirement was available upon the earlier of reaching age 50 with at least 10 years of covered F&P service, or completing 20 years of service of which at least 10 years were covered F&P service. (*Id.* ¶¶ 37-38.)

Following the effective date of Ordinance 10-306, Service Retirement eligibility was bifurcated into those who are grandfathered into pre-10-306 eligibility criteria and those who are not. Members who met pre-10-306 Service Retirement eligibility as of June 30, 2010, as well as members with 15 or more years of covered F&P service as of June 30, 2010, are grandfathered into pre-10-306 Service Retirement eligibility criteria.[41] All other active Plan members are subject to 10-306 normal Service Retirement criteria. (*Id.* ¶¶ 37-38, with internal citations to post-10-306 BALT., MD., CODE art. 22 (2010).)

Under Ordinance 10-306, normal Service Retirement benefits are available to Plan members upon the earlier of completion of 25 years of continuous F&P service, or reaching age 55 with a minimum 15 years of continuous F&P service. (*Id*.)

76. Ordinance 10-306 created a new early retirement benefit that enables non-grandfathered members to retire at their pre-10-306 Service Retirement eligibility date, or any date

[41] Ordinance 10-357, effective August 10, 2010, removed the "continuous" service requirement for grandfathering members with 15 year of service and provided a means by which members can purchase credits to satisfy the 10-306 15-year service requirement. (Stipulations of Fact ¶ 48.)

thereafter but before their post-10-306 Service Retirement eligibility date, subject to a statutory benefit reduction formula. (*Id*. ¶ 46.)

77. Prior to 10-306, Plan members were required to contribute six percent of their regular pay toward the Plan. Ordinance 10-306 modified this to a seven to 10% contribution depending on the year: a) as of July 1, 2010, seven percent of regular pay; b) as of July 1, 2011, eight percent of regular pay; c) as of July 1, 2012, nine percent of regular pay; and d) as of July 1, 2013, 10% of regular pay. (Stipulations of Fact ¶ 37.)

78. Prior to 10-306, the Plan operated under a "Regular interest" definition of 5.5% annually for the Annuity Savings Fund into which member contributions are deposited. Ordinance 10-306 modified this to three percent. This change does not affect Service Retirement benefits. (*Id*.)

79. Prior to 10-306, the Plan employed a two-tiered "Regular interest" investment assumption for valuation purposes (which figured into the annual City contribution): 8.25% on pre-retirement assets and 6.8% on post-retirement assets. Ordinance 10-306 modified the investment assumption to a straight eight percent on all assets. (*Id*.)

80. As set forth above, Ordinance 10-306 modified DROP 2. Before 10-306, DROP 2 was available to Plan members with 20 or more years of service as of December 31, 2009, as well as to Plan members hired on or after January 1, 2010, upon completion of a minimum of 20 years of continuous F&P service. (*Id*.)

Following the effective date of Ordinance 10-306 (June 30, 2010), DROP 2 eligibility was bifurcated into those who are grandfathered into pre-10-306 eligibility criteria and those who are not. Members with 15 or more years of covered F&P service as of June 30, 2010, are grandfathered into pre-10-306 DROP 2 eligibility criteria upon

completing 20 or more years of service. Members with fewer than 15 years of covered F&P service as of June 30, 2010, are not grandfathered. (Stipulations of Fact ¶ 37.) For those not grandfathered into the pre-10-306 DROP 2 eligibility, DROP 2 eligibility is attained upon completion of 25 or more years of covered F&P service. (*Id.*)

81. Prior to Ordinance 10-306, AFC (a calculation critical to determination of a member's retirement benefit amount) was the average annual regular pay earnable by a member for the 18 consecutive months during which pay was highest. (*Id.; see also* ¶ 27, *supra.*)

Following the effective date of Ordinance 10-306 (June 30, 2010), a member's AFC (*i.e.,* AFC as a defined term) depended upon whether or not the member was grandfathered into the pre-10-306 AFC definition. Members with 15 or more years of covered F&P service as of June 30, 2010, are grandfathered into the pre-10-306 AFC definition. Members with fewer than 15 years of covered F&P service as of June 30, 2010, are not grandfathered. (Stipulations of Fact ¶ 37.)

82. Under 10-306, AFC is the average annual regular pay earnable by a member for the 36 consecutive months during which pay was highest. (Stipulations of Fact ¶¶ 37, 42, with internal citations to post-10-306 BALT., MD., CODE art. 22 (2010).)

83. As of the effective date of Ordinance 10-306, Plaintiff Class Representatives Robert F. Cherry, Jr. (Active Sub-Class), Thomas S. Lake (Active Sub-Class), Robert J. Sledgeski (Retirement-Eligible Sub-Class), Charles Williams (Retired Sub-Class), and Christopher Houser (Retired Sub-Class) were members and beneficiaries of the Plan. (Stipulation of Plaintiff Status ¶ 4.)

84. As of the effective date of Ordinance 10-306, Plaintiff Class Representatives Houser and Williams and other all members of the Retired Sub-Class were entitled to, and receiving, Plan benefits. (*Id.*)

85. As of the effective date of Ordinance 10-306, Plaintiff Class Representative Sledgeski and all other members of the Retirement-Eligible Sub-Class were eligible to retire, but were not entitled to receive Plan benefits because they remained working.[42] (*Id.*)

86. As of the effective date of Ordinance 10-306, Plaintiff Class Representatives Cherry and Lake and all other members of the Active Sub-Class were working and not yet eligible to receive Plan benefits. (*Id.*)

87. As of June 30, 2010, Plaintiff Class Representative Cherry had completed more than 15 years of service with the Baltimore Police Department. (Stipulation of Plaintiff Status ¶ 5.)

88. As of June 30, 2010, Plaintiff Class Representative Lake had completed fewer than 15 years of service with the Baltimore City Fire Department. (*Id.*)

89. Plaintiff Class Representative Cherry agrees, and the court finds, that the Plan was actuarially unsound and "needed to be fixed" at the time the City adopted Ordinance 10-306. (10/29/18 PM Trial testimony of Robert Cherry, p. 87.)

90. Plaintiff Class Representative Sledgeski agrees, and the court finds, that the Plan was actuarially unsound at the time the City adopted Ordinance 10-306. (10/30/18 AM Trial testimony of Robert Sledgeski, pp. 135-37.)

[42] The parties agreed in informal discourse on the record at the November 2, 2017, summary judgment hearing that Plaintiff Sledgeski was enrolled in DROP as of the effective date of the Ordinance.

91. Plaintiff Class Representative Houser agrees, and the court finds, that an actuarially sound plan is important so that "it can meet the obligations that the City has to the retirees." (10/29/18 PM Trial testimony of Christopher Houser, pp. 21-22.)

92. Plaintiff Class Representative Lake agrees, and the court finds, that an actuarially sound plan is important "so that the benefits that are set or earmarked for myself and other officers and firefighters" are available to be paid. (10/29/18 AM Trial testimony of Thomas Lake, p. 133.)

93. When Plaintiff Class Representative Thomas Lake became employed by the Baltimore City Fire Department, his goal was to retire after 20 years of service and pursue a second career, which he acknowledges is "not what most firefighters do." He agrees, and the court finds, that "[m]ost firefighters elect the DROP, stay, and then retire at a much later age than [he] wanted to" retire. Mr. Lake was "turned down" for participation in DROP because at the time the Ordinance was enacted, he did not qualify to be grandfathered into the DROP program; he missed the cut-off by just a few months. (10/29/18 AM Trial testimony of Thomas Lake, pp. 114-15, 121-24, 129.)

94. Plaintiff Class Representative Christopher Houser was shot in the line of duty on July 20, 2002, following which he was on long-term disability for approximately 3 years. He was involuntarily retired on August 20, 2005, at age 32 on "66 and two-thirds percent disability," tax free. Following his retirement, Mr. Houser did not receive a pension increase under the pre-10-306 Plan; and has not since 10-306 was enacted. Based on the 0-1-2 COLA of 10-306, Mr. Houser will receive a one percent pension increase at age 55. Until recently before trial, Mr. Houser voluntarily elected not to seek employment during his retirement "because it's more valuable to [his] family to have [him] home as a resource

for [his] kids and [his] wife has a good job and so it ma[d]e sense." The AFC modifications of 10-306 do not affect him; the modifications pertaining to employee contributions do not affect him; and the modifications in DROP eligibility do not affect him (10/29/18 PM Trial testimony of Christopher Houser, pp. 9, 12-13, 15-16, 20-21.)

95. Plaintiff Class Representative Robert Cherry joined the Baltimore City Police Department in 1993 at age 25. The pension benefits were a "very important" consideration in his decision to join the Police Department, including the ability to retire after 20 years of service. He did not enter DROP when eligible (pre-10-306) because, at the time, he was considering retiring when eligible to pursue a second career. He stayed on as a City police officer and joined DROP in May 2018, nearly five years after he was eligible to do so. (10/29/18 PM Trial testimony of Robert Cherry, pp. 24, 26-27, 38-40.)

96. Plaintiff Class Representative Charles Williams started with the Baltimore City Fire Department in 1968 and retired March 11, 2004, at age 62. At the time of trial, Mr. Williams was the president of the Baltimore City Firefighter Fire Officers Retirees. (10/30/18 AM Trial testimony of Charles Williams, pp. 94-95, 98.)

97. Plaintiff Class Representative Robert Sledgeski joined the Baltimore City Fire Department on April 9, 1973, and retired on January 2, 2012. It was important to him when joined the Department that the job offered "decent benefits." He served as president of the union (Local 734) for a three-year term beginning approximately in spring 2008. Mr. Sledgeski entered DROP upon reaching eligibility in 1996 and, thereafter, continued to work in the Department for another 20 years. (10/30/18 AM Trial testimony of Robert Sledgeski, pp. 107-108, 110.)

98. At the time the City adopted Ordinance 10-306, the Variable Benefit was unsustainable as a method of providing post-retirement benefit increases.

99. At the time the City adopted Ordinance 10-306, the Plan was actuarially unsound.

IV. COUNTS II, III AND IV – DOES ENACTMENT OF ORDINANCE 10-306 CONSTITUTE BREACH OF CONTRACT?

A. Applicable Law

Section 42 of Article 22 of the Baltimore City Code (both pre- and post-10-306) provides:

> Upon becoming either a Class A, a Class B, or a Class C member of the Employees' Retirement System, or upon becoming a member of the Fire and Police Employees' Retirement System, established under this Article 22, such member shall thereupon be deemed to have entered into a contract with the Mayor and City Council of Baltimore, the terms of which shall be the provisions of this Article 22, as they exist at the effective date of this ordinance, or at the time of becoming a member, whichever is later, and the benefits provided thereunder shall not thereafter be in any way diminished or impaired.

BALT., MD., CODE art. 22, § 42 (2009 and 2010).

Buttressing the language of Section 42, Maryland common law holds that pensions are contractual in nature (as opposed to merely gratuitous) but not subject to the strict or rigid application of contract law applicable in a commercial setting. More specifically, under certain conditions, the government may unilaterally modify the terms of a pension contract, including the benefits provided thereunder. *City of Frederick v. Quinn*, 35 Md. App. 626 (1977).

In *Quinn,* five retired City of Frederick police officers sued the city over the city's unilateral 1961 legislative repeal of a section of the city's charter which covered the plaintiffs under a noncontributory retirement and disability benefit plan. The plaintiff retired officers sought declaratory judgment that they were entitled to benefits under the repealed portion of the charter,

and damages for breach of contract. The repealed section of the charter (Article XVI, Section 196) stated in pertinent part:

> Any policeman, including the Chief of Police, who is in good standing and who has served on the force for a period of 20 consecutive years, including the years of service of any policeman now on the force, provided they are consecutive, and who has been retired from active service as provided in Section 196 shall be paid, for life, a sum of money equal to one-half of a prevailing salary, payable in semimonthly installments. Any policeman retired as provided in Section 196 who shall not have served on the force for a period of 20 years shall be paid, for life, a sum of money prorated in the proportion that the years he has served as a policeman bears to the whole period of 20 years.

Id. at 628 (quoting FREDERICK, MD., CHARTER art. XVI, § 196, prior to the 1961 legislative repeal).

The *Quinn* court examined the pension rights theories espoused by courts nationwide, which it divided between a gratuitous rights theory and a strict contract theory, the majority and minority approaches, respectively, at the time *Quinn* was decided. Addressing the trial court's subscription to the strict contract theory, the court reasoned:

> The court below followed the strict contract theory, holding that when pension rights vested upon employment or adoption of the plan those rights were immune from prospective legislative impairment. . . . Although we think that holding goes too far, we agree that a pension is more contractual than gratuitous. . . .
>
> It is reasonable to assume, as the court below found factually, that appellees were induced, at least in part, to their employment by the pension benefits held out at the time, just as they were induced by the salary then offered. . . . The future benefits vested as they were proratedly earned, just as the employees' rights to their salary vested as it was earned. Momentarily assuming for argument that the City could terminate either or both of these benefits at its option, by doing so it would have no more right to withdraw retroactively the pro rata pension benefits that had accrued than it could demand repayment of the salary the employees had earned and had been paid. To that extent at least, especially in view of the proportionate prorating provision of Section 196, the pension rights vested absolutely. The provision acts as an express assurance to the employees that pension benefits they have earned by satisfactory service cannot be divested.
>
> But the analogy of earned salary and vested pension does not withstand prospective comparison. The pension plan is not immutable and the government-employer need not keep its provisions precisely intact. As government grows in size and complexity and as more employees draw from the fund, changes must often be made to assure the soundness of the fund and permit its growth commensurate with its prospective needs. *The contractual or vested rights of the employee in Maryland are subject to a reserved legislative power to*

> *make reasonable modifications in the plan, or indeed to modify benefits if there is a simultaneous offsetting new benefit or liberalized qualifying condition. Each case where a changed plan is substituted must be analyzed on its record to determine whether the change was reasonably intended to preserve the integrity of the pension system by enhancing its actuarial soundness, as a reasonable change promoting a paramount interest of the State without serious detriment to the employee. In short, the employee must have available substantially the program he bargained for and any diminution thereof must be balanced by other benefits or justified by countervailing equities for the public's welfare. This seems to be the substance of the majority of cases which have found municipal pension plans contractual in nature and it is the view we expressly adopt here.*

City of Frederick v. Quinn, 35 Md. App. 626, 629-31 (1977) (emphasis added).

Finding itself "in accord with our overseers," the *Quinn* court found its path lit well by the Court of Appeals. "'In all states, municipal corporations may make reasonable modifications of a pension plan at any time before the happening of the defined contingencies.'" *Quinn*, 35 Md. App. at 633 (quoting *Saxton v. Bd. of Trs. of the Fire and Police Employees Ret. Sys. of Baltimore*, 266 Md. 690, 694 (1972)). Importantly, "the rights which have accrued under the terminated plan may not be retrospectively withdrawn from him." 35 Md. at 631.[43] *See also, Howell v. Anne Arundel Co.*, 14 F. Supp.2d 752 (D. Md.) (1998) (Davis, J.) (granting summary judgment to defendant county on federal Contract Clause pension dispute, holding that (1) plaintiff employees who had not yet qualified for benefits based on years of service and age lacked standing to sue; and (2) a law that prospectively affects benefits does not constitutionally impair rights within the meaning of the Contract Clause).[44]

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[43] Unlike the pension benefits at issue in the instant case, the pension benefits in *Quinn* were subject to vesting on a *pro rata* basis. This does not materially distinguish *Quinn* from the instant case. Whether Class members' respective entitlements to Plan benefits had "vested" as of the effective date of the Ordinance figures into evaluation, *infra*, of whether the Ordinance imposed prospective or retrospective modifications. The court revisits *Quinn* for that purpose below.

[44] *Howell* also educates the reader regarding the interplay between state and federal law in Contract Clause disputes, noting that "state law informs the analysis of the question whether a contract exists, [and] whether there has been an 'impairment' is a federal question." Following a determination that defendant was entitled to summary judgment on the Contract Clause claim, the court declined to exercise supplemental jurisdiction over the plaintiff's breach of contract claim

Five years before *Quinn*, in *Saxton*, a Baltimore City fireman's widow was denied special death benefits in connection with the death of her husband. Mr. Saxton was a long-time fireman who, after nearly 30 years in service, suffered an on-the-job injury in 1968, which disabled him from service. After receiving his full (regular) salary for a year following his injury, in May 1969, Mr. Saxton was involuntarily retired and received a special disability benefit. On January 1, 1970, Mr. Saxton died of his work-related injury. Following her husband's death, Mrs. Saxton applied for a special death benefit under Article 22, Section 34(i) (since amended). Although it was undisputed that Mr. Saxton's work injury caused his death, the Board denied the death benefit because he retired prior to his death. Section 34(i) required as a condition precedent to receipt of the benefit that the plan member's death "'aris[e] out of and in the course of the actual performance of duty.'" *Saxton*, 266 Md. at 692 (quoting BALT., MD., CODE art. 22, § 34(i) (1966)).

Mrs. Saxton argued that, against the backdrop of the legislative history and evolution of the statutory provision, Section 34(i) should not be read to "limit[] entitlement to death benefits to instances where death occurred in service, if it were occasioned by injuries sustained in the line of duty," and that pension law should be "liberally construed." *Saxton*, 266 Md. at 693-94. Affirming the denial of Mrs. Saxton's request for writ of mandamus, the Court of Appeals determined that the statutory language "presents no ambiguity and poses no problems of statutory construction." *Id.* at 694. "The ground rules here, to put it quite simply, were changed prior to the date when Lieut. Saxton sustained his injuries. In all states municipal corporations may make reasonable modifications of a pension plan at any time before the happening of the defined contingencies." *Id.*

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and, therefore, declined to engage in the *Quinn/Saxton* "reasonable" analysis of the law's prospective impact on benefits. 14 F. Supp.2d at 756-57.

More recently, in 1994, the Court of Special Appeals had occasion to revisit this subject matter in *Davis v. Mayor and Alderman of Annapolis,* 98 Md. App. 707 (1994). In *Davis,* an Annapolis police officer sued for disability benefits, which had been denied by the Public Safety Disability Retirement Board. At trial, the court denied relief. On appeal, the Court of Special Appeals held that the Board erroneously applied an amended version of the benefits statute despite the fact that the officer's entitlement to his disability benefit had fully vested under the statute prior to amendment. In its analysis as to the contractual nature of the plaintiff's disability benefits and application of plan modifications to previously vested benefit entitlements, the Court of Special Appeals returns to old stomping grounds, citing with favor and quoting at length from *Quinn* and its forebear, *Saxton*. *Id.* at 715-20.

Saxton and *Quinn* make plain that a government employer is entitled unilaterally to modify a pension plan, including the benefits offered thereunder, provided such modifications are (1) prospective and not retrospective (*i.e.*, provided the modification does not operate to divest a plan member of benefits already earned), and (2) reasonable. In determining whether a prospective modification is reasonable, a court must consider the following: (1) whether the modification "was reasonably intended to preserve the integrity of the pension system by its actuarial soundness;" and (2) whether the modification causes "serious detriment" to the plan member. *City of Frederick v. Quinn,* 35 Md. App. 626, 631 (1977). The second prong of this inquiry calls upon the court to examine whether, subject to the modification, the plan member retains "substantially the program he bargained for" and whether any reduction or diminution of benefits has been balanced by comparable other benefits "or justified by countervailing equities for the public welfare." *Id.*

(citing with approval *City of Downey v. Bd. Of Admin., Pub. Emp. Retire. Sys.*, 47 Cal. App.3d 621 (1975)).[45]

In applying the test set forth by *Quinn* to determine whether the Ordinance is a proper exercise of the City's legislative power, the court evaluates the changes to the Plan and the impact of those changes holistically ("on its record" as a "program"). The court does not measure the post-10-306 Plan against *Quinn* by focusing on snapshots of a member's journey through service and retirement; rather, the court evaluates the impact of the Ordinance on the Plan from the members' perspective, considering each modification for the purpose of understanding the net effect of the Ordinance on the Plan as experienced by its members. *Id*.

1. A Deeper Dive into the "Reserved Legislative Power"

The "reserved legislative power" referred to in *Quinn*[46] pertains to "contracted or vested rights." A careful reading of *Quinn* and its cornerstone authorities establishes that the Court of Special Appeals, not surprisingly, did not use the words "rights" and "benefits" interchangeably. The distinction is a tipping point in this matter.

The five *Quinn* plaintiffs were employed as police officers by the City of Frederick "at various times dating from September 12, 1942 until the present [April 13, 1977] or the recent

[45] "Such modifications must be reasonable, and it is for the courts to determine upon the facts of each case what constitutes a permissible change. To be sustained as reasonable, alterations of employees' pension rights must bear some material relation to the theory of a pension system and its successful operation, and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages." *City of Downey*, 47 Cal. App.3d at 632.

[46] "The contractual or vested rights of the employee in Maryland are subject to a reserved legislative power to make reasonable modifications in the plan, or indeed to modify benefits if …" *Quinn*, 35 Md. App. at 630-31.

past."[47] *City of Frederick v. Quinn*, 35 Md. App. 626, 628 (1977). "After 1951," Frederick made available to the plaintiffs a noncontributory retirement and benefit plan which set forth various and sundry service requirements to receive benefits. *Id*. Under the plan, benefits were earned on a *pro rata* basis (unlike the benefits at issue in the instant case). By legislative action effective May 18, 1961, the noncontributory plan was repealed and replaced with a contributory plan.

In the midst of its artful (at times entertaining) discussion of contract theory application to public employee statutory pensions, the *Quinn* court concludes that Maryland subscribes to the moderate theory, reasoning that we can no more abide the concept of a pension as a mere gratuity bestowed (or not) by a "gracious and beneficent governmental employer" than we can the rigid application of strict contract theory, which the lower court had applied. *Quinn,* 35 Md. App. at 629-30.[48] The Court of Special Appeals then presents a contrast-and-compare illustration to bring along its reader – drawing a likeness between salary and pension benefits – and deems reasonable the trial court's factual finding that the plaintiff officers were induced to their employment at least in part by "the pension benefits held out at the time, just as they were induced by the salary then

[47] The span of these employment dates becomes relevant at the close of *Quinn* and later in this memorandum opinion. *See Quinn, 35 Md. App.* at 634, and Section IV(A)(1)(a), *infra*.

[48] "The court below followed the strict contract theory, holding that when the pension rights vested upon employment or adoption of the plan those rights were immune from prospective legislative impairment." *Id.* at 629-30. Echoing the effective date language at issue in *Quinn*, Section 42 of Article 22 of the Baltimore City Code (both pre- and post-10-306) provides:

> Upon becoming either a Class A, a Class B, or a Class C member of the Employees' Retirement System, or upon becoming a member of the Fire and Police Employees' Retirement System, established under this Article 22, such member shall thereupon be deemed to have entered into a contract with the Mayor and City Council of Baltimore, the terms of which shall be the provisions of this Article 22, *as they exist at the effective date of this ordinance, or at the time of becoming a member, whichever is later*, and the benefits provided thereunder shall not thereafter be in any way diminished or impaired.

BALT., MD., CODE art. 22, § 42 (2009 and 2010) (emphasis added).

offered." *Id.* at 630. The court goes on to explain to the nodding reader, just as the law would not countenance the right to claw back earned salary, the law does not countenance clawing back "pro rata pension benefits that have accrued." *Id*.

Critically, the court next explains,

> To that extent at least, especially in view of the proportionate prorating provision of the [repealed plan], the pension rights vested absolutely. The provision acts as an express assurance to employees that pension benefits they have earned by satisfactory service cannot be divested.

City of Frederick v. Quinn, 35 Md. App. 626, 630 (1977). In other words, the Court of Special Appeals reasoned, to the extent pension benefits have been earned by employee service, the employee has an absolute right to those benefits; they are not subject to divestment, because the right to those earned or accrued benefits has "vested absolutely." But, the Court of Special Appeals continues, the same cannot be said for salary and pension not yet earned:

> The contractual or vested rights of the employee in Maryland are subject to a reserved legislative power to make reasonable modifications in the plan, or indeed to modify benefits if there is a simultaneous offsetting new benefit or liberalized qualifying condition.

The balance of this passage speaks to evaluation of whether "the change" (the modification in the plan) was reasonable, which is to say whether its aim was "to preserve the integrity of the pension system" … "without serious detriment to the employee." *Id.* at 630-31.

The parties disagree what this court should make of the phrase "contractual or vested rights" regarding the scope of the reserved legislative power *Quinn* describes. The City argues that this phrase necessarily demands but one conclusion: the legislature is entitled to enact a pension plan modification that divests a plan member of previously accrued pension benefits, provided (1) the modification was reasonable when made and (2) that any diminution in or impairment of benefits is (a) appropriately offset to ensure the member is given a fair equivalent of his bargain or (b) justified by countervailing equities for the public's welfare.

The City's position fails to accommodate *Quinn's* description and holding regarding the plan at issue there. As recited above, *Quinn* explains that because the plaintiffs' benefits were earned on a *pro rata* basis,

> future benefits vested as they were proratedly earned … The City … would have no more right to withdraw retroactively the pro rata pension benefits that had accrued than it could demand repayment of salary …. To that extent at least, especially in view of the proportionate prorating provision of the [repealed plan], the pension rights vested absolutely. The provision acts as an express assurance to the employees that pension benefits they have earned by satisfactory service cannot be divested.

City of Frederick v. Quinn, 35 Md. App. 626, 630 (1977). Later in the opinion, *Quinn* reframes this, holding that an employee who declines to accept a reasonable substituted plan "is barred prospectively from further claims upon the rejected plan and is obviously not eligible to claim under the substitute plan. But the rights which have accrued under the terminated plan may not be retrospectively withdrawn from him." *Id.* at 631. In other words, *Quinn* instructs and holds, the City of Frederick was prohibited from making a change to the plan that divested the plaintiffs of benefits that had been earned up to that point on a *pro rata* basis; the very nature of a *pro rata* plan entitled the plaintiffs to keep them. Their rights to any proratedly earned benefits "vested absolutely" upon the requisite performance (or happening of other defined contingency), and the City of Frederick was not entitled to modify the plan to divest them of that portion of their benefits.

The *Quinn* court concludes that portion of its holding and transitions into a new paragraph, explaining that while the plaintiffs' earned salary and vested pension benefits cannot be taken from them, prospective plan modifications are different. It is here that the court describes the imperative of allowing governments to be nimble in the face of change. "As government grows in size and complexity and as more employees draw from the fund, changes must often be made to assure the

soundness of the fund and permit its growth commensurate with its prospective needs." *Id.*[49] Having laid the foundation for the second prong of its holding, the court announces: "The contractual or vested rights of the employee in Maryland are subject to a reserved legislative power to make reasonable modifications in the plan, or indeed to modify benefits if there is a simultaneous offsetting new benefit or liberalized qualifying condition. . . . [T]he employee must have available substantially the program he bargained for and any diminution thereof must be balanced by other benefits or justified by countervailing equities for the public's welfare." *City of Frederick v. Quinn*, 35 Md. App. 626, 630-31 (1977).

Critically for our purposes here, the court continues: "This seems to be the substance of the majority of cases which have found municipal pension plans contractual in nature and it is the view we expressly adopt here." *Id*. The court then gives attribution of its holding to a California case for its "succinct" expression of "the view we expressly adopt here":

> "Such modifications must be reasonable, and it is for the courts to determine upon the facts of each case what constitutes a permissible change. To be sustained as reasonable, alteration of employees' pension rights must bear some material relation to the theory of a pension system and its successful operation, and changes in a pension plan which result in disadvantage to employees should be accomplished by comparable new advantages."

Id. at 31 (quoting *City of Downey v. Board of Admin., Pub. Emp. Retire. Sys.*, 47 Cal. App.3d 621 (1975)).

City of Downey was instructive to the *Quinn* court and it reprises that role here. Litigation in *City of Downey* centered on claims that 1971 amendments to state legislation effectively made city employee retirement contributions available for state use to cover a statewide system deficit. The legislative amendments at issue made forward-looking (*i.e.*, prospective) changes to the Public

[49] This is the characteristic that differentiates Maryland from strict contract theorists on the one side and "gracious and beneficent government employer" theorists on the other. *Quinn*, 35 Md. App. at 629-30.

Employees' Retirement Law, including a change in the employees' contribution calculation (from an individual actuarial computation to a flat percentage of salary) and a change in account maintenance. Notably, "[t]he employee's account was maintained intact." *City of Downey,* 47 Cal. App.3d at 626.

City of Downey makes plain to this court that the Court of Special Appeals in *Quinn*, with clear purpose and understanding, drew a bright line between permissible and impermissible pension plan changes. Explaining that the legislative amendments at issue there did not unlawfully impair the contractual pension rights of the plaintiffs who were not yet eligible to retire, *City of Downey* held, "'[a]n employee's vested contractual pension rights may be modified prior to retirement for the purpose of keeping a pension system flexible to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system.'" *City of Downey v. Board of Admin., Pub. Emp. Retire. Sys.,* 47 Cal. App.3d 621, 631 (1975) (quoting *Allen v. City of Long Beach*, 45 Cal.2d 128, 131 (1955)).

Further, as painstakingly explained in *City of Downey*, upon becoming a plan member, an employee has a contractual or vested right to a pension,[50]

> "but this right is not rigidly fixed by the specific terms of the legislation in effect during any particular period in which he serves. The statutory language is subject to the implied qualification that the governing body may make modifications and changes in the system. *The employee does not have a right to any fixed or definite benefits, but only to a substantial*

[50] Section 42 of Article 22 of the Baltimore City Code (both pre- and post- 10-306) provides:

> Upon becoming either a Class A, a Class B, or a Class C member of the Employees' Retirement System, or upon becoming a member of the Fire and Police Employees' Retirement System, established under this Article 22, such member shall thereupon be deemed to have entered into a contract with the Mayor and City Council of Baltimore, the terms of which shall be the provisions of this Article 22, *as they exist at the effective date of this ordinance, or at the time of becoming a member, whichever is later,* and the benefits provided thereunder shall not thereafter be in any way diminished or impaired.

BALT., MD., CODE art. 22, § 42 (2009 and 2010) (emphasis added).

> *or reasonable pension. There is no inconsistency therefore in holding that he has a vested right to a pension but the amount, terms and conditions of the benefits may be altered*."

City of Downey, 47 Cal. App.3d 621 (1975) (quoting *Kern v. City of Long Beach*, 29 Cal.2d 848, 855 (1947))(emphasis added).

This court notes once more, as is relevant for our purposes, that the legislative amendments in *City of Downey* were forward-looking. The plaintiff employees were not yet eligible to retire and did not complain the amendment withdrew previously accrued pension benefits to divert their value for credit against the statewide system deficit. After dispensing with the notion that a government is prohibited from making plan changes that affect those not yet eligible to retire (per *Allen, supra*), the court went on to assess the legislative amendments as reasonable, and, therefore, lawful. *City of Downey,* 47 Cal. App.3d at 632-33.

This court returns, full circle, once more to *Quinn*. Appreciation of its reliance on *City of Downey* – the view "we expressly adopt" – as well as the facts at issue in both *Quinn* and *City of Downey* reveal no mystery in *Quinn's* meaning, but rather a straightforward, sensible, and equitable approach: Upon becoming a plan member, an employee has a contractual right to a pension; upon becoming a plan member, the employee's right to a pension vests. The employee's "contractual or vested right" to a particular plan, however, is not absolute. Before the happening of the defined contingencies set forth in the plan (*e.g.*, terms of service) which entitle the member to a particular benefit, the employer may make changes to the plan within certain boundaries.

Those boundaries permit a modification to plan terms (*e.g.*, terms of service), provided such modification was reasonably intended at the time to enhance the actuarial soundness of the plan, as a paramount state interest, without serious detriment to the employee. Should the plan modification disadvantage an employee, or diminish or impair a benefit which he would have received upon retirement under the previous plan, such disadvantage or impairment must be offset

by a reasonable benefit substitute or liberalized qualifying condition, or justified by countervailing equities for the public's welfare. The permissible boundaries of plan modification do not include modifications that have the effect of divesting an employee of, or withdrawing from an employee, pension benefits which he has already earned or accrued by satisfaction of the terms of service or other qualifying contingency. Such modifications are disallowed by law under the moderate approach and amount to breach of contract.

Finally on this point, if the law were as the City urges – that is, if the City were entitled to make prospective and retrospective plan modifications,[51] and we need concern ourselves singularly with the matter of their necessity and/or reasonableness – it seems to this court more likely than not that the Court of Special Appeals would have omitted the discussion of retroactive withdrawal of earned benefits beginning at Headnote 1 and transitioning to the contrasting principles of prospective changes in Headnote 2. *City of Frederick v. Quinn*, 35 Md. App. 626, 630-32 (1977).

a. The *Quinn* Remand

The City points to the fact that *Quinn* was remanded to the trial court for determination of whether the substituted plan was "necessary or reasonable when substituted" as proof that retrospective plan modifications are permissible if reasonable. *Id.* at 634. The full text of the paragraph on which the City relies and a brief return to the salient facts of the case shed light.

> In the case before us the stipulation disclosed that a substitute contributory plan was offered to appellees at the time of the repeal of the original plan; but the plan that was offered is not in the record. We will remand, therefore, in order for the trial judge to obtain and

[51] By "retrospective," the court means a pension plan modification that has the effect of withdrawing from an employee pension plan benefits previously accrued or earned as a result of having satisfied the terms of service or other defined contingencies.

> review the substituted plan to determine factually whether it was either necessary or reasonable when substituted.

Id. The remand to the trial court does not have the significance the City places on it.

As recited above, the five *Quinn* plaintiffs were employed by the City of Frederick "at various times dating from September 12, 1942 until the present [April 13, 1977] or the recent past."[52] *Quinn*, 35 Md. App. at 628. The original pension plan was effective "[a]fter 1951" and was "repealed on May 18, 1961 by resolution of the Board of Alderman of the City of Frederick. Thereafter, the officers on the police force were offered" a substitute plan. *Id.*

These facts establish that the original plan at issue in *Quinn* was substituted smack in the middle of the span of years during which the five individual plaintiffs were employed by the City of Frederick, as they were employed "at various times" from 1942 until 1977 (or "the recent past"). Thus, for those *Quinn* plaintiffs who continued in active service following the adoption of the 1961 substitute plan, the substituted plan represented prospective change (as well as some measure of retrospective change given the *pro rata* system). With respect to the claims of these plaintiffs, therefore, the trial court was directed to make factual findings as to the necessity or reasonableness of the substituted plan as a prospective change from its inception.

b. Contract Clause Analysis Does Not Apply

The City argues further that a federal Contract Clause "reasonable and necessary" analysis is a pre-requisite to adjudication of Plaintiffs' breach of contracts claims. The City asserts:

> Finding that a legislative action had "retrospective" effect does not necessarily mean that the action was unlawful. To the contrary, all it means is that the Court's analysis must proceed to a further step: the Court then should determine whether the change it believes was retrospective was reasonable and necessary to a legitimate or important public purpose. This analysis is the same under the reserved legislative power described in *Quinn* and under

[52] *See* footnote 47, *supra.*

the Contract Clause, as described in *Md. State Teachers Ass'n, Inc. v. Hughes*, 594 F. Supp. 1353, 1361-62 (D. Md. 1984).[53]

For the reasons set out above, the court concludes that this argument fails in the face of a full reading of *Quinn* and its foundational authorities. The City argues the court should construe *Quinn* to espouse an analysis coterminous or equal to that required by a Contract Clause challenge – to allow retroactive withdrawal of accrued benefits under certain conditions. Were it the case that the essential holding of *Quinn* requires a Contract Clause analysis, this court doubts the Court of Special Appeals in *Quinn* would so carefully have set up camp in the national field of pension contract theory absent reference to or incorporation of Contract Clause case law, neglecting a ripe opportunity to instruct trial courts with the aid of a rich foundation of federal jurisprudence for Maryland trial courts to call upon in adjudicating future cases.

Moreover, in this court's view, the City's argument turns the law on its head. Unlike Maryland state law on pension contracts, federal Contract Clause analysis is not implicated unless the state action has retrospective effect, because only a retroactive effect creates an inference of contract impairment. *Md. State Teachers Ass'n, Inc. v. Hughes*, 594 F. Supp. 1353, 1360 (D. Md. 1984). If the state legislation at issue is prospective in effect only, no violation of the Contract Clause exists; the analysis ends there. This is in direct contrast to Maryland public pension contract law, which unequivocally holds that prospective plan modifications, in order to pass muster, must be reasonable, because upon becoming a member of a pension plan, the employee locks into a "contracted or vested right" to a pension, subject to the state's entitlement to make reasonable changes to terms and benefits to meet the shifting actuarial needs of the government without substantial harm to plan members, or justified by public welfare. This is the second prong of the

[53] City Motion for Reconsideration, filed January 18, 2018, p. 4, and denied by Memorandum Opinion and Order issued February 21, 2018 (Docket Entries 41 and 41/3, respectively).

essential teaching of *Quinn*. In this light, the City's misstep is laid bare. *Quinn* mandates that a retrospective plan modification (*i.e.*, one that operates to divest a plan member of benefits already earned) is unlawful because it violates an employee's rights to the benefit in question, which have at that point vested absolutely. The analysis ends there. If, however, the plan modification is prospective in effect (*i.e.*, the defined contingency has not yet occurred), the analysis moves forward to evaluate whether the change was reasonable when made. In a Contract Clause arena, this is flip-flopped: analysis only proceeds if the modification is retrospective; analysis ends if the modification is prospective.

i. Closer Analysis of *Maryland State Teachers Assoc., Inc. v. Hughes* and *Davis v. City of Annapolis*

As the City relies considerably on *Maryland State Teachers Assoc., Inc. v. Hughes*, 594 F. Supp. 1353 (1984), and *Davis v. City of Annapolis*, 98 Md. App. 707 (1994), to urge the court to apply a Contract Clause analysis (rejected above), the court addresses them in more detail here.

In *Hughes,* 1979 legislation established a two-tiered pension system option for teachers. In 1984, the Pension Reform Law was passed, providing a menu of options for plan members. The plaintiff class of public school teachers (and others) sued, alleging, *inter alia*, that the Pension Reform Law violated the federal Contract Clause. "The nub of the plaintiffs' suit is their allegation that the 1979 Act created a contract between the State and the employees and teachers governed by the Act and that the 1984 amendments unjustifiably impaired the contract in a substantial way in violation of … the Contract Clause." *Maryland State Teachers Ass'n, Inc. v. Hughes*, 594 F. Supp. 1353, 1358 (1984).

In its discussion of the essential legal analysis, the *Hughes* court offers that a state may "constitutionally impair" the contractual obligations "imposed by its own contract . . . if the legislation doing so is reasonable and necessary to serve a legitimate or important public purpose." *Id*. at 1360. The court aptly cautions:

> Where a state's own contract is involved, "*complete* deference [by a reviewing court] to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake." . . . If it has been determined that a contract exists which has been substantially impaired by subsequent legislative action, then, as previously explained, the third question a reviewing court must decide is whether the challenged legislation is reasonable and necessary to serve a legitimate or important public purpose. It is at this level of analysis that a more strict review is necessary to be applied to contracts of a state than to solely private contracts since the state's self-interest might cause its legislature to make legislative findings and judgments which are not objective but prejudiced in favor of the state. . . . Nevertheless, this is not to say that the legislative history and findings are to be ignored or that the court is to sit as a super legislature, making its own totally independent assessment of reasonableness and necessity. As the Court in *United States Trust Co.* said, it is only "*complete* deference" (emphasis supplied) to the legislative findings which is to be avoided. And, in both public as well as private contract cases, the level of court scrutiny will vary directly with the extent of the contractual impairment imposed by the challenged legislation.

Id. (quoting *United States Trust Co. v. New Jersey*, 431 U.S. 1, 26, 97 S. Ct. 1505, 1519, 52 L. Ed.2d 92 (1977), and citing *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 411, 103 S. Ct. 697, 704, 74 L. Ed.2d 569 (1983)).

The *Hughes* court thereafter traces the requisite steps of Contract Clause analysis: 1) the court must ascertain if a contractual obligation was created by a statute; 2) the court must determine if the state's actions impaired the obligations of the state's contract, noting that, in the exercise of its police powers, a state may constitutionally impair contractual rights and obligations imposed by its own contract if the legislation doing so is reasonable and necessary to serve a legitimate or important public purpose; 3) if an impairment exists, the legitimate expectations of the parties to the contract must be examined to determine if the impairment is substantial, as the Contract Clause is not implicated absent a substantial impairment. *Hughes*, 594 F. Supp. at 1359-60. With respect

to the "reasonable and necessary" evaluation, "[r]easonableness is to be judged in light of whether the prior state contractual obligations had unforeseen and unintended effects"; and "necessity is to be judged on two levels: 1) whether a less drastic modification could have been implemented; and 2) whether, even without the modification, the State could have achieved its stated goals." *Id.* at 1362.

Citing and quoting *Quinn* and *Baker v. Baltimore*, *Hughes* recites Maryland state law that "the State has reserved the power to amend or alter pension contracts … [and] 'what alterations in the [pension system] are permissible is [governed by] the law of the state.'" *Id.* (citing and quoting *Baker v. Baltimore*, 487 F. Supp. 461, 466, 468 (D. Md. 1980), *aff'd,* 660 F.2d 488 (4th Cir. 1981), and *City of Frederick v. Quinn*, 35 Md. App. 626, 631 (1977)).

In reaching the impairment prong of the Contract Clause analysis, the *Hughes* court drops a bombshell: "The glaring fact emerging from the welter of documents and affidavits … is that the challenged legislation does not operate to deny vested or merely earned pension rights retroactively." *Id.* at 1363. "In addition," *Hughes* continues, "… writings from the Office of the Maryland Attorney General and an opinion of the Court of Special Appeals of Maryland roughly contemporaneous with the 1979 Act should have made anyone interested aware that Maryland law would not extend unalterable contractual protection against change in pension benefits which were to be earned on a pro rata basis by employment services in the future." *Md. State Teachers Ass'n, Inc. v. Hughes*, 594 F. Supp. 1353, 1364 (D. Md. 1984) (citing *City of Frederick v. Quinn*, 35 Md. App. 626 (1977)).

Notwithstanding its determination that the challenged legislation was prospective and therefore not a violation of the Contract Clause, the *Hughes* court nonetheless diligently exhausted the entirety of the Contract Clause analysis, reaching the conclusion that "the 1984 Act … does

not violate the Contract Clause of the United States Constitution. Similarly, the 1984 Act modifies the 1979 Act in a way that complies with state law as set forth in *City of Frederick v. Quinn*, 35 Md. App. 626, 371 A.2d 724 (1977)." 594 F. Supp. at 1371-72. *Hughes* neither contradicts nor challenges the fact that *Quinn* protects "as vested absolutely" those pension benefits an employee has earned in advance of a plan modification. *Quinn*, 35 Md. App. at 630. A plan modification that retrospectively divests a plan member of previously accrued or earned benefits is prohibited by Maryland law as a breach of contract.

Turning to *Davis*, the City urges that the remand in *Quinn* is "in accord" with *Davis v. City of Annapolis*, 98 Md. App. 707 (1994). In the opinion of this court, the City misconstrues *Davis*. In *Davis*, a police officer sought mandamus review following denial of disability benefits in connection with a thumb injury. After several defeating rounds with the Public Safety Disability Retirement Board (the "Board"), the Circuit Court for Anne Arundel County denied mandamus relief. The salient facts are these:

- Officer Davis injured and re-injured his thumb in 1989 and 1990;
- On June 23, 1986, the applicable disability retirement ordinance defined occupational disability as a permanent incapacitation from active service;
- Effective August 12, 1991, the standard was changed such that a member was permanently incapacitated for disability pension purposes if he was "wholly and permanently prevented from engaging in any occupation … or … any job in the fire or police department."

Davis, 98 Md. App. at 709-11.

Although his injuries occurred in 1989 and 1990, the Board applied the 1991 standards to Davis' case. The *Davis* court reviewed the state of the law and concluded that the nature of pension contracts is such that one legislature cannot bind "'subsequent legislatures for work and services

to be performed by … employees … in the future'" and fairly summarized the permissible boundaries of plan modifications consistent with *Quinn*. *Id.* at 716-17 (quoting *City of Frederick v. Quinn*, 35 Md. App. 626, 630-31 (1977), and *Maryland State Teachers Assoc., Inc. v. Hughes*, 594 F. Supp. 1353, 1362 (D. Md. 1984)).

Critically, not unlike the facts of *Hughes*, the *Davis* court further concluded that the 1991 statute applied only prospectively and did not by its terms apply retroactively to injuries or disabilities arising under the preexisting 1986 provisions. Moreover, relying on *Saxton v. Bd. of Trs. of the Fire and Police Employees Ret. Sys.*, 266 Md. 690, 694 (1972), and *Baker v. Baltimore County*, 487 F. Supp. 461 (D. Md. 1980), *aff'd,* 660 F.2d 488 (4th Cir. 1981), the *Davis* court concluded that Davis' rights accrued at the time(s) of his injuries such that the 1986 standard applied because the 1991 revision had not yet come into existence when he was injured in 1989 or in 1990. In closing, the court determined that the 1991 revision 1) was prospective in force only and 2) was not applicable in any event, because Davis' rights accrued under the old law. Therefore, the court was relieved of having to evaluate and determine whether the 1991 prospective modification to disability benefits was grounded upon appropriate policy necessity or whether it provided a fair match to benefits afforded under the plan as it stood in 1986.

To this court's way of thinking, the City's reliance on *Davis* is misplaced and its reading of the holding is unfounded. *Davis* neither holds nor suggests that evaluation of whether a plan change was necessary or reasonable is "reserved for 'retrospective' changes" as the City asserts. (City Motion for Reconsideration, p. 5.) To the contrary, the Court of Special Appeals expressly finds the 1991 provision to be prospective only, and inapplicable; and on these combined bases, the court explains, it need not engage further as to the reasons for the legislative plan modification.

2. Reasonableness under *Quinn* – Analysis of the Burden

At the pre-trial conference in preparation for trial, the court addressed with the parties the subject of legal burdens with respect to the test set out in *City of Frederick v. Quinn*, as *Quinn* does not address the issue directly. During the pre-trial conference, held September 7, 2018, the court and the parties agreed that the question of whether 10-306 was "reasonable" as defined by *Quinn* is the City's burden to establish by a preponderance of evidence. The court and the parties agreed further that the City's burden was akin to an affirmative defense, or, alternatively, similar to that of a defendant employer in a *McDonnell-Douglas* burden shifting framework.[54]

On reflection, the court does not believe the City's burden is comparable to that of a defendant employer in a *McDonnell-Douglas*-like burden shifting scheme. No legal presumption arises favoring Plaintiffs upon mere production of a *prima facie* breach of contract case and, assuming for discussion purposes that the City satisfies its burden of production regarding reasonableness (per *Quinn*), the burden does not shift back to Plaintiffs to prove by a preponderance of evidence the contrary.

Instead, the court treats the City's burden like an affirmative defense. "An affirmative defense is any matter that serves to excuse the defendant's conduct or otherwise avoid the plaintiff's claim, but which is proven by facts extrinsic to the plaintiff's claim" and is "established only when the defendant admits facts contained in the complaint and sets up other facts in justification or avoidance." 61A Am. Jur. 2d *Pleading* § 300 (2019).

[54] The *McDonnell-Douglas* burden shifting framework applies to employment discrimination (and retaliation) cases, whereby the plaintiff bears the initial burden of producing a *prima facie* case of employment discrimination. If the plaintiff meets that burden, a presumption of discrimination arises and the burden shifts to the defendant to produce evidence of a non-discriminatory basis for its employment decision. If the defendant meets its burden, the burden shifts back to the plaintiff to prove the proffered non-discriminatory reason is a pretext for discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

> "In Maryland, as in the majority of states, it is the rule, in either breach of contract or tort cases, that the burden of proof is on the plaintiff, or on the party who asserts the affirmative of an issue, and that burden never shifts." The phrase "burden of proof" encompasses two distinct burdens: the burden of production and the burden of persuasion. The party that bears the burden of production must produce sufficient evidence on an issue to present a triable issue of fact and avoid a directed verdict. The burden of production is "usually cast first upon the party who has pleaded the existence of the fact . . . but may shift to the adversary when the pleader has discharged its initial duty." The burden of persuasion comes into play only after the parties have sustained their burdens of production and then only if the fact finder finds the evidence supporting each party of equal weight. In that case, the fact finder must find against the party bearing the burden of persuasion. Unlike the burden of production, the burden of persuasion never shifts from one party to another during the course of a trial. A plaintiff initially bears both the burden of production and the burden of persuasion as to its claims. The burden of production may shift to the defendant, who can either do nothing or present evidence to disprove the plaintiff's allegations. A defendant does not assume the burden of persuasion merely by presenting a defense. An exception is when a defendant asserts an affirmative defense. When a defendant asserts an affirmative defense, the defendant has taken the affirmative of an issue and therefore assumes the burden of production and the burden of persuasion as to the elements of that defense.

Community Coll. of Baltimore Co. v. Patient First Corp, 444 Md. 452, 469-71 (2015) (internal common law and treatise citations omitted).

B. Counts II and III – Retired and Retirement-Eligible Sub-Classes[55]

The City offers language- and logic-based arguments that the Ordinance's elimination of the Variable Benefit is prospective and not retrospective. Section 36A(e)(ii) of the pre-10-306 Code provides in pertinent part: "The granting of any benefit increase under this section is contingent on the performance of the [Plan's] investment funds;" that the "continuation of any benefit increase previously accrued . . . is . . . contingent on the ability of the Paid-Up Benefit Fund and the Contingency Reserve Fund to provide these benefits in the future;" and that "§§ 37

[55] To avoid the inconvenience to the reader that comes with wholesale incorporation by reference, in this section, where appropriate, the court borrows from its Memorandum Opinions issued January 2, 2018, and February 21, 2018.

and 42 to the contrary notwithstanding, any benefit increase provided under this section is not and does not become an obligation of the City . . . ." Pre-10-306 BALT., MD., CODE art. 22, § 36A(e)(ii).

In its language-based argument, the City asserts that the above-referenced language of pre-10-306 Section 36A establishes as a matter of law that elimination of the Variable Benefit cannot form the basis for breach of contract liability. In its logic-based argument, the City argues that, because the Variable Benefit is market driven, the amount of the benefit to be paid (if any) is unknowable from one year to the next and, therefore, is, necessarily, prospective in nature. For the reasons set forth below, the court is not persuaded that Section 36A's carve out or the market driven nature of the Variable Benefit, as a matter of law, renders elimination of the Variable Benefit a prospective change in the meaning of *Quinn* and other authority cited herein.

Section 36A's expression that "§§ 37 and 42 to the contrary notwithstanding, any benefit increase is not and does not become an obligation of the City" does not carry the import the City wishes the court to find. Section 37, titled "Guaranty," appears to this court to be self-limiting. Specifically, Section 37 refers to "maintenance of . . . reserves as provided for," and "payment of . . . other benefits granted under the provisions of this subtitle . . . ." Pre-10-306 BALT., MD., CODE art. 22, § 37. Further, Section 37 mandates that funds derived from Plan-related deposits and investments shall not be diverted from the Plan for another City purpose. *Id.*

Section 42, as well known by any reader reaching this page, articulates the contractual relationship between the City and the Plan members. Its language, well-wrung (and rung) by this point, need not be restated. Section 36A's expression that Section 42 does not render "any benefit increase" an obligation of the City mutes neither the balance of Section 42 nor the portions of Section 36A directed at things other than "benefit increase." Specifically, Section 36A's limiting language does not mean that the Variable Benefit is not to be counted among the "provisions of this Article 22"

to which Section 42 refers to as the "terms" of the contract. When read together,[56] Sections 36A and 42 are harmonious: (1) the City has an obligation to maintain and manage the Variable Benefit feature of the Plan as set forth in Section 36A; and (2) if Plan investment funds are insufficient to grant an increase or if the Paid-Up Benefit Fund and Contingency Reserve Fund are unable to support continuation of accrued benefit increases, these conditions (alone) cannot form the basis to hold the City liable for breach of contract for failure to pay the "benefit increase" or "continuation." *Cochran v. Norkunas*, 398 Md. 1, 17 (2007) (holding that a "'contract must be construed in its entirety and, if reasonably possible, effect must be given to each clause so that a court will not find an interpretation which casts out or disregards a meaningful part of the language of the writing unless no other course can be sensibly and reasonably followed'")(quoting *Sagner v. Glenangus Farms,* 234 Md. 156, 167 (1964)).

The City's logic-based argument is equally unavailing. Section 36A states in detail terms of eligibility, benefit allocation methods and criteria, benefit increase formulas, and benefit and reserve fund maintenance. These prescriptions, by their terms, are fixed. That the amount of any benefit increase (if any) is market driven – a condition written in to Section 36A(e)(ii) – does not extract the Variable Benefit facility from the "provisions" of Article 22 which, according to Section 42, form the terms of the contract between the City and Plan members.

The City argues that "Ordinance 10-306 did not retroactively withdraw any [Variable Benefit] raises" paid since the Variable Benefit was adopted in 1983. "Rather, it adopted a different mechanism for providing future raises." Therefore, "no 'rights which have accrued under the terminated plan' – *i.e.,* the variable benefit – were 'retrospectively withdrawn' from the retirees." (City Motion for Reconsideration, p. 9; quoting *City of Frederick v. Quinn,* 35 Md. App.

[56] And subject to common law interpretation.

626, 631 (1977) (holding that "the rights which have accrued under the terminated plan may not be retrospectively withdrawn from" a pension plan member).) In the opinion of this court, the City has the wrong end of the stick.

In addressing the *pro rata* pension benefits at issue there, the *Quinn* court determined that "future benefits vested as they were proratedly earned." *Quinn*, 35 Md. App. at 630. The proportionate prorating provision of the old plan "act[ed] as an express assurance to the employees that pension benefits they have earned by satisfactory service cannot be divested." *Id.* Likewise, for Plan members who have satisfied all terms of service to earn, or to be entitled to earn, the Variable Benefit, prior to the effective date of Ordinance 10-306, their rights in same vested absolutely. The notion that by virtue of the Variable Benefit's market driven nature, Retired and Retirement-Eligible Sub-Class members, despite having satisfied all terms of service and defined contingencies, nevertheless float from one year to the next in some undefined, ethereal place, with the barest tether to entitlement – neither vested and yet not quite non-vested – is unpersuasive. Likewise, to reduce earned or accrued pension benefits to cash in hand or bust defies logic and flies in the face of controlling law.

In sum, inasmuch as Retired Sub-Class members were entitled to, and receiving, Plan benefits as of the effective date of the Ordinance (Findings of Fact ¶ 84, *supra*), the court is not persuaded by the City's argument that the Ordinance does not retroactively impair or diminish the rights or benefits of these Class members under the Plan. Further, as Retirement-Eligible Sub-Class members were eligible to retire as of the effective date of the Ordinance, but not entitled to receive Plan benefits solely because they remained working (Findings of Fact ¶ 85, *supra*), the court is not persuaded by the City's argument that the Ordinance does not retroactively impair or diminish the rights or benefits of these Class members under the Plan. Instead, as explained

elsewhere, the court finds that the City, by way of the Ordinance, breached its contract with Retired Sub-Class and Retirement-Eligible Sub-Class members by unlawfully withdrawing or removing previously earned and accrued benefit entitlements, specifically the Variable Benefit.

1. Conclusion

For the reasons set forth above, as well as in the Memorandum Opinions of January 2, 2018, and February 21, 2018, consistent with the Declaratory Judgment and Order of January 2, 2018, and in light of the ruling on the Motion for Class Certification (*supra*), the court, having considered all evidence and argument submitted on behalf of the parties, concludes that:

a. Section 42, as interpreted by Maryland common law, prohibits the City from retrospectively modifying the Plan such that a modification shall not remove, diminish or impair a Plan benefit where a Plan member had satisfied all defined contingencies related to such benefit prior to the effective date of the modification;

b. Members of the Retired and Retirement-Eligible Sub-Classes, having satisfied all of the contractual conditions precedent to receipt of benefits under the Plan prior to the adoption of Ordinance 10-306, held vested rights to Plan benefits that the City could not lawfully unilaterally diminish or impair;

c. By enacting Ordinance 10-306, the City retrospectively, and therefore unlawfully, withdrew from members of the Retired and Retirement-Eligible Sub-Classes their rights to the Variable Benefit feature of the Plan as it stood prior to the Ordinance; therefore,

d. By enacting Ordinance 10-306, the City breached its contract with members of the Retired and Retirement-Eligible Sub-Classes.

C. Count IV – Active Sub-Class

1. "Reasonably Intended to Preserve the Integrity of the Pension System by Enhancing its Actuarial Soundness"

The court is not persuaded by Plaintiffs' argument that the City's motivation in passing 10-306 was to safeguard its bond rating or that the City misappropriated the economic circumstances that beleaguered the City as a springboard to jettison a pension plan the City found more expensive than it preferred. Plaintiffs place great emphasis on differences between the May 2010 Rating Agency Presentation and PFM's June 2010 presentation to City Council, and urge that the City sold a rosy view to the bond market and a grim view to City Council to suit its divergent purposes – thus exposing the reality that 10-306 was not intended to render the plan sound but rather to avoid undesirable expenses. The court does not see it this way.

A close review of the Rating Agency Presentation includes considerably unflattering details of the City's circumstances. Regardless, however, even were the court to agree that the two presentations appear to depict two very different cities, the court would not reach the conclusion Plaintiffs seek. The City did sustain several iterations of deep cuts in core services, did furlough workers, and did ferret out additional tax revenue to weather the financial crisis. The GBC's recommendations were rooted in a thoughtful and thorough examination of the City's circumstances. The PFM presentation and the GBC report were no parlor trick. The objectively verifiable and undisputed facts are that the City was in financial free fall; and – critically – even had the City not been in financial crisis, the Plan judged on its own merit was actuarially unsound and plainly unsustainable. Indeed, the basic benefit itself was in the crosshairs of the Variable Benefit. This was not theory subject to debate. This was reality. The Plan was unsound, unsustainable, and the City simply had to do something to turn it around.

With respect to subjective intention, the court finds former Mayor Stephanie Rawlings-Blake's testimony credible and persuasive that she believed 10-306 was critical to securing a sustainable, healthy and sound Plan, and that this was the priority and central objective in signing 10-306 into law. The court rejects the notion that 10-306 was the product of any bearded motivation, unseemly opportunism, or that the City simply gave priority to other concerns.

Plaintiffs also argue that determination of whether the City "reasonably intended to preserve the actuarial soundness" of the Plan when it adopted 10-306 does not allow for consideration of the economic conditions of the City at the time, whether the budget could (or can) be balanced (as required by the City Code) in the presence of the pre-10-306 Plan, or whether the Plan is sustainable in the long term as a continuing expense of the City. Further, Plaintiffs characterize 10-306 as the product of the City's inappropriate prioritization of various interests at the expense of its contractual duties to the members of the Active Sub-Class (and the other Sub-Classes). Plaintiffs argue generally that the City passed 10-306 because the Plan obligations had become financially "inconvenient," which, they correctly assert, would not excuse the City's obligations as a matter of law. Certainly, the latter notion is true as a general matter; one cannot avoid a contractual obligation merely because priorities have shifted over time (even under the moderate theory of public pension contract law). Plaintiffs' primary proposition, however, that the court ought not to consider the financial and related City conditions leading up to the adoption of 10-306 is myopic as a practical matter, and – importantly – ignores the principle underpinning *Quinn* and its progeny: governments must remain nimble if they are to remain at all. Indeed, this is the basis of *Quinn's* primary holding that public pension contracts are not subject to strict construction.

Plaintiffs' position also fails to acknowledge the court's duty to examine the Plan "on its record" in determining whether a modification passes muster.[57] The rigidity of strict construction is antithetical to the preservation and persistence of government bodies as living, breathing, dynamic enterprises. Plaintiffs ask this court to ignore the very thing on which *Quinn* rests – the realities of the City and the Plan. And, in this way, Plaintiffs ask the court to construe the contract strictly or, at least, to apply a contract construction theory that is not supported by Maryland law – indeed, one *Quinn* expressly eschews as unrealistic, impractical and unworkable. To the court's way of thinking, *Quinn's* allowance for a diminution of Plan benefits if "balanced by other benefits *or* justified by countervailing equities for the public's welfare"[58] further demonstrates that Maryland law requires the court to consider that at the time 10-306 was adopted, the City's obligations were not merely complex and multi-faceted, as is surely the case in all cities; its dire financial and related circumstances extended to all City residents. Importantly, notwithstanding the crisis the City was weathering in June 2010, continuation of the Plan unchanged would, in

[57] "Each case where a changed plan is substituted must be analyzed on its record to determine whether the change was reasonably intended to preserve the integrity of the pension system by enhancing its actuarial soundness, as a reasonable change promoting a paramount interest of the State without serious detriment to the employee." *City of Frederick v. Quinn,* 35 Md. App. 626, 631 (1977).

[58] The quoted portion in context reads: "The contractual or vested rights of the employee in Maryland are subject to a reserved legislative power to make reasonable modifications in the plan, or indeed to modify benefits if there is a simultaneous offsetting new benefit or liberalized qualifying condition. Each case where a changed plan is substituted must be analyzed on its record to determine whether the change was reasonably intended to preserve the integrity of the pension system by enhancing its actuarial soundness, as a reasonable change promoting a paramount interest of the State without serious detriment to the employee. In short, the employee must have available substantially the program he bargained for and any diminution thereof must be balanced by other benefits or justified by countervailing equities for the public's welfare. This seems to be the substance of the majority of cases which have found municipal pension plans contractual in nature and it is the view we expressly adopt here." *Quinn,* 35 Md. App. at 630-31.

relatively short order, cannibalize the Plan's basic benefit. *City of Frederick v. Quinn*, 35 Md. App. 626, 631 (1977) (emphasis added).

Throughout the case, Plaintiffs have placed considerable emphasis on the City's failure (beginning in 2003) to heed the recommendations of its Plan actuary to reduce the post-retirement assets investment rate (also referred to as an earnings assumption rate) for valuing liabilities, which was set at 6.8% beginning in 1995.[59] Plaintiffs aver generally that "[h]ad the City made its actuarially recommended contributions, the Plan would have been better funded when confronted with the market downturn in 2008, and the $64.5 million increase that the City hung over the City Council's head to encourage their acquiescence in cutting benefits in 2010 would have been significantly smaller."[60] (Pl. Post-Trial Brief, p. 4 n.3.) In essence, Plaintiffs argue that the City, having turned a blind eye to the repeated recommendations of its independent actuary engaged to ensure it avoided the very situation in which it found itself in 2009 (or, created, if viewed through Plaintiffs' lens), cannot now shield itself from blame for the actuarially unsound condition of the Plan; and surely that condition should not be borne by the City's police, fire, and other first responders.

This argument resonates. After all, the City admits that for years it did not act in accordance with independent professional recommendations. But while the premise of Plaintiffs' thesis is fact – the City did not act in accordance with the actuary's recommendations – the conclusion is speculation[61] and is laid out for the court to consider in isolation from the myriad

[59] The pre-retirement investment rate was set at 8.25%.

[60] Which is to say, had the City adopted the Plan actuary's recommendations to reduce the post-retirement investment rate, "the Plan would have been better funded" because a lower earnings assumption would have resulted in increased contributions by the City.

[61] To be precise and fair, the conclusion the courts finds disagreeably speculative is not the amorphous notion that had the City comported with the recommendations to drop the interest assumption rate that the "$64.5 million . . . would have been significantly smaller." But that is

other conditions and circumstances the City faced during that span of time (2002/2003 through 2009). The evidence does not support what Plaintiffs pose as a necessary conclusion – that had the City dropped the 6.8% rate to 6% in 2003 and continued to follow Mr. Rowe's recommendations on the rate as time went on, the City Council would not have felt compelled to take 10-306-like legislative measures. Some may well hold the City morally to blame for its inaction – negligent even – but the court is not persuaded that this argument favors Plaintiffs in this breach of contract case. *Cf. Maryland State Teachers Assoc., Inc. v. Hughes,* 594 F. Supp. 1353, 1360 (D. Md. 1984) (noting that the reviewing court should not exercise hindsight like a "super legislature, making its own totally independent assessment of reasonableness and necessity.").

Further, the image of the City Plaintiffs present – that the City shooed away its actuary in favor of other City interests and commitments, and that 10-306 was a pressure release valve following the market devastations of the aughts – omits to mention several material moving parts and influences at work during the period 2003 through the adoption of 10-306. To be sure, the City alone is responsible for discharging its duties (in all manner of speaking, whatever they might be). An accurate register of historical events, however, includes the influence and voice of police and fire-fighter union representatives in the City's (and the City Council's) decision making.

The record confirms that during the relevant time frame leading up to adoption of 10-306, those voices did not support City-proposed legislative Plan changes, which ultimately failed due

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not what Plaintiffs are really asking the court to conclude with this argument. Plaintiffs want the court to conclude that 10-306 would not have been (viewed as) necessary had the City followed the recommendations to reduce the rate, which is to say that 10-306 would not have happened had the City followed its actuary's advice. This assertion also ignores the fact that the earnings assumption rate is a creature of statute subject to revision only by legislative action, not mere recommendation of the Board.

to lack of support. (*See, e.g.*, Trial Ex. 369, March 2006 Proposed Amendments to Post-Retirement Benefit Increases; Trial Ex. 131, October 2008 City Council Bill 08-0220; 11/01/18 PM Trial testimony of Thomas Taneyhill, pp. 157-64.) Instead, unions urged preservation of the Plan's Variable Benefit, which favored DROP participants and retirees/beneficiaries at the time. Following the 2009 report and recommendations of the Greater Baltimore Committee (per then-Mayor Stephanie Rawlings-Blake's request for its input), when it appeared inevitable that legislative changes would be made, the unions acknowledged that the City could not afford to repair the funding level of the Plan by reducing the post-retirement assumed rate of return to five percent. The unions proposed scrapping the Variable Benefit entirely in favor of a plan that included a fixed COLA and increasing employee contribution requirements by three percent (to nine percent) spread over an equal number of years. (Trial Ex. 46, 2009 Union Proposal for Funding Reform; 10/29/18 PM Trial testimony of Robert Cherry, pp. 32-38.) Union proposals are not admissions of the Active Sub-Class for purposes of Count IV, and the court does not treat them as such; however, neither are they to be entirely disregarded inasmuch as what the unions, as organizations advocating for the best interests of their members, proposed in 2009 and 2010 may shed light regarding what the unions offered and were prepared to accept on behalf of their members as a reasonable substitute for the pre-10-306 Plan (in the vein of *Quinn*). Moreover, a true "how did we get here" history includes these facts.

a. <u>Expert Testimony</u>

In addition to the court's first-hand observation, evaluation and weighing of fact witness testimony and documents in evidence, the court also considered the testimony of the parties' expert witnesses regarding whether 10-306 was reasonably intended to preserve the pension system by

enhancing its actuarial soundness. Plaintiffs offered the following experts at trial: Colin England in the field of "defined benefit plans sponsored by state and local governments, and gainsharing features of public plans" and Thomas Lowman as "an actuarial expert in issues dealing with public pensions, including the ASOPs." (10/30/18 PM Trial testimony of Colin England, p. 12; 10/31/18 AM Trial testimony of Thomas Lowman, p. 124.) The City offered expert witnesses Adam Reese in the field of "actuarial science in the practice of pensions" and Michael Nadol in "the field of municipal budgets and municipal finance." (11/2/18 AM Trial testimony of Adam Reese, p. 95; 11/5/18 AM Trial testimony of Michael Nadol, p. 97.)[62]

The court found the testimony of Mr. Reese and Mr. Nadol credible, persuasive, and helpful, occasionally to the point of enlightening. Their testimony – in their respective fields of expertise – was critical to the court's appreciation of the trajectory of the Plan (including the state of Plan assets) had it not been modified by law, the more complex features of the Plan pre- and post-10-306, and the effect of the Plan's levers and pulleys on the overall function of the City as a municipality. While there is no question that Mr. England and Mr. Lowman (particularly Mr. Lowman) have deep institutional knowledge of the Plan and changes made to the Plan over time, the court did not on the whole find their testimony or opinions expressed comparatively credible or persuasive.

[62] Consistent with Maryland Rule 5-702, the expert testimony offered by the parties' expert witnesses was helpful to the court, sitting as the trier of fact in this instance, to understand the evidence and to make decisions and determinations about the facts in issue pertaining to the parties' disputes. All trial experts were well-qualified to render their respective opinions, their testimony was appropriate on the subject matters about which they testified, and each expert's testimony had sufficient factual basis.

The court notes, in particular, Mr. Reese's expert opinion that the "trajectory of the [Plan] was actuarially unsound."[63] Mr. Reese noted that "[b]enefit payments exceeded City and member contributions resulting in a need to sell assets to pay benefits" or to keep Plan assets liquid for benefit payment availability. He further stressed the process by which the assets credited to the Annuity Reserve Fund ("ARF") and Pension Reserve Fund ("PRF") grew to dwarf the total of all Plan funds, setting in motion increasing "excess investment income"[64] to be attributed to the Variable Benefit funds, which in turn only grew the Plan's unfunded liabilities.[65] These conditions, he testified, would eventually result in the Plan "becoming insolvent – that is, exhausting assets." In sum on this subject, Mr. Reese opined: "[T]he pre-Ordinance 10-306 legally prescribed funding method, coupled with the variable benefit provisions in Article 22, Section 36A, is inconsistent with the plan accumulating adequate assets to make benefit payments when due, assuming all actuarial assumptions are realized. Simply put, it was actuarially unsound."[66]

Mr. Nadol helped the court place in context the precarious position of the City in the spring of 2010 from an overall budget standpoint and its operation as a municipality.[67] In particular, Mr. Nadol aided the court's appreciation of the prospect of maintaining the Plan in its pre-10-306 form against the backdrop of the City's FY 2011 budget options and whether the City, instead of passing the Ordinance, could have sharpened its pencil to find money elsewhere (from a finance

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[63] Trial Exhibits 330 through 333 are, respectively, Mr. Reese's expert report, errata, workbooks, and supplemental expert report.

[64] BALT., MD., CODE art. 22, § 36A(c) (2009) regarding "amount of investment income to be used to increase benefits," Trial Ex. 1.

[65] *See* footnotes 78 and 79, *infra.*

[66] *See also* Figures 17 and 18 of Mr. Reese's Expert Report depicting "Estimated Funding Cost Had Ordinance 10-306 Not Been Adopted, Using 6.80% Discount Rate" and "Projected Funded Status Had Ordinance 10-306 Not Been Adopted." (Trial Ex. 330, p. 25).

[67] Trial Exhibit 335, Expert Report of Michael Nadol and Valentine J. Link. Mr. Link did not testify at trial.

perspective and as a practical matter vis-à-vis the functionality of the City at the time). In this way, Mr. Nadol's testimony aided the court's determination of whether Plaintiffs are right to complain that the City's decision to modify the Plan by 10-306 was a way to avoid cuts and changes elsewhere out of convenience, concern for political fallout, or other reasons (that would tend to suggest that 10-306 was not reasonably intended to enhance the integrity of the plan, but rather to save money by plucking low hanging fruit).

Mr. Nadol opined that after the two years of cuts brought on by the 2008/2009 Great Recession, the City was unable to absorb the nearly $62 million cost to the General and Motor Vehicle Fund budgets that would have resulted had the City modified the post-retirement assets earning investment rate from 6.8 to five percent as recommended, inasmuch as the proposed budget included General Fund and Motor Vehicle Fund $60 million combined operating budgets for the Sheriff's Office, Baltimore Parks and Recreation Department, and City Libraries.[68] Some seemingly available cost-cutting and revenue-generating avenues were, as a practical matter, either non-existent or not reasonably within the City's control, including, for example, Baltimore City Public School State maintenance of efforts requirements, debt service, and employee health benefit premiums. Mr. Nadol further noted that, even in the absence of an additional $62 million pension cost for FY 2011, the recommended budget continued the service reductions, furloughs, job eliminations and layoffs former Mayor Rawlings-Blake described in her testimony. Further, additional tax revenue was effectively unavailable to resolve the problem, given the already tapped tax base of the City. As Mr. Nadol explained, while some juice could be squeezed from

[68] The swell in the City's employer contribution obligation to $165 million would have increased the City's FY 2011 budget deficit by another $64 million, approximately $62 million of which would have been in these two main City funds. (*See* Findings of Fact ¶¶ 65, 69, *supra*; and Trial Ex. 43, transcript of hearing on Bill 10-0519, City Council, Taxation, Finance and Economic Development Committee, June 10, 2010, pp. 66-67.)

maximizing City income tax to the State limit (adopted in the FY 2011 budget) and increasing some small-scale taxes, these measures were simply insignificant in the face of the actual shortfall and posed the considerable risk of eroding an already weak tax base of City residents.

In view of these conclusions, Mr. Nadol predicted in 2010 that the $62 million Fund gap presented by the FY 2011 proposed budget would more than double by FY 2015. And PFM, Mr. Nadol's company,[69] advised the City of this prediction in 2010. PFM also advised the City in 2010 that 10-306 as proposed (and later adopted) would enhance the Plan's integrity and improve its soundness by enabling unfunded liabilities to be paid down.[70]

Mr. Nadol summarized his expert opinion in the concluding paragraph of his expert report, which also suggests the interrelation of the court's two central considerations under *Quinn*:[71]

> In the midst of the most severe fiscal crisis in generations – following decades of economic decline, ongoing structural budget deficits, and year after year of difficult cuts – the drafters of Ordinance 10-306 nonetheless took care in seeking to preserve the highest level of benefits possible within the contribution level the City could afford to make without dramatically slashing core services. At the same time, the modifications adopted in Ordinance 10-306 sought to preserve the integrity of the pension system and enhance its actuarial soundness by addressing the destabilizing VB structure, and by recalibrating overall plan design to a level more affordable and sustainable within the City's constrained resources. …Ordinance 10-306 made it more likely that the City would be able to continue to pay out pension benefits to its members, while protecting – and in several key ways, enhancing – the primary structure of those benefits to better safeguard the opportunity for career police and firefighters to enjoy a secure and dignified retirement. Overall, … the modifications adopted in Ordinance 10-306 reasonably balanced the interests of then-current police and firefighters, current and future retirees dependent on the actuarial soundness of the [Plan], and the general public welfare – all while facing an extraordinarily challenging and critical turning point for the City of Baltimore.

[69] He is the Managing Director.
[70] PFM did not take the position in 2010, nor did Mr. Nadol at trial, that 10-306 was a magic bullet in view of growing employer required contributions and the overall City budget trend line.
[71] Whether 10-306 was reasonably intended to preserve the integrity of the Plan by enhancing its actuarial soundness; and whether the revised Plan is substantially the program Class members enjoyed before 10-306.

(Trial Ex. 335, p. 9-10 at ¶ 24.) The court does not view the City's handling of the Plan with the sense of praise Mr. Nadol's tone suggests. Nonetheless, the court is persuaded that the sum and substance of Mr. Nadol's opinion is correct.

Having closely compared the pre-10-306 Plan with the post-10-306 Plan,[72] and having studied the Plan's "record" per *Quinn* – which is to say, its history and evolution, the work of the Board and the City Council, and the financial and other community circumstances of the City during the period covered by the record evidence of documents and testimony, as set forth in the Findings of Fact – as well as all fact and expert witness testimony provided, the court is persuaded and finds that, by adopting the Ordinance, the City reasonably intended to preserve the integrity of the pension system by enhancing its actuarial soundness. The court further finds that the Ordinance was reasonably crafted to achieve that end. The court's conclusions are based not only on the circumstances culminating in the Ordinance but also on the specific content of the Plan pre- and post-10-306.

2. Modifications in Plan Terms; Modifications in Plan Benefits

Section 42 of the Plan (pre- and post-10-306) refers to "terms" and "benefits" separately, explaining that "Article 22" sets forth the "terms" of the contract (the Plan), and included among the "terms" of the contract are the "benefits." BALT., MD., CODE art. 22, § 42 (2009 and 2010). *Quinn* refers to the City's legislative power to make "reasonable modifications in the plan, or indeed to modify benefits" if balanced by other benefits or "justified by countervailing equities for the public's welfare." *City of Frederick v. Quinn*, 35 Md. App. 626, 631 (1977). *Quinn*, therefore, allows for (prospective) reasonable modifications to the general terms of the parties' contract (*e.g.*,

[72] *See* Findings of Fact, *supra*, ¶¶ 27-31, 70-82, and Trial Ex. 1.

benefit service requirements) as well as the retirement benefits provided. At the end of the day, the employee is entitled to substantially the deal he struck at the start of the job. If a government employer modifies its pension plan by removing a benefit the employee started with, or changing it to his disadvantage, the modified plan must strike a balance with a new benefit or liberalized condition, or be justified by a countervailing public welfare or equity concern.

Mindful that *Quinn* tasks the court with evaluating the revised Plan as an overall program from the perspective of the employee,[73] the court, several times, completed a fulsome and critical comparison of the Plan pre- and post-10-306, which in some measure is reflected in the Findings of Fact. There is no contest, and the court finds, that the Ordinance modified Plan terms, including Plan benefits of Active Sub-Class members. Rather than regurgitate earlier portions of this memorandum, the court directs the reader's attention to its Findings of Fact, including specifically paragraphs 27 through 31, and 70 through 82, which the court includes by reference in this section of its opinion. (*See also*, Trial Ex. 1.)

Important in the court's evaluation are the following: 1) implementation of a tiered cost-of-living increase in place of the unsustainable Variable Benefit. This 0-1-2 COLA was properly intended to provide increases in income at stages of life when the City determined members were most likely not to have secondary employment or alternative sources of income; 2) under the revised Plan, for the first time, the City became a guarantor of the 0-1-2 COLA and all past Variable Benefit payments; 3) under the revised Plan, for the first time, the Plan provides a minimum annual benefit for qualifying spousal beneficiaries;[74] 4) the revised Plan grandfathers

[73] "In short, the employee must have available substantially the program he bargained for . . . ." *City of Frederick v. Quinn*, 35 Md. App. 626, 631 (1977)

[74] Plaintiffs assert that the court should not consider the minimum annual spousal benefit added by 10-306, because Class members' spousal beneficiaries are not Class members. (Plaintiffs' Post-Trial Brief, p. 11 n.10.) The court is tasked to examine the Plan "on its record" to decide whether

certain Plan members into pre-Ordinance Service Retirement eligibility criteria; 5) the revised Plan includes a new early retirement benefit enabling non-grandfathered Plan members to retire at pre-10-306 Service Retirement eligibility dates; 6) updated levels of employee contribution increases are phased in over several years; 7) the revised Plan grandfathers in to pre-10-306 DROP 2 eligibility those with qualifying years of service; and 8) the revised Plan grandfathers in to pre-10-306 AFC calculation those with qualifying years of service.

The most significant of the court's considerations of the countervailing public equities are relayed at Findings of Fact paragraphs 48 through 53, 56 through 61, which the court restates here by reference for efficiency. The conditions of the City beginning in 2009 included woefully anemic core services – cuts spanned from shocking reduction in life-saving public essentials like fire-fighting and police units to important basic public health and welfare-related waste disposal services. It is no exaggeration to say these core service cuts, necessitated in large part by the nation's financial circumstances that had overcome the City, placed the City's residents in peril. Moreover, the court finds that ensuring the City has the capacity to continue to pay the basic Plan benefit is, itself, an important public equity, and the Plan in its pre-10-306 state posed no mere threat to that public equity. The Plan, if left unmodified, was on track to run out of assets – not in theory, but with near certitude; not in some far off future, but in the relative near term.

a. <u>Expert Testimony</u>

Here, again, defense expert witnesses Mr. Reese and Mr. Nadol provided valuable guidance to the court. The court found each of them, and their opinions expressed, credible and

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the revised Plan provides substantially the "program" Class members bargained for at the start of employment. *Quinn*, 35 Md. App. at 631. The court is not persuaded to exclude consideration of this new benefit in its review.

persuasive on the subject of the impact of the comparative differences of the pre- and post-10-306 Plan on the Class (and Sub-Classes). Mr. England and Mr. Lowman rendered opinions appropriate for and within their respective fields of expertise, and otherwise consistent with Rule 5-702. Their testimony and ultimate opinions, however, were neither credible nor persuasive on the question of whether the post-10-306 Plan provides Active Sub-Class members substantially the Plan they bargained for at the start of employment.

With respect to the increase in service requirement from 20 to 25 years, Mr. Reese brought out that, at the time of the Ordinance's passage, more than 59% of Plan retirees (who retired having met the term of service requirement) retired having completed at least 25 years of service. Only 15% retired within their 20th year of service (likely due at least in part to the attractive option of participating in DROP). (Trial Ex. 330, Expert Report of Adam J. Reese, p. 26-27; Trial Ex. 331, Errata of Adam Reese, correcting reference to Figure 13 to Figure 19.) And while those who retired having completed fewer than 25 years of service would have been impacted by the term of service requirement modification, Plan members who met pre-10-306 Service Retirement eligibility as of June 30, 2010, as well as members with 15 or more years of covered service as of June 30, 2010, are grandfathered into pre-10-306 Service Retirement eligibility criteria. (Ordinance 10-357, effective August 10, 2010, removed the "continuous" service requirement for grandfathering members with 15 year of service and provided a means by which members can purchase credits to satisfy the 10-306 15-year service requirement for grandfathering.) Further, "[t]he increase in the minimum service requirement from 20 to 25 years for non-grandfathered employees will most likely impact a minority of employees in their retiring planning horizon, by one to at most five years; and, for these employees, the resulting pension at retirement with 25 years of service would be larger than they would have received retiring with 20 to 24 years of

service under pre-10-306 provisions." (Trial Ex. 330, p.26.) In addition, under the revised Plan, the popular DROP benefit option remains available to Active members. (*See* Findings of Fact ¶¶ 22-26, 80.)

Ordinance 10-306 did not modify the Plan's benefit accrual rates. They remained unchanged: accrual of 2.5% AFC per year for the first 20 years of retirement, and 2% annually thereafter. (Trial Ex. 1; Trial Ex. 330, p. 28.) Regarding the impact of the AFC calculation modification (*see* Findings of Fact ¶¶ 81-82), at the outset, it is important to appreciate that employees retiring with 25 or more years of service who did not receive a pay increase in the final two years of employment would have received the same retirement benefit under the pre-10-306 Plan as they will receive under the revised Plan. For those affected by the change in AFC calculation, the paid benefit remains substantially the same. As set out in Mr. Reese's expert report at page 28, using an example of an employee receiving three percent annual pay raises in the three years before retirement, with a final year salary of $100,000.00 (and starting at $94,260 two years from retirement), the difference in the AFC pre- and post-10-306 is two percent – with the AFC at $99,029 pre-10-306 and $97,116 post-10-306.

The court finds persuasive and credible Mr. Reese's opinion that the predictability and reliability of the 0-1-2 COLA provides stability in a way the Variable Benefit cannot given its market dependency. Further, as far as hard dollars are concerned, the COLA measures up well to the Variable Benefit. "The age-based COLAs are expected to deliver larger increases over an employee's lifetime than under the variable benefit provisions prior to Ordinance 10-306. Accordingly, the lifetime income under 10-306 is expected to be reasonably equivalent (and certainly more predictable) than the benefits that would have been payable had Ordinance 10-306 not been adopted." (Trial Ex. 330, p. 28.) Although not necessary to a determination of whether

the revised Plan provides Class members the substantial benefit of their bargain, due to the longevity of the parties' dispute prior to trial, the court is able to examine the actual effect the COLA has had on retiree benefits (versus the Variable Benefit) since the Ordinance passed. This enables the court to consider what has happened in fact instead of relying solely on opinions of what may come to bear. This data further solidifies the court's conclusion that the post-10-306 Plan provides Active Sub-Class members the substantial benefit of their bargain. (*See* Section VII, *infra*, incorporated herein for this purpose, and Trial Exs. 330-333, Expert Report of Adam J. Reese, Errata Sheet, Supplemental Report, and Workbooks in support of both reports.)

Following a review of the Plan's "record" as described above, as well as the specific modifications to Plan terms and benefits brought about by the Ordinance from the perspective of Active Class members (including Class Representatives), the court concludes that the Ordinance made reasonable prospective modifications to the Plan's terms, including Plan benefits affected by the Ordinance. Specifically, the court finds that the prospective modifications to Plan benefits were balanced by a combination of essential and overwhelming public welfare considerations, and new benefits or qualifying conditions. The Ordinance was "a reasonable change promoting a paramount interest of the State without serious detriment to the employee." *Quinn*, 35 Md. App. at 631.[75]

[75] While not a customary use of this space, this court will cordon off a few lines to express that the court's judgment as to Count IV is neither equivalent to nor reflective of its appreciation of the individual Active Sub-Class members. The court is intensely sympathetic to those who went to work – doing dangerous, critical jobs for the City and its residents – expecting earnestly all the while that the particular pension they planned for would be the pension they receive. And, while the court's decisions are rooted in objective, neutral determinations based on evidence and law, it weighs heavily on this court that many of the City's police officers, firefighters and others feel they were cheated.

3. Conclusion

For the reasons set forth above, as to Count IV for breach of contract on behalf of the Active Sub-Class, the court finds that the City, by way of Ordinance 10-306, made prospective and reasonable modifications to the Plan. Therefore, the City did not breach its contract with Active Sub-Class members by modifying the Plan through enactment of Ordinance 10-306.

V. COUNTS II, III AND IV – DOES "UNDERFUNDING" THE PLAN CONSTITUTE BREACH OF CONTRACT?

Plaintiffs allege in Counts II, III and IV that the City breached its contract with the Plaintiff Class by underfunding the Plan. Specifically, Plaintiffs allege that the following City actions (in some instances, inactions) breached its contractual pension funding obligations: 1) failure of the City to adopt the Plan actuary's recommendations to reduce the 6.8% post-retirement asset earnings assumption rate (which enabled the City to avoid the resultant increase in required contributions during the relevant period); 2) application of two layers of smoothing ("double smoothing") to losses sustained following the technology bubble burst (which delayed recognition of those losses and, therefore, depressed the City's required contributions during the relevant period); and 3) failure to recognize losses resulting from the 2008/09 Great Recession by adopting 10-306 instead of fully funding the ARF and the PRF.

A. Applicable Law[76]

1. Plan Sections

To begin at the beginning, the contractual relationship between Plaintiffs (as Plan members) and the City is established in section 42:

> **Contractual relationship.**
>
> Upon becoming either a Class A, a Class B, or a Class C member of the Employees' Retirement System, or upon becoming a member of the Fire and Police Employees' Retirement System, established under this Article 22, such member shall thereupon be deemed to have entered into a contract with the Mayor and City Council of Baltimore, the terms of which shall be the provisions of this Article 22, as they exist at the effective date of this ordinance, or at the time of becoming a member, whichever is later, and the benefits provided thereunder shall not thereafter be in any way diminished or impaired.

BALT., MD., CODE art. 22, § 42 (2009 and 2010) (emphasis in original); Pre-10-306 Article 22 introduced in evidence as Trial Ex. 1.

As to the City's failure to drop the 6.8% investment rate, Plaintiffs rely upon subsections 33(m) through (p) of the Plan. Subsection 33(m) provides: "*Duties of actuary*. The Board of Trustees shall designate an actuary who shall be the technical adviser of the Board of Trustees on matters regarding the operation of the funds created by the provisions of this subtitle, and shall perform such other duties as are required in connection therewith." *Id.* § 33(m) (emphasis in original). Together, subsections 33(n), (o) and (p) require the actuary to conduct an experience

[76] It bears mentioning that *Quinn* pertains to the scope of permissible modifications of public pension contracts. The essential holding of *Quinn* (simplified for purposes of this footnote) is that the City has a "reserved legislative power to make reasonable modifications in the plan, or indeed to modify benefits" within certain enumerated parameters. *City of Frederick v. Quinn*, 35 Md. App. 626, 630-31 (1977). Except to the extent that *Quinn* may inform the court's evaluation of the third basis of Plaintiffs' breach by underfunding claim, addressed below, *Quinn's* holding does not bear directly upon Plaintiffs' claims that the City breached its contractual obligations by underfunding the Plan.

study[77] at least once every five years in order "certify" Plan member and City contribution rates going forward; for the Board formally to adopt actuarial tables and rates of contribution; and for the actuary to conduct an annual valuation of Plan assets and liabilities based on the tables adopted by the Board. *Id.* §§ 33(n)-(p).

Regarding the second basis of their underfunding claim, Plaintiffs refer the court's attention to the Plan provision that entitled the City to defer recognition of the $400-plus million BIF/ERF losses until the 2005 sunset of those funds:

> **Method of financing.**
>
> . . .
>
> (j) *Interest and earnings*
>
> . . .
>
> (14) Any negative combined balance in the [BIF] or the [ERF] at June 30, 2005, shall be applied by the Board of Trustees in accordance with an appropriate asset valuation method, as recommended by the system's actuary.

BALT., MD., CODE art. 22, § 36(j)(14) (2009), Trial Ex. 1.

In support of the third enunciated basis of Plaintiffs' breach-by-underfunding claims Plaintiffs rely upon Plan sections 36(j)(4) and 37.

Section 36(j)(4) provides:

> **Method of financing.**
>
> . . .
>
> (j) *Interest and earnings*
>
> . . .

[77] An experience study is an actuarial investigation of mortality, service and compensation data (experience) of Plan members. BALT., MD., CODE art. 22, § 33(o) (2009 and 2010); Trial Ex. 1 (pre-10-306 Article 22).

(4) Any deficit earnings shall be applied by the Board of Trustees in the following order:

(i) to meet the conditions of any asset valuation method then in use by the system; and

(ii) the remaining deficit earnings, if any, may next be applied by the Board of Trustees, at the recommendation of the system's actuary, in such amount or amounts as they determine:

(a) to increase the amount to be contributed by the City of Baltimore, and/or

(b) to increase the period over which the unfunded accrued liability will be amortized as provided in § 36(d)(4).

Id. § 36(j)(4).

Section 37 provides:

Guaranty.

The creation and maintenance of reserves in the Pension Accumulation Fund, the maintenance of annuity reserves and pension reserves as provided for, and regular interest creditable to the various funds as provided in § 35(b) of this subtitle and the payment of all pensions, annuities, retirement allowances, refunds and other benefits granted under the provisions of this subtitle and all expenses in connection with the administration and operation of this Retirement System are hereby made obligations of the City of Baltimore. All income, interest and dividends derived from deposits and investments authorized by this subtitle shall be used for the payment of the said obligations of the said City. Any amounts derived therefrom which, when combined with the regular amounts, otherwise contributable by the City of Baltimore as provided under the provisions of this subtitle, exceed the amount required to provide such obligations, shall be used to reduce the regular appropriations otherwise required, or to reduce the period of amortization of the unfunded accrued liability, or both, as determined by the Board of Trustees.

Id. § 37.

Sections 36(d)(1) and (5) also require the court's attention. Section 36(d) defines the Plan's Pension Accumulation Fund ("PAF") and sets out how it is to be funded and maintained, including

calculation methods for employee and City contributions.[78] The PAF "shall be the fund in which shall be accumulated all reserves for the payment of all pensions and other benefits" paid for by City and Plan member contributions. *Id.* § 36(d)(1).

Section 36(d)(5) defines the City's required annual contribution to the PAF as the normal cost plus any accrued liability contribution[79] (or less the amortized amount of excess assets were that the case); "[h]owever, the aggregate payment by the City must be sufficient, when combined with the amount in the fund, to provide the pensions and other benefits payable out of the fund during the then-current year." BALT., MD., CODE art. 22, § 36(d)(5) (2009), Trial Ex. 1.

2. Statute of Limitations, Laches and "Complicity"

In addition to its language-based defense, the City defends against the underfunding piece of Plaintiffs' breach of contract claims on the basis that these claims are barred by the three-year

[78] Section 36(a) explains that there are four Plan funds: an Annuity Savings Fund, an Annuity Reserve Fund, a Pension Accumulation Fund, and a Pension Reserve Fund. The Annuity Savings Fund "consists of the assets for each member's annuity portion of the member's retirement benefit." The Annuity Reserve Fund "shall be the fund from which shall be paid all annuities and all benefits in lieu of annuities." "The Pension Accumulation Fund shall be the fund in which shall be accumulated all reserves for the payment of all pensions and other benefits payable from contributions made by the City of Baltimore and from which shall be paid all pensions and other benefits on account of members with prior service credit and lump sum death benefits for all members payable from the said contributions." "The Pension Reserve Fund is the fund from which the pension is paid to members not entitled to credit for prior service and benefits in lieu thereof." BALT., MD., CODE art. 22, §§ 36(b)(1), (c), (d)(1), (e) (2009), Trial Ex. 1. The balance of section 36(d) sets forth how "[c]ontributions to and payments from the Pension Accumulation Fund shall be made." *Id.* §§ 36(d)(2)-(7).

[79] The normal cost is an actuarial calculation of the amount of annual contribution necessary to pay for an employee's benefit if such contributions are made annually from the start of employment until retirement. BALT., MD., CODE art. 22, § 36(d)(3) (2009), Trial Ex. 1. Accrued liability is the accumulated normal cost from the start of employment through a given year's valuation date (*i.e.*, June 30, the close of the fiscal year). That amount is then added to the reserve for retirement benefits to be paid from the PAF to derive the City's total accrued liability. The assets held in the PAF are measured against the total accrued liability for all Plan participants to determine the total unfunded accrued liability of the City. *Id.* §§ 36(d)(4)(i)-(iii).

statute of limitations, laches, and "the unions' complicity." (City Post-Trial Brief, p. 13.) In support of these defenses, the City cites Maryland's three-year statute of limitations for civil actions and no other law.[80]

a. Statute of Limitations

A "civil action at law shall be filed within three years from the date it accrues." MD. CODE ANN., CTS. & JUD. PROC. § 5-101 (2018). In view of the fact that Plaintiffs' underfunding claims are tied to the City's annually budgeted funding obligation based on the Plan provisions and attendant accounting methods set forth above, the court finds helpful Maryland law on accrual of civil actions in continuing obligation contracts. *See, e.g., Ely v. Science Application Interns Corp.*, 716 F. Supp.2d 403 (D. Md. 2010) (holding that statute of limitations on failure to pay rent on commercial lease begins running anew for each successive rental payment); *see also Avery v. Weitz*, 44 Md. App. 152 (1979) (holding that statute of limitations begins to run on each successive promissory note payment obligation as it becomes due and bars recovery on claims for unpaid installments due more than three years before filing of confession of judgment). Further, a breach of contract claim accrues when the contract is breached or anticipatorily breached.[81] *Catholic*

[80] Other than citation to the statute of limitations, the City presents no legal authority or argument in support of its defenses that the statute of limitations, laches, and "complicity" bar Plaintiffs' recovery on the basis of Plan underfunding. The court is therefore left to assume, and does assume, that reference to "complicity" relates to the City's affirmative defenses of unclean hands, estoppel, and waiver. Further, the court applies the law it concludes is controlling (or, where appropriate, persuasive) on these issues in view of party silence.

[81] Anticipatory breach of contract ordinarily requires a "definite, specific, positive, and unconditional repudiation of the contract by one of the parties to the contract." "[W]hen 'in anticipation of the time of performance one definitely and specifically refuses to do something which he is obligated to do, so that it amounts to a refusal to go on with the contract, it may be treated as a breach by anticipation, and the other party may, at his election, treat the contract as abandoned, and act accordingly.'" *C. W. Blomquist & Co., Inc. v. Capital Area Realty Investors Corp.*, 270 Md. 486, 494-95 (1973) (internal citations omitted). Anticipatory breach of contract is

Univ. of Am. v. Bragunier Masonry Contractors, Inc., 139 Md. App. 277, 297 (2001).

Because Plaintiffs' claims started in federal district court, also relevant to this discussion is the "savings rule" contained within Maryland Rule 2-101, which provides that actions "filed in a circuit court within 30 days after the entry of the order of dismissal" for lack of subject matter jurisdiction by the federal district court shall be treated as timely filed. MD. RULE 2-101.[82]

Finally, Plaintiffs complain that the City "misrepresented the true nature" of its contribution requirements during the period 2002 to 2009 and that "the members of the Class had no reason to suspect that the City had been knowingly underfunding the Plan." (Amended Complaint, ¶¶ 162-63; Plaintiffs' Post-Trial Brief, p. 6 n.6.) As advocacy at times calls for, this argument relies entirely upon acceptance of Plaintiffs' underfunding arguments (and related reading of the Plan). Plaintiffs' claims do not sound in fraud or negligent misrepresentation; nor have Plaintiffs argued that the statute of limitations was equitably tolled by virtue of the City's alleged trickery. That said, if for no other reason than exhaustive completeness, in view of Plaintiffs' incantation of the word "misrepresented," the court will consider (below) application of the discovery rule and equitable tolling of the applicable statute of limitations.

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not applicable where the anticipated breach is solely payment of money. *Phelps v. Herro,* 215 Md. 223, 231 (1957) (holding that "the proper rule is that the doctrine of anticipatory breach of a contract has no application to money contracts, pure and simple, where one party has fully performed his undertaking, and all that remains for the opposite party to do is to pay a certain sum of money at a certain time or times").

[82] Plaintiffs filed a class action against the City in federal district court in June 2010, which included breach of contract claims. Following its ruling on Plaintiffs' Contract Clause claims, the court dismissed as moot (and without prejudice) Plaintiffs' state breach of contract and federal Takings Clause claims, and issued final judgment subject to appeal. Following the case's passage through the United States Court of Appeals for the Fourth Circuit, by memorandum and order issued July 22, 2016, the district court denied Plaintiffs' request that it accept supplemental jurisdiction over Plaintiffs' state law contract claims. Thereafter, on August 19, 2016, Plaintiffs filed the instant suit.

"The 'discovery rule' operates as an exception to the accrual rule when the plaintiff does not know, or could not through the exercise of reasonable diligence know, of the" breach of contract. *Kumar v. Dhanda*, 198 Md. App. 337, 343 n.2 (2011), *aff'd,* 426 Md. 185 (2012) (citing *Poffenberger v. Risser*, 290 Md. 631, 635-36 (1981)). "'[E]quitable tolling [of the statute of limitations] seeks to excuse untimely filing by an individual plaintiff[,] and is generally applicable where the plaintiff has been induced or tricked by the defendant's conduct into allowing the filing deadline to pass.' . . . Stated otherwise, for equitable estoppel to toll a statute of limitations, a plaintiff must show that there was some wrongful conduct on the part of the defendant that prevented the plaintiff from asserting his or her claim." *Ademiluyi v. Board of Elections*, 458 Md. 1, 31 (2018) (quoting *Adedje v. Westat,* 214 Md. App. 1, 13 (2013)); *see generally Philip Morris v. Christensen*, 394 Md. 227 (2006).

b. <u>Laches</u>

> "Laches 'is a defense in equity against stale claims, and is based upon grounds of sound public policy by discouraging fusty demands for the peace of society.'" . . . [L]aches "applies when there is an unreasonable delay in the assertion of one's rights and that delay results in prejudice to the opposing party." . . . "Prejudice is 'generally held to be anything that places [the defendant] in a less favorable position.'"

State Center, LLC v. Lexington Charles Ltd. Partnership, 438 Md. 451, 585-86 (2014) (quoting *Ross v. State Bd. of Elections*, 387 Md. 649, 668 (2005), and *Liddy v. Lamone*, 398 Md. 233 (2007); internal citations omitted.) In determining whether a delay is unreasonable, the court looks at (i) when the claim became ripe (at the earliest); and (ii) whether the passage of time between ripeness and filing was unreasonable. *State Center,* 438 Md. at 590-91. In evaluating the latter, "where appropriate, we should look to the General Assembly for guidance in determining what amount of time is reasonable." *Id.* at 603. "When a case involves concurrent legal and equitable remedies,

'the applicable statute of limitations for the legal remedy is equally applicable to the equitable one." *Frederick Road Ltd. Partnership v. Brown & Sturm*, 360 Md. 76 (2000) (quoting *Schaeffer v. Anne Arundel Cnty*, 338 Md. 75, 81 (1995)). Further, the doctrine of laches will not apply to bar an action where the requested relief ancillary to the equitable claim is legal, not equitable, in nature. *Murray v. Midland Funding, LLC*, 233 Md. App. 254 (2017).

c. "Complicity" – Estoppel, Waiver and Unclean Hands

i. Estoppel

> Under the doctrine of equitable estoppel, a party will be precluded by his voluntary conduct from asserting, at law or in equity, either property, contract, or remedial rights that otherwise might have existed as against a person who relied on such conduct in good faith and thereby was led to change his condition for the worse, and in doing so acquired some corresponding right, either of property, contract, or of remedy. . . . The essential elements of estoppel are "(1) voluntary conduct or a representation by the party to be estopped, even if there is no intent to mislead; (2) reliance by the estopping party; (3) and detriment to the estopping party."

Catholic Univ. of Am. v. Bragunier Masonry Contractors, Inc., 139 Md. App. 277, 305 (2001) (citing many sources including *Savonis v. Burke*, 241 Md. 316, 319 (1966), and *Holzman v. Fiola Blum*, Inc., 125 Md. App. 602, 631 (1999); other citations omitted).

ii. Waiver

Waiver is the "intentional relinquishment of a known right," and may result from an "express agreement or be inferred from conduct." *Simko, Inc. v. Graymar Co.*, 55 Md. App. 561, *cert. denied*, 298 Md. 244 (1983) (citing *Gould v. Transamerican Assocs.*, 224 Md. 285 (1961)); *see also Taylor v. Mandel*, 402 Md. 109, 135-36 (2007) (citing *Gould*, 224 Md. at 295, and holding that "waiver rests upon the intention of the party, and therefore, acts relied upon as constituting

waiver must unequivocally demonstrate that waiver is intended."). Acts relied on for waiver must be inconsistent with an intention to insist upon enforcing the provisions, be clearly established and not be inferred from equivocal acts or language. *Gold Coast Mall, Inc. v. Larmar Corp*., 298 Md. 96 (1983).

iii. Unclean Hands

> The [un]clean hands doctrine states that "courts of equity will not lend their aid to anyone seeking their active interposition, who has been guilty of fraudulent, illegal, or inequitable conduct in the matter with relation to which he seeks assistance." The doctrine does not mandate that those seeking equitable relief must have exhibited unblemished conduct in every transaction to which they have ever been a party, but rather that the particular matter for which a litigant seeks equitable relief must not be marred by any fraudulent, illegal, or inequitable conduct.

Dickerson v. Longoria, 414 Md. 419, 455-56 (2010). Some sort of inequitable, fraudulent or illegal conduct on the part of the party seeking relief from court is necessary before the court will invoke the unclean hands doctrine. *Id.* "There must be a nexus between the misconduct and the transaction, because '[w]hat is material is not that the plaintiff's hands are dirty, but that he dirties them in acquiring the right he now asserts.'" *Id.* (quoting *Hicks v. Gilbert*, 135 Md. App. 394, 400-401 (2000)).

3. Statutory Construction and Contract Construction

Peculiar to this breach of contract case is the fact that the contractual relationship is a creature of statute. BALT., MD., CODE art. 22, § 42 (2009) ("…deemed to have entered into a contract with the Mayor and City Council of Baltimore"), Trial Ex. 1. The parties' contractual relationship cannot rightly be described as the product of a garden variety, arm's length transaction between two parties who reduce their negotiated deal to paper for clarity, guidance, and everyone's

protection; nor is it correct that the Plan is composed of a sovereign's terms, pronounced from on high, subject to change at the whim of the government (or never to be changed even on persuasive request of its employees).[83] In view of the hybrid nature of this instrument, the court reviewed Maryland law on both statutory and contract construction, and concludes, thankfully, these bodies of law are quite happy bedfellows.

a. Statutory Construction

"[T]he cardinal rule of statutory construction is to ascertain and give effect to the true legislative intent that lies behind the enactment itself. The primary indication of legislative intent is found in the plain language of the statute, with the words given their ordinary and natural meaning." *Sacchet v. Blan*, 353 Md. 87, 92 (1999) (internal citations omitted). "When the statutory language is clear, we need not look beyond the statutory language to determine the Legislature's intent." *Marriott Employees Fed. Credit Union v. Moto Vehicle Admin.*, 346 Md. 437, 445 (1997). "[T]he plain-meaning rule[, however,] does not force us to read legislative provisions in rote fashion and in isolation. . . . We may and often must consider other 'external manifestations' or 'persuasive evidence,' including a bill's title and function paragraphs . . . and other material that fairly bears on the fundamental issue of legislative purpose or goal, which becomes the context within which we read the particular language before us in a given case." *Kaczorowski v. Mayor and City Council*, 309 Md. 505, 514-16 (1987). The Court of Appeals instructs further that "viewing statutory language in isolation is a method of construction which this Court eschews. Instead, we construe the statute as a whole; examine the statute in the context

[83] Interestingly, although *Quinn* pertains to modification not interpretation, the centaurian nature of the Plan is at the root of *Quinn's* holding – that the Plan is to be treated neither as the product of a standard commercial negotiation nor some gift of a benevolent, mercurial overlord.

in which it was adopted; and consider the general purpose, aim, or policy behind the statute." *Sacchet*, 353 Md. at 95 (internal citations omitted).

"If the language of the statute is clear and unambiguous and expresses a meaning consistent with the statute's goals and apparent purpose, our inquiry normally ends with that language. If, on the other hand, the language is susceptible to more than one meaning and is therefore ambiguous, we consider 'not only the literal or usual meaning of the words, but their meaning and effect in light of the setting, the objectives and purpose of the enactment,' and, in those circumstances, in seeking to ascertain legislative intent, we consider 'the consequences resulting from one meaning rather than another, and adopt that construction which avoids an illogical or unreasonable result, or one which is inconsistent with common sense.'" *Chesapeake Charter, Inc. v. Anne Arundel Co. Bd. of Educ.*, 358 Md. 129, 135 (2000) (citing *Melgar v. State*, 355 Md. 339, 347 (1999); quoting *Tucker v. Fireman's Fund Ins. Co.*, 308 Md. 69, 75 (1986), and *Bd. of License Comm'rs v. Toye,* 354 Md. 116, 123 (1999)).

b. Contract Construction

If the language of a contract is unambiguous, the court shall "give effect to its plain meaning." *Cochran v. Norkunas*, 398 Md. 1, 16 (2007); *see also Walton v. Mariner Health*, 391 Md. 643, 660 (2006) (holding that the court shall focus "on the four corners" of a contract and give effect to the "customary, ordinary, and accepted meaning" of its words). The "objective theory of contracts" looks to what a reasonably prudent person in the same position would have understood the contract to mean, not what she intended. If the meaning is plain, the analysis stops there – as no construction tools need be applied to extract meaning. It means what it says. Ambiguity is not rooted in mere difference of opinion as to meaning (X versus Y), but rather arises when the

language is in fact susceptible to multiple meanings (X and Y), or the meaning is simply doubtful. *Cochran*, 398 Md. at 17 (quoting *Gen. Motors Acceptance Corp. v. Daniels*, 303 Md. 254, 261 (1985)). Further, "'the contract must be construed in its entirety and, if reasonably possible, effect must be given to each clause so that a court will not find an interpretation which casts out or disregards a meaningful part of the language of the writing unless no other course can be sensibly and reasonably followed.'" *Id.* at 17 (quoting *Sagner v. Glenangus Farms*, 234 Md. 156, 167 (1964)).

As to apparent internal conflicts between or among contract provisions (as distinguished from ambiguity), it is well-settled that: (i) "where two clauses or parts of a written agreement are apparently in conflict and one is general in character and the other is specific, the specific stipulation will take precedence over the general, and control it;" and (ii) "[w]here the provisions in question may be reconciled and accepted as binding on the parties, no one of them ought to be rejected." If application of these basic rules still leaves "proper construction in doubt," the court looks to whether the parties "have given it a practical construction by their conduct" – but "practical construction is not conclusive, and may be considered only when the contract, read in the light of surrounding circumstances, leaves the proper construction in doubt." *Mattingly Lumber Co. v. Equitable Bldg. & Sav. Ass'n of Balto. City*, 176 Md. 403 (1939); *Fed. Ins. Co. v. Allstate Ins. Co.*, 275 Md. 460, 472 (1975).

B. Doctrine of Laches and Statute of Limitations – Application to Counts II, III and IV for Breach of Contract by Underfunding

By Counts II, III and IV, Plaintiffs seek a return to the pre-10-306 Plan (noted as a demand for specific performance in the *ad damnum* clauses); alternatively, Plaintiffs seek damages equal to the present value of pension benefits they claim they would have been entitled to receive going

forward from the date of final judgment had the Plan not been modified. Plaintiffs also seek damages in the amount of pension benefits they allegedly would have been entitled to receive had the Plan not been modified by 10-306 from the effective date of 10-306 to the date of final judgment, including in that calculation damages Plaintiffs attribute to the City's failure to fund the Plan "adequately" during the years identified in the Amended Complaint.

The doctrine of laches does not apply to Plaintiffs' request for damages in connection with their claims for breach of contract by underfunding of the Plan. These are breach of contract actions in law to which the applicable statute of limitations applies. *State Center, LLC v. Lexington Charles Ltd. Partnership*, 438 Md. 451 (2014); *Ross v. State Bd. of Elections*, 387 Md. 649, 668 (2005).

To the extent Plaintiffs state a cognizable claim for breach of contract by underfunding of the Plan (in each of Counts II, III and IV), Maryland's three-year statute of limitations for civil actions bars recovery for claims that accrued on or before June 3, 2007, as Plaintiffs federal lawsuit was filed June 3, 2010. (*See* Amended Complaint, *Prior Relevant History of Proceedings*, p. 2.) The court finds that claims for breach of contract by underfunding the Plan accrued upon the budget approval for a given fiscal year, as each fiscal year required the City to approve, and the mayor to adopt, the Board-recommended accounting and related contribution decisions about which Plaintiffs complain as the basis for their breach by underfunding claims. *See supra Ely v. Science Application Interns Corp.*, 716 F. Supp.2d 403 (D. Md. 2010) (holding that statute of limitations on failure to pay rent on commercial lease begins running anew for each successive rental payment); *see also Avery v. Weitz*, 44 Md. App. 152 (1979) (holding that statute of limitations begins to run on each successive promissory note payment obligation as it becomes due and bars recovery on claims for unpaid installments due more than three years before filing of

confession of judgment); *see also C. W. Blomquist & Co., Inc. v. Capital Area Realty Investors Corp.*, 270 Md. 486, 494-95 (1973) (holding that refusing to do something required for contract performance effects a repudiation and anticipatory breach of contract).

The Ordinance of Estimates (the City budget) was adopted by the City Council and signed by the mayor on the following dates for the noted fiscal years:

June 16, 2006 – FY 2007

June 11, 2007 – FY 2008

June 16, 2008 – FY 2009

June 17, 2009 – FY 2010

June 24, 2010 – FY 2011

Plaintiffs' claims for breach of contract attributable to the City's failure to adequately fund the Plan in fiscal year 2008 accrued when the mayor approved the budget on June 11, 2007. *Catholic Univ. of Am. v. Bragunier Masonry Contractors, Inc.*, 139 Md. App. 277, 297 (2001) (citing, *inter alia, Singer Co., Link Simulation Sys. Div. v. Balt. Gas & Elec. Co.*, 79 Md. App. 461, 473 (1989)). Therefore, Plaintiffs are not time barred from recovering damages attributable to the City's underfunding of the Plan, if any, for FY 2008 (ending June 30, 2008) and later in time. Plaintiffs are time-barred from recovering such damages, if any, attributable to actions/inactions during FY 2007 and earlier, inasmuch as the City's (and mayor's) approval of the FY 2007 budget on June 16, 2006 included the City's post-retirement earnings assumption rate for FY 2007 and continued recognition of BIF/ERF losses via double smoothing in that year. MD. CODE ANN., CTS. & JUD. PROC. § 5-101 (2018); MD. RULE 2-101; *C. W. Blomquist & Co.*, 270 Md. at 494-95. Plaintiffs' recovery of damages attributable to the City's failure to recognize losses

resulting from the 2008/09 Great Recession by adopting 10-306 instead of fully funding the ARF and the PRF, if any, are not barred by limitations.

1. Discovery Rule and Equitable Tolling of the Statute of Limitations

Plaintiffs complain that the CAFRs for 2002 to 2009 did not "take into consideration the Plan actuary's recommendations," and, therefore, the City "misrepresented the true nature" of its contribution requirements, failed to report a net pension obligation, and "falsely claimed . . . that it was fully funding the Plan and satisfying 100% of its Annual Required Contribution." "[T]he members of the Class had no reason to suspect that the City had been knowingly underfunding the Plan." (Amended Complaint, ¶¶ 162-63; Plaintiffs' Post-Trial Brief, p. 6 n.6.) The court construes this generously as a discovery rule and/or equitable tolling argument. The record supports neither.

As mentioned above in Section V(A)(2)(a), this argument presupposes acceptance of Plaintiffs' reading of the Plan to impose the City's alleged funding obligations on which Plaintiffs base that aspect of their breach of contract claims. Plaintiffs have not presented legal authority or argument on the discovery rule or equitable tolling (nor have they pursued claims of fraud or negligent misrepresentation against the City).[84] For the sake of equity and completeness, however, the court has considered whether the discovery rule applies and whether the doctrine of equitable tolling excuses Plaintiffs' failure to file timely claims regarding alleged City actions/inactions during FY 2007 and earlier.

[84] This comment should not be misconstrued to suggest the requisite tort duty exists independent of the Plan. *See Mesmer v. Maryland Auto. Ins. Fund*, 353 Md. 241 (1999) (holding that a duty giving rise to a tort action must be independent of the contractual obligation) (citing *Wilmington Trust Co. v. Clark*, 289 Md. 313, 328-29 (1981)).

There is no evidence in the record that Plaintiffs (and Class members) did not know the facts on which they base their breach of contract by underfunding claims; nor is there evidence in the record to suggest that, if material facts were unknown to Plaintiffs (or Class members), that exercise of reasonable diligence would not have revealed such facts. Therefore, the discovery rule does not apply as an exception to the accrual rule in this case. *Kumar v. Dhanda*, 198 Md. App. 337, 343 n.2 (2011), *aff'd*, 426 Md. 185 (2012) (citing *Poffenberger v. Risser*, 290 Md. 631, 635-36 (1981)).

Likewise, there is no evidence in the record that the City tricked any Class member about the funding status of the Plan or the City's contribution obligations under the Plan; nor is there evidence that the City induced any Class member, by words or deeds, not to file action before June 3, 2010. There is no evidence that the 2002 to 2009 CAFRs (or any one of them) contained a misstatement that did so trick or induce any Class member.[85] The court finds that the doctrine of equitable tolling does not apply. *Ademiluyi v. Board of Elections*, 458 Md. 1, 31 (2018) (quoting *Adedje v. Westat*, 214 Md. App. 1, 13 (2013)).

C. Estoppel, Waiver and Unclean Hands – Application to Counts II, III and IV for Breach of Contract by Underfunding

As mentioned above, the court is rather left to assume that the City's reference to "the unions' complicity" is intended to encompass its affirmative defenses of estoppel, waiver, and

[85] Moreover, in view of the fact that Class member Captain Fugate was a Board member for 12 years beginning July 1998, and chaired the Board for 10.5 of those years, Plaintiffs had ready access to and knowledge of all goings on regarding the City's contributions and funding of the Plan. By way of example, at the November 2005 Board meeting, the Board (chaired by Captain Fugate) unanimously approved use of the market-based conversion rate of five percent (instead of 6.8%) for calculation of the Variable Benefit effective January 2006.

unclean hands. Aside from the fact that the unions are not parties to any of the three counts for breach of contract, the record does not support application of any of these affirmative defenses.

With respect to estoppel, there is no evidence of voluntary conduct of a Plaintiff or Class member on which the City relied or on which it based a decision regarding its funding of the Plan (including the City's loss recognition methods or calculation of its contribution obligation in any given year) to its detriment. And while the court generally accepts the proposition that the unions, on behalf of its members, participated in creation of (even lobbied for) the BIF/ERF system, in the opinion of the court, that proposition is a bridge shy of satisfying the elements of estoppel. In other words, the evidence does not give rise to a finding that union lobbying efforts (even were they attributed to Plaintiffs and the Class generally) resulted in the particular Plan language in which the City cloaks itself to assert entitlement to apply double smoothing to the $400-plus million losses. There is no evidence whatsoever (and the City offers none) to support an estoppel defense in connection with the City's decisions not to reduce the 6.8% investment rate assumption for post-retirement assets; and, further yet, no evidence to support an estoppel defense to Plaintiffs' claims that the City breached the Plan by opting to legislate an escape hatch following the losses from the 2008-09 Great Depression instead of recognizing the losses pursuant to the Plan (as Plaintiffs read it). *Catholic Univ. of Am. v. Bragunier Masonry Contractors, Inc.*, 139 Md. App. 277, 305 (2001) (citing many sources including *Savonis v. Burke*, 241 Md. 316, 319 (1966), and *Holzman v. Fiola Blum*, Inc., 125 Md. App. 602, 631 (1999); other citations omitted).

The merits of a waiver defense meet the same end. There is no evidence that a Plaintiff or Class member, expressly or implicitly, unequivocally and intentionally relinquished a known (alleged) right regarding the City's alleged funding and contribution obligations. Failure to pursue a claim, absent more, is insufficient to meet the clear evidence of intentional relinquishment

required to establish waiver. *Simko, Inc. v. Graymar Co.*, 55 Md. App. 561, *cert. denied*, 298 Md. 244 (1983); *Gould v. Transamerican Assocs.*, 224 Md. 285 (1961); *Taylor v. Mandel*, 402 Md. 109 (2007); *Gold Coast Mall, Inc. v. Larmar Corp*., 298 Md. 96 (1983).

The elements of unclean hands are also not present here. Nothing whatsoever in the record suggests that any Plaintiff or Class member sullied him or herself by some inequitable, fraudulent or illegal conduct in acquiring any rights (alleged or otherwise) on which the instant case rests. *Dickerson v. Longoria*, 414 Md. 419 (2010); *Hicks v. Gilbert*, 135 Md. App. 394 (2000).

Finally, apart from whether the facts support these affirmative defenses in a hornbook sense, the legal nature of the parties' relationship adds complexity. Plaintiffs, as beneficiaries of the Plan, are owed a fiduciary duty by those charged with administration, management and disposition of Plan assets. *See* BALT., MD., CODE art. 22, §§ 33(q)(2) ("Service in a fiduciary capacity defined"), 35(f) ("Trustee fiduciary liability"), 35(h) ("Prudent investment of funds") (2009 and 2010); and *Bd. of Trs. of the Employees' Ret. Sys. v. Mayor and City Council*, 317 Md. 72, 91, 100-101 (1989) (explaining in *dicta* that "[i]t is true that, like ordinary trustees, the persons administering Baltimore's retirement funds are charged with fiduciary duties of loyalty and care toward the system's beneficiaries").[86] Add to this brew the fact that "Baltimore City Code, Article 22, §§ 7(h) and 35(h), adopt the duty of prudence set forth in § 404(a)(1) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1104(a)(1)(1982)," and ERISA expressly prohibits waiver of claims for breaches of fiduciary duty as against public policy. *Bd. of Trs. of the Employees' Ret. Sys.,* 317 Md. at 103; ERISA § 410, 29 U.S.C. § 1110(a). This court

[86] *Employees' Retirement System* addressed whether public pension fund beneficiaries were entitled to intervene as of right in a case brought by trustees and two employee beneficiaries against the City relating to ordinances requiring divestment of holdings in companies doing business in South Africa. Discussion of the fiduciary duties owed to plan beneficiaries pertained to whether the intervenors' rights would be adequately represented absent their presence as parties in the case.

does not assume or find that Maryland law follows suit as to the prohibition of claim waiver, but it stands to reason that determination of whether a waiver affirmative defense applies to these facts ought to include explication of this important issue. There is none in the record. The court declines to find that Plaintiffs/Class members waived their alleged right to a fully funded pension because they participated in the creation of, and benefitted from, the BIF/ERF, by virtue of their representation on the Board, or otherwise. Participation in the creation of the BIF/ERF system, which in any event includes a sunset provision, does not equate to "complicity" in the City's alleged breach of its general duty to fully fund the Plan; nor does it equate to waiver of any such right (if one exists).

D. Count II, III and IV – Liability for Breach of Contract by Underfunding[87]

Plaintiffs' claims for breach of contract by underfunding[88] call upon the court to impose a duty upon the City not found in the plain language of the Plan. Specifically, when read individually or as a cohesive unit, the sections of the Plan upon which Plaintiffs rely do not create an obligation

[87] Subject to the court's determination that recovery for breach-by-underfunding is time-barred for FY 2007 and earlier.

[88] By now a reminder is likely needed. Plaintiffs allege breach of contract by underfunding based on the following allegations 1) failure of the City to adopt the Plan actuary's recommendations to reduce the 6.8% post-retirement asset earnings assumption rate (which enabled the City to avoid the resultant increase in required contributions during the relevant period); 2) double smoothing the losses sustained following the technology bubble burst (which delayed recognition of those losses and, therefore, depressed the City's required contributions during the relevant period); and 3) failure to recognize losses resulting from the 2008/09 Great Recession by adopting 10-306 instead of fully funding the ARF and the PRF. Plaintiffs' second and third bases for their breach by underfunding claims are really two sides of the same coin or, perhaps more accurately, allege a continuation of conduct. Plaintiffs argue that double smoothing was an inappropriate method of recognition of the BIF/ERF losses and 1) had City not engaged in double smoothing and instead recognized the losses more "responsibly," 2) the City would have been better positioned to weather the Great Recession, and 3) the City's alleged breach of its Guaranty under 37 to fully fund the ARF and PRF per 36(j)(4) would never have occurred.

on the part of the City to fully fund the Plan. In addition to the absence of an affirmative obligation to maintain the Plan in a fully funded state, provisions of the Plan at sections 33, 36 and 37 are fundamentally at odds with such an obligation. *See* Section V(A), *supra*, on Applicable Law. If the legislature had intended the meaning Plaintiffs attribute, the Plan would require that at all times the Plan be "fully funded," to use Plaintiffs' language, or the equivalent. Likewise, the legislature would not have afforded the City entitlement to exercise discretion in consultation with industry professional advisors regarding, among other things, the proper methods of accounting for losses and gains. Importantly, were it the case that the City was required to maintain a fully funded Plan at all times, the legislature would not have accommodated the possibility of a pay-go system. BALT., MD., CODE art. 22, § 36(d)(5) (2009) (". . . the aggregate payment by the City must be sufficient, when combined with the amount in the fund, to provide the pensions and other benefits payable out of the fund during the then-current year."), Trial Ex. 1.

The court does not find merit in Plaintiffs' claims that the City breached its contract with Plaintiffs by "underfunding" the Plan. The language of the Plan is plain and clear. It does not give rise to multiple meanings; nor is its meaning doubtful. Therefore, the court finds that the legislature did not intend to require that the City maintain the Plan in a "fully funded" state as Plaintiffs contend; and the Plan did not so require on the effective date of Ordinance 10-306 or at any time at issue in the Amended Complaint. Specifically, Plaintiffs (Class members) have failed to satisfy their burden to demonstrate that the City breached its contractual duties to any of the three Sub-Classes by 1) failing to lower the post-retirement earnings assumption rate from 6.8%; 2) double smoothing the tech bubble losses; or 3) legislatively modifying the Plan following the Great Recession (and not "fully funding" the ARF and the PRF). *Cochran v. Norkunas*, 398 Md. 1, 16 (2007); *Sacchet v. Blan*, 353 Md. 87, 92 (1999); *Marriott Employees Fed. Credit Union v.*

Moto Vehicle Admin., 346 Md. 437, 445 (1997); BALT., MD., CODE art. 22, §§ 33(m)-(p), 36(d)(1) and (5), 36(j)(4), (14), (37) (2009); Trial Ex. 1; Section V(A), *supra*.

1. Conclusion

For the reasons set forth above, as to Counts II, III and IV, the court concludes that the City did not breach its contract with Plaintiff Class members (including its respective Sub-Classes) by underfunding the Plan.

VI. COUNT I – DECLARATORY JUDGMENT

A. Applicable Law

1. Maryland Uniform Declaratory Judgment Act

The Maryland Uniform Declaratory Judgments Act exists "to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations. It shall be liberally construed and administered." Further, the court is empowered to "declare rights, status, and other legal relations whether or not further relief is or could be claimed" regarding all manner of legal disputes, including breach of contract. Moreover, "[a]ny person interested under a … written contract, or other writing constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, [or] contract, . . . may have determined any question of construction or validity arising under the . . . ordinance . . . or . . . contract, . . . and obtain a declaration of rights, status, or other legal relations under it." MD. CODE ANN., CTS. & JUD. PROC. §§ 3-401 *et seq.*

2. Doctrine of Laches

Plaintiffs' Count I for Declaratory Judgment requests declaration that "The members of the Class have the right to an adequately-funded Plan." (Amended Complaint, p. 55, ¶ 218(N).) All other requested mandates are tied directly to 10-306 or the date of its passage. To the extent the City's invocations of the doctrine of laches in affirmative defense of Plaintiffs' breach of contract by underfunding claims is directed at this portion of Count I, the court will address the law on the doctrine of laches as applicable to actions for declaratory relief.

"A declaratory judgment can be obtained either at law or in equity." Because a declaratory judgment action is neither wholly an action at law or in equity, but rather *sui generis*, ["d]eclaratory relief may take on the color of either equity or law, depending on the issues presented and the relief sought." *Murray v. Midland Funding, LLC*, 233 Md. App. 254, 262 (2017) (quoting *LaSalle Bank, N.A. v. Reeves*, 173 Md. App. 392, 411-12 (2007)). Determination of whether a declaratory judgment action sounds in law or equity must be made by examining the nature of the claim and requested relief. *Murray*, 233 Md. App. at 262.

When additional relief is sought ancillary to a declaratory judgment action, the court will determine whether such requested ancillary relief is legal or equitable in nature. Where it is legal in nature, the appropriate statute of limitations will apply, not the doctrine of laches. *Murray*, 233 Md. App. 263-64 (2017). A declaratory judgment action that relates to a breach of contract claim does not sound in equity because breach of contract is a legal cause of action. *Fisher v. Tyler*, 24 Md. App. 633, 668-69 (1975) (noting that at the conclusion of negligence and breach of contact counts, plaintiffs requested the trial court to make declarations regarding defendant insurers' liability to plaintiffs for judgments against them by third parties based on insurance contracts

between the parties; thus, holding the request for declaratory judgment sounded in law not equity) (cited with approval by *Murray*, 233 Md. App. at 262).

3. Statute of Limitations

The court adopts by reference Section V(A)(2)(a), above, regarding the statute of limitations applicable to this action.

B. Count I is Not Barred by Laches or Statute of Limitations

Laches will not bar Plaintiffs' requested declaratory relief (Count I) that the Class is entitled to an "adequately-funded Plan" (Amended Complaint, p. 55, ¶ 218(N)), as such a mandate is a general statement of rights and status held by Class members regarding any pension plan in place; indeed, as written, it is tied to no event or law. And, in any event, the relief ancillary to that requested mandate is largely (if not entirely) legal, not equitable, in nature. By Counts II, III and IV, Plaintiffs seek a return to the pre-10-306 Plan (noted as a request for "specific performance" in the *ad damnum* clauses); alternatively, Plaintiffs seek damages equal to the pension benefits they claim they would have received had the Plan not been modified (reduced to present value). Plaintiffs also seek damages to which they claim entitlement in the amount of pension benefits they assert they would have received for the years that the City allegedly failed to fund the Plan "adequately."[89] And, at bottom, Count I is more in the nature of an action at law, not equity.

[89] Plaintiffs do not complain that Retired and Retirement-Eligible Sub-Class members did not receive benefits to which they were entitled under the 6.8% post-retirement earnings assumption rate in place. Plaintiffs do, however, contend entitlement to a "fully funded" and an "adequately funded" Plan, and assert that the court ought to measure damages on Counts II and III based on a five percent earnings assumption rate. Calculation of the City's contribution obligation at a five percent rate (from the effective date of the Ordinance to the date of final judgment, or beginning at any time for that matter) would generate a larger pool of assets from which the Variable Benefit

Fisher, supra. Laches will not apply to bar action where the requested relief ancillary to the equitable claim is legal, not equitable, in nature. *Murray v. Midland Funding, LLC,* 233 Md. App. 254 (2017).

Further, statute of limitations does not otherwise bar Plaintiffs' requested declarations at Count I. Count I asks the court to declare the parties' rights, duties and entitlements under the Plan as a consequence of the Ordinance and the controversies it generated vis-à-vis the parties' respective rights and obligations. These justiciable issues and controversies were pursued in the Federal Litigation within three years from the date of accrual of the claim.[90]

C. Requested Declarations – The Class and Sub-Classes

The court finds as a matter of law that the Plaintiff Class, and each Sub-Class, is entitled to pursue and has properly stated a claim for relief under the Maryland Uniform Declaratory Judgments Act as set forth in MD. CODE ANN., CTS. & JUD. PROC. §§ 3-401 *et seq.* The Amended Complaint sets out 14 requested declarations of the court, identified as A through N (Amended

would be calculated (than if a 6.8% rate were used) and therefore result in a higher damages award. *See* Section VII, *infra*, regarding damages on Counts II and III.

[90] The Complaint in the Federal Litigation included a count for relief under the Maryland Uniform Declaratory Judgment Act (against all Defendants), as well as counts asserting violation of the Takings Clause of the Fourteenth Amendment to the United States Constitution (against the City), violation of the Contract Clause of Article 1 of United States Constitution (against the City), breach of contract (against the City and the Board), breach of fiduciary duty (against the Board), breach of the duty of loyalty (against the Board), negligence and gross negligence (against the Board), civil conspiracy (against all Defendants), conversion of trust property (against the City and the Board), entitlement to an accounting (against all Defendants) and injunctive relief (against all Defendants). The same issues and requested relief presented through Count I were asserted against the City by way of the Federal Litigation.

Complaint, pp. 54-55.) The court addresses each requested declaration as set forth in the Amended Complaint as follows:[91]

A. [Whether] the City, by adopting Ordinance 10-306, engaged in the unlawful taking of property without just compensation.

Plaintiffs voluntarily withdrew this requested declaration as confirmed on the record in open court on January 4, 2019.

B. [Whether] the City, by adopting Ordinance 10-306, unlawfully diminished and impaired the benefits of the members of the Plan and their beneficiaries.

As set forth in the Memorandum Opinion and Declaratory Judgment and Order issued January 2, 2018 (Doc. Nos. 20/2 and 21/5, respectively),[92] the court finds that by enacting Ordinance 10-306, the City retrospectively, and therefore unlawfully, withdrew from Retired and Retirement-Eligible Sub-Class members their rights to the Variable Benefit feature of the Plan as it stood prior to the Ordinance. In so doing, the City unlawfully diminished and impaired a Plan

[91] Plaintiffs' requested declarations are set out in the affirmative in the Amended Complaint. For purposes of this opinion, the court construes each requested declaration to be set off with the word "Whether" to pose the statement as an inquiry. For example, "F. *Whether* the City, by adopting Ordinance 10-306, breached its contract with the members of the Plan."

[92] At the time of the Memorandum Opinion and Declaratory Judgment and Order of January 2, 2018, Plaintiffs had not yet filed their Motion for Class Certification (Doc No. 45, filed February 15, 2018). Therefore, as set forth at footnotes 20 and 26 at pages 33 and 41 of the January 2018 Memorandum Opinion, consistent with the Stipulation of Plaintiff Status, for purposes of the parties' cross dispositive motions then pending, the court construed "Active Sub-Class" to mean Plaintiffs Cherry and Lake; "Retired Sub-Class" to mean Plaintiffs Houser and William; "Retirement-Eligible Sub-Class" to mean Plaintiff Sledgeski; and "Class" to mean Plaintiffs Cherry, Lake, Houser, Williams and Sledgeski collectively. Now that the court has ruled on the Motion for Class Certification, the court uses the applicable sub-class names in ruling on Count I and the requested declarations.

benefit of Retired and Retirement-Eligible Sub-Class members. Ordinance 10-306 did not diminish or impair Plan benefits of Retired and Retirement-Eligible Sub-Class members other than the Variable Benefit. With respect to Active Sub-Class members, the court finds that by enacting Ordinance 10-306, the City lawfully modified the Plan. The City did not unlawfully diminish or impair the benefits of Active-Sub Class members.

C. [Whether] members of the Plan and their beneficiaries are entitled to the benefits provided under Article 22, § 29 et seq. that existed immediately prior to the enactment of Ordinance 10-306.

With respect to Retired and Retirement-Eligible Sub-Class members, as set forth more fully in Section VII, below, it is subject to the court's discretion whether to award money damages equivalent to the value of the withdrawn Variable Benefit (reduced to present value) or, alternatively, specific performance in the form of re-institution of the Variable Benefit. The court declines to declare that Retirement and Retirement-Eligible Sub-Class members are entitled to the benefits that existed immediately prior to the enactment of Ordinance 10-306; however, it is within the court's discretion to order such relief. Active Sub-Class members are not entitled to the benefits that existed immediately prior to the enactment of Ordinance 10-306, as the City lawfully modified their benefits under the Plan by way of the Ordinance.

D. [Whether] members of the Active Sub-Class, by virtue of their membership in the Plan prior to the adoption of Ordinance 10-306, held contractual rights to the benefits provided under the Plan that the City could not unilaterally diminish or impair.

As set forth in the January 2018 Memorandum Opinion and Declaratory Judgment and Order, the City is, and was at all times relevant to this case, entitled to make prospective and reasonable unilateral modifications to the Plan. As set forth in *Quinn*, "the employee must have

available substantially the program he bargained for and any diminution thereof must be balanced by other benefits or justified by countervailing equities for the public's welfare." *City of Frederick v. Quinn*, 35 Md. App. 626, 631 (1977). Active Sub-Class members have contractual rights coterminous with this pronouncement. The court finds that Ordinance 10-306 provides Active Sub-Class members substantially the pension plan that existed at the time of employment, and that any diminution of Plan benefits are balanced by other benefits provided under the modified (post-10-306) Plan or are justified by countervailing equities for the public's welfare.

E. [Whether] members of the Retired and Retirement-Eligible Sub-Classes, having satisfied all of the contractual conditions precedent to receipt of benefits under the Plan prior to the adoption of Ordinance 10-306, held vested rights to Plan benefits that the City could not unilaterally diminish or impair.

As set forth in the January 2018 Memorandum Opinion and Declaratory Judgment and Order, pursuant to *Quinn* and *Saxton,*[93] the City's entitlement to make unilateral, reasonable modifications to the Plan is limited to prospective changes, *i.e.*, changes that affect Plan members who have not yet satisfied the defined contingencies for eligibility for, or receipt of, the subject benefit or benefits. As Retired and Retirement-Eligible Sub-Class members had satisfied all such defined contingencies, the City was disallowed from making changes to the Plan that removed, diminished or impaired those benefits, as those rights had "vested absolutely." *Quinn*, 35 Md. App. at 630.

[93] *City of Frederick v. Quinn*, 35 Md. App. 626 (1977); *Saxton v. Bd. of Trs. of the Fire and Police Employees Ret. Sys. of Baltimore*, 266 Md. 690 (1972).

F. [Whether] the City, by adopting Ordinance 10-306, breached its contract with the members of the Plan.

As set forth in the January 2018 Memorandum Opinion and Declaratory Judgment and Order, pursuant to Section 42, each Class member entered a contract with the City upon employment, the terms of which were the provisions of Article 22 as it existed upon his or her date of employment. Under *Quinn* and *Saxton*, the City has a reserved legislative power to make unilateral, prospective, reasonable modifications to the Plan. Likewise, the City is prohibited under these common law authorities from enacting retrospective changes. Ordinance 10-306, by eliminating the Variable Benefit, effectively removed from Retired and Retirement-Eligible Sub-Class members a benefit in connection with which each had satisfied the defined eligibility or entitlement contingencies. Therefore, by enacting Ordinance 10-306, the City breached its contract with Retired and Retirement-Eligible Sub-Class members. The City did not breach its contract with Active Sub-Class members by enacting Ordinance 10-306.

G. [Whether] Article 22 § 42 prohibits the City from unilaterally diminishing or impairing Class members' benefits under the Plan.

As set forth in the January 2018 Memorandum Opinion and Declaratory Judgment and Order, as set forth in *Quinn* and *Saxton, supra,* and as cited with favor by other Maryland state and federal authority discussed above, in Maryland, pension plans are not subject to the rigors of strict contract construction. The law reserves for the legislature power to make unilateral, prospective, reasonable modifications.

> The contractual or vested rights of the employee in Maryland are subject to a reserved legislative power to make reasonable modifications in the plan, or indeed to modify benefits if there is a simultaneous offsetting new benefit or liberalized qualifying condition. Each case where a changed plan is substituted must be analyzed on its record to determine whether the change was reasonably intended to preserve the integrity of the pension system by enhancing its actuarial soundness, as a reasonable change promoting a paramount

> interest of the State without serious detriment to the employee. In short, the employee must have available substantially the program he bargained for and any diminution thereof must be balanced by other benefits or justified by countervailing equities for the public's welfare. This seems to be the substance of the majority of cases which have found municipal pension plans contractual in nature and it is the view we expressly adopt here.

Quinn, 35 Md. App. at 629-31. "'In all states, municipal corporations may make reasonable modifications of a pension plan at any time before the happening of the defined contingencies.'" *Id.* at 633 (quoting *Saxton,* 266 Md. at 694). Critically, however, "the rights which have accrued under the terminated plan may not be retrospectively withdrawn" from a Plan member. *Quinn,* 35 Md. App. at 631. Section 42, therefore, prohibits the City from retrospectively modifying the Plan in such a way that removes, diminishes or impairs a Plan benefit where a Class member had satisfied all defined contingencies related to such benefit prior to the effective date of the modification.

H. [Whether] the City is prohibited from unilaterally diminishing or impairing the benefits of members of the Retired and Retirement-Eligible Sub-Classes who have satisfied all of the contractual contingencies necessary to receive retirement benefits under the Plan.

See requested declaration E, *supra.* [94]

I. [Whether] the City is obligated to compensate members of the Retired Sub-Class in accordance with the Variable Benefit provision of the Plan in place prior to the enactment of Ordinance 10-306.

The City is obligated to compensate each Retired Sub-Class member to the extent, if any, of his or her monetary loss following the effective date of Ordinance 10-306 owing to the

[94] The court is unable to discern a substantive difference between requested declarations E and H. But for their flip-flopped fragments and H's replacement of "conditions precedent" with "contingencies," these requested declarations are effectively identical.

withdrawal of the Plan's Variable Benefit in accordance with the method of general damages calculation set forth in Section VII, *infra*.

J. [Whether] the City is obligated to reimburse members of the Retirement-Eligible and Active Sub-Classes the full amount they were required to pay in increased employee contributions as a result of Ordinance 10-306.

The City is not obligated to reimburse Retirement-Eligible or Active Sub-Class members for amounts they were required to pay in increased employee contributions as a result of Ordinance 10-306, as the court finds that by enacting Ordinance 10-306 the City lawfully modified the Plan in this respect in accordance with *Quinn*.

K. [Whether] the tiered-COLA provided under Ordinance 10-306 is . . . the equivalent of the Variable Benefit that was provided under the Plan prior to the enactment of Ordinance 10-306.

The City is entitled to make unilateral, prospective, reasonable modifications to the Plan, provided the employee has "available substantially the program he bargained for and any diminution thereof must be balanced by other benefits or justified by countervailing equities for the public's welfare." *City of Frederick v. Quinn,* 35 Md. App. 626, 629-30 (1977). Therefore, comparison of the tiered-COLA to the Variable Benefit in a vacuum (that is, extracted from the entirety of the Plan pre- and post-10-306) – and request that the court declare the extent of their equivalency – fails to appreciate the breadth of the court's required examination of "the program." Moreover, Plaintiffs offer no legal authority regarding "equivalent." That being said, as set forth above, the court finds that Ordinance 10-306 provides Active Sub-Class members substantially the pension program that existed at the time of their employment, and that any diminution of Plan benefits are balanced by other benefits provided under the post-10-306 Plan or are justified by

countervailing equities for the public's welfare. Further, Ordinance 10-306, by eliminating the Variable Benefit, effectively removed from Retired and Retirement-Eligible Sub-Class members a benefit for which each had satisfied the defined eligibility or entitlement contingencies. By enacting Ordinance 10-306, therefore, the City breached its contract with Retired and Retirement-Eligible Sub-Class members, and the City did not breach is contract with Active Sub-Class members.

L. [Whether] the City is required to restore all Plan benefits that were unlawfully diminished or impaired through its enactment of Ordinance 10-306.

The City did not unlawfully diminish or impair Plan benefits of Active Sub-Class members. Therefore, the City is not obligated to restore pre-10-306 Plan benefits to members of Active Sub-Class. As set forth above and more fully in Section VII, with respect to Retired and Retirement-Eligible Sub-Class members, whether to award specific performance in the form of re-institution of the Variable Benefit or money damages equivalent to the value of the withdrawn Variable Benefit (reduced to present value) is subject to the discretion of the court. Therefore, although the City unlawfully withdrew the Variable Benefit from Retired and Retirement-Eligible Sub-Class members, the court declines to declare that the City is required to restore the Variable Benefit; however, it is within the court's discretion to order such relief.

M. [Whether] the City had the financial ability, as of June 30, 2010, to adequately fund the benefits provided under the Plan.

The City funded the Plan in accordance with Article 22 of the City Code through June 30, 2010. That notwithstanding, the Plan had grown actuarially unsound and was actuarially unsound in June 2010. In June 2010, the City did not have the ability both to fund the Plan at a five percent

post-retirement assets earnings assumption rate and ensure that it fulfilled basic, core public safety and welfare needs of Baltimore City's residents. Had the City elected in June 2010 to fund the Plan at a five percent post-retirement assets earnings assumption rate, the City would not have been able to meet basic, core public safety and welfare needs of Baltimore City's residents.

N. [Whether] the members of the Class have the right to an adequately-funded Plan.

Plaintiff Class members have the right to an actuarially sound Plan funded in accordance with Article 22 of the City Code.

VII. REQUESTS FOR RELIEF AND MEASURE OF DAMAGES: COUNTS II AND III FOR BREACH OF CONTRACT BY ENACTMENT OF ORDINANCE 10-306 (RETIRED AND RETIREMENT-ELIGIBLE SUB-CLASSES)

With respect to the period following entry of final judgment in this action, Retired and Retirement-Eligible Sub-Classes, through Counts II and III respectively, demand, alternatively, specific performance in the form of reinstitution of the Variable Benefit or money damages equal to the present value of the Variable Benefit increases to which these members (or their beneficiaries) would be entitled under the pre-10-306 Plan. These Sub-Classes also demand money damages in the amount of the Variable Benefit each would have received (or been entitled to receive in the case of Retirement-Eligible Sub-Class members) from the effective date of 10-306 through final judgment.

A. Applicable Law

When a contract is breached, damages are recoverable "such as may fairly and reasonably be considered, either as arising naturally, *i.e.* according to the usual course of things from such breach of the contract itself; or as may reasonably be supposed to have been in contemplation of both parties, at the time they made the contract, as the probable result of breaching it." *Burson v. Simard,* 424 Md. 318, 327 (2012) (quoting *Hadley v. Baxendale,* 9 Ex. 341, 156 Eng. Rep. 145 (1845)). The former remedy is known as "general damages"; the latter as "special damages" or "consequential damages." *Id.* General damages are understood as "that sum which would place the plaintiff in as good a position as that in which the plaintiff would have been, had the contract been performed," including losses incurred and gains prevented. *Beard v. S/E Joint Venture,* 321 Md. 126, 133 (1990) (citing Restatement (Second) of Contracts § 347 (1981)).

The party who has suffered the breach may also seek specific enforcement of the contract in lieu of damages. "A court may not refuse to specifically enforce a contract on the ground that the party seeking specific performance has an adequate remedy in damages unless the party resisting specific enforcement" demonstrates it has "property" from which damages may be collected (or posts a performance bond). MD. CODE ANN., CTS. & JUD. PROC. § 3-601 (2019). The classic application of specific performance is to remedy a breach of contract for the sale of land, because of the "presumed uniqueness of land itself, no parcel being exactly like another." *Archway Motors, Inc. v. Herman,* 37 Md. App. 674, 681 (1977).

In *Yaffe v. Scarlett Place Residential Condo., Inc.*, despite the fact that neither of the 3-601 exceptions applied,[95] the Court of Special Appeals determined that the trial court was within its

[95] "The two exceptions to [section 3-601] do not apply here." *Yaffe v. Scarlett Place Residential Condo., Inc*., 205 Md. App. 429, 454 (2012).

discretion to deny specific performance of a building construction/repair contract because "there [was] simply no reason given in the record to require the equitable remedy of specific performance[, an] 'extraordinary equitable remedy, which may be granted, in the discretion of the chancellor, where more traditional remedies, such as damages, are either unavailable or inadequate.'" *Yaffe v. Scarlett Place Residential Condo., Inc*., 205 Md. App. 429, 454 (2012) (quoting *Archway Motors*, 37 Md. App. at 681). The *Yaffe* court noted further that contracts to repair buildings, like the one at issue there, typically make poor candidates for specific performance "on account of the great difficulty and often impossibility attending a judicial superintendence and execution of the performance." *Yaffe*, 205 Md. App. at 454 (quoting and citing *Fran Realty, Inc. v. Thomas*, 30 Md. App. 362, 366 (1976), and Pomeroy, *Specific Performance of Contracts* § 23 at 61 (3d Ed. 1926)).

In evaluating the appropriateness of specific performance, "[h]ardship is an element which a court . . . may consider . . . and specific performance may be refused if it would be burdensome to the defendant and of little benefit to the plaintiff." *Glendale Corp. v. Crawford*, 207 Md. 148, 158 (1955). "'If to enforce specifically an agreement would do one party great injury and the other but comparatively little good, so that the result would be more spiteful than just, the chancellor will not require its execution.'" *Abell v. Safe Deposit & Trust Co.*, 192 Md. 438, 447 (1949). The court is well advised not to "specifically enforce a contract for a pound of flesh." *Id.* at 448.

1. "Property From Which the Damages May be Collected"

The court is satisfied, in accordance with MD. CODE ANN., CTS. & JUD. PROC. § 3-601(1), that the City has property from which damages may be collected by the Retired and Retirement-Eligible Sub-Classes in satisfaction of judgments to be entered in Counts II and III for breach of

contract (by enactment of 10-306). Plaintiffs do not allege that the City failed to pay any Variable Benefit payable under the pre-10-306 Plan or any COLA under the modified Plan (which the City guarantees per 10-306).[96] Further, based on the court's determination of the correct measure of damages (set forth below), and allowing for the possibility that some members of these Sub-Classes will opt out of a breach of contract remedy in favor of the reliability of the COLA (or for other reasons, including a possible claw back of COLA benefits previously awarded), the court is satisfied the City has adequate property from which damages may be collected.

2. The Proper Remedy Going Forward: Specific Performance or Damages?

The Retired and Retirement-Eligible Sub-Classes have not articulated any reason the court should award specific performance in lieu of damages as the remedy for the City's breach of contract through enactment of Ordinance 10-306 (going forward from final judgment). No expert opined that specific performance is more appropriate than damages for any equitable, mathematical or other reason. Conversely, reinstitution of the Variable Benefit would be virtually, if not in fact, unworkable given the structure of the Plan funds and the intractable problem of how to marry the mechanism of calculating the Variable Benefit under the pre-10-306 Plan with the post-10-306 Plan. This would be even more unwieldy given the closed status of the pre-10-306 Plan as to workers hired after June 30, 2010. Because of the manner in which the Variable Benefit was calculated (*see* Section 36A of the pre-10-306 Plan, Trial Ex. 1), a specific performance remedy is not as simple as setting up a two-tiered benefit system. Moreover, while judicial

[96] Likewise, the City has taken the position through the case that it never has failed to make any pre-10-306 Variable Benefit or post-10-306 COLA payment due, something Plaintiffs would in all likelihood have refuted were that not the case. But the court acknowledges that absence of an objection is not proof of the affirmative.

oversight of such a remedy does not, itself, dissuade the court from specific performance, the fact that such a superintendent type of responsibility in this instance would have no known or knowable termination date is a worrisome concern the court cannot ignore. Specific performance would impose a significant hardship on the City and specific performance presents no discernable comparative benefit to the Retirement and Retirement-Eligible Sub-Classes versus damages. Adding to that the potential for considerable judicial administrative burden, damages prevails over specific performance as the appropriate remedy for the prevailing Class members.

The court, therefore, declines to award the Retired and Retirement-Eligible Sub-Classes specific performance in the form of reinstitution of the Variable Benefit to remedy the City's breach of contract by enactment of 10-306 (Counts II and III). Instead, the court will award damages in the amount of the Variable Benefit each of these Sub-Class members would have received (or been entitled to receive in the case of the Retirement-Eligible Sub-Class members) from the effective date of 10-306 through the date of final judgment, as well as damages equal to the present value of the Variable Benefit increases to which these Sub-Class members (or their beneficiaries) would be entitled pursuant to the pre-10-306 Plan post-final judgment, if any. The court will now turn to the formula to be applied in determining what damages, if any, members of the Retired and Retirement-Eligible Sub-Classes are entitled to as a remedy for the City's breach of contract by enactment of Ordinance 10-306.

B. The Calculations and the Experts

For a constellation of reasons, the court does not find Plaintiffs' expert witnesses credible or persuasive on the issue of what assumptions, bases and projections should be applied to calculate damages of the Retired and Retirement-Eligible Sub-Class members. (*See* Trial Exs. 282, 283,

Second Expert Report and Rebuttal Expert Report of Thomas B. Lowman and Colin England.) One of the primary reasons for the court's poor reception of their joint opinion is their reliance on a five percent post-retirement assets earnings assumption rate as the basis for a significant portion of their determination of what the prevailing Class members would have received had the Variable Benefit remained in place. This is not a mere matter of assuming that the City Council would have voted to change the law per the Board's recommendation to drop the rate from 6.8% to five percent – which in fact did not occur. More assets mean more earnings to share once the levels of section 36A are met. This assumption, therefore, has the effect of materially inflating damages without basis in fact.

Further, as to the $400 million in tech bubble losses incurred in 2002, Plaintiffs' experts' calculations assume the City recognized those losses between 2002 and enactment of the Ordinance, resulting in hundreds of millions of dollars in City Plan contributions. This did not happen and, even were the court to allow that double smoothing was chicanery, the notion that the City had even a fraction of that capacity is rather a whopper of a departure from reality. In addition, for reasons not made clear to the satisfaction of the court, Messrs. England and Lowman's model includes attributing those extra contributions to the retirees' reserves (the PRF and the ARF) until they are fully funded, which wildly skews the amount of Variable Benefit in favor of Plaintiffs and does not reflect how Plan assets were actually accounted for among the pre-10-306 Plan funds; nor is it required by the Plan language. (*See, e.g.,* 11/1/18 PM Trial testimony of Thomas Lowman, pp. 43-50, and Trial Ex. 282.)

Plaintiffs' proposal also ignores the well-documented, deliberate Board practice of not tethering the Variable Benefit conversion rate to the post-retirement investment rate given the reality of the bond market (*i.e.,* not yielding returns on par with the statutory 6.8% assumed

investment rate) and the importance of avoiding volatile investments for retirees' reserves. (*See* Findings of Fact ¶¶ 38-39, *supra*.) Despite this, Plaintiffs' experts employed a 6.8% conversion rate – which has the effect of enhancing Plaintiffs' damages without suitable explanation of the presumed hike in rate.[97] Plaintiffs' experts also do not account for the fact that the pre-10-306 Plan is a closed plan. Instead, they assume employee contributions for workers hired July 1, 2010 and beyond – and associated employer contributions. This assumption is contrary to the undisputed fact that workers hired on or after the effective date of the Ordinance have no entitlement to pre-10-306 Plan terms and benefits, and fails to suggest an explanation as to why the City would elect to re-open the pre-10-306 Plan in the face of plain practice to the contrary. Finally, the court is persuaded that the Summit Strategies 2009 projections of future investment returns on which Plaintiffs rely for their Monte Carlo simulation is outdated and outmoded, and unrealistically reliant on rarefied air of investment returns in ranges well above 40% in some years.

In essence, Messrs. England and Lowman built upon Plaintiffs' breach by underfunding argument to calculate damages on a multi-faceted foundation of hundreds of millions of dollars in phantom City contributions (and capacity), an overly robust 6.8% conversion rate, post-10-306 new employee and employer contributions, and by booking these contributions singularly for the benefit of retirees until those funds are slated to be fully funded.[98] Further, the return on investment

[97] This criticism omits to mention Plaintiffs' curious use of a tethered 6.8% conversion rate (despite the City's May 2009 written explanation to Mr. Lowman for not tethering the conversion rate to the investment rate), while assuming "that the City would . . . have changed the law to include five percent" for the earnings assumption rate. Neither of these assumptions is rooted in actual practice and the court is unpersuaded that these assumptions should be used for calculating damages. (Trial Ex. 282, p. 24; *see also* Trial Exs. 218 and 223, and Findings of Fact ¶ 39.)

[98] The City also complains that Plaintiffs' calculation is based on the assumption that the court will reinstitute certain terms of the pre-10-306 Plan that were modified by the Ordinance (including, *e.g.*, an 18-month AFC, a 20-year term of service, and the Variable Benefit for all incoming employees). While the City is correct that these assumptions drive Plaintiffs' numbers up, the

projections in Plaintiffs' Monte Carlo retirement simulation are not well-based. In sum, in the opinion of the court, Plaintiffs' damages theory is unsupported by historic fact and is unaccompanied by persuasive explanation why the court should go along with these assumptions. Plaintiffs' theory is also unavailing as a matter of law, as it purports to place the prevailing Class members in a considerably better position than had the Plan not been modified. Contract law does not countenance a windfall for aggrieved parties, but rather mandates their position be righted.

The court finds that City expert witness Adam Reese was credible, persuasive, and helpful to the court on the issue of the appropriate assumptions, bases and projections to utilize in determining what damages, if any, the Retired and Retirement-Eligible Sub-Class members are entitled, both pre- and post-final judgment. (*See* Trial Exs. 330-333, Expert Report of Adam J. Reese, Errata Sheet, Supplemental Report, and Workbooks in support of both reports.) The City's proposal – as supplemented by Mr. Reese in October 2018 with an updated "Baseline VB Projection" (Trial Ex. 333) – is based on the terms of the pre-10-306 Plan and the City's documented, known, and Board-approved practices in place just prior to Plan modification. Importantly, Mr. Reese's calculations provide outcomes based on assets actually in the Plan when the modification was enacted and on a closed pre-10-306 Plan (although his report provides the comparative iteration were the Plan open to new hires and retirees post-10-306).

The City's proposed damages bases and assumptions ensure, to the degree possible, the members of the Retired and Retirement-Eligible Sub-Classes will receive the Variable Benefits they would have received had the Plan not been modified. This is in accordance with controlling

court does not base its decision not to follow Plaintiffs' experts on these features of their proposal, inasmuch as these were terms of the pre-10-306 Plan.

law. *Beard v. S/E Joint Venture*, 321 Md. 126, 133 (1990) (citing Restatement (Second) of Contracts § 347 (1981)).

C. Conclusion

The court will, therefore, apply the City's proposed assumptions, projections and overall method of calculating Variable Benefits the members of the Retired and Retirement-Eligible Sub-Classes would have received from the effective date of Ordinance 10-306 to the date of final judgment (including known FY 2010 through FY 2017 investment performance), and thereafter, reduced to present value. The pre-10-306 Plan will be treated as closed to new employees and new retirees following June 30, 2010, and calculated damages will implement Mr. Reese's Variable Benefit averages based on his 20 trials,[99] and shall be based on the amortization period and method in place in June 2010.

VIII. CONCLUSION

For the reasons set forth herein, by accompanying orders issued herewith, the court will:

A) Grant the Motion for Class Certification and direct the parties to take related action pursuant to Maryland Rule 2-231 and other requirements of the court;

B) Issue a declaratory judgment and order as to Count I;

C) Grant judgment as to liability only in favor of Plaintiff Retired Sub-Class, and against the City, on Count II for breach of contract by enactment of Ordinance 10-306; and grant judgment

[99] As corrected in his Supplemental Expert Report for consideration of the Variable Benefit that would have been implemented January 1, 2011.

in favor of the City, and against Plaintiff Retired Sub-Class, on Count II for breach of contract by underfunding the Plan;

D) Grant judgment as to liability only in favor of Plaintiff Retirement-Eligible Sub-Class, and against the City, on Count III for breach of contract by enactment of Ordinance 10-306; and grant judgment in favor of the City, and against Plaintiff Retirement-Eligible Sub-Class, on Count III for breach of contract by underfunding the Plan;

E) Grant judgment in favor of the City, and against Plaintiff Active Sub-Class, on Count IV for breach of contract; and

F) Direct the parties to submit dates of availability for a scheduling and status conference.

[JUDGE'S SIGNATURE ON ORIGINAL]

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May 13, 2019 Judge Julie R. Rubin

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