

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

**Plaintiffs**

**v.**

**MAYOR & CITY COUNCIL OF  
BALTIMORE CITY**

**Defendant.**

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**IN THE**

**CIRCUIT COURT**

**FOR**

**BALTIMORE CITY**

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

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**MEMORANDUM REGARDING THREE REMAINING DAMAGES ISSUES**

Pursuant to the court’s Memorandum Opinion and Order issued July 30, 2019, on August 13, 2019, the parties submitted briefs setting forth their respective positions on three remaining issues relevant to damages and class notice to be issued in accordance with the court’s Memorandum Opinion and Orders of May 13 and June 25, 2019.<sup>1</sup> The court, having considered the parties’ positions within the context of the court’s merits rulings and the (pre-10-306) Plan, issues this memorandum and an accompanying order to resolve the three issues.

**I. Issue Number One:**

**“[T]he methodology for constructing the actuarial value of assets in the closed plan after removal of the portion of the Annuity Savings Fund attributable to the Pre-Eligible Actives.”**

This issue boils down to calculation of the City’s contribution to the pre-10-306 Plan (the “old” or “closed” Plan, as the parties have referred to it) for purposes of paying out Variable

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<sup>1</sup> “The issues that remain include: (i) the methodology for constructing the actuarial value of assets in the closed plan after removal of the portion of the Annuity Savings Fund attributable to the Pre-Eligible Actives; (ii) the ratio to be used for calculating the amount of assets available for Variable Benefits when the sum of the Pension Accumulation Fund and Annuity Savings Fund is negative; and (iii) whether the Annuity Reserve Fund and Pension Reserve Fund should: (a) receive assets transfers from the Annuity Savings Fund and the Pension Accumulation Fund for new retirements; and/or (b) be ‘trued up’ to hold assets equivalent to the Retirees’ liabilities, and no more than those liabilities.” (Joint Status Report of July 29, 2019.)

Benefits in accordance with the court’s Memorandum and Order of May 13, 2019. This is complicated by reallocation of Active Sub-Class members’ contributions from the closed Plan Annuity Savings Fund to the new Plan. The method of valuing reallocated Active assets and, therefore, assets remaining in the Annuity Savings Fund (old Plan) effectively determines the City’s annual contribution for purposes of Variable Benefit damages to which certain Class members are entitled, the amount of those Variable Benefit increases, and when the old Plan will run out of money.

The court remains mindful that this issue is relevant to general contract damages and, therefore, the court’s objective is to “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 method for valuing assets of the closed Plan, therefore, must be based on Plan provisions in place before the enactment of Ordinance 10-306 and not on what the parties urge would be advantageous or produce an equitable outcome for one reason or another.

Pre-10-306 section 36(j) refers throughout to the “asset valuation method” “used by” or “then in use by” the Plan, as recommended by the Plan actuary; section 36(j) does not specify an asset valuation method for any particular purpose.<sup>2</sup> Pre-10-306 BALT., MD., CODE art. 22 § 36(j). Therefore, the court shall abide, to the extent reasonably possible, established Board practice, based on the recommendations of the Plan actuary in place immediately prior to the effective date of Ordinance 10-306. Such a valuation method is compliant with, or most closely resembles, the parties’ contract (and the legislature’s intent).

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<sup>2</sup> Section 36(j)(1) of the old Plan does require that “[f]or the purpose of actuarial valuations, the system’s assets shall be carried at current market value ....” Pre-10-306 BALT., MD., CODE art. 22 § 36(j)(1).

The court is not persuaded by Plaintiffs that the old Plan's assets should be valued for purposes of damages pursuant to the market value of assets on July 1, 2010. This is not in accordance with the terms of the old Plan, as it does not reflect the practice of the parties while the old Plan was in place (as recommended by the Plan actuary). Plaintiffs quarrel with Mr. Reese's supplemental expert report, which, among other things, corrects or modifies his original fund and Plan valuations ("Baseline VB Projection") to reflect actuarial values instead of market values. (See Trial Exs. 330, 333-34, respectively, Expert Report of Adam J. Reese, Supplemental Report of Adam J. Reese, and Reese Workbook for the Supplemental Report.) Plaintiffs take issue with the City's proposed reliance on the asset values set forth in Mr. Reese's Supplemental Report on the basis that it "proposes calculating the City's future annual contribution as if the Plan had \$660 million more in assets than what the Plan actually has" and, in turn, "quite substantially" reduces the damages. Plaintiffs now assert that "Mr. Reese was correct the first time" when his valuation was premised on market value. It is true that damages will be affected (and possibly substantially so) by the ASF valuation methodology, but this has no bearing on whether application of market values is correct as a matter of law under the rule of general contract damages (or, if there be room for it, an appropriate exercise of discretion). Neither the old Plan, the parties' past practice (per section 36(j)), nor other appropriate consideration calls for the methodology Plaintiffs propose.

The court remains persuaded by Mr. Reese's Supplemental Report (Trial Ex. 333) and trial testimony on these and related issues. For purposes of the actuarial valuation of the Annuity Savings Fund as of July 1, 2010, the portion of the Annuity Savings Fund attributable to Active Sub-Class members shall be transferred to the new (post-10-306) Plan and subtracted from the market value and actuarial valuation of assets of the old/closed (pre-10-306) Plan on a dollar for dollar basis. Application of the approach espoused by the City is consistent with the parties'

contract as well as the court’s previous legal analysis and rulings (*see* Memorandum Opinion and Order of May 13, 2019).

**II. Issue Number Two:**

**“[T]he ratio to be used for calculating the amount of assets available for Variable Benefits when the sum of the Pension Accumulation Fund and Annuity Savings Fund is negative.”**

The court understands that the parties have reached agreement on this issue, and the court has reviewed and evaluated their proposal against the backdrop of the old Plan. Consistent with the parties’ agreement, the accompanying order shall state that when the sum of the Pension Accumulation Fund and the Annuity Savings Fund is negative, the ratio to be used for calculating the amount of assets available for Variable Benefits shall be capped at one (1).

**III. Issue Number Three:**

**“[W]hether the Annuity Reserve Fund and Pension Reserve Fund should: (a) receive assets transfers from the Annuity Savings Fund and the Pension Accumulation Fund for new retirements; and/or (b) be ‘trued up’ to hold assets equivalent to the Retirees’ liabilities, and no more than those liabilities.”**

Plaintiffs are correct. The City cannot avoid the plain language of the contract (the old Plan) mandating asset transfers to the Annuity Reserve Fund and the Pension Reserve Fund equal to the annuity and pension liabilities on the basis that past practice involved making “adjustments” to “true up” the reserve funds with the City’s liabilities.<sup>3</sup> Nor can the City look to Mr. Reese’s expert opinion to avoid this (closed Plan) contractual obligation. Mr. Reese allows that his model does not take these mandatory asset transfers into account because the Pension Accumulation Fund “had no assets” to transfer, and therefore, incorporation of mandatory asset transfers into his model would not have affected the outcome (*i.e.*, the fund balances would have remained negative). Mr.

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<sup>3</sup> Unlike the plasticity of section 36(j), which allows for whatever valuation method was “then in use,” sections 36(b)(4) and (d)(7) expressly mandate specific asset transfers.

Reese does not opine (nor could he) that the old Plan did not mandate the transfers required by sections 36(b)(4) and (d)(7).

The City's past practice of "truing up" the assets and liabilities when there were, in fact, no assets to be transferred does not affect the proper measure of breach of contract damages where the contract language expressly mandates (a) that "accumulated contributions" shall be transferred from the ASF to the ARF; and (b) "an amount equal to that member's pension reserve shall be transferred" from the PAF to the PRF. *Beard v. S/E Joint Venture*, 321 Md. 126, 133 (1990) (citing Restatement (Second) of Contracts § 347 (1981)); *see also* Memorandum Opinion of May 13, 2019 at Section VII(A). Although the City trued-up the accounts in practice given the negative balances, the law on the measure of damages does not allow for such an escape hatch.

August 27, 2019

*[JUDGE'S SIGNATURE APPEARS ON ORIGINAL]*

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Judge Julie R. Rubin

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