Civil District Court for the Parish of Orleans
STATE OF LOUISIANA

No. 1981 - 11108 Section: 06 - L

NEW ORLEANS FIREFIGHTERS LOCAL 632,
versus
CITY OF NEW ORLEANS, ET AL

Date Case Filed: 1/1/1981

NOTICE OF SIGNING OF JUDGMENT

TO:

Louis L Robein Esq 11307
2540 Severn Avenue, Suite 400
Metairie LA 70002-7335

Joshua P. Clayton
909 Poydras Street
28th Floor
New Orleans La 70112

In accordance with Article 1913 C.C.P., you are hereby notified that Judgment in the above entitled and numbered cause was signed on December 8 , 2015 New Orleans, Louisiana.
December 8 , 2015

MINUTE CLERK

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 81-11108 **DIVISION "L"** **SECTION (6)**

NEW ORLEANS FIREFIGHTERS LOCAL NO. 632, ET AL.

VERSUS

THE CITY OF NEW ORLEANS, ET AL.

FILED: _____ _____

DEPUTY CLERK

JUDGMENT

The Motions for Approval of Class Action Settlement and Approval of Class Action Counsel Common Fund Recovery Fee Application came on for hearing December 1, 2015.

Present were:

Louis L. Robein
Nancy Picard
Christina L. Carroll
Robein, Urann, Spencer, Picard & Cangemi, APLC
Attorneys for the Class

Joshua P. Clayton
Sher, Garner, Cahill, Richter, Klein & Hilbert, LLC
Attorney for City of New Orleans

Also present were:

Nicholas G. Felton, President
New Orleans Firefighters Local No. 632

Thomas Meagher, Secretary-Treasurer
New Orleans Firefighters Pension & Relief Fund

Also present, after notice issued by Class Counsel, were the following Class Members:

Rodney Waller
Henry Beba
John Bartchy
Dennis Schorr
Dean Marullo
Philip Pier
Terence Morris
John Manning
Ralph Junot
Russell Choina
Gerald Foster
James Hymel
Earl Valois
Michael Barrett
John Klumpp
Al Juno
H.J. Hadley
Bobby O'Neal
Robert Miller

The Court, upon reviewing the evidence presented by the parties and upon hearing the testimony of Class Counsel; Class Member/Representative Nicholas Felton, President of New Orleans Firefighters Local No. 632; Thomas Meagher, Secretary-Treasurer of the New Orleans Firefighters Pension and Relief Fund and Class Member; as well as considering the sworn affidavits of Class Counsel Louis L. Robein, Mediator John W. Perry, Fire Superintendent Timothy McConnell, New Orleans Firefighters Pension and Relief Fund Deputy Director Paul Mitchell, and Rachel Wetzel, paralegal to Louis L. Robein; hearing the testimony of the above-named Class Members in attendance; and for the reasons assigned, finds the following and hereby ORDERS:

1. Pursuant to Louisiana Code of Civil Procedure, Article 594, the October 15, 2015 Settlement Agreement, attached hereto as Exhibit "A" and incorporated into this Judgment, among the parties is fair, reasonable, and adequate for the Class. The Court recognizes that certain Class Members are effectively withdrawing claims for retroactive pension payments (including "unfunded" DROP accruals) based on wages previously adjusted by earlier consent judgments, but the Court finds that the $75 million payment of over 99% of the 2014 consent judgment relating to back pay (longevity and annual leave), in addition to the City's agreement not to seek allegedly overpaid pension benefits from any Class Member, represents a fair and reasonable compromise of all pending claims and defenses.

2. The settlement funds shall be distributed to Class Members on a pro-rata basis according to the longevity and annual leave amounts specified in the 2014 Consent Judgment, with 1% of the $15,000,000 payment to be paid no later than February 1, 2016, to be withheld for "absent" Class Members (disbursable thereafter to any such "absent" Class Members, and any remaining funds disbursable thereafter to the Class under supervision of the Court).

3. Pursuant to La. R.S. § 11:3363(G), the parties are authorized to enter into a cooperative endeavor agreement to authorize the New Orleans Firefighters Pension and Relief Fund ("Fund") to serve as disbursing agent for distribution of the settlement funds. The City will be responsible for making any required employer tax payments for Medicare, while the Fund, as disbursing agent for the City, will effect any required employee tax withholdings.

4. Pursuant to Louisiana Code of Civil Procedure Article 595(A), the Court awards a "common fund" attorneys' fee of 20% of the settlement amounts to be disbursed hereafter in accordance with the approved Settlement Agreement and payment schedule, payable to Class Counsel, Robein, Urann, Spencer, Picard & Cangemi, APLC.

5. The Court retains jurisdiction in this cause to implement the terms and conditions of the October 15, 2015 Settlement Agreement, including matters relating to the parties' agreement to initiate and seek voter approval of a millage proposition in 2016 and payment obligations affecting the Class thereafter under the Settlement Agreement, including obligations that may be triggered by any voter rejection of a millage proposition in 2016.

New Orleans, Louisiana, this 8th day of Dec., 2015.

District Judge

JUDGE KERN A. REESE

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 81-11108 **DIVISION "L"** **SECTION (6)**

NEW ORLEANS FIREFIGHTERS LOCAL NO. 632, ET AL.

VERSUS

THE CITY OF NEW ORLEANS, ET AL.

FILED: _____ _____

DEPUTY CLERK

REASONS FOR JUDGMENT

Motions for approval of a settlement or compromise of the remaining claims in this class action, as well as an application for attorney's fees for Class counsel, came on for hearing at 9:00 a.m. on December 1, 2015. Judgment on both motions has been entered based on the findings discussed below and for the reasons assigned herein.

The history of this cause is relevant to a determination of both motions.

Procedural History

In 1981, New Orleans Firefighters Local No. 632 ("Local 632") and individual Union-represented firefighters (AFirefighters@) filed a class action against the City and certain City officials, and later joined the Commission and its Director. The action primarily challenged Commission Rule VIII, § 1.2, which established a "use it or lose it" policy concerning the Firefighters' use of accumulated annual leave in excess of ninety days (or forty-five days depending on the date of hire of the particular firefighter). Subsequently, in March 1993, the Firefighters amended their petition and broadened their attack on Commission rules and City pay practices to assert (1) that La. Rev. Stat. § 33:1996 provided for accrual of more annual leave per year than allowed by Commission Rule VIII, § 1.1, and (2) that the Commission Rule IV, § 8.1 provided for less frequent longevity pay increases than is required by La. Rev. Stat. § 33:1992B. In this respect, the Firefighters also claimed that Commission Rule IV, § 8.1 failed to consider their actual salary (base pay plus accrued longevity) in the computation of longevity pay increases.

On July 19, 1993, the this Court certified the class action, dividing plaintiffs into three classes: 1) all active and retired Firefighters who forfeited accrued annual leave under the "use it or lose it" policy; 2) all active and retired Firefighters who were denied the full measure of

annual leave days; and 3) all active and retired Firefighters who were deprived their full longevity pay increases.[1] In April 1999, this Court rendered a partial summary judgment in favor of the Class Members, ruling that (1) the members of Class One, who forfeited accrued annual leave by operation of Commission Rule VIII, §§ 1.2 and 1.3, were entitled to back pay and future pay, subject to any applicable set-off and credit; (2) the members of Class Two, who were denied their full annual leave entitlement because of Commission Rule VIII, § 1.1, were entitled to back pay and future pay, subject to a credit for any payments they may have received; and (3) members of Class Three, whose annual longevity pay increases were limited by operation of Commission Rule IV, § 8.1, were entitled back pay and future pay, subject to a credit for any payments they may have received.

Then and now, Local 632 was certified as lead Class Representative.

On appeal, the Louisiana Fourth Circuit Court of Appeal ("Fourth Circuit") held that defendants, despite the clear language of La. Rev. Stat. § 33:1996, implemented rules and policies that impermissibly limited the amount of annual leave that Class Members may accumulate and carry over from year to year.[2] The Fourth Circuit further held that La. Rev. Stat. § 33:1996 prohibited the Commission's practice of placing a ceiling on the amount of annual leave Class Members could accrue. Additionally, the Fourth Circuit held that Commission Rule IV, § 8.1 was far less generous than La. Rev. Stat. § 33:1992B, and violated that statute.

The Supreme Court granted certiorari to review the rulings below.[3] The Class Members prevailed before the Supreme Court in all respects, except as to the Ause it or lose it@ claims of Class One.[4] The Supreme Court validated the Commission=s rule, but remanded for the trial court any sub-claims of the Class which alleged that any Class Member sought to use leave but was denied usage by the City. As to the remaining claims, the Court unanimously affirmed the lower courts.

On January 23 and 24, 2003, a Special Master appointed by Judge Roland Belsome conducted Amini-trials@ on Class One claims of denied annual leave usage and oversaw the confection of further stipulations as to approximately 75 individual claims. Back pay issued — pursuant to the agreement of the parties — in late February 2003 for the increases awardable in fiscal year 2002. Longevity raises were implemented (compounded) for 2003 and the future.

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[1] Collectively, "Class Members," numbering 1,198.
[2] *New Orleans Firefighters Local 632 v. City of New Orleans*, 99-1995 (La. App. 4th Cir.6/7/00), 767 So. 2d 112, 114.
[3] *New Orleans Firefighters Local 632 v. City of New Orleans*, 00-1921 c/w 00-2041 (La. 11/17/00), 774 So. 2d 152.
[4] *New Orleans Firefighters Local 632 v. City of New Orleans*, 2000-1921 (La. 5/25/01), 788 So. 2d 1166.

This substantial recovery benefitted approximately 500 Class Members and an untold number of future hires to the Fire Department. This latter development also caused the City, after 20 years of litigation, to finally implement the mandated program of annual leave benefits and longevity increases in its Fire Department. Moreover, the Class Member litigation efforts caused the City earlier in 2002 to substantially increase annual leave accruals for all active Class Members.

In February 2003, the City Council, in response to this Court=s orders and the Firefighters' diligent public advocacy, adopted an ordinance ratifying the Commission=s longevity rules. As a result, there is no longer any question regarding Class entitlements to current and future benefits under R.S. §§ 33:1992 and 1996.

In its final judgment on February 28, 2003, this Court issued a comprehensive ruling pertaining to longevity pay and calculations, which the Fourth Circuit affirmed in most respects, except that it amended the judgment to provide a different prescription commencement date of March 2, 1990, and also to provide an offset for the years in which the City had awarded general discretionary raises as well as longevity raises.[5] The Fourth Circuit remanded the case for recalculation of damages based on those parts of the trial court judgment amended or reversed, and the Supreme Court denied writs.[6] The February 28, 2003 judgment, amended as to the prescription commencement date and offset for post-1979 City discretionary raises, became final and a Athing adjudged.@ Then and today, the judgment is in the form of a mandatory injunction.

On April 4, 2005, this Court ordered the City to immediately implement Aevery aspect@ of the District Court=s order of February 28, 2003 and the appellate court=s May 26, 2004 order or face sanction of indirect contempt of court. Not surprisingly, the City appealed, but the Fourth Circuit, on May 5, 2006, dismissed, stating that the district court=s ruling was interlocutory and not ripe for appeal.[7] A lengthy hearing on back pay calculation methodology before this Court then ensued.

In its November 8, 2006 judgment, this Court ordered the City to utilize the methodology approved by the Court and affirmed by the Fourth Circuit to upgrade current Firefighter longevity. Nevertheless, in January 2007, when the City finally corrected its then current Firefighters= longevity steps and awarded them a 10% raise that other City employees had begun receiving in November 2006, Firefighters had received far less than their anticipated longevity

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[5] *New Orleans Firefighters Local 632 v. City of New Orleans*, 2003-1281 (La. App. 4th Cir. 05/26/04), 876 So. 2d 211.
[6] *New Orleans Firefighters Local 632 v. City of New Orleans*, 2004-1590 (La. 11/15/04), 887 So. 2d 475.
[7] *New Orleans Firefighters Local 632 v. City of New Orleans*, 2005-1361 (La. App. 4th Cir. 4/4/06).

increase, and some even received less in gross pay than before the correction. After other hearings and conferences, this Court, on March 2, 2007, ordered the City to recalculate those longevity rates and to submit them both to the Court and to Firefighters for review before implementation. Again, on appeal, the Fourth Circuit, finding "no error in the method of calculation designated by the trial court's judgment," affirmed.[8] The City continued to question aspects of this Court's judgment and claimed "offsets" to the payment of longevity raises. On April 5, 2008, this Court issued a judgment mandating the City to make retroactive payments to all Class Members employed on or after September 1, 2006, in full, on or before August 15, 2008, subject to the common fund fee award ordered on March 2, 2007 and May 14, 2007.

The longevity raises implemented by that order of this Court effective September 1, 2006, and 10% raises on those longevity increases effective November 1, 2006, resulted in a retroactive payment to Class Members who were currently employed as Firefighters as well as a pay upgrade for the present and future.

On May 23, 2008, Firefighters filed a motion for contempt arguing that the City failed to fully implement this Court's judgment, including failing to include longevity enhancements on its annual millage payment paid that same month, and failing to provide an explanation or an accounting of its payments to Firefighters. They sought injunctive relief. On September 16, 2009, this Court issued a judgment continuing the Firefighters' motion for contempt until September 25, 2009, and ordering the City to transmit the data necessary for calculating annual leave, longevity-related pension adjustments, millage adjustments and "historic" longevity back pay; ordering the City to complete the calculations by October 15, 2009; and ordering all parties to appear before the Court on October 30, 2009 to report the status. The City Council then approved a budget which included longevity enhancements on the 2008 and 2009 millage payments, and dedicated a source of funds to upgrade current pension payment to proper levels.

As discussed *infra*, a separate legislative action was taken by the City Council in March 2010, which resulted in another consent judgment addressing longevity-related pension enhancements. Again, the persistent public advocacy of Firefighters yielded a "legislative" result.

A consent judgment was entered in this cause in 2014. The multiparty settlement discussions leading up to this important case development are discussed *infra.* It finalized salary

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[8] *New Orleans Firefighters Local 632 v. City of New Orleans*, ADD DOCKET # (La. App. 4th Cir. 3/5/08), 980 So.2d 760, *writ denied,* 2008-0626 (La. 5/9/08), 980 So.2d 693.

back pay entitlements for all Class Members (Active and Retired) for the closed period 1990 – September 2006. The back pay "numbers" were compiled by City auditors, and accepted by Local 632. Local 632's trial expert's calculations had been rejected by the City. Multiple appearances before the Court in 2014 and 2015 on motions for contempt have since taken place.

The August 6, 2015 hearing in this cause essentially brought the matter to a head. After hearing testimony regarding the multiparty mediation that had taken place, the Court deferred action, but with this instruction:

THE COURT:

> You know, I have been on this docket since 2004. This makes eleven years from the time I first embraced this case. It is my understanding this case started in 1979. And there is another iteration of it over twenty, almost twenty-five years ago now. But we have been kicking the can down the road long enough. There was a Consent Judgment issued. And consent, once a judgment is made, once an agreement is struck, it's a deal. And I come from the neighborhoods of New Orleans, and a whole lot of different neighborhoods in New Orleans. And the one thing I learned, if you want to get along, that a deal is a deal.
>
> This is what I'm going to do. The reason why I asked if the City Council is meeting today, I don't expect the Council to pass on it today, but they have to be part of this process. The business community and the Business Council has injected itself in this process. And that's laudable that they want to be good corporate citizens. But if they do they need to be good corporate citizens and assist in resolving this issue.
>
> I'm going to give you one week, until August the 14th, to do any briefing you want to give me. I am going to rule on the contempt on August 21st at 12:00 noon.
>
> Now City Council meeting is on August 20th. If there's going to be a resolution it needs to be presented to the Council at that meeting and resolved once and for all, or I will make a contempt finding.
>
> And quite frankly, (Indicating.) you got me, Mr. Kopplin? You understand what that means. The handwriting is on the wall.
>
> The Court's at recess.

August 6, 2015 Hearing Tr. at 27-28.

Ultimately, the Court entered judgment of civil contempt directed at the "chief executive officer" of the City. All parties are painfully aware of the protracted and intense negotiations and mediated settlement discussions that have been conducted since May 2015, which followed months of multiparty mediation efforts among the City, Local 632, the New Orleans Firefighters Pension and Relief Fund, and the Business Council of New Orleans.

FINDINGS OF FACT

1. The undersigned Judge has presided over this case for 11 years. The Court is intimately familiar with the legal, political, and economic issues presented by this case. In particular, this Court recognizes the difficulty of execution because of the sovereign immunity of the City. Because of this immunity, the parties were required to seek legislative and political solutions, including identification and securing of a funding source or sources. In light of the obstacle created by sovereign immunity, Plaintiffs moved the Court to hold the City in contempt for failing to comply with the 2014 consent judgment, which included a mandatory injunction. As noted above, this motioning for contempt was pursued in 2006 and 2008 under a prior City administration. This Court entered a judgment of contempt against the City's chief executive officer on September 4, 2015, which was ultimately stayed by the Louisiana Supreme Court, pending an appeal to the Fourth Circuit Court of Appeal. While the judgment of contempt was on appeal, the parties reached a proposed settlement on October 15, 2015. The Fourth Circuit Court of Appeal remanded the action to this Court on November 2, 2015, upon a joint motion to remand the suspensive appeal granted by direction of the Supreme Court.

2. The Court has reviewed the October 15, 2015 Settlement Agreement prepared by the parties, in addition to receiving testimony from Class representatives about the proposed settlement. The settlement terms include total payments by the City to the longevity and annual leave Class Members of $75 million. The principal amount of the consent judgment entered by this Court on June 10, 2014 is $75,524,868.85. This total includes $180,000 of wages and interest for on-duty injuries (ODI), paid by the City pursuant to the December 2, 2014 order entered by this Court. Therefore, the total settlement amount, including the ODI wage payment in December 2014, is approximately 99.5% of the principal amount of the longevity and annual leave judgment. Previously, the City increased the wages of active Class Members in January 2007 pursuant to this Court's November 8, 2006 judgment. This action by the City followed a show cause order on September 16, 2007, why contempt sanctions should not be issued with respect to the Court's order, to transmit payroll data to the City Civil Service Commission.

3. Following entry of the original judgment in this cause, the Legislature enacted Act No. 610 implementing Senate Bill No. 90 authored by Senator Boissier and Representatives Arnold and Tucker. This Act amended La. R.S. § 11:3363 (Powers of the Board), adding a new subsection (G), which directly addressed the class action judgment in this cause. It provides:

> G. The New Orleans Firefighters Association, Local 632 and the board of trustees of the Firefighters' Pension and Relief Fund for the city of New Orleans shall be authorized to enter into a cooperative endeavor agreement or other contractual agreement with the city of New Orleans pursuant to the Supreme Court of Louisiana decision in "New Orleans Firefighters Local 632 et al. versus the city of New Orleans et al.," bearing number 00-C-1921 c/w number 00-C-2041 for the purpose of establishing a special class of benefits or benefit accrual rates for any class of active or retired members in the Firefighters' Pension and Relief Fund for the city of New Orleans based on the member's employment with the city of New Orleans fire department. Any such agreement may be entered into as a basis for full or partial satisfaction of judgments rendered in favor of such members and shall be subject to the approval of the court in which the judgments were rendered.

(Emphasis added).

4. In 2010, a consent judgment was entered into by Local 632 and the City directly addressing funding and implementation of enhanced pension benefits for Class Members who were retired as of January 2, 2010 or would retire thereafter. The Pension Fund and NOMERS (of which a small number of Class Members were and continue to be members) were "directed" to prospectively adjust pension benefits. This Court entered judgment, consented to by Local 632, the City and the City Civil Service Commission. It was and continues to be a "contractual agreement" among the City, Local 632, the Pension and the City Civil Service Commission, enforceable by this Court.

5. The March 17, 2010 consent judgment mandated as follows:

> IT IS HEREBY ORDERED, ADJUDGED AND DECREED that, upon receiving the funds appropriated by the Council of the City of New Orleans, the New Orleans Firefighters Pension and Relief Fund and the Retirement System for the City of New Orleans shall be authorized and are hereby directed to upwardly adjust monthly pension benefits due and owing those members of the Class who retired on or after March 2, 1990, effective January 1, 2010, in accordance with the Longevity Factors ordered by this Court and affirmed by the Fourth Circuit Court of Appeal, subject to the award of a common fund attorney fee of 20% awarded by Judgment entered on March 2, 2010;
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the pension adjustments made in accordance with this Consent Judgment shall not prejudice any member of the Class as to pension adjustments due for the period between March 2, 1990 and January 1, 2010, whether they be monthly pension benefits or benefits administered under a Deferred Retirement Option Plan (DROP) or Initial Lump Sum Option, or any back pay (including adjustments to the 2008 and 2009 annual millage payments) or annual leave adjustments otherwise due under Judgments of this Court and the Court of Appeal.

(Emphasis added).

6. A separate case regarding funding of the New Orleans Fire Fighters Pension and Relief Fund ("Fund") is pending in another section of this Court.[9] Although the cases are separate, they involve many of the same "players." The settlement negotiations leading up to the Settlement Agreement involved, as in 2010, the City, Local 632, and the Pension Fund. A "funding mandamus directed at the City, as the "employer" responsible for contributing the Actuarially Required Contribution (ARC) to the Pension Fund, was affirmed by the Fourth Circuit.[10]

7. The City insisted on a settlement that would conclude both cases, a "global" settlement, and many issues in the two cases were intertwined, particularly the issues of pension and longevity funding. After attempted mediation with the assistance of the New Orleans Business Council (NOBC), the parties engaged the services of John W. Perry, Jr., a well-known and established mediator. The Court is familiar with this Mediator's expertise.

8. The Mediator in this case addressed the global nature of the settlement talks thusly:

> Resolving the Longevity case required concomitant resolution of the Mandamus case. Issues unique to the Mandamus case included workers' compensation supplemental earnings benefits (SEB) offsets in favor of the Fund, increased Employee Contributions, increased years of service to achieve a maximum pension benefit, DROP and PLOP accounts, and the statutory interpretation issue discussed above. Negotiating these issues required familiarity with the effect of each of the City's proposals and counterproposals.

The Court agrees with this assessment.

9. The ongoing settlement negotiations were lengthy — taking place over approximately six months — and contentious.

10. The proposed settlement of the longevity judgments is as lengthy, complex, and reticulated as the procedural history of this matter would lead one to expect. A summary of the key elements of the proposed settlement is as follows:

a. The City will pay to the longevity Class Members a total of $75 million. (The principal amount of the consent judgment entered by this Court on June 10, 2014, is $75,524,868.85.)

b. The City will initially pay $15 million to the Class Members no later than February 1, 2016.

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[9] *New Orleans Fire Fighters Pension and Relief Fund v. City of New Orleans*, CA 12-7061 (Giarrusso, R).
[10] *New Orleans Firefighters Pension and Relief Fund v. City of New Orleans*, 2013-0873 (La. App. 4 Cir. 12/18/13), 131 So.3d 412.

c. The structure of the payment of the remaining $60 million balance depends on whether a 2.5 millage proposition dedicating funds to the Fire Department is approved by New Orleans voters.

d. The Settlement Agreement requires this millage proposal to be submitted to the voters before July 2016. If the millage is approved by the voters, then the City must annually pay $5 million to Class Members from 2017 to 2028.

e. If the voters reject the millage, the City shall seek an alternative funding source for payment of the remaining $60 million. If the City fails to submit an additional tax measure to the voters before 2019, then Plaintiffs may move to accelerate payment of the remaining $60 million.

f. If the millage proposition fails in 2016 and an additional tax also fails, then the City will make payments of $1 million per year from 2019 to 2025, $2 million per year from 2026 to 2031, then $17 million per year until the $60 million has been paid in full. This structure reflects a revenue stream available in 2032 when a bond funding the Old System will be retired.

g. The Settlement Agreement permits the City to reduce its contribution for Old Fund benefits by $5 million in 2016 and, if the millage is approved in 2017, by another $4 million. Further, the agreement caps the City's obligation to pay the New Fund's ARC (actuarially required contribution) at $36 million per year for six years beginning in 2017.

h. The Settlement Agreement requires the Fund to adopt certain structural and benefit changes, including changes to DROP/PLOP rules, the granting of Cost of Living Adjustments (COLAs), and investment policies; a higher retirement age and a lower benefit multiplier for new hires; and the possibility of increased employee contributions. Judge Robin Giarrusso, in CA No. 12-7061, will determine, upon motion of the parties, how the Trustees should prospectively interpret the statute addressing calculation of benefits. Separately, Judge Giarrusso will determine, upon motion of the parties, whether the Trustees are permitted to offset workers' compensation supplemental earnings benefits (SEB) payments for disabled and retired Class Members currently receiving this benefit.

i. The settlement agreement also prohibits "clawbacks" of alleged overpaid pension benefits from Class Members, should Judge Giarrusso enjoin the Trustees from continuing to apply the "alternative interpretation" calculation. Further, the Settlement Agreement requires dismissal, except for the above-described claims to be litigated, of the City's reconventional demand in CA No. 12-7061, in which the City-appointed Fund Trustees also seek repayment from Retirees (Class Members) of allegedly overpaid cost of living adjustments ("COLAs") for some or all of the period of time of backpay entitlements in this cause.

j. The City's agreement not to seek judicial recovery for an offset or reimbursement for various amounts allegedly overpaid to Retirees entitles those Retirees to their pro-rata share of the principal of the longevity judgment and to continued receipt of pension benefit payments based on the "alternative interpretation" calculation, subject to litigation of the propriety of that calculation as described above, and based on all COLAs (3% annually, 5% annually if over 65 years of age) previously granted by the Board of Trustees of the Pension Fund.

11. As noted, in 2012, the City's engaged independent auditor, the LaPorte CPA firm, provided its calculations of back pay for longevity that differed from the calculations prepared by the Class representatives. This process was being undertaken as the parties engaged in "global" negotiations to address all longevity, annual leave and related pension funding claims. Class counsel determined that the City's proffered calculations did not account for worker's compensation pay due to the Class Members.[11] On November 28, 2012, Class counsel sent a copy of each Class member's calculations to them, asking each to report any time they knew they were out on worker's compensation time.

12. After mailing almost 1200 letters and calculation sheets to the active and retired Class Members and receiving responses, the data received was used to re-audit the calculations for longevity pay, annual leave and off duty injury ("ODI").

13. The re-audit resulted in significantly increased back pay calculations for many Class Members.

14. Class counsel used these results to compile a list of all Class Members and their total calculations in the categories of longevity, annual leave, ODI, and grand totals for each

[11] Firefighters are entitled to "full pay" for 52 weeks of injury or illness leave by operation of La. R.S. § 33:1995. Class Counsel previously litigated and prevailed on that pay issue. *New Orleans Firefighters Local 632 v. City Civil Service Commission*, 521 So. 2d 452 (La. App. 4th Cir. 1988).

member. This compilation was the basis for the Consent Judgment which was signed by this Court on June 10, 2014. A further audit caused the Consent Judgment to be amended with minor revisions on August 8, 2014. This final calculation was also the basis for the total principal amount agreed to be paid in the proposed Settlement Agreement.

15. A notice of the proposed settlement was mailed by Class representative, Local 632 to all Class Members on October 20, 2015, before the two meetings scheduled to discuss the proposed settlement. Those meetings were held on October 28 and 29, 2015 from 6:00 PM to 9:00 PM. Widows of deceased members were also notified.

16. At the meetings, Local 632 president and Class representative, Nicholas Felton spoke, as did Class counsel, Louis Robein, and Pension Fund Secretary/Treasurer, Thomas Meagher, to explain the terms of the proposal and answer questions. At the meetings, all Class Members (Union members and non-members) who had questions had the opportunity to ask them. In addition to the formal question and answer period, various members of Class counsel's office and members of the negotiation team were available to speak individually to Class Members, address individual issues, and answer questions. All Class Members were given ballots to cast in favor of or in objection to the settlement. These ballots were kept in a locked box until removed by Class Counsel's staff, who secured and counted them.

17. Four hundred seventy-five Class Members cast ballots at the meetings: 360 in favor of and 115 objecting to the proposed settlement. The ballots had space for Class Members to make written comments. The ballots have been admitted in to the record as evidence.

18. On November 18, 2015, a notice of the proposed 20 percent attorney fee application, the proposed settlement, and the December 1, 2015 Court hearing were mailed by Class counsel to every Class Member employed and/or retired in 2015. That notice was also posted on web pages for the New Orleans Firefighters Local No. 632 and the New Orleans Firefighters Pension and Relief Fund.

19. After the mailing, an additional 133 ballots were returned, of which 105 were in favor of and 28 objected to the proposed settlement. All ballots were admitted into the record as evidence.

20. Those who explained in writing why they opposed the proposed settlement terms expressed the following reasons:

a. The settlement does not provide judicial interest on back pay.

b. The back pay distribution is spread out over several years and is partially contingent on passage of a millage election.

c. The settlement was "announced" by the Mayor before it was presented to the Class Members for approval.

d. The settlement does not include certain DROP account "funding" to which certain Retirees believe themselves to be entitled.

e. The proposed Settlement Agreement includes terms that also settle a related lawsuit involving the New Orleans Firefighters Pension & Relief Fund and its Trustees.

21. At the hearing held December 1, 2015, at which all Class Members who wished to be heard were allowed to testify, some twenty Class Members vehemently expressed similar objections to the written comments. Also, one Retiree complained that he would not be receiving all past due retirement benefits to which he was entitled. Nevertheless, this Court takes cognizance of the fact that the opinion of Class Members is overwhelmingly in favor of the settlement.

22. Class representative and Union President Felton and Pension Fund Secretary/Treasurer Meagher, who were both involved in the lengthy settlement negotiations, attested to the fairness, reasonableness, and adequacy of the proposed settlement. The Court takes judicial notice of the fact that Meagher, in addition to the other three member-trustees to the Fund, are actually elected to those positions by Class Members, both active and retired.[12] The Class representatives will not receive any additional payment or benefit due to their status as Class representatives than any other Class member, and their recovery is subject to the same limitations as other Class Members: they will or may lose claims for some "funding" that would or could have increased their DROP accounts, they will receive no interest on their back pay awards, and they will only receive all of the proposed back pay after an extended period of time.

23. The Settlement Agreement, as noted above, provides for a "waiver" of any claims for pension benefits that are today "unfunded," which the 2010 consent judgment clearly reserved for adjudication. However, as emphasized by Meagher, the Fund-related aspects of the Settlement Agreement guarantee future ARC's to the Fund, which resolves the previous under-

[12] *See*, La. R.S. 11:3362(A)(3), (4) and (B).

funding of the Fund and secures full funding of all future pension benefits, including the benefits enhanced by virtue of this action.

24. The 2010 consent judgment also reserved for future adjudication "back pay" and "annual leave adjustments" that may have been due under prior judgments of this Court.

25. The Settlement Agreement provides for virtually full satisfaction of the longevity back pay and related annual leave adjustments ($75,000,000) in principal amounts.

26. John W. Perry, Jr., who has served as a mediator, arbitrator, and/or Special Master in over 4,000 cases, has proffered an affidavit in support of the fairness of the settlement. It has been received into evidence. Perry states that "[a]ttempting to find common ground in the face of substantial past and future obligations on the part of the City, coupled with the city's limited resources and other pressing needs (short and long term), made this one of the most difficult matters I have mediated." Perry explains that the complex legal demands and defenses among the parties, overshadowed by the doctrine of sovereign immunity, caused the difficulty. Perry was retained after a "Pension Working Group," including the Business Council of New Orleans (BCNO), failed to reach a resolution. An expert in public pension law and practices, Vijay Kapoor, Esq., was retained by BCNO to assist the Working Group. Kapoor continued to assist the parties and mediated these cases over six months, and Perry personally performed 98 hours of service in the mediation. Class counsel, the City Attorney, and BCNO board members and counsel attended the meetings. In addition, outside counsel for the City participated in most of the meetings. Kapoor participated in person and by teleconference. City Council members also participated.

27. According to the Mediator, identifying a funding source for the judgment obligations required a political solution, as the Mayor and City Council had to agree on not only the dollar amount of the settlement, but also the source of the funds. The Mediator opines that the settlement is fair to the Class Members, and that, in his opinion, collection of an amount in excess of the 2014 consent judgment is not likely. The Mediator emphasizes that the participants confronted impasse on numerous occasions, and the eventual resolution was arms-length. According to the Mediator, the representatives of the Class Members who participated in the mediation (two of whom testified at the December 1, 2015 hearing) understood the concessions, and made these concessions in good faith, in light of the constraint of sovereign immunity. The

Class representatives recognized specific concessions were not symmetrical, but made the determination that the resolution outweighed the concessions.

28. Louis Robein proffered an affidavit in support of the fee application and the Settlement Agreement and testified at the December 1, 2015 hearing. The Court has received this affidavit into evidence. Robein served as lead counsel and trial attorney for Local 632 and the named Class representatives. He has represented Local 632 since October 1975. This action, filed in 1981 and amended in 1990 to add longevity claims, has resulted in significant wage and pension gains for Class Members. As reflected in the procedural history, litigation of this case has been lengthy and complex, involving numerous appeals and remands. In addition to legal issues, political and economic issues confronted Class counsel and the Class representatives, requiring novel approaches. The Court also recognizes that Local 632, represented by Robein and his firm, has successfully litigated many other pay and working conditions cases for the represented Firefighter Classes, active and retired, during the 1981 to present period.[13]

29. Robein initiated motions for contempt and responded to the City=s declaratory judgment petition. These matters required several conferences with the Court, numerous meetings and analysis with data experts, depositions, and a trial in this Court on February 2, 2007 in order to have current employees elevated to their proper rate of pay, and continuous depositions, conferences, meetings with the City, and conferences with and hearings before this Court for that and related purposes.

30. Since early 2012, Robein and his firm have been engaged in "tripartite" negotiations with the City and its officers to resolve outstanding judgment obligations in the Longevity Class Action, as well as related Pension Fund funding obligations. These negotiations recently culminated and resulted in a mediated settlement of all Longevity and Pension Fund claims, as well as complex counterclaims asserted by the City. During the course of these negotiations, Robein actively participated in public discussions with the Business Council of New Orleans in connection with an Executive Order issued by Mayor Landrieu (MJL 14-01). The proposed resolutions produced by the "Pension Working Group" (BCNO, City, Pension

[13] *See, e.g., New Orleans Firefighters Ass'n v. Civil Service Commission*, 422 So.2d 402 (La. 1982) (declaring that all Firefighters minimum wage and supplemental pay laws applicable to City of New Orleans); *Levy v. Civil Service Commission,* 542 So. 2d 1385 (La. 1989), reversing 538 So. 2d 674 (La. App. 4 Cir. 1989) (reinstated trial court judgment awarding class of fire alarm operators and fire inspectors 25% pay differential); *Rapp v. City of New Orleans*, 750 So. 2d 1130 (La. App. 4th Cir. 1999) (affirming claims of 20 retired Firefighters for Supplemental Earnings Benefits related to fire duty-related injuries, as well as sanctions against the City).

Fund, Local 632) served as a basis for the mediated global settlement of all Longevity and related Pension Fund claims now before this Court for approval.

31. Robein expended over 300 hours of time to the global mediation process. Robein's best estimate of his total time expended is over 5,000 hours over 33 years, not including the involvement of other attorneys in his firm. Paralegal time exceeds 1,000 hours. The lead Plaintiff, New Orleans Firefighters Local No. 632, supports the 20% common fund attorney's fee.

32. Robein and his firm actively participated in specially-called Union meetings to inform the Class (actives, retirees, and spouses) of the proposed settlement, address questions and objections from Class Members, collect written approvals and objections from members in attendance, and "voting" on approval of same.

CONCLUSIONS OF LAW

Procedural and Substantive Fairness.

La. C.C.P. art. 594 provides, in pertinent part, as follows:

> A. (1) An action previously certified as a class action shall not be dismissed or compromised without the approval of the court exercising jurisdiction over the action.
>
> (2) Notice of the proposed dismissal of an action previously certified as a class action shall be provided to all members of the class, together with the terms of any proposed compromise that the named parties have entered into. Notice shall be given in such manner as the court directs.
>
> B. After notice of the proposed compromise has been provided to the members of the class, the court shall order a hearing to determine whether the proposed compromise is fair, reasonable, and adequate for the class. At such hearing, all parties to the action, including members of the class, shall be permitted an opportunity to be heard.
>
> C. The court shall retain the authority to review and approve any amount paid as attorney fees pursuant to the compromise of a class action, notwithstanding any agreement to the contrary.
>
> D. Any agreement entered by the parties to a class action that provides for the payment of attorney fees is subject to judicial approval.
>
> E. If the terms of the proposed compromise provide for the adjudged creation of a settlement fund to be disbursed to and among members of the class in accordance with the terms thereof, the court having jurisdiction over the class action is empowered to approve the compromise settlement of the class action as a whole and issue a final judgment accordingly, following a finding that the compromise is fair, reasonable, and adequate for the class, and to order the distribution of the settlement fund accordingly, without the necessity of prior qualification of representatives of minors, interdicts, successions, or other incompetents or absentees, or prior approval of the terms of the settlement or the distribution thereof by another court; provided, that in such cases the court having jurisdiction over the class action shall include in the orders of settlement and distribution of the settlement fund appropriate provisions to ensure that all funds adjudicated to or for the benefit of such incompetents, successions, or absentees are placed in appropriate safekeeping pending the completion of appointment, qualification, and administrative procedures otherwise applicable in this Code to the interests and property of incompetents, successions, and absentees.

The class action provisions of Louisiana Code of Civil Procedure, arts. 591-597, are adapted from Federal Rule of Civil Procedure 23.[14] Accordingly, the Louisiana Supreme Court

[14] *Stevens v. Board of Trustees of Police Pension Fund*, 309 So.2d 144 (La. 1975); *Williams v. State*, 350 So.2d 131 (La. 1977).

has acknowledged the relevance of judicial decisions and treatises interpreting Federal Rule of Civil Procedure 23 when analyzing the Louisiana class action rules.[15]

The federal Fifth Circuit has held that compromising a class action requires the trial judge to review the proposed settlement to protect members of the class from unjust or unfair settlements affecting their rights.[16] The trial court must "evaluate whether the settlement is fair, adequate and reasonable and is not the product of fraud or collusion," and weigh these concerns against the "policy of law to favor settlements and to uphold them whenever possible because they produce an amicable resolution of disputes and minimize demands on judicial time and resources."[17] In performing this balancing task, the trial court should rely upon the judgment of experienced counsel for the parties and, "absent fraud or collusion, should be hesitant to substitute its own judgment for that of counsel."[18]

The federal Fifth Circuit has also held that Rule 23(e) mandates notice to absentee Class Members before the district court approves the dismissal or compromise of a class action, and that this obligation is one the parties to a class action may not waive.[19] The purpose of the mandatory notice requirement is to prevent class representatives and class opponents from abusing the class action device at the expense of absentee Class Members' rights.[20] Class representatives should not be allowed to receive favorable personal treatment in a settlement by sacrificing or abandoning the claims of the absent class member.[21] Because this Settlement Agreement is fair, adequate and reasonable for Class Members, because it is not the result of fraud or collusion, and because it is recommended by the experienced Class counsel and favored by a vote of the Class Members, this Court, after giving Class Members the opportunity to object, approves the Settlement.

The first factor, fairness, is not an issue in the present case. The Settlement Agreement is fair on its face because Class representatives are not being treated any differently from other Class Members. Each Class member will be paid approximately ninety-nine percent (99%) of the amount s/he would have received from his/her combined Longevity and Annual Leave back pay. Also, Class representatives are subject to the same loss of claims for additional payments toward

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[15] *See, e.g., McCastle v. Rollins Environmental Services of Louisiana, Inc.*, 456 So.2d 612, 616-618, 620-621 (La. 1984).
[16] *Piambino v. Bailey*, 610 F.2d 1306, 1327 (5th Cir. 1980).
[17] *Id.* at 1328.
[18] *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977).
[19] *McArthur v. Southern Airways, Inc.*, 556 F.2d 298, 302 (5th Cir. 1977), *vacated on other grounds*, 569 F.2d 276 (5th Cir. 1978).
[20] *Id.* at 302-03.
[21] *Id.*

interest and their DROP accounts. Therefore, Class representatives are not getting more favorable treatment in any fashion.

The Settlement Agreement is also reasonable and adequate. Two important factors in determining whether a settlement is reasonable and adequate are the amount of the actual damages compared to the final settlement figure, and the terms of the settlement considered in light of the risks to the Plaintiff Class in continuing litigation.[22] Applying these factors, the settlement agreement is reasonable because Class Members are to be paid ninety-nine percent (99%) of the amount due from Longevity and Annual Leave back pay even though they effectively relinquish interest and arguably past due pension benefits increases. The outcome in this Court is, of course, uncertain given the limitations on execution of judgments against any political subdivision. Continued litigation (after 33 years) would subject the Class to further uncertainty and delay. Furthermore, the reasonableness of the Settlement Agreement is reinforced by the fact that Class Members have voted overwhelmingly in favor of approving the settlement after a full and fair discussion of the relative merits of settlement as opposed to pursuing the case in continued litigation. Written notice of the proposed settlement terms was mailed to Class Members on October 20, 2015, along with notice of meetings held on October 28 and 29, 2015 to discuss the terms of the settlement and vote on approval. The Class Members voted 360 in favor of and 115 objecting to the settlement terms, over three to one in favor. Notice was mailed again to Class Members to notify them of the December 1, 2015 hearing, after which additional Class Members delivered or mailed ballots — 105 in favor of versus 28 objecting to the settlement terms.[23]

Critically, the Settlement Agreement would provide for a significant concession from the Class. While the full principal amount of backpay on longevity and annual leave is accounted for, the Class forgoes judicial interest. Additionally, any claims for retroactive pension enhancements (1990-2010), which were earlier reserved for adjudication by the 2010 consent judgment, are to be withdrawn or dismissed. While those Class Members testifying on December 1, 2015 did not provide any specific explanations of the "unfunded" pension benefits, particularly Deferred Retirement Option Plan (DROP) benefits, it is clear to this Court that some or all of any such "unfunded" pension benefits would no longer be pursued for full recovery should this cause be compromised as proposed.

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[22] *Cotton*, 559 F.2d at 1330.

[23] Exhibit B, &&21-23, attached to Attorneys' Fee Memo.

The Court received the testimony of many Class Members who objected to the proposed settlement. Henry Beba, the longest serving Class Member, is entitled to $291,852.94 in longevity and enhanced leave amounts. He objects to the settlement for lack of any judicial interest, and for lack of any recovery pension enhancements that he may have enjoyed post-retirement. He, like other testifying Class Members, had been informed that retroactive pension adjustments could have been realized when the longevity case was "settled."

Class Members Russell Choina, who will receive $97,389.26, and Alfred Juno, who will receive $123,645.75, expressed opposition to any concession over "unfunded" enhancements to their existing DROP accounts, also alluding to assurances from Union or Fund representatives that these enhancements would be realized once the case was "settled."

These Class Members, like others who either testified or submitted written objections, do not object to the compromise over salary-based longevity; they understandably object to the effective withdrawal from litigating the retirement-side of the back pay recovery. They do not, of course, object to the significant enhancements already made in their retirement benefits by operation of the 2010 consent judgment.

The Court affords weight to the opinion of the Mediator urging approval. It is well established that, notwithstanding mediation privilege, the parties here expected and have consented to disclosure of mediation discussions. It is particularly accepted practice in class actions to receive reports from the mediator.[24] In *In re Lawnmower Engine Horsepower Marketing and Sales Practice Litigation*,[25] the trial court recognized the mediator's declaration "describing the contentiousness of the mediation sessions" and his statement that "he became very familiar with the legal, factual, and procedural issues in this case, and in his opinion the global settlement is an 'excellent result' for the class."[26] The Court concurs with the Mediator's balanced analysis of the negotiation process that occurred here.

The compromise before the Court recognizes the overarching limitations on the litigants: the sovereign immunity of the City and its officers endowed by our Constitution. The judgments in this cause are judgments of mandatory injunction directed at the City and its officers.

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[24] *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 961 (9th Cir. 2009).
[25] 733 F. Supp. 997, 1007 (E.D. Wis. 2010).
[26] *See also*, Coben, *Creating a 21st Century Oligarchy: Judicial Abdication of Class Action Mediators*, 5 Penn. St. Y. B. Arb. & Mediation 162 (2013).

However, under current law, this legal remedy cannot mandate an appropriation to fund a judgment obligation.[27]

"While the judicial branch is empowered to render judgments against the state ... the constitution does not provide the judiciary with the ability to execute those judgments."[28] That power is reserved to the legislative branch under La. Const. art. XII, § 10(c), and La. R.S. 13:5109(B)(2). Monetary satisfaction of any judgment can be achieved only through legislative appropriation.

The Class has successfully, to date, petitioned the Court to exercise its power of contempt. The Court of late has exercised this authority, as it prepared to do in 2007-2009. All parties, including this Court, recognize that even the issue of contempt is not fully resolved and is subject to further review by this Court based on the remand of the suspensive appeal on that very question. However, while the integrity of the Court is secured through contempt, the Class must effectively negotiate a reasonable and fair plan with the City and its officers, including the legislative branch of government, to address the actual funding of the judgment obligation. The Class representatives have done so here.

A like weighing and balancing was applied by the court in *Professional Firefighters of Omaha Local 385 v. Zalewski,*[29] a class action brought by a Firefighter union seeking to enjoin changes in city ordinances and collective bargaining agreements establishing health care benefits for active and retired employees. In reviewing the proposed settlement, the court considered "(1) the merits of the plaintiff's case weighed against the terms of the settlement; (2) the defendant's financial condition; (3) the complexity and expense of further litigation; and (4) the amount of opposition to the settlement."[30]

The settlement there, opposed by retired class members concerned about relatively harmful financial effects that could occur in the future, was approved. The court considered the costs of protracted litigation and the "very limited" availability of city funds then and going forward.

Here, there is no question that "funding" of the judgments in question is an urgent and critical factor. The Class representatives present a viable method of funding of a reasonably compromised resolution of all longevity-related claims remaining on the table.

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[27] *See, Hoag v. State,* No. 2004-0857 (12/1/2004), 889 So. 3d 1019.
[28] *Newman Marchive Partnership, Inc.*, 07-C-1890 (La. 04/8/2008), 979 So. 2d 1262.
[29] 678 F. 3d 640 (8th Cir. 2012).
[30] *Id.*, citing *In re Wireless Tel. Fed Cost Recovery Fees Litig.*, 396 F.3d 922, 932 (8th Cir. 2005). (Emphasis added.)

Finally, this proposed settlement contains none of the potential elements for abuse that require a district court to refuse to approve class action settlements. The Fifth Circuit has explained the reason that a trial court must scrutinize the compromise or dismissal of a class action:

> Class representatives are precluded from filing a class suit to enhance their individual bargaining position in settlement negotiations and then upon receiving favorable treatment of their personal claims either partially sacrificing or completely abandoning the class claim.[31]

In the present case, there is no possibility that Class representatives have enhanced their own positions to the detriment of other Class Members because all Class Members, including Class representatives, will receive payment according to the same formula, *i.e.*, ninety-nine percent (99%) of the amount s/he would have received pursuant to Longevity and Annual Leave back pay calculations, and all Class Members suffer loss of interest and past due retirement benefits. Moreover, all Retirees are to benefit from the 2010 consent judgment going forward as it pertains to mandated pension adjustments, including those Class Members who also objected to the proposed compromise.

The federal Fifth Circuit has also held that the purpose of Rule 23(e) is to minimize the conflict that may arise between attorney and the Class.[32] In the present case, however, the attorneys for the Class are seeking a 20% fee out of the common fund. Counsel has sought —and this Court has awarded —the same 20% fee out of other interim funds created through the course of this litigation. This fee is the same imposed on all Class Members and is reasonable considering the amount of time, effort and expertise expended in this matter.

In class action suits there is an overriding public interest in favor of settlement.[33] In this case, the Settlement Agreement meets the universally recognized elements of fairness, reasonableness, and adequacy, and there are no elements pointing to collusion. Significantly, the settlement plan accommodates the ever-present consideration of the City's "financial ability" to fulfill the compromised judgment obligation. Accordingly, the Court approves the settlement.

Common Fund Recovery Fee.

The Court also awards attorneys' fees of 20% of the settlement amount. Article 595 (A) of the La. C.C.P., as amended in 1997, provides, in pertinent part:

> The court may allow the representative parties their reasonable expenses of litigation, including attorney=s fees, when as a result of the class action a fund is

[31] *McArthur*, 556 F.2d at 303.
[32] *Piambino*, 610 F.2d at 1327-28.
[33] *Cotton*, 559 F.2d at 1331.

made available, or a recovery or compromise is had which is beneficial, to the class.

The Official Revision Comments to Article 595 provide, in pertinent part:

(a) It is intended, in the first paragraph, that the reasonable expenses of litigation allowed the successful representative parties is to be paid out of the fund or benefits made available by their efforts . . . .

(b) The consistent policy of Louisiana heretofore has been to allow a successful litigant only his taxable costs, and not to award attorney=s fees, unless provided by statute or convention. Under the general equity jurisprudence, reasonable expenses of litigation in a class action, including attorney=s fees, may be allowed the successful litigant. The above article retains the consistent policy with respect to the class action. (*Citations omitted).*

Generally, under federal law a court may not award attorney=s fees to a prevailing party unless expressly authorized by statute.[34] An exception to this rule is the right of counsel who has created a benefit for third parties, to recover reasonable fees and expenses as awarded by the court from the common fund created.[35] Under these circumstances, it is within a district court=s discretion to award attorney=s fees under the equitable doctrine of the common fund.[36] The common fund doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched at the expense of a successful litigant or attorney.[37] The doctrine allows a party who creates, preserves, or increases the value of a fund in which others have an ownership interest to be reimbursed from that fund for litigation expenses incurred, including counsel fees. In a common fund case, the class of persons benefitted by the lawsuit is typically easily identifiable, and there is reason for confidence that the costs of litigation may be shifted with some exactitude to those benefitting.[38] When awarding attorney=s fees from a common fund, the court must act as a fiduciary for absent Class Members, and carefully scrutinize the requests of attorneys for fees and costs.[39]

Similarly, although there is not extensive jurisprudence pertaining to the award of attorney=s fees under art. 595, principles of state law support this fee request. Under Louisiana law, a court in the exercise of equitable jurisdiction will order an allowance of counsel fees to a complainant, or directly to the attorney, Awho at his own expense has maintained a successful suit for the preservation, protection, or increase of a common fund . . . or who has created at his

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[34] *Alyeska Pipeline Co. v. Wilderness Soc=y*, 421 U.S. 240, 247 (1975).
[35] *Alyeska,* 421 U.S. at 264; *Newberg on Class Actions*, § 14.01 (3d ed. 1992).
[36] *Sprague v. Ticonic Nat=l Bank*, 307 U.S. 161, 166-67, (1939) (federal court has power in equity to award costs and fees in its discretion from a common fund).
[37] *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) (citing *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970)).
[38] *Alyeska Pipeline Service Co.*, 421 U.S., at 265, n. 39, 95 S. Ct. at 1625, n.39.
[39] *Cook v. Niedert*, 142 F.3d 1004, 1011 (7th Cir. 1998).

own expense, or brought into court, a fund in which others may share with him.@[40] The common fund doctrine originated as a common law theory of equity allowing an attorney to recover fees from one not his client in limited situations.[41] Further, the Louisiana Civil Code recognizes the equitable principle Athat no one is allowed to take unfair advantage of another and that no one is allowed to enrich himself unjustly at the expense of another.@[42] Moreover, a Aperson who has been enriched without cause at the expense of another person is bound to compensate that person.@[43]

In this case, an attorney=s fee award to Class counsel is justified under both the statutory authority of La. C.C.P. art. 595 and the equitable fund doctrine. In the language of art. 595(A), this class action has resulted in another recovery which is beneficial to the Class; therefore, the court allows the representative parties their reasonable expenses, including attorney=s fees. Here, members of the Class of New Orleans active and retired Firefighters are being enriched by the efforts of undersigned counsel, and it is only fair to require them to share attorney=s fees to the same extent that they share in the recovery.

While the common fund doctrine is well established in both federal and state law, federal courts debate the appropriate method for determining a reasonable fee. The two principal methods for determining a reasonable fee under the common fund doctrine are the lodestar and the percentage-of-benefit approach.[44]

The lodestar approach was first introduced in 1973 by the Third Circuit in *Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp.*,[45] in which the court instructed the judges in that circuit to first compute the product of the reasonable hours expended and the reasonable hourly rate to arrive at the lodestar, and then to adjust that product upward or downward, depending on other relevant factors, such as the contingent nature of the case and the quality of the attorney=s work. A year after the *Lindy* decision, in *Johnson v. Highway Express, Inc.*,[46] the federal Fifth Circuit set forth twelve factors that should be

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[40] *In re Interstate Trust & Banking Co.*, 235 La. 825, 106 So.2d 276, 280 (1958) (quoting 49 A.L.R. 1150); *Capital Bancshares, Inc. v. FDIC*, 957 F.2d 203, 209 (5th Cir. 1993).
[41] *Kirkpatrick v. Young*, 456 So.2d 622 (La. 1984). As early as 1893, the Louisiana Supreme Court recognized this exception to the general rule that a lawyer cannot recover a fee from one who has neither employed him nor authorized another to do so. *McGraw v. Andrus,* 45 La. Ann. 1073, 13 So. 630 (1893).
[42] La. C.C. art. 2055.
[43] La. C.C. art. 2098.
[44] *See* R. Herman, *Percentage-0f-Benefit Fee Awards In common Fund Cases*, 74 Tul. L.Rev. 2033 (June 2000).
[45] 487 F.2d 161 (3d Cir. 1973).
[46] 488 F.2d 714 (5th Cir. 1974).

considered in determining a reasonable fee under a fee-shifting statute.[47] An analysis of these factors is mandatory in the Fifth Circuit.[48]

Thereafter, the federal courts experimented with combinations of the *Lindy* lodestar and *Johnson* twelve-factor approaches in both fee-shifting and common fund cases; however, many courts and commentators began to note differences between fee-shifting and common fund cases, calling into question whether the same methodology should apply. A Task Force appointed by the Third Circuit compared the merits of these approaches and ultimately recommended the lodestar approach in statutory fee cases, but concluded that the percentage-of-recovery method was the best determinant of the reasonable value of service rendered by class counsel in a common fund case.[49]

> The rationale behind awarding a percentage of the fund to counsel in common fund cases is the same as that which justifies permitting contingency fee arrangements in general. The underlying premise is the existence of risk - the contingent risk of nonpayment. The size of the contingent fee is designed to be greater than the reasonable value of the services in the individual case, *i.e.*, hours worked times hourly rate. The higher payment due under a contingency fee reflects the fact that the lawyer will realize no return for his investment of time and office expenses in the cases he loses.[50]

The lodestar approach has been criticized partly on the basis that it could have the effect of encouraging class counsel to spend more time than necessary on a case in order to increase the fee.[51] Also, many have noted that even courts giving lip service to the lodestar process still tend to award fees within the same 20 - 30% range of recovery as the percentage-of-recovery approach.[52] For these and other reasons, many courts which previously adopted the lodestar approach have returned to the percentage-of-recovery method for awarding fees, including the

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[47]Those factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to the acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or the circumstances; (8) the amount involved and the result obtained; (9) the experience, reputation, and ability of the attorney; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. These factors are very similar to the factors enumerated for determining the reasonableness of a fee under the Attorney Rules of Professional Conduct, La. R.S. foll. 37:221: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal service; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent. *See Davidson, Meaux, Sonnier, McElligot & Swift v. Broadhead*, 94-97 (La. App. 3d Cir. 1955), 649 So.2d 479, 483 *writ denied*, 94-2910 (La. 1/27/95), 650 So. 2d 243.

[48] *Longden v. Sunderman*, 979 F.2d 1095, 1100 (5th Cir. 1992).

[49] *Id.; Court Awarded Attorney Fees, Report of the Third Circuit Task Force Report*, 108 F.R.D. 237 (1986).

[50] *In re Combustion, Inc.*, at 1132, citing F. MacKinnon, *Contingency Fees for Legal Services*, (1964).

[51] *Third Circuit Task Force*, 108 F.R.D. at 246-49.

[52] *See, e.g., In re Catfish Antitrust Litg.*, 939 F. Supp. 493, 501 (N.D. Miss. 1996); *Chrysler Motors Corp. Oversight Evaluation Program Litg.*, 736 F. Supp. 1007, 1015 (E.D. Mo. 1990); *In re Activision Sec. Litg.*, 723 F. Supp. 1373, 1375 (N.D. Cal. 1989).

Third Circuit, where the lodestar rule originated in *Lindy*.[53] Louisiana state courts have generally adopted the percentage-of-benefit method for awarding fees in common fund cases.[54] In *Rivet v. State, Dep=t of Transp. & Dev.,*[55] the Louisiana Supreme Court distinguished fee awards granted pursuant to La. R.S. ' 13:5111(A) from awards granted under La. C.C.P. art. 595, in which a percentage approach is appropriate. In *White v. GMC*,[56] the court noted that Louisiana courts, as well as numerous federal circuits, employ the percentage-of-fund approach, as opposed to the lodestar approach in determining a reasonable attorneys' fee. That method is particularly appropriate here where counsel has worked on this case for 33 years with little payment, and where payment sought now is a partial payment only, based on the amount recovered for Class Members in back pay only and does not affect the increased wages and pension benefits the Class Members enjoy as a result of this litigation.

Although common fund fee awards may be higher than 40%, they typically range from 17% to 40% of a common fund, with the benchmark standard lying between 20% and 30%.[57] Twenty percent of the amount due to be paid out now to Firefighters, the 2016 payment toward "historic" back pay, is reasonable in view of the time and effort spent in obtaining this recovery. It is also reasonable when viewed against the *Johnson* factors and the factors for determining a reasonable fee under the Rules of Professional Conduct.[58]

A 20% fee is in the low range of what is normally considered a reasonable contingency fee for this area and it is at the low end of the typical range for a common fund award. Also, 20% of the 2016 "historic" back pay is less than 20% of the benefit that will inure to Class Members since the City has changed its pay practices and Class Members continue to reap these

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[53] *See, e.g., In re General Motors Corp. Pickup Truck Fuel Tank Prods. Liability Litg.*, 55 F. 3d 768, 821-22 (3d Cir. 1995).

[54] *See also Bruno v. New Orleans*, 639 So.2d 1201, 1203 (La. App. 4th Cir. 1994) (20% fee for attorneys in back pay class action on behalf of police); *Pillow v. Board of Commissioners*, 425 So.2d 1267, 1283-84 (La. App. 2d Cir. 1982) (awarding 33% fee); *Consolidated Sewerage Dist. v. Schulin*, 387 So.2d 1369, 1370-73 (La. App. 4th Cir. 1980) (awarding 25% fee); *Alexander v. Lindsay*, 152 So.2d 261, 267 (La. App. 4th Cir. 1963) (awarding 20% fee); *Dumas v. Angus Chem. Co.,* No. 92-1707 (La. 4th JDC 11/2/99) (awarding 35% fee).

[55] 96-0145 (La. 9/5/96), 680 So.2d 1154, 1160-61.

[56] 97-1028 (La. App. 1st Cir. 6/29/98), 718 So.2d 480, 508-09, *writ denied*, (La. 98), 729 So.2d 590.

[57] *See Longden v. Sunderman,* 979 F.2d 1095, 1099 (5th Cir. 1992) (awarding lead counsel fees amounting to 27.5% of the common fund); *In re Combustion, Inc.*, 968 F. Supp. 1116, 1132-33 (W.D. La. 1997) (benchmark standard is between 20% and 30%); *In re Catfish Antitrust Litig.*, 939 F. Supp. 493, 501 (N.D. Miss. 1996) (adopting a benchmark of 25%); *In re Shell Oil Refinery*, 155 F.R.D. 552, 571, 573 (E.D. La. 1993)(finding customary contingency fees to be between 33 1/3% and 40% and most common fund fee awards to fall between 20% to 30% of the fund); *In re Prudential Bache*, 1994 WL 86682*1 (E.D. La. 3/7/94) (review of the percentage-of-recovery approach reveals a range from 17.5% to 33% of recovery); *Crouch v. Tenneco, Inc.*, 853 S.W. 2d 643, 647 (Tex. App. 1993) (awarding fees of 28.5% of the common fund in an employment-related class action); *In re Ampicillin Antitrust Litig.*, 526 F. Supp. 494 (D. D.C. 1981) (noting that most fee awards are less than 25% of settlement, but awarding 45% of $7.3 million settlement fund as fees); *Beech Cinema, Inc. v. Twentieth Century-Fox Film Corp.*, 480 F. Supp. 1195 (S.D. N.Y. 1979) (apparently 53% of settlement fund awarded as fees); *see also Vela v. Plaquemines Parish Government*, 2000-CA-2221 (La. App. 4th Cir. 3/13/02) 811 So.2d 1263 (awarding interim statutory attorney's fees in the amount of 30% of the judgment value); *writ denied,* 819 So.2d 343, (La. 6/21/02).

[58] *See* fn. 47, *supra.*

benefits prospectively. From 2007, going forward, active Class Members have and will continue to receive substantial enhancements to their pay because of upgraded longevity rates and increased annual leave as a result of Class counsel=s efforts, and retired Firefighters will continue to have their pension benefits increased as a result of their higher salaries. No fee will be extracted from this huge, ongoing recovery.

Moreover, Robein has represented the Local 632 since 1975. During that time, he has represented Firefighters in several pay cases and in each case has been paid a 20% contingency fee for his work. Local 632 has agreed to support and recommend this fee to members, and its membership has approved this fee percentage by vote in the past. Additionally, the 20% requested is far less than 20% of the recovery since Firefighters continue to receive longevity raises in other aspects of their pay and continue to receive increased annual leave days, which are not be subject to any fee. As noted, the pension-side of the recovery is huge. Enhanced longevity necessarily increases lifetime pension benefits.

In addition to a long relationship with Local 632 and his history of representing Firefighters, Robein has extensive experience in labor and employment law issues. This case was taken on a contingency basis; counsel has only been compensated intermittently for years of litigation which has taken time away from other work and his firm has advanced the costs of litigation, including data entry and expert fees. Robein and his firm have spent more than 7,000 hours in over 33 years of litigation. In the related case brought by the New Orleans Firefighters Pension Fund, Robein has been compensated on an hourly basis.

It must be re-emphasized that the Class-wide recovery in this cause is quite frankly immense: guaranteed annual pay raises applied to all base pay, supplemental pay and annual millage awards. No fee has been requested or assessed as to any ongoing or future entitlements that have been enjoyed or will be enjoyed by Class Members. This benefit to the Class Members applies to ongoing pay for Actives, as well as substantially increased retirement benefits for current and future Retirees. The "upgrade" for Retirees occurred in 2010 and will continue forever. A fee was awarded in each case only as to discrete portions of back pay awarded to each Class set in 2006, 2008 and 2010.

New Orleans, Louisiana, this 8th day of December, 2015.

JUDGE KERN A. REESE