

IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

ROBERT F. CHERRY, JR., THOMAS S. LAKE )
ROBERT J. SLEDGESKI, JOHN )
LEWANDOWSKI, CHARLES WILLIAMS, )
individually and on behalf of all persons similarly )
situated, and BALTIMORE CITY FRATERNAL )
ORDER OF POLICE, LODGE #3, INC., )
BALTIMORE CITY FIREFIGHTERS' IAFF, )
LOCAL #734 and BALTIMORE FIRE )
OFFICERS UNION, LOCAL #964, )
INTERNATIONAL ASSOCIATION OF )
FIREFIGHTERS, on behalf of their members, )
Plaintiffs, )
v. )
MAYOR AND CITY COUNCIL )
OF BALTIMORE CITY, )
Defendant. )

Civil Action No.: \_\_\_\_\_

CLASS ACTION COMPLAINT

CIVIL DIVISION
2015 AUG 19 PM 3:52

CLASS ACTION COMPLAINT

Plaintiffs, Robert F. Cherry, Jr. ("Cherry"), Thomas S. Lake ("Lake"), Robert J. Sledgeski ("Sledgeski"), John Lewandowski ("Lewandowski"), and Charles Williams ("Williams"), on behalf of themselves and all similarly-situated public safety employees and retirees of the City of Baltimore, and the Baltimore City Fraternal Order of Police, Lodge #3, Inc. ("FOP"), Baltimore City Firefighters' IAFF, Local #734 ("Local 734"), and Baltimore Fire Officers Union, Local #964, International Association of Firefighters ("Local 964"), on behalf of their members, by and through their undersigned counsel, bring this class action against Defendant, Mayor and City Council of Baltimore City ("Defendant", "City", or "Baltimore"), seeking monetary, injunctive, declaratory, and other relief. Cherry, Lake, Sledgeski,

Lewandowski, and Williams are collectively referred to herein as “Class Plaintiffs.” The Class Plaintiffs, the FOP, Local 734, and Local 964 are collectively referred to herein as “Plaintiffs.”

### **PRIOR RELEVANT HISTORY OF PROCEEDINGS**

Litigation of the issues set forth below began on June 3, 2010, when Plaintiffs filed federal Constitutional challenges to the City’s systematic underfunding of the Fire and Police Employees’ Retirement System of the City of Baltimore (“Plan”) in the U.S. District Court for the District of Maryland, captioned *Robert F. Cherry, Jr., et al. v. Mayor and City Council of Baltimore City*, Case No. MJG 10-CV-001447 (the “Federal Court Litigation”). On June 30, 2010, the City adopted Ordinance 10-306, significantly diminishing contractually-guaranteed pension benefits previously promised to – and earned by – active and retired Baltimore police officers and firefighters, which caused Plaintiffs to file an Amended Class Action Complaint challenging the constitutionality of the new Ordinance under the Contract Clause set forth in Article I of the United States Constitution, in addition to related federal Takings Clause and state-law claims arising from the same operative facts. The federal case was assigned to Judge Marvin J. Garbis. Judge Garbis, while noting that the Plaintiffs and putative class members may well have had state-law breach of contract claims, elected to stay the state-law claims and focus instead on the federal Contract Clause claim. With respect to the Contract Clause claim of retired members (those receiving Plan benefits when Ordinance 10-306 was adopted), Judge Garbis ruled that (a) Article 22 of the City Code (wherein the Plan is codified) represented a contract between the City and all of the members and beneficiaries of the Plan, (b) Ordinance 10-306 retroactively and substantially impaired the contractual rights of all members of the Plan who were retired or eligible to retire as of the effective date of the Ordinance, (c) Ordinance 10-306 was not “reasonable and necessary to serve an important public purpose,” and (d) Ordinance

10-306 violated the federal Contract Clause and represented an unconstitutional impairment of the contractual rights of the retired and eligible-to-retire members of the Plan.

Prior to reaching this decision, Judge Garbis conducted several extended evidentiary hearings, creating a substantial record addressing the Plan's actuarial experience, funding decisions made prior to adoption of the Ordinance, and the City's purported justifications for significantly reducing the retirement benefits of the members of the Plan. After ruling that the Ordinance impermissibly impaired the contractual benefits of retired and eligible-to-retire members of the Plan in violation of the Contract Clause, Judge Garbis dismissed as moot the Federal Takings Clause claim, which addressed the same conduct. At the Court's suggestion, Plaintiffs agreed to voluntarily dismiss without prejudice (preserving all rights) their related state-law claims, so that the parties could pursue cross-appeals of the Court's rulings on the federal claims. The Fourth Circuit Court of Appeals reversed the District Court, holding that the federal Contract Clause was not implicated because state-law breach of contract remedies were available to Plaintiffs against the City. The Fourth Circuit reasoned that the Contract Clause would be implicated only if Maryland law denied Plaintiffs a remedy for the City's abrogation of its contractual obligations. The Fourth Circuit, however, reinstated the federal Takings Clause claim, noting that Plaintiffs could choose to proceed on their state-law claims in state or federal court and that the federal Takings Clause claim could be held in abeyance until the state-law claims were resolved. On July 22, 2016, Judge Garbis declined to exercise supplemental jurisdiction over the state-law claims, referring Plaintiffs to state court to pursue state-law claims, and stayed the federal Takings Clause claim pending resolution of the state-law claims. In its ruling, the Court noted that "the City has agreed that the entire record of proceedings herein can be deemed 'on the record' in a state court presenting the state-law claims, reducing – if not

virtually eliminating – the need for duplicative proceedings regarding factual issues.” *See* Memorandum and Order Re: Amended Complaint, dated July 22, 2016, at 6.

In support of their claims and requests for relief, Plaintiffs state as follows:

### **INTRODUCTION**

1. Effective June 30, 2010, the City adopted Ordinance 10-306, which on its face terminated, reduced, diminished, and impaired numerous core retirement benefits provided under the Plan to which the City’s active, retired, and disabled firefighters and police officers and their beneficiaries held contractual rights. In an apparent case of changing budget priorities, the City contended that the pension contract had grown too costly and it desired to spend money elsewhere. No public entity in Maryland – county, municipality, or the state itself – has ever enacted pension reductions remotely resembling the sweeping reductions imposed under Ordinance 10-306, nor has any such entity taken away the pension benefits of retirees who had already fulfilled their contractual obligations and begun to receive retirement benefits. Here, the City applied Ordinance 10-306’s benefit reductions to both active and retired members of the Plan, leaving those members with significantly-reduced retirement and disability benefits. Making the City’s actions even more unprecedented, Ordinance 10-306 not only terminated and reduced the Plan’s core benefits, but it required members of the Plan to contribute significantly more of their salaries to the Plan for the reduced benefits.

2. Baltimore’s police officers and firefighters engage in two of the most dangerous and physically and mentally taxing occupations in Maryland, and unfortunately they do so in one of the most dangerous jurisdictions in the nation.

3. These public safety workers regularly face life-threatening conditions and risk serious injury, disability, and death on the job. Their schedules are irregular, extended, and

strenuous, particularly during emergencies, and their work requires substantial, sustained physical and emotional vigor.

4. When Baltimore firefighters begin serving the City, they take the following Fire Fighter's Oath:

*We will never bring disgrace or dishonesty.  
We will fight for the ideals and sacred things of the City.  
We will revere and obey the City laws,  
and do our best to incite a like respect and reverence in others.  
We will transmit this City to those who come after us,  
Greater, better and more beautiful than it was transmitted to us.*

5. When Baltimore police officers begin serving the City, they pledge to:

*Support the Constitution of the United States.  
Be faithful and bear true allegiance to the State of Maryland,  
and support the constitution and the laws thereof.  
Do to the best of my skill and judgment, diligently and faithfully,  
without partiality or prejudice, execute the office of law enforcement  
officer, according to the constitution and laws of this State.*

6. Unlike other City employees, Baltimore's public safety workers do not receive Social Security benefits.

7. Article 26 of the Baltimore City Charter specifically authorizes the City to adopt a pension plan for its public safety employees. The City was thus specifically empowered to bind itself to a long-term benefit commitment. First enacted in 1962, the Plan adopted by the Mayor and City Council was incorporated in Article 22 of the City Code and was designed to address the unique needs of the City's public safety workers. Specifically, the retirement age and years-of-service thresholds in the Plan were adopted in recognition of the fact that police officers and firefighters in Baltimore, unlike other public sector employees, face heightened physical and mental demands in performing their jobs. Moreover, by adopting Section 42 of Article 22 of the Baltimore City Code, the City chose to make an express, unambiguous contractual commitment

to each public safety worker that the benefits defined in the pension contract would not be in any way diminished or impaired after the worker became a member of the Plan (and a party to the pension contract) upon commencement of employment. Specifically, Section 42 provides:

Upon becoming . . . a member of the [Plan], 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 time of becoming a member, . . . and the benefits provided thereunder shall not thereafter be in any way diminished or impaired.

8. As a consequence of these Charter and Code provisions, the City made contractual, common law, and moral commitments to the members of the Plan and their beneficiaries to operate the Plan responsibly, to fund the Plan adequately to preserve and provide the retirement benefits defined in the Plan, and to not in any way diminish or impair the contractual retirement benefits for members upon commencement of employment.

9. In exchange for the retirement and disability benefits provided under the Plan, members of the Plan agreed to work for the City, contribute a percentage of their salary to the Plan, and forfeit their right to earn Social Security benefits during their public safety sector employment with the City.

10. Plan benefits are an integral part of the employment relationship between the City and its public safety workers and are viewed by workers as deferred compensation. The City does not include its pension obligations, however, in the bundle of contractual obligations subject to collective bargaining with its public safety unions. Rather, the City enacted Section 42 to unambiguously, contractually bind itself to provide the promised benefits to each individual public safety employee.

11. Members and their beneficiaries rely upon Plan benefits as security against

personal financial catastrophe and destitution in retirement.

12. Prior to the enactment of Ordinance 10-306 in June 2010, Plan benefits were comparable to the retirement benefits provided to police officers and firefighters in neighboring Maryland jurisdictions, notwithstanding the heightened dangers confronting Baltimore's public safety workers.

13. For years preceding the enactment of Ordinance 10-306, the City recruited its public safety workers by advertising the benefits of the Plan and induced police officers and firefighters to accept and continue employment in exchange for the benefits defined in the Plan. This inducement included periodic enhancements of Plan benefits.

14. Notwithstanding the contractual commitments made, and the inducements offered, by the City to the members of the Plan, on June 30, 2010, the City enacted Ordinance 10-306, which severely breached and impaired the City's contractual pension obligations to the members of the Plan and drastically reduced and diminished the retirement benefits defined in the Plan.

15. For nearly a decade leading up to the adoption of Ordinance 10-306, the City willfully and recklessly disregarded its legal and moral obligations to fund the Plan adequately by, among other actions and inactions, (a) failing to make adequate annual contributions to the Plan, (b) knowingly disregarding and rejecting the advice of the Plan's actuary so that the City could reduce its annual required contributions to the Plan, and (c) publishing financial reports containing misleading and inflated Plan asset values and making the false representation that the City had adequately funded the Plan and had no net pension obligation when in fact this was not the case.

16. It is ironic that among the City's justifications for its enactment of Ordinance 10-306 was its purported inability to afford its annual required contribution to the Plan for Fiscal Year 2011, the amount of which was the inevitable mathematical result of its prior systematic and knowing underfunding of the Plan.

17. For almost ten years prior to June 30, 2010, the Plan's actuary regularly advised the Board of Trustees of the Fire and Police Employees' Retirement System of the City of Baltimore ("Board") and the City of the need for the City to increase its annual contributions to the Plan in order to maintain adequate funding, but the City consistently instructed the Board that the requisite increased contributions were "not acceptable", supposedly based upon the City's dire financial circumstances, thereby resulting in the rejection of the actuary's recommendations and enabling the City to make artificially and unreasonably low contributions to the Plan, notwithstanding that in several of those years the City actually reported budget surpluses.

18. After years of underfunding the Plan and manipulating and spurning its funding obligations, the City, rather than correcting its past wrongdoing and adequately funding existing Plan benefits, enacted Ordinance 10-306, which reduced, impaired, and diminished the benefits provided under the Plan without legal justification.

19. Although the City contended that it was in financial extremis, in reality that was not the case. Had the City: (a) complied with the terms of the Plan in place prior to the enactment of Ordinance 10-306; (b) applied the provisions of Ordinance 10-306 to new hires only; and (c) adopted alternative actuarial methods and assumptions consistent with actuarial standards of practice, its Fiscal Year 2011 Plan funding payment would have been equivalent to what it chose to pay after adoption of Ordinance 10-306 *and* would have responsibly addressed Plan funding without breaching its contractual obligations to the members of the Plan.



20. The City's unprecedented legislative reduction of the contractual retirement and disability benefits provided under the Plan violated the laws of the State of Maryland.

**JURISDICTION AND VENUE**

21. This is a civil action seeking monetary, declaratory, equitable, injunctive, and other relief against the City for committing acts under color of law to deprive the members of the Plan and their beneficiaries of their rights secured under Maryland law. This Court has jurisdiction over the subject matter and all parties pursuant to Md. Code, § 6-102(a) of the Courts and Judicial Proceedings Article ("C.J.P.") because all parties are either domiciled in, organized under the laws of, or maintain a principal place of business in, the State of Maryland.

22. Venue is proper pursuant to C.J.P. § 6-201(a) because the City resides and carries on a regular business in Baltimore City.

**PARTIES**

23. Plaintiff Robert F. Cherry, Jr. is employed by the Baltimore Police Department, and has been a member of the Plan since December 1993. Cherry resides in Baltimore, Maryland.

24. Plaintiff Thomas S. Lake is employed by the Baltimore City Fire Department, and has been a member of the Plan since September 1995. Lake resides in Stewartstown, Pennsylvania.

25. Plaintiff Robert J. Sledgeski was employed by the Baltimore City Fire Department from April 1973 to January 2012, and has been a member of the Plan since April 1973. Sledgeski resides in Severna Park, Maryland.

26. Plaintiff John Lewandowski was employed by the Baltimore Police Department from November 1960 to June 1994, and has been a member of the Plan since its enactment in 1962. Lewandowski resides in Pasadena, Maryland.

27. Plaintiff Charles Williams was employed by the Baltimore City Fire Department from October 1968 to March 2004, and has been a member of the Plan since October 1968. Williams resides in Bel Air, Maryland.

28. Plaintiff Baltimore City Fraternal Order of Police, Lodge #3, Inc. is an incorporated employee organization doing business in the State of Maryland and representing police officers holding the rank of lieutenant and below, for purposes of collective bargaining, who are employed by the City. The FOP brings this action for and on behalf of its members based on associational standing on the following grounds: (a) FOP members have suffered injury as a result of the acts alleged herein; (b) the interests furthered by this action are germane to the FOP's purpose and functions as an employee organization representing police officers employed by the City; and (c) neither the claims asserted nor the relief sought require the participation of all of the FOP members because the unlawful acts alleged in this Complaint affect all of the FOP's members for whom Plaintiffs seek declaratory, injunctive and other equitable relief.

29. Plaintiff Baltimore City Firefighters' IAFF, Local #734 is an employee organization doing business in the State of Maryland and representing firefighters and paramedics below the rank of lieutenant, for purposes of collective bargaining, who are employed by the City. Local 734 brings this action for and on behalf of its members based on associational standing on the following grounds: (a) Local 734 members have suffered injury as a result of the acts alleged herein; (b) the interests furthered by this action are germane to Local

734's purpose and functions as an employee organization representing firefighters employed by the City; and (c) neither the claims asserted nor the relief sought require the participation of all of Local 734's members because the unlawful acts alleged in this Complaint affect all of the Local 734 members for whom Plaintiffs seek declaratory, injunctive, and other equitable relief.

30. Plaintiff Baltimore Fire Officers Union, Local 964, International Association of Firefighters is an employee organization doing business in the State of Maryland and representing supervisors and officers of the Baltimore City Fire Department holding the rank of lieutenant, captain, or battalion chief, for purposes of collective bargaining. Local 964 brings this action for and on behalf of its members based on associational standing on the following grounds: (a) Local 964 members have suffered injury as a result of the acts alleged herein; (b) the interests furthered by this action are germane to Local 964's purpose and functions as an employee organization representing firefighters employed by the City; and (c) neither the claims asserted nor the relief sought require the participation of all of Local 964's members because the unlawful acts alleged in this Complaint affect all of the Local 964 members for whom Plaintiffs seek declaratory, injunctive, and other equitable relief.

31. Defendant Mayor and City Council of the City of Baltimore is a municipal corporation organized, existing, and incorporated under the laws of the State of Maryland. As a municipal corporation organized under the laws of the State of Maryland, the City is obligated to abide by its lawful contracts and may not assert sovereign immunity as a defense to actions sounding in contract. *See Harford Cty. v. Town of Bel Air*, 348 Md. 363, 372-73 (1998).

### **CLASS ACTION ALLEGATIONS**

32. Class Plaintiffs Cherry, Lake, Sledgeski, Lewandowski, and Williams bring this action pursuant to Rule 2-231 of the Maryland Rules ("Rule \_\_\_") on behalf of themselves and the

following class of individuals who are similarly situated (the “Class”):

All members and beneficiaries of the Plan as of June 30, 2010 (“members of the Class”), which, to the extent necessary, may be comprised of the following sub-classes:

- A. 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, such as Plaintiffs Lewandowski and Williams (the “Retired Sub-Class”). The Retired Sub-Class was previously certified by the U.S. District Court for the District of Maryland in *Robert F. Cherry, Jr., et al. v. Mayor and City Council of Baltimore City*, Case No. MJG 10-CV-001447 in connection with Plaintiffs’ claim under the Contract Clause of the United States Constitution;
- B. 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, such as Plaintiff Sledgeski (the “Retirement-Eligible Sub-Class”); and
- C. 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, such as Plaintiffs Cherry and Lake (the “Active Sub-Class”).

33. The Class and the potential Sub-Classes, as defined above, are identifiable. The Named Plaintiffs are all members of their respective Class and/or Sub-Classes. Named Plaintiffs Cherry and Lake are members of the Active Sub-Class. Named Plaintiff Sledgeski is a member of the Retirement-Eligible Sub-Class. Named Plaintiffs Lewandowski and Williams are members of the Retired Sub-Class.

34. Upon information and belief, there are approximately 10,600 members of the Class. The members of the Class are so numerous that joinder of all members of the Class is impracticable pursuant to Rule 2-231(a)(1).

35. Pursuant to Rule 2-231(a)(2), common questions of law and fact exist as to each putative Class member, as alleged herein, including, but not limited to, questions concerning rights to contractual benefits under the Plan for active, retired, and disabled members, the

lawfulness of the City's enactment of Ordinance 10-306, and the City's systematic, knowing, and willful failure to fund the Plan adequately.

36. Pursuant to Rule 2-231(a)(3), the claims of the Class Plaintiffs are typical of the claims of all members of the Class, as all members of the Class are similarly affected by Defendant's wrongful conduct in violation of state law, as alleged herein.

37. The Class Plaintiffs will fairly and adequately represent and protect the interests of the members of the Class (and the potential sub-classes) pursuant to Rule 2-231(a)(4), and they have retained competent and experienced counsel to adequately represent the interests of the Class.

38. The prosecution of separate actions by individual members of the Class would create a risk of inconsistent or varying adjudications that would establish incompatible standards of conduct for Defendant and/or would be dispositive of the interests of non-party members of the Class or would substantially impair or impede their ability to protect their interests. As such, this litigation can be maintained as a class action pursuant to Rule 2-231(b)(1).

39. This litigation can also be maintained as a class action pursuant to Rule 2-231(b)(2) because Defendant has acted and/or refused to act on grounds that apply generally to the members of the Class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the Class as a whole.

40. This litigation can also be maintained as a class action pursuant to Rule 2-231(b)(3) because the questions of law and fact common to the members of the Class predominate over any questions affecting only individual members and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

41. A class action is superior to other available methods for fairly and efficiently

adjudicating this litigation because the actions of Defendant were systematic, common, and uniform as to all members of the Class, and class certification will obviate the need for unduly duplicative litigation, which might result in inconsistent judgments.

42. Members of the Class have not expressed an interest in individual litigation and, upon information and belief, no members of the Class have commenced litigation related to the matters in controversy.

43. It is desirable to concentrate the litigation of the claims in Baltimore City, which is where Class members work or worked and where the wrongdoing by Defendant occurred.

44. The Class Plaintiffs are not aware of any difficulty that will be encountered in the management of this litigation as a class action.

45. The damages suffered by individual members of the Class may be relatively small compared to the expense and burden of individual litigation, thereby making it impossible for members of the Class to individually redress the wrongs done to them.

### **FACTUAL BACKGROUND**

46. The Plan was established by City Ordinance on July 1, 1962, to provide retirement, disability, and death benefits to members and their beneficiaries.

47. The Plan is codified at Article 22 § 29 *et seq.* of the Baltimore City Code (hereinafter “Article 22”), which has been amended from time to time by City Ordinances enacted by the Mayor and City Council.

48. The Plan is a defined benefit plan, under which future benefits are definitely determined using a formula tied to employees’ earnings and length of service.

49. The Plan covers all uniformed officers of the Baltimore Fire and Police Departments, certain Maryland Aviation Administration firefighters and paramedics, and certain

Maryland Transportation Authority police officers (collectively, “public safety workers” or “police and firefighters”).

50. The employment of public safety workers is contractual. They are not at-will employees.

#### **THE PLAN IS A CONTRACT**

51. Section 42 of Article 22 of the Baltimore City Code, entitled “Contractual Relationship,” establishes a contract between the City and each member of the Plan, and a third-party beneficiary relationship with each member’s spouse or child beneficiary. *Board of Trustees of the Employees’ Retirement System of the City of Baltimore, et al. v. Mayor and City Council of Baltimore City, et al.*, 317 Md. 72, 100, 562 A.2d 720, 733, n.26 (Md. 1989) (stating that “the Baltimore City Code expressly recognizes the existence of a contractual relationship, at least between the City and the members of the [Plan]...”). Members’ benefits under the Plan, according to the statutory contract, may not be diminished or impaired by the City after the member’s commencement of employment, as follows:

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.

### **PLAN BENEFITS REPLACE SOCIAL SECURITY BENEFITS**

52. Unlike private sector employees and most Baltimore City non-public safety employees, members of the Plan are excluded from Social Security because the City opted out of Social Security for its fire and police employees, choosing instead to provide retirement, death, and disability benefits to its public safety employees through the Plan. Accordingly, the retirement benefits provided under the Plan substitute for the Social Security benefits that members and their beneficiaries would otherwise receive upon retirement, death, or disability.

53. Prior to enactment of Ordinance 10-306, public safety workers were induced to commence and continue their employment with the City in reliance upon the contractual benefits guaranteed by the City under the Plan.

54. Throughout their employment and into their retirement, members of the Plan have relied upon the contractual benefits guaranteed by the City under the Plan for their economic well-being and as security against destitution in retirement.

### **THE CITY OF BALTIMORE'S ROLE IN THE PLAN**

55. The City is the Plan sponsor, which, with respect to defined benefit plans (such as the Plan), means that it was and remains obligated to fund the defined benefits that it chose to provide to the members by contract, regardless of the Plan's investment performance.

56. Article 22 § 29 *et seq.* is the Plan document, and it establishes the City's contractual obligations under the Plan and the contractual benefits guaranteed by the City to the members and their beneficiaries.

57. Article 22 § 36 requires the City to make annual contributions to the Plan as recommended by the Plan's actuary and certified by the Plan's Board.

58. The City's Law Department provides legal counsel to both the Plan and the City.



59. The City's Finance Director is responsible for the custody of the Plan's funds.

#### **THE PLAN'S BOARD OF TRUSTEES**

60. The Plan's Board is required to exercise due care, skill, prudence, and diligence in conducting the proper administration and operation of the Plan and in executing the duties ascribed to the Board under Article 22 § 29 *et seq.*

61. The Board owes an unconditional fiduciary duty to the Plan's members and beneficiaries (but not to the City) and is required to fulfill its obligations solely in accordance with that duty.

62. The Board is required to discharge its duties solely in the interest of the members and beneficiaries of the Plan for the exclusive purpose of providing the promised benefits to the members and beneficiaries.

63. The Board has a fiduciary duty to monitor and evaluate investment performance and to adopt investment policies and guidelines regarding its investment objectives to ensure that the Plan's investment objectives are being met.

64. Prior to enactment of Ordinance 10-306 on June 30, 2010, Article 22 § 33 provided that the Board was to be comprised of the following nine members:

- Comptroller of the City of Baltimore, *ex officio*.
- Police Commissioner, *ex officio*.
- Chief of the Fire Department, *ex officio*.
- Two citizens of the City of Baltimore who are not employees, one of whom is a responsible officer of a bank authorized to do business within the State of Maryland, or a person with similar experience. These individuals are appointed by the Mayor with the consent of the City Council and serve four-year terms.

- Two members of the Plan, one of whom is selected from the Fire Department and one from the Police Department. These individuals are elected by the membership of the department to which each belongs and serve for four-year terms.
- Two retired members of the Plan, one of whom is a Fire Department retiree and the other a Police Department retiree. These individuals are elected by the retirees of the department to which each belonged, and serve four-year terms. Elections are held concurrently with the elections for the employee representatives of each department.

#### **THE PLAN'S ACTUARY**

65. The Board is required to select an actuary to serve as the technical advisor to the Board regarding operation of the Plan, the adequacy of Plan funding, and the calculation of Plan benefits.

66. The Board annually certifies the amount of the City's required annual contribution to the Plan based upon the Plan actuary's opinion and recommendation.

67. The Plan's actuary calculates the amount of the City's annual contribution to the Plan, as reported in the actuary's annual Actuarial Valuation Report, after approval and adoption by the Board of the actuarial methods and assumptions to be employed. The amount of the City's contribution is then certified by the Board to the City and is included in the City's annual operating budget.

68. At least once every 5 years, the Plan's actuary conducts an actuarial investigation into the mortality, service, and compensation experience of the members and beneficiaries of the Plan and issues a report, which is called an Actuarial Review and Recommended Assumption Changes report ("Experience Study"). The purpose of these investigations is to investigate the recent experience of the Plan in comparison to the previously-made assumptions, and to recommend improvements, where necessary, for use in the Plan actuary's Actuarial Valuation

Report.

#### **PLAN MEMBERSHIP AND ELIGIBILITY**

69. Subject to statutory exceptions and qualifications, all officers and employees of the Baltimore Police Department and the Baltimore City Fire Department and certain employees of the Department of Aviation become members of the Plan upon commencement of employment. Balt. City Code, Art. 22 § 31.

70. Participation in the Plan is mandatory. Baltimore's public safety employees do not have an opportunity to participate in any other equivalent retirement, death, and disability plan in connection with their employment with the City, including Social Security.

71. As used herein, a "member" of the Plan is any person included in the membership of the Plan as provided for in Article 22 § 31. An "active member" of the Plan is someone who, as of June 30, 2010, had entered into the retirement contract (the Plan) with the City and was providing employment services to the City while a member of the Plan. A "retired member" of the Plan is someone who, as of June 30, 2010, had withdrawn from active service after fulfillment of the necessary service requirements provided under Article 22, or for some other reason permitted under Article 22, such as disability, and is entitled to receipt of the retirement benefits provided under Article 22. A "member eligible for retirement" is someone who, as of June 30, 2010, had fulfilled all the necessary requirements for retirement, but who had not withdrawn from active employment. A "beneficiary" is a person who, as of June 30, 2010, was entitled to receive the retirement benefits provided under Article 22 due to his or her relationship with a deceased member of the Plan.

## **MANDATORY CONTRIBUTIONS BY THE EMPLOYEES AND THE CITY**

72. The City and the members of the Plan share in the funding of the Plan.

73. Prior to the enactment of Ordinance 10-306, members were required to contribute 6% of their regular compensation to the Plan for their entire period of service. Contributions are deducted from each employee's pay beginning with the first pay period of employment.

74. The City is required to contribute annually a percentage of the earnable compensation of each member, known as the "normal contribution," and an additional percentage of each member's earnable compensation, known as the "accrued liability contribution." Balt. City Code, Art. 22 §36(d).

75. Using the regular interest rate set forth in Article 22 § 30 and the mortality and other tables adopted by the Board, the Plan's actuary makes valuations to determine the annual required contribution by the City.

76. The amount of the City's annual required contribution is based on the liabilities of the Plan as shown by actuarial valuation.

77. Each year, the Board is required to certify to the City's Director of Finance the amount of the City's required contribution, as determined by the Plan's actuary and presented in the Plan's fiscal year-end Actuarial Valuation Report.

78. The certified amount of the City's required contribution, as determined by the Plan's actuary and adopted by the Board, must be included in the City's Ordinance of Estimates.

79. From July 1, 1999 until June 30, 2009, active members contributed \$154,365,469 of their compensation to the Plan. During this same period, the City, as the Plan's sponsor, contributed \$379,008,891. Thus, active members contributed approximately 29% of all contributions to the Plan during this period.

80. Contributions to the Plan by members and by the City, including any earnings thereon, become part of the corpus of the Plan trust held in trust by the City. Plan funds are not taxpayers' money nor are they the City's property. Rather, Plan funds are the property of the members and beneficiaries and must be maintained for their exclusive use and benefit.

#### **PLAN BENEFITS PRIOR TO ORDINANCE 10-306**

81. Member eligibility for retirement allowances falls into three categories: (1) Service Retirement; (2) Non-Line-of-Duty Disability Retirement; and (3) Line-of-Duty Disability Retirement.

82. Prior to the enactment of Ordinance 10-306, the basic Service Retirement benefit of the Plan was the sum of: (1) an annuity of the actuarial equivalent of a member's accumulated contributions; and (2) a pension that, together with the aforementioned annuity, equaled 2.5% of the member's Average Final Compensation multiplied by the first 20 years of service, plus 2.0% of the Average Final Compensation multiplied by service in excess of 20 years. If a member retired after 20 years of service, the member's pension would 50% (2.5% times 20 years) of the member's Average Final Compensation.

83. Prior to the enactment of Ordinance 10-306, a member who commenced employment before July 1, 2003, was eligible for Service Retirement either upon reaching age 50 regardless of service years or upon accruing 20 years of service regardless of age. A member who commenced employment on or after July 1, 2003, was eligible for Service Retirement upon reaching age 50 with 10 years of service as a contributing member or, regardless of age, upon accruing 20 years of creditable service with 10 years of service as a contributing member.

84. Prior to the enactment of Ordinance 10-306, Article 22 § 30(11) defined "Average Final Compensation" for members who retired on or after July 1, 1988, as the average annual

compensation, pay, or salary earnable by the member for the 18 consecutive months of service during which the member's earnable compensation was highest.

85. Members are eligible for Line-of-Duty Disability Retirement, without consideration of age or years of service, if totally and permanently incapacitated for the performance of duty as the result of an injury arising out of and in the course of the performance of duty without willful negligence ("Regular Line-of-Duty Disability Retirement"). The Regular Line-of-Duty Disability Retirement benefit consists of: (i) an annuity that is the actuarial equivalent of the member's accumulated contributions at the time of retirement; and (ii) a pension of 66.667% of the member's average final compensation. As of June 30, 2010, 715 out of 4,565 retired members, or 16%, were receiving Regular Line-of-Duty Disability Retirement benefits.

86. A larger Line-of-Duty Disability Retirement benefit is provided to each member who is eligible for Regular Line-of-Duty Disability Retirement and has suffered injuries resulting in: (A) extensive brain damage causing total incapacity; or (B) the loss of or loss of use of any combination of two or more: (1) hands; (2) arms; (3) feet; (4) legs; or (5) eyes ("100% Line-of-Duty Disability Retirement"). The 100% Line-of-Duty Disability Retirement benefit consists of: (i) a lump-sum refund of the member's accumulated contributions; plus (ii) a pension equal to 100% of the member's current regular compensation at the time of retirement. As of June 30, 2010, only five retired members were receiving 100% Line-of-Duty Disability Retirement benefits.

87. Members are eligible for Non-Line-of-Duty Disability Retirement when they reach 5 years of service and are certified to be mentally or physically incapacitated for the performance of duty and the incapacity is likely to be permanent. Any member who retired on

Non-Line-of-Duty Disability Retirement from October 16, 1992 to June 30, 2003 receives an allowance of: (A) an annuity which shall be the actuarial equivalent of the member's accumulated contributions at the time of retirement; and (B) a pension which, together with the annuity, shall provide a total retirement allowance equal to: (1) 2.5% of the member's average final compensation for each of the first 20 years of service; plus (2) 1.8% of his average final compensation for each year thereafter, the total benefit of which shall not be less than 25% of the member's average final compensation. Any member who retired on Non-Line-of-Duty Disability on or after July 1, 2003, receives an allowance that is the greater of: (A) 25% of the member's average final compensation; or (B) a combination of: (1) an annuity that is the actuarial equivalent of the member's accumulated contributions at the time of retirement; and (2) a pension that, together with the annuity, provides a total retirement allowance equal to 2.5% of the member's average final compensation for each of the first 20 years of service, plus 2% of the member's average final compensation for each subsequent year. As of June 30, 2010, only 290 out of 4,565 retired members, or 6%, were receiving Non-Line-of-Duty Disability Retirement benefits.

#### **THE VARIABLE BENEFIT**

88. Prior to the enactment of Ordinance 10-306, Section 36A of the Plan provided for post-retirement benefit increases (referred to as the "Variable Benefit") for retirees and beneficiaries with more than two (2) years of retirement, depending on the investment performance of certain Plan assets.

89. Under the Variable Benefit provision, whenever Plan investment performance for any Fiscal Year exceeded 7.5%, eligible members and beneficiaries would receive an increase to their retirement benefit. Specifically, all earnings of the Pension Reserve Fund and Annuity

Reserve Fund between 7.5% and 10% and half the earnings above 10% were to be allocated to the Paid-Up Benefit Fund and the Contingency Reserve Fund. The amount of these earnings, employing a statutorily-mandated assumed rate of return of 6.8%, was then used to calculate an enhanced pension benefit for each eligible member and beneficiary that was the equivalent of a pro-rata portion of the earnings invested at an assumed rate of 6.8% for the expected life of each eligible member or beneficiary. The Variable Benefit increase was paid to eligible members and beneficiaries beginning with the first pay period following January 1 of the fiscal year and was expected to continue for the lifetime of eligible members and beneficiaries.

90. The Court of Appeals of Maryland has determined that, consistent with the contractual guarantee in Section 42 of the Plan, members and beneficiaries have a contractual right to the Variable Benefit provided under Article 22 § 36A. The Court of Appeals expressly rejected the City's argument that the Variable Benefit was not contractual. *Board of Trustees of the Employees' Retirement System of the City of Baltimore, et al. v. Mayor and City Council of Baltimore City, et al.*, 317 Md. at 100, 562 A.2d at 733, n. 26.

#### **DESCRIPTION OF PLAN FUNDS**

91. Immediately prior to the enactment of Ordinance 10-306, the Plan was comprised of six funds: (i) the Annuity Savings Fund; (ii) the Annuity Reserve Fund; (iii) the Pension Accumulation Fund; (iv) the Pension Reserve Fund; (v) the Paid-Up Benefit Fund; and (vi) the Contingency Reserve Fund.

92. Pursuant to Art. 22 § 36(b), the Annuity Savings Fund represented an individual account for each member of the Plan. Each account was credited with the member's contributions at a set interest rate. If a member withdrew funds or died, the member's contributions were withdrawn from the member's account within the Annuity Savings Fund and



paid to the member at the interest rate set forth in the Plan.

93. Pursuant to Art. 22 § 36(c), the Annuity Reserve Fund was the source of all “annuities and benefits in lieu of annuities” derived from member contributions. Upon retirement, the Plan administrator would transfer funds from the Annuity Savings Fund to the Annuity Reserve Fund to fund the retiring member’s retirement benefit.

94. Pursuant to Art. 22 § 36(d), the Pension Accumulation Fund was credited with the contributions by the City, but is not segregated by each individual member. Amounts in the Pension Accumulation Fund were transferred to the Pension Reserve Fund to pay pension benefits upon an employee’s retirement.

95. Pursuant to Art. 22 § 36(e), upon retirement, funds for a retiree were transferred from the Pension Accumulation Fund to the Pension Reserve Fund.

96. Prior to the enactment of Ordinance 10-306, when annual earnings from the Annuity Reserve Fund and the Pension Reserve Fund exceeded 7.5%, a portion of the earnings above 7.5% was transferred to the Paid-Up Benefit Fund and/or the Contingency Reserve Fund.

97. The Paid-Up Benefit Fund was used to fund the Variable Benefit and the Contingency Reserve Fund, a reserve established to fund previously-accrued Variable Benefit increases whenever the Paid-Up Benefit Fund was insufficient.

98. Similar to the Paid-Up Benefit Fund, the Contingency Reserve Fund was funded by investment earnings of the Annuity Reserve Fund and Pension Reserve Fund. If the value of the Contingency Reserve Fund fell below 2.5% of the combined value of the Annuity Reserve Fund and Pension Reserve Fund, then up to 25% of the excess earnings that would have been transferred to the Paid-Up Benefit Fund would be directed to the Contingency Reserve Fund. If the value of the Contingency Reserve Fund was greater than the 2.5% threshold, the Plan

administrator would not transfer any additional excess earnings to the Contingency Reserve Fund and the “excess” amounts in the Contingency Reserve Fund would be applied to reduce contributions by the City or to shorten the period of time over which unfunded accrued liability would be amortized.

#### **UNDERFUNDING OF THE PLAN BY THE CITY**

##### **A. USE OF INFLATED INTEREST ASSUMPTIONS TO REDUCE THE CITY’S ANNUAL CONTRIBUTIONS TO THE PLAN**

99. Actuaries of government-sponsored retirement plans calculate funding levels and costs using assumptions about future events, such as retirement age, salary rate, post-retirement life expectancy, and the anticipated earnings of plan investments.

100. Prior to the enactment of Ordinance 10-306, Section 30(9) of the Plan provided two interest rate assumptions to be used for these “valuation purposes:” (1) 8.25% for the pre-retirement period; and (2) 6.8% for the post-retirement period.

101. The Plan’s statutory interest rate assumptions may be changed only by amendment of Article 22.

102. The investment interest assumption is the most important assumption used to estimate the cost of any pension plan primarily because, over time, earnings from investments are expected to account for a majority of plan revenues that are used to fund benefits.

103. A reduction of the investment assumption rate in the Plan statute would necessarily require the City, as Plan sponsor, to increase its contribution to the Plan.

104. Higher investment assumption rates permit the City to project that the Plan will earn more and, as a consequence, can be funded through smaller contributions to the Plan.

105. Even a modest increase or decrease in the investment assumption rates will

significantly affect (i) the City's annual contribution obligation, (ii) the measure of future liabilities, and (iii) the annual cost of funding the Plan. For example, as explained during the Board's meeting on October 18, 2005, a reduction of the post-retirement interest assumption rate for invested return on Plan assets from 6.8% to 5.0% would have at that time increased the required City contribution for Fiscal Year 2007 by \$54.3 million.

**USE OF AGGRESSIVE INTEREST RATE ASSUMPTIONS AVOIDS  
INCREASES IN CITY'S ANNUAL REQUIRED CONTRIBUTIONS TO THE PLAN**

106. From Fiscal Years 2002 through 2010, the Plan's actuary regularly advised that it would be prudent to adopt lower interest rate assumptions for investment returns in order to fund adequately the retirement benefits provided under the Plan. Of course, adoption of these proposed lower interest rate assumptions would have required the City to increase its annual contributions to the Plan, which the City's Finance Director advised the Board the City was unwilling to do.

**2002**

107. In a letter to the Executive Director of the Plan dated February 11, 2002, the Plan's actuary advised the Board that lower expected investment returns and higher market volatility appeared to be leading the Plan to a position where it could not achieve the 6.8% return that had been assumed for years for retired liabilities, and that new economic modeling by the actuary could more accurately predict a prudent assumed interest return rate, as follows:

The 6.8% for retirees/8.25% for actives assumption was established when there were fewer tools of the type of analysis that Mercer and [Investment Advisor, Callan Associates, Inc.] can do now. The assumption probably was established when standard deviations were lower (or at least appeared to be lower) than they are today.

## 2003

108. The Plan's 2003 Experience Study conducted by its actuary evaluated the Plan's investment performance from July 1999 through June 2002. Based on this evaluation, the Plan's actuary advised that the Plan's post-retirement interest rate assumption should be reduced from 6.8% to 6.0%.

109. Adoption of all of the Plan actuary's interest rate assumption recommendations in the 2003 Experience Study would have resulted in a \$14.3 million increase in the City's contribution for Fiscal Year 2004, raising the City's total contribution that year from \$47.3 million to \$61.6 million.

110. At its meeting on January 9, 2003, the Board deferred acting on the Plan actuary's interest rate assumption recommendation until it could convene a meeting with the actuary and the City's Finance Director, among others.

111. The City's Finance Director, however, informed the Plan's Executive Director and the Board that the Plan actuary's recommended reduction of the interest rate assumption from 6.8% to 6%, which would result in a corresponding increase of the City's required contribution from \$47.3 million to \$61.6 million, was *not acceptable* to the City. By contributing less than the amount recommended by the actuary, the City chose to underfund the Plan.

112. The City contributed only \$42.7 million to the Plan in July 2003, which was *\$14.3 million less* than the contribution that would have been required had the City reduced the statutory interest assumption in accordance with the actuary's recommendation.

## 2004

113. Indeed, during a Board meeting on May 18, 2004, the Plan's actuary confirmed

this point by explaining that the 2003 Experience Study had recommended a reduction in the assumed rate of return from 6.8% to 6% after commencement of benefit payments because, under the Plan design, the City's annual required contributions to the Plan would be inadequate using the statutory 6.8% rate.

114. Despite these warnings, the City failed to adopt the actuary's recommended interest rate assumption in order that the City could continue to make inadequate and artificially low contributions to the Plan.

## 2005

115. In the Plan's 2005 Experience Study, which evaluated investment performance from July 2002 through June 2005, the Plan's actuary again recommended reducing the post-retirement interest rate assumption, from 6.8% to 5%, and also recommended decreasing the pre-retirement interest rate assumption by 0.4% to reflect investment expenses the Plan was incurring.

116. Adoption of all of the actuary's assumption recommendations in the 2005 Experience Study would have increased the City's annual required contribution to the Plan for Fiscal Year 2007 by \$68.5 million, as follows: \$54.3 million for the post-retirement interest assumption; \$6.6 million for the expense assumption; and \$7.6 million for "other assumption changes (before reduction for investment gains from FY 2005)."

117. The City's Finance Director, however, again informed the Plan's Executive Director and the Board that a \$68.5 million increase to the City's contribution was not acceptable.

118. Because of its refusal to adopt the recommended interest assumptions, the City knowingly underfunded the Plan by \$60.9 million for Fiscal Year 2007.

119. At the same time as the City's Finance Director was advising the Board that an increase in the City's annual contribution in the amount recommended by the Plan's actuary was unacceptable, the City was experiencing a significant budget surplus of \$37.5 million and an increase in locally-generated revenue in the amount of \$70 million.

## 2006

120. In March 2006, the Plan's actuary again recommended the adoption of a lower interest rate assumption, as follows:

In October 2005, Mercer presented an Actuarial Review and Recommended Assumptions report to the trustees. Among the recommended changes was a decrease in the assumption for post-retirement investment return from 6.8% to 5.0%. The reason for recommending the change was to reflect a combination of lower expectations for equity returns and the greater volatility of returns, which has a significant impact on the returns used to provide variable benefits and therefore on the returns remaining to support the basic (non-variable) benefits. The trustees did not accept the 5.0% post-retirement investment return assumption, which would have increased the total annual contribution (based on the 2005 data) by \$54.3 million. In lieu of changing the assumption, the trustees decided to look to changing the variable benefit structure. (Emphasis added.)

Letter from Douglas L. Rowe, Mercer Human Res. Consulting, to Thomas P. Taneyhill, Executive Dir., Fire & Police Employees' Ret. Sys. (Mar. 20, 2006).

121. During a Board meeting on April 18, 2006, Board member Peter E. Keith questioned what the Plan's goals should be considering the "underfunded status" and whether the goal ought to be to achieve fully funded status in ten years. In response, the Plan's actuary identified the following potential solutions: (1) increase City contributions to the Plan, which, according to the actuary, "would not be acceptable to the City;" (2) earn "a lot more," which the actuary noted was not feasible given market expectations; (3) have unusual actuarial experience, which meant that members would retire much later and/or die sooner than expected; or (4)

diminish benefits, which the actuary explained was “not a favorable resolution.” (Emphasis added.)

122. In 2006, while the City maintained its unwillingness to increase its annual contribution to the Plan, the City experienced another significant budget surplus of \$61 million.

123. In July 2006, the Plan’s actuary noted the City’s unwillingness to fund the Plan in accordance with the actuary’s recommended interest assumptions, as follows:

In the 2002 and 2005 Experience Studies, Mercer recognized that the high return volatility and lower expected future returns would necessitate either a change in actuarial assumptions or a change in the variable benefit provisions. The Administration said that the higher contributions required by a change in assumptions were not affordable. (Emphasis added.)

Letter from Douglas L. Rowe, Mercer Human Res. Consulting, to Thomas P. Taneyhill, Executive Dir., Fire & Police Employees’ Ret. Sys. (July 13, 2006).

## 2008

124. On April 7, 2008, the Plan’s actuary advised the Board that, for several years, the actuary had “recognized [and advised the Board] that the combination of high return volatility and lower expected future returns would necessitate either a change in actuarial assumptions or a change in the variable benefit provisions.”

125. In its 2008 Experience Study, which evaluated the Plan’s investment performance from July 2005 through June 2008, the actuary recommended decreasing the post-retirement investment rate assumption from 6.8% to 5%, and noted that a 5.7% investment rate assumption might be reasonable.

126. On November 18, 2008, the Plan’s actuary stated that, “to keep variable benefit provisions as they are, the assumption rate on retiree assets would have to be lowered from 6.8% to 5% and the City’s contribution would have to increase by \$61.5 million a year.”

127. The City maintained that a \$61.5 million increase to its required annual contribution to the Plan was unacceptable and, therefore, it failed to adopt the recommended interest assumption change, which enabled it to underfund the Plan by \$61.5 million that year.

128. From 2003 through 2008, the City knew that its failure to adopt the interest assumption changes that had been recommended by the Plan's actuary was resulting in the systematic underfunding of Plan assets that were necessary to fund the contractual retirement benefits of the members and beneficiaries.

129. By maintaining inflated interest assumptions, which were used in the Plan's annual valuation reports and comprehensive annual financial reports and certified by the City's auditor, the City misled Plan members and beneficiaries, causing them to believe that the Plan was adequately funded, when it was not.

130. The City's knowing and willful underfunding of the Plan constitutes a substantial impairment, breach, and deprivation of the contractual rights of the members and beneficiaries of the Plan.

131. In 2010, the City relied on the Plan's poor funding status and its purported inability to afford its Fiscal Year 2011 contribution to the Plan to justify its enactment of Ordinance 10-306, which reduced by more than \$1 billion the present value of the contractual benefits of the Plan's members and beneficiaries. The Plan's funding status, however, was the direct consequence of the City's longstanding refusal to lower the Plan's interest rate assumptions and increase its annual required contributions to fund the Plan adequately.

#### **ORDINANCE OF ESTIMATES**

132. The City's annual budget is given legal effect through the Ordinance of Estimates.

133. The City's Finance Director is responsible for preparing the City's preliminary



operating budget for the City's Board of Estimates.

134. Upon receipt of the preliminary budget from the Finance Director, the Board of Estimates prepares a proposed Ordinance of Estimates for the City Council.

135. After enactment by the City Council, the Finance Director is required to implement the Ordinance of Estimates under the direction of the Board of Estimates.

136. From 2003 through 2008, the Finance Director, knowing that the Plan's actuary had recommended increases in the City's annual required contribution to the Plan, informed the Board and/or the Plan's Executive Director that the City would not increase its annual required contributions in the amounts required using the actuary's recommended interest rate assumptions – which the Plan's actuary advised were necessary to fund the Plan adequately – in breach of the City's contractual obligations to Plan members and beneficiaries.

137. From 2003 through 2008, despite knowing that the Plan actuary had recommended lower interest rate assumptions which would have required additional contributions from the City to safeguard the benefits of the members and beneficiaries, the Finance Director prepared and submitted preliminary budgets that failed to request City contributions in the amounts recommended by the Plan's actuary.

138. Accordingly, from 2003 through 2008, the Mayor and City Council enacted Ordinances of Estimates which failed to fund the Plan adequately, in violation of the City's contractual obligation set out in Section 42 that the City would not "impair" its pension obligation to members and beneficiaries.

**B. FUNDING HOLIDAYS, "DOUBLE" SMOOTHING, AND DELAYED RECOGNITION OF LOSSES**

139. Enacted in 1997, City Ordinance 97-164 established the Benefit Improvement

Fund and Employer Reserve Fund to provide for a reallocation of certain so-called “excess” earnings held by the Plan. Effective June 30, 1996, pursuant to the new ordinance, the Board deposited investment earnings not allocated to the Paid-Up Benefit Fund or the Contingency Reserve Fund (funds set aside to pay for Variable Benefit increases previously granted to members and beneficiaries) or to any other purpose (so-called “unallocated excess earnings”) into the Benefit Improvement Fund and the Employer Reserve Fund.

140. The so-called Benefit Improvement Fund was intended to pay for benefit improvements (cost-of-living adjustments) for members and beneficiaries of the Plan and it was used for this purpose. The Employer Reserve Fund was intended to reduce the required annual contribution of the City. On June 30, 1997, as required by Ordinance 97-164, the Benefit Improvement Fund received 1/3 of the unallocated “excess” earnings and the Employer Reserve Fund received the remaining 2/3.

141. On June 30, 1997, the City established Minimum Stabilization Funds within both the Benefit Improvement Fund and the Employer Reserve Fund, which were funded to offset future deficits. The Minimum Stabilization Funds had initial target amounts of \$10 million and \$20 million, respectively, which were intended to increase each year until 2003.

142. By 1999, the Minimum Stabilization Funds had reached their target amounts, so the Plan administrator assigned all unallocated excess earnings for the year to the Benefit Improvement Fund and the Employer Reserve Fund.

143. In the 1999 Experience Study, however, the Plan’s actuary raised concerns with the effects of Ordinance 97-164, the significance of setting aside surplus earnings, and the potential impacts of the Benefit Improvement Fund and the Employer Reserve Fund:

In contrast to the situation at some points in the past, there is only one

material fiscal issue: the use of unallocated excess earnings.

The original purpose of setting aside surplus earnings was to smooth out year to year changes in the City's contribution. Indeed, most plans do not consider this investment smoothing amount to be "surplus." They would not deem funds to be surplus until after the smoothing amount had been reserved. Holding aside such funds will protect the City from a contribution increase should the fund not meet the assumed returns in the future. While a \$100 million surplus can occur again, a \$100 million loss will result in about a \$10 million increase in the annual City contribution phased in over a series of years. Because the plan is so well funded, most of the benefits are funded by investment earnings and not contributions. Can the City afford the impact of a "market correction" when one occurs? If not, the current surplus should be retained for it's [sic] original purpose.

144. Between 1999 and 2001, funds allocated to the Employer Reserve Fund were used by the City to eliminate the contributions to the Plan it would have made.

145. In 1999, the City used \$28.3 million from the Employer Reserve Fund to eliminate its contribution for Fiscal Year 2000.

146. In 2000, the City used \$27.7 million to eliminate its contribution for Fiscal Year 2001.

147. However, large investment losses in 2001 wiped out both Minimum Stabilization Funds and created so-called "negative" balances in the Benefit Improvement Fund and the Employer Reserve Fund. Despite the fact that the Plan suffered an enormous investment loss in 2001 of approximately \$450 million, the City used over \$29 million from the Employer Reserve Fund to eliminate its annual contribution for Fiscal Year 2002. In other words, instead of having funds set aside to smooth out the increases to the City's annual required contributions, the City made no contribution but instead "borrowed" against the Employer Reserve Fund, which had no assets. By employing this technique, the City drove the Employer Reserve Fund further into deficit status, meaning that on the Plan's books an entry was made giving credit to the City for

making its annual contribution when, in fact, the City's contribution was simply an accounting entry debiting another Plan fund. This internal borrowing was, at best, a fiscal "shell game" that drove the Plan's true funding status lower each year. This fiscal shell game jeopardized the funding status of the Plan.

148. Additional investment losses in 2002 and 2003 created even larger deficits in the Employer Reserve Fund, when the City again used internal "borrowing" of Plan assets to avoid making annual required contributions to the Plan.

149. From 2002 through 2005, the Employer Reserve Fund was always in deficit status, but the City continued to make its required annual contribution by "drawing" on this statutory fund.

150. In 2004, the Plan experienced excess investment earnings, which were directed to the Minimum Stabilization Funds. Because, however, the earnings were insufficient to reduce the deficits being carried in both Minimum Stabilization Funds, nothing was directed to the Employer Reserve Fund to reduce the large deficit being carried in that fund.

151. On June 30, 2005, pursuant to the original statutory scheme, the Employer Reserve Fund expired, at which point the negative balances came due and the City's off-balance sheet "loans" had to be recognized as Plan losses.

152. However, rather than immediately recognizing these already-deferred losses and rendering payment, the City further delayed recognition of the aggregate negative balance in the Employer Reserve Fund.

153. The initial 2006 Actuarial Valuation Report, signed by the Plan's actuary on October 12, 2006, recommended that the City increase its Fiscal Year 2008 required contribution by 25.1%, from \$54,940,977 to \$68,742,688. The Actuarial Valuation Report used a 5-year

straight-line phase-in of the negative balance in the Employer Reserve Fund, phasing in the losses at \$82,561,114 per year, resulting in a 5-year deferred recognition of \$247,683,341 in losses that had accumulated in this fund.

154. After receiving the initial Actuarial Valuation Report, the City's Finance Director informed the Plan's Executive Director and the Board that a 25.1% increase of the City's required contribution was unacceptable to the City.

155. Shortly thereafter, a revised 2006 Actuarial Valuation Report, dated October 16, 2006, and signed by the Plan's actuary on October 17, 2006, was issued reducing the recommended increase in the City's required contribution for Fiscal Year 2008 from 25.1% to 22.9%, or from \$68,742,688 to \$66,423,208.

156. In order to achieve this reduction in the City's required contribution, the City ignored available options to recognize the \$450 million losses in the Employer Reserve Fund and, instead, applied a phase-in recognition designed to continue to hide these significant losses.

157. The Plan has a procedure to phase-in (or "smooth") the recognition of investment gains and losses to spread out the effect of significant gains and losses in any given year on the City's annual funding obligations. The regular smoothing formula phases-in investment gains and losses equally over 5 years (20% per year). In 2005, the City directed the Plan to apply an additional layer of smoothing ("double-smoothing") to the \$450 million unrecognized losses in the Employer Reserve Fund in order to further delay recognition of the losses. This double-smoothing, which the current Plan actuary has referred to as "the evil we inherited" and the current Plan administrator has referred to as "alchemy," phased-in the losses in the Employer Reserve Fund over 10 years and, as those losses were recognized, they were smoothed again in accordance with the Plan's regular 5-year smoothing formula (at 20% per year).

158. As an example of how double-smoothing works, a loss of \$400 in the Employer Reserve Fund would generate a recognized loss of \$40 in the first year ( $\$400 \times 1/10 = \$40$ ) at the first level of double-smoothing. Applying the Plan's regular 5-year smoothing, the \$40 loss would then be reduced to \$8 ( $\$40 \times 1/5 = \$8$ ) for the first year, and then amortized over 20 years (arguably a third layer of smoothing). The 10-year phase-in of losses in the Employer Reserve Fund before regular smoothing had the effect of smoothing the final 2001-2002 "tech bubble" investment loss recognition to 15 years. By 2010, less than \$10 million of the \$400 million "tech bubble" losses had been paid down by the City (far less than one year of interest on the loss from 2002).

159. According to the 2005 Actuarial Valuation Report, the disparity between the actuarial value of assets and the market value of assets was \$405 million (using a 10-year phase-in) or \$396 million (using a 5-year phase-in).

160. In 2005 and 2006, the City experienced budget surpluses of \$37.5 million and \$61 million, respectively. Instead of using portions of its budget surpluses to address the Plan's market losses, the City used the surpluses to fund discretionary projects that, apparently, it ranked higher on its list of priorities than funding adequately its police and fire pension plan. As a consequence, when the Plan suffered another major market correction in 2008-2009, its funding position, which was still affected by the largely unrecognized losses from 2001-2002, was further reduced.

#### **CONCEALMENT OF FUNDING PROBLEMS**

161. As Plan funding declined from 2001 to 2009, the Chairman of the Board of Trustees regularly assured members of Local 734, the FOP, and Local 964 that the Plan was in good condition.

162. From 2002 until 2009, the City's Comprehensive Annual Financial Reports misrepresented the true nature of the City's annual required contribution to the Plan because these Reports did not take into consideration the Plan actuary's recommendations and, consequently, they failed to disclose that the City was materially underfunding its pension obligation.

163. Based on the publicly-available Actuarial Valuation Reports and the City's Comprehensive Annual Financial Reports, the members of the Class had no reason to suspect that the City had been knowingly underfunding the Plan.

164. In or around August 2008, the presidents of Local 734 and the FOP engaged an actuary ("unions' actuary") to investigate certain Plan matters.

165. During the course of this investigation, the unions' actuary discovered that the Plan was significantly underfunded.

166. On February 17, 2009, the unions' actuary advised the Board that it should follow the Plan actuary's oft-repeated recommendation to lower the interest rate assumption for retiree assets.

167. By letter dated March 2, 2009 to the Plan's executive director, the unions' actuary recommended the following measures: (1) follow the Plan actuary's recommendation to lower the 6.8% rate assumption to 5.0% for June 30, 2008; (2) stop using excess earnings to reduce the City's contribution on a dollar-for-dollar basis; and (3) "rethink the smoothing of the \$400-plus million 'tech bubble' loss." At that time, the full extent of the Plan's investment losses from the 2008-2009 market crash was not yet known.

168. Neither the Board nor the City responded to the proposal of the unions' actuary.

169. In late 2009, after a diligent analysis of the Plan, which came at significant

expense to the unions, the Class Plaintiffs began to discover the extent of and reasons for the irregularities and underfunding of the Plan, which for years had been obscured by the assurances of the Board and misleading Actuarial Valuation Reports and Comprehensive Annual Financial Reports.

#### **FUNDING POSITION AS OF JUNE 30, 2010**

170. In 1998, the Plan's basic benefit was 110% funded, meaning that the Plan had approximately \$1.10 for each dollar of basic benefits it was obligated to pay.

171. In the Actuarial Valuation Report of June 30, 2009, the Plan's actuary estimated that the Plan's "GASB 25 funded ratio would be 58.2% on a market value of assets basis instead of 84.8% on an Actuarial Value of Assets basis based on a 6.8% post-retirement investment return assumption and 50.2% on a market value basis instead of 73.2% on an Actuarial Value of Assets basis based on a 5.0% post-retirement investment return assumption."

172. As of June 30, 2009, the fair market value of Plan assets (\$1.8 billion) was materially less than a conservative estimate of Plan liabilities (\$3 billion).

173. From June 30, 2009 to June 30, 2010, the fair market value of Plan assets increased in the range of 17% to 24% as a result of improved market conditions, leaving the Plan in a better funding position as of June 30, 2010, but also portending a significant Variable Benefit cost of living adjustment for retirees payable in January 2011.

#### **CITY'S IMPAIRMENT OF CONTRACTUAL RIGHTS**

174. Beginning in March 2009, and shortly after learning of these funding problems, the FOP and Local 734 brought certain proposed solutions to the attention of the City. The City, however, declined to respond.

175. Thereafter, the unions – with the assistance of an actuary – attempted in good



faith to negotiate with the City to address issues affecting the Plan, again to no avail.

176. Unbeknownst to the Plaintiffs, at the time, the City was devising wholesale benefit reductions to the Plan for its active and retired members.

177. On June 7, 2010, the City introduced City Council Bill 10-0519, which proposed severe, immediate, and retroactive reductions to the benefits provided under the Plan.

178. In response, the fire and police unions submitted proposals that addressed the City's purported funding "crisis," which proposals would have resulted in a lower City contribution than that called for by the Mayor's proposed budget.

179. At its meeting on June 8, 2010, the Board voted unanimously to oppose Bill 10-0519.

180. On June 21, 2010, ignoring the unions' proposed modifications and the Board's unanimous decision to oppose Bill 10-0519, the City Council voted to adopt Bill 10-0519.

181. On June 22, 2010, the Mayor signed Bill 10-0519 into law as Ordinance 10-306, effective June 30, 2010, which resulted in severe and permanent reduction in the contractual retirement benefits of the Plan's retired and active members and their beneficiaries.

182. The following chart, which was included in the legislative file for Bill 10-0519, compared the benefits provided under the Plan to the benefits that would be provided under Ordinance 10-306:

<b>Issues</b>	<b>[Article 22 § 29 <i>et seq.</i>, prior to enactment of Ordinance 10-306]</b>	<b>[Ordinance 10-306]</b>
Required annual City contribution	Approximately \$165 million	Approximately \$87.5 million

Retiree COLA	<p>“Variable benefit” Retiree on payroll for 2 or more years as of June 30. Increases paid in January Increases based on investment performance</p> <p>Not guaranteed by City</p>	<p>Retiree on payroll for 2 or more years as of June 30 Increases paid in January based on age of retiree or beneficiary as of prior June 30: 1% for ages 55 to 64 2% for age 65 and older</p> <p>No COLA payable in January 2011</p> <p>All variable benefit increases and COLAs guaranteed by City</p>
Minimum Benefits	No recent minimum benefit provisions for retirees or beneficiaries	\$24K minimum benefit for sworn pre-DROP retirees w/ 20+ years and \$12k minimum benefit for their beneficiaries
Age and service retirement eligibility	<p>If plan member before 7/1/2003: Earlier of age 50 or 20 years of service</p> <p>If plan member after 6/30/2003: Earlier of age 50 with at least 10 years of F&amp;P covered employment or 20 years of service of which at least 10 years must be F&amp;P covered employment</p>	<p><u>Grandfathered</u> to current provisions: Members who meet current eligibility requirements as of June 30, 2010 or members with 15 or more years of F&amp;P covered employment as of June 30, 2010.</p> <p><u>Non-Grandfathered:</u> Members with less than 15 years of F&amp;P covered employment. NEW ELIGIBILITY Requirements for NORMAL service retirement: Earlier of 25 years of continuous F&amp;P service or age 55 with at least 15 years of continuous F&amp;P service.</p>
DROP 2	<p>Available for members with 20 or more years of service as of 12/31/2009.</p> <p>Members hired on or after 1/1/2010, 20 or more years of continuous F&amp;P employment.</p>	<p><u>Grandfathered</u> to current provisions: Members with 15 or more years of F&amp;P covered employment as of June 30, 2010, upon attaining 20 or more years of service.</p> <p><u>Non-grandfathered:</u> Members with less than 15 years of F&amp;P covered employment. NEW ELIGIBILITY Requirement: 25 or more years of F&amp;P covered employment.</p>
Average Final Compensation (AFC)	Average of 18 consecutive months of regular pay when regular pay is highest.	<p><u>Grandfathered</u> to current provisions: Members with at least 15 years of F&amp;P covered employment as of June 30, 2010.</p> <p><u>Non-grandfathered:</u> Average of 36 consecutive months of</p>

		regular pay when regular pay is highest.
Member Contribution Rate	6% of regular pay	Effective 7/1/10 - 7% of regular pay Effective 7/1/11 - 8% of regular pay Effective 7/1/12 - 9% of regular pay Effective 7/1/13 -10% of regular pay
F&P Board Governance	9 Trustees	Expands F&P Board to add Finance Director and 3 <sup>rd</sup> mayoral appointee, nominated by President of the City Council
Interest on member contributions	5.5% annually	3.0% annually No impact to service retirement benefits.
Investment Assumption	8.25% on pre-retirement assets 6.8% on post-retirement assets	8.00% on all assets
Pre-employment Military Service Credit	Up to 3 years of credit if member attains age 50 with at least 10 years of service or acquires 20 or more years of service	Same eligibility requirements. However, can only be used to determine eligibility for: normal service retirement, DROP, and DROP 2.  Cannot be used for early retirement eligibility but can be used for benefit purposes.
New Hire Benefits		Taxation, Finance and Economic Development committee to conduct hearings beginning Sept. 1, 2010.
Effective Date	N/A	June 30, 2010

183. Ordinance 10-306 mandated sweeping, retroactive reductions to the vested benefits of the Plan’s active and retired members and their beneficiaries.

184. Ordinance 10-306 was by no means a minor adjustment to members’ and beneficiaries’ retirement benefits. It did not come close to providing substantially the same program for which the members had bargained, and it was not balanced by other benefits. In fact, in developing Ordinance 10-306, the City never intended to provide substantially the program for which the members had bargained. Instead, the City devised a program that severely diminished and impaired virtually every significant contractual benefit under the Plan, reducing the total value of retirement benefits for active and retired members and beneficiaries

by more than 20%.

185. Ordinance 10-306 reduced the present value of members' and beneficiaries' total contractual Plan benefits by more than \$1 billion.

186. On an annual operating budget of more than \$2.2 billion in 2010, the City projected a budget deficit of \$121 million for Fiscal Year 2011. In calculating this deficit projection, the City chose, for the first time, to use the Plan actuary's recommended 5% interest rate assumption for post-retirement benefits rather than the 6.8% statutory interest rate assumption, which increased the City's projected annual required contribution to the Plan by \$64 million, to \$165 million. Had the City used the 6.8% post-retirement interest rate assumption then required by law, its annual required contribution to the Plan would have been \$101 million – an amount that was well under the budget goal for the Plan set by the Mayor for Fiscal Year 2011.

187. Ironically, during the Fiscal Year (2011) in which the City first chose to base its budget projection on a 5% interest rate assumption (rather than 6.8%), Plan earnings were expected to, and in fact did, significantly exceed the statutory 6.8% interest rate assumption.

188. In direct contravention of its obligations as Plan sponsor and under Article 22 § 42 of the City Code, by enacting Ordinance 10-306 the City shifted the economic burden of a lower statutory interest rate assumption to the active and retired members of the Plan and their beneficiaries, *permanently* reducing retirement and disability benefits by more than 20%.

189. Although Ordinance 10-306 caused severe reductions in retirement benefits under the Plan and drastically reduced the City's annual required contribution to the Plan by tens of millions of dollars in Fiscal Year 2011 and millions more in the future, Ordinance 10-306 "rubbed salt in the wound" by significantly *increasing* employees' required salary contributions

to the Plan from 6% to 10% of their pay, without providing any corresponding increase in benefits to the members and beneficiaries. In other words, active members were required to contribute four (4) percentage points more of their income in exchange for drastically diminished retirement benefits.

190. In addition, Ordinance 10-306 permanently eliminated the Plan’s Variable Benefit provision and confiscated the 3.47% Variable Benefit cost of living adjustment increase that would have been payable under then-existing law to eligible members and beneficiaries beginning with the first pay period after January 1, 2011, and would have continued throughout their lives. By way of example, under Ordinance 10-306, rather than receiving their 3.47% Variable Benefit increase beginning in January 2011, retirees below 65 years of age received *nothing* and retirees 65 years of age and older received only a 2% cost-of-living increase as compared to the 3.47% increase that they would have received under the Variable Benefit.

191. Upon information and belief, based on Plan earnings from July 2010 through July 2014, had the City not eliminated the Variable Benefit through Ordinance 10-306, eligible retirees and beneficiaries would have received the following Variable Benefit increases over the past five years:

<b>Effective January of Calendar Year</b>	<b>Variable Benefit Increase (%)</b>
2011	3.47
2012	7.05
2013	0.00
2014	1.50
2015	3.50

192. From 1983 through June 2010, the Variable Benefit provided *on average* a 3.1%

annual cost-of-living increase for retirees and beneficiaries, which is the equivalent of Social Security increases during the same period. Ordinance 10-306 replaced the Variable Benefit with a *0% annual cost-of-living increase* for service retirees and disabled retirees below the age of 55 (with the exception of 5 members receiving 100% Line-of-Duty Disability Retirement benefits), a 1% annual cost-of-living increase for retirees ages 55 to 64, and a 2% annual cost-of-living increase for retirees age 65 and older. The 1% annual cost-of-living increase for retirees ages 55 to 64 was deferred until January 2012 and, therefore, all retirees under 65 received nothing the first year instead of a 3.47% Variable Benefit.

193. Using the statistics set forth in the Plan's Comprehensive Annual Financial Report for Fiscal Year ended June 30, 2010, of the 715 members receiving Regular Line-of-Duty Disability Retirement benefits, 295 members (41%) were below age 55 and an additional 126 members (18%) were below age 65. Under the terms of Ordinance 10-306, the 295 members under age 55 are no longer eligible to receive *any* cost-of-living increases until they reach age 55 and, even then, will only be eligible to receive a 1% annual cost-of-living increase until they reach age 65. The 126 additional members who were between ages 55-65 received no cost-of-living increase in 2011 and are only eligible to receive a 1% annual cost-of-living increase until they reach age 65. The remaining Regular Line-of-Duty Disability Retirement members who had reached age 65 as of June 30, 2010, are eligible to receive only a 2% annual cost-of-living increase, as compared to the 3.47% Variable Benefit increase that they would have received in January 2011.

194. Using the statistics set forth in the Plan's Comprehensive Annual Financial Report for Fiscal Year ended June 30, 2010, of the 290 members receiving Non-Line-of-Duty Disability Retirement benefits, 82 members (28%) were below age 55 and an additional 40

members (14%) were below age 65. Under the terms of Ordinance 10-306, the 82 members under age 55 are no longer eligible to receive *any* cost-of-living increases until they reach age 55 and, even then, will only be eligible to receive a 1% annual cost-of-living increase until they reach age 65. The 40 members who were below age 65 as of June 30, 2010, received no cost-of-living increase in 2011 and are only eligible to receive a 1% annual cost-of-living increase until they reach age 65. The remaining Non-Line-of-Duty Disability Retirement members who had reached age 65 are eligible to receive only a 2% annual cost-of-living increase.

195. The cost to the City of the Variable Benefit, which the City used to justify its decision to breach its contract and terminate the Variable Benefit, was neither unforeseen nor unanticipated. In fact, on May 31, 1983, immediately prior to the City's enactment of the Variable Benefit, then-Mayor William Donald Schaefer expressly recognized in a letter to the City Council the cost and burdens the Variable Benefit would place on current and future City budgets. Indeed, the City estimated that it would have to allocate approximately \$60 million for the Variable Benefit in 1983 alone. Mayor Schaefer also acknowledged that, by enacting the Variable Benefit, "through the years, depending on the investment performance and the aggregate of the [Plan] assets, the City will not get the benefit of good investment years but will incur the cost of bad years." Despite these foreseeable and expected costs and burdens, Mayor Schaefer, noting his concern for the well-being of fire and police retirees, signed the Variable Benefit into law to give "retirees a much needed increase," notwithstanding the fact that the funds allocated to the Variable Benefit "could have been allocated to the Department of Education and other agencies to avoid service reductions and layoffs or help fund the ever increasing cost of fringe benefits made available to City employees and retired employees."

196. Ordinance 10-306 increased the retirement age and service requirements for City police officers and firefighters from age 50 with 10 years of covered employment to age 55 with 15 years of covered employment, and from 20 years of service regardless of age to 25 years of service regardless of age. Thus, a police officer or firefighter who had dedicated 14 years of his or her life safeguarding the City and its residents and had contributed 6% of his or her salary to the Plan during these years relying upon the expectation set out in Article 22 § 42 that the City would not impair or diminish the benefits it had promised to induce the police officer or firefighter to commence and continue employment, is now required to work five years longer to satisfy the service thresholds mandated under Ordinance 10-306 and, even upon doing so, will receive severely diminished retirement benefits.

197. Public safety workers who had less than 15 years of service on June 30, 2010, and who will have given the City 20 years of service as of July 1, 2015, have not been permitted to begin taking their contractual retirement benefits at that time as a result of Ordinance 10-306.

198. Although the City contended that it was necessary to increase the age and service requirements for its current police officers and firefighters, the City chose *not* to increase the age and service requirements for its elected officials as provided in the Elected Officials' Retirement System, which provides retirement benefits to the City's elected officials upon reaching age 50 with 12 years of service *or 16 years of service regardless of age*.

199. In addition to requiring Plan members to work *several additional years* in order to receive their normal retirement benefits, Ordinance 10-306's increased age and service thresholds require fire and police employees to contribute up to 10% of their pay to the Plan (rather than the 6% required prior to the enactment of Ordinance 10-306) for each additional year of service required by Ordinance 10-306. If these members choose to retire at the age and



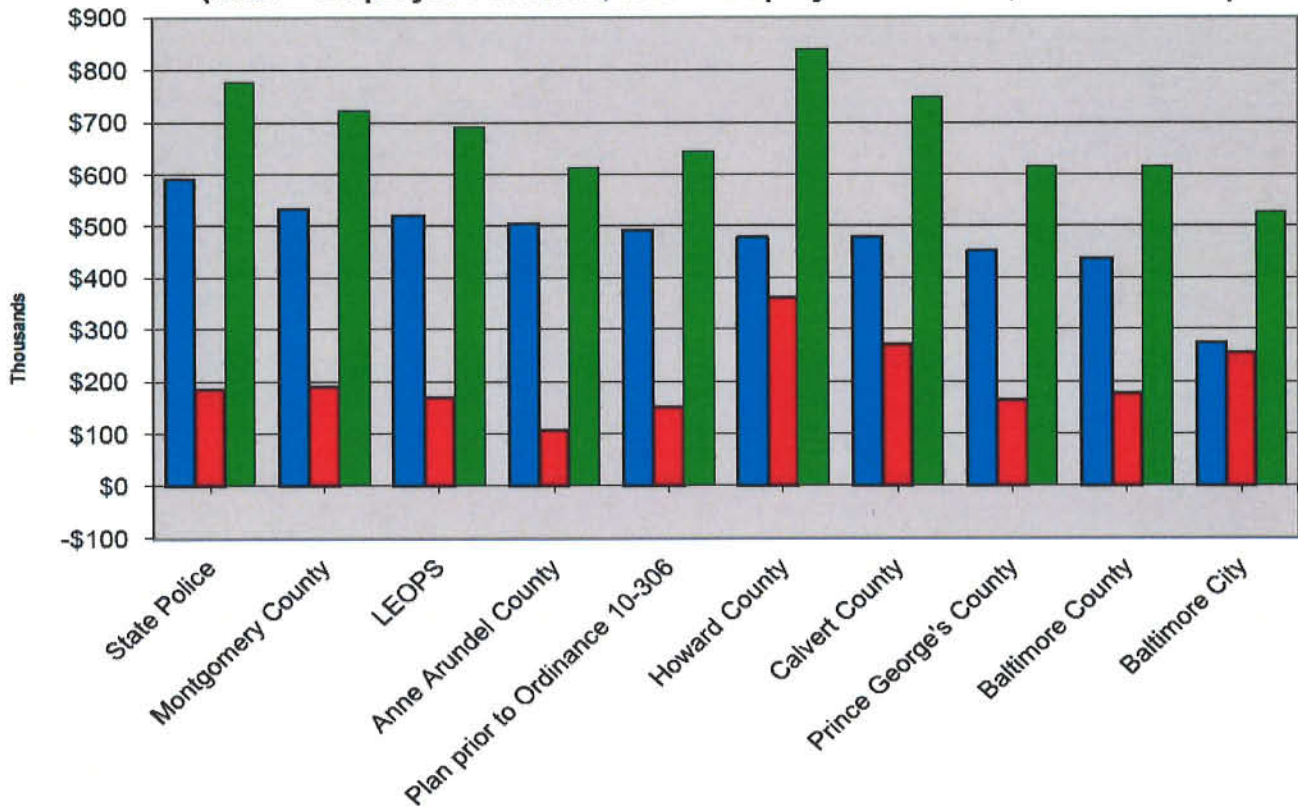
service levels promised by the City prior to the enactment of Ordinance 10-306, they will receive a significantly reduced retirement benefit.

200. On August 26, 2009, the City enacted a modified Deferred Retirement Option Plan (“DROP 2”) benefit in accordance with the provisions of Section 36B(p) of the Plan. Unlike all of the other Plan benefit provisions, which the City is prohibited from diminishing or impairing for current members and beneficiaries, Section 36C(r)(2) grants the City the right to enact legislation modifying DROP 2, but *only after* the completion of actuarial tests for the Fiscal Year ending *June 30, 2022*. Notwithstanding its promise not to enact legislation modifying DROP 2 prior to the conclusion of Fiscal Year ending June 30, 2022, Ordinance 10-306 modified and diminished DROP 2. The City’s reduction of DROP 2 benefits through the enactment of Ordinance 10-306 occurred less than a year after it enacted DROP 2, during which time the Plan’s total assets actually increased in the range of 17% to 24% as a result of improved market conditions.

201. Ordinance 10-306 reduced the Average Final Compensation upon which retirement benefits are calculated by increasing the time during which Average Final Compensation is calculated from 18 months to 36 months.

202. The value of retirement benefits provided under Ordinance 10-306 is dramatically lower than the value of retirement benefits provided under comparable local police retirement systems, including the retirement plans offered to the Maryland State Police, Montgomery County Police, Anne Arundel County Police, Howard County Police, Calvert County Sheriff’s Office, Prince George’s County Police, Baltimore County Police, and under the State Law Enforcement Officers’ Pension System (“LEOPS”), as follows:

**Value of Benefits at Retirement for Police Officers  
(Blue = Employer Provided, Red = Employee Provided, Green = Total)**



203. Instead of making the most limited modifications to the Plan necessary to address the City's perceived problems, the City enacted legislation that left active and retired members and their beneficiaries with a retirement program that was vastly different from and less valuable than the program for which the members had previously bargained.

204. In designing Ordinance 10-306, the City did not attempt to minimize benefit reductions. Rather, the City started with a clean slate and effectively re-wrote the Plan for active and retired members and their beneficiaries.

**THE CITY'S FAILURE TO CONSIDER AVAILABLE  
ALTERNATIVES TO ORDINANCE 10-306**

205. Prior to the enactment of Ordinance 10-306, the FOP and Local 734 proposed

modifications to the Plan, which would have resulted in a lower City contribution to the Plan in 2010 than is called for under Ordinance 10-306.

206. Instead of limiting Ordinance 10-306 prospectively to new hires who were not members of the Plan as of June 30, 2010 (and, therefore, had no contractual rights to Plan benefits), or providing new, equivalent benefits in place of the terminated and reduced benefits, as other local jurisdictions have done when implementing pension modifications, the City took the unprecedented step of applying Ordinance 10-306 retroactively to existing active and retired members of the Plan and beneficiaries, thereby violating the Plan's express prohibition of unilateral diminutions and impairments of benefits and abrogating the vested contractual rights of the members and beneficiaries of the Plan.

207. By enacting legislation that breached, took, and retroactively impaired the contractual rights of police and fire employees and retirees, the City clearly chose to grant preference to other City employees, elected officials, its bond holders and creditors, and other policy initiatives at the expense of the members of the Plan and their beneficiaries.

208. For example, the City chose not to reduce, impair, diminish, or modify in any way the retirement benefits of other City employees or elected officials under Baltimore's Employees' Retirement System and Elected Officials' Retirement System, despite the fact that those retirement plans offered certain benefits that were far more generous to their members and costly to the City than the benefits provided under the Plan prior to its amendment by Ordinance 10-306.

209. The City's purported justification for enacting Ordinance 10-306 was its alleged inability to pay a \$165 million annual contribution that it claimed was owed on July 1, 2010, which, in fact, would not have been due under the then-existing statutory scheme. The City

represented that the only way to address that obligation was to reduce the retirement benefits under the Plan.

210. Despite the City's claim that passage of Ordinance 10-306 was the only way to meet its annual required contribution, the City could have satisfied its Fiscal Year 2011 contribution requirement by the following alternative strategies, among many other choices available to a municipality with the substantial fiscal capabilities of Baltimore City:

- A. Paying for lower statutory interest rate assumptions by phasing in (over a period of years) any resulting increases to the City's annual required contribution, as the City had done in the past after it lowered the Plan's statutory interest rate assumptions in 1995;
- B. Utilizing \$80 million available in the City's Budget Stabilization Fund;
- C. Seeking greater efficiencies in employment;
- D. Increasing the cap on the Homestead Tax Exemption phase-in to 10%;
- E. Increasing tax revenues;
- F. Reducing funding to other governmental services; and
- G. Making an annual contribution pursuant to the then-existing statutory interest rate assumption.

211. Rather than considering these available alternatives, the City rushed to judgment and enacted Ordinance 10-306, which stripped members and beneficiaries of their contractually guaranteed retirement benefits.

212. Indeed, immediately *prior* to adopting Ordinance 10-306, City Council members acknowledged that the Council was making a rushed and rash decision, rather than taking time to meaningfully consider and weigh all of the available alternatives.

213. On August 10, 2010, the City enacted Ordinance 10-357, which represented corrective and clarifying legislation that did not materially alter the effect of Ordinance 10-306.

Ordinance 10-357 removed the “continuous” service requirement for the “grandfathering” of members with 15 years of total service with the Plan, and it provided a means by which members may purchase credit necessary to satisfy Ordinance 10-306’s 15-year service requirement.

214. No other jurisdiction in Maryland has ever unilaterally reduced the contractual retirement benefits of both its active and retired employees and their beneficiaries as severely as the City did through Ordinance 10-306. Simply put, the City’s actions were unprecedented, unjustified, and unlawful.

**CLAIMS FOR RELIEF**

**COUNT I  
DECLARATORY JUDGMENT**

215. Plaintiffs incorporate by reference Paragraphs 1 through 214 of the Complaint as if set forth fully herein.

216. Article 22 § 42 expressly provides that, upon becoming a member of the Plan at the commencement of employment, each member of the Plan enters into a contract with the City and secures contractual rights to the benefits provided thereunder, which the City may not thereafter diminish or impair in any way.

217. Justiciable controversies exist between the City and Plaintiffs concerning the contractual rights of Plan members under Article 22 § 29 *et seq.*, and the consequences of the enactment of Ordinance 10-306.

218. The City has asserted a legal right, *i.e.*, the right to unilaterally eliminate, diminish, impair, and/or modify by legislation (specifically, Ordinance 10-306) the vested, accrued, and/or contractual benefits of the members of the Class, and that purported right is challenged and denied by Plaintiffs.

**WHEREFORE**, pursuant to the Declaratory Judgment Act, C.J.A. § 3-401, *et seq.*,

Plaintiffs seek declarations that:

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

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

C. 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;

D. 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;

E. 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;

F. The City, by adopting Ordinance 10-306, breached its contract with the members of the Plan;

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

H. 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;

I. 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;

J. 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;

K. The tiered-COLA provided under Ordinance 10-306 is not the equivalent of the Variable Benefit that was provided under the Plan prior to the enactment of Ordinance 10-306;

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

M. The City had the financial ability, as of June 30, 2010, to adequately fund the benefits provided under the Plan; and

N. The members of the Class have the right to an adequately-funded Plan.

**COUNT II**  
**BREACH OF CONTRACT**  
**(Contractual Rights of Retired and Disabled Plaintiffs)**

219. Plaintiffs incorporate by reference Paragraphs 1 through 218 of the Complaint as if set forth fully herein.

220. Pursuant to Article 22 § 42, and under the common law of Maryland, upon becoming a member of the Plan, each retired and disabled member of the Plan entered into a binding and enforceable contract with the City, supported by adequate consideration, and secured a contractual right to benefits under the Plan through employment and service for the requisite

term, which the City expressly agreed not to diminish or impair in any way.

221. As of June 30, 2010, the retired and disabled members of the Plan had satisfied all of the contractual defined contingencies necessary for receipt of benefits under the Plan.

222. Since June 30, 2010, more than 1,010 retired members of the Plan have died according to the Plan's 2015 Actuarial Valuation Report.

223. By virtue of the forgoing actions, including but not limited to the City's adoption and enforcement of Ordinance 10-306 and its underfunding of the Plan, the City materially breached the terms of the Plan and the vested, contractual rights of the members of the Retired Sub-Class.

224. As a consequence of the foregoing, the retired members of the Plan have suffered and will continue to suffer damages, losses, and the impairment of their rights under the Plan.

**WHEREFORE**, Plaintiffs respectfully request that this Court enter judgment against the City and award Plaintiffs monetary damages in an amount to be determined at trial, equitable relief, specific performance, attorneys' fees, costs, and interest (including pre-judgment interest), and such further and other relief deemed just and proper.

**COUNT III  
BREACH OF CONTRACT  
(Contractual Rights of Retirement-Eligible Plaintiffs)**

225. Plaintiffs incorporate by reference Paragraphs 1 through 224 of the Complaint as if set forth fully herein.

226. Pursuant to Article 22 § 42, and under the common law of Maryland, upon becoming a member of the Plan, each member of the Plan entered into a binding and enforceable contract with the City, supported by adequate consideration, and secured a contractual right to retirement benefits under the Plan, which the City agreed not to diminish or impair in any way.



227. As of June 30, 2010, the members of the Plan who were eligible to retire had satisfied all of the contractual contingencies necessary to be eligible for receipt of benefits under the Plan, but had not yet retired from employment.

228. By virtue of the forgoing actions, including but not limited to the City's adoption and enforcement of Ordinance 10-306 and its underfunding of the Plan, the City materially breached the terms of the Plan and the vested, contractual rights of the members of the Plan who were eligible to retire.

229. As a consequence of the foregoing, the members of the Plan who were eligible to retire as of June 30, 2010, have suffered and will continue to suffer damages, losses, and the impairment of their rights under the Plan.

**WHEREFORE**, Plaintiffs respectfully request that this Court enter judgment against the City and award Plaintiffs monetary damages in an amount to be determined at trial, equitable relief, specific performance, attorneys' fees, costs, and interest (including pre-judgment interest), and such further and other relief deemed just and proper.

**COUNT IV**  
**BREACH OF CONTRACT**  
**(Contractual Rights of Active Plaintiffs)**

230. Plaintiffs incorporate by reference Paragraphs 1 through 229 of the Complaint as if set forth fully herein.

231. Pursuant to Article 22 § 42, and under the common law of Maryland, upon commencing employment with the City and becoming a member of the Plan, each member of the Plan entered into a binding and enforceable contract with the City, supported by adequate consideration, and secured a contractual right to retirement benefits under the Plan, which the City agreed not to diminish or impair in any way.

232. By virtue of the forgoing actions, including but not limited to the City's adoption and enforcement of Ordinance 10-306 and its underfunding of the Plan, the City materially breached the terms of the Plan and the contractual rights, including but not limited to the *pro rata* rights, of all Plaintiffs who were members of the Plan as of June 30, 2010.

233. As a consequence of the foregoing, the members of the Plan who were employed by the City as of June 30, 2010 have suffered and will continue to suffer damages, losses, the impairment of their rights under the Plan.

**WHEREFORE**, Plaintiffs respectfully request that this Court enter judgment against the City and award Plaintiffs monetary damages in an amount to be determined at trial, equitable relief, specific performance, attorneys' fees, costs, and interest (including pre-judgment interest), and such further and other relief deemed just and proper.<sup>1</sup>

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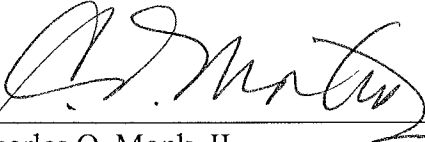
<sup>1</sup> Based on the facts asserted in Paragraphs 1–242 of the Complaint, Ordinance 10-306 constituted a legislative appropriation of Plaintiffs' contractual rights, for which the City failed to provide just compensation. Contracts are a form of property. *Lynch v. United States*, 292 U.S. 571, 579 (1934). The City's actions thus constituted a violation of the Takings Clause of the Fifth Amendment, as incorporated via the Fourteenth Amendment. *See South Carolina State Educ. Assistance Auth'y v. Cavazos*, 897 F.2d 1272, 1276 (4th Cir. 1990). Plaintiffs are entitled to bring such a claim before a federal court, *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 415-16 (1964), and they expressly reserve the right to bring such a claim, as well as any potential claim under the Contract Clause of the United States Constitution, in federal court. *Id.* at 419-20.

Respectfully submitted,

SAUL EWING LLP

Dated: August 19, 2016

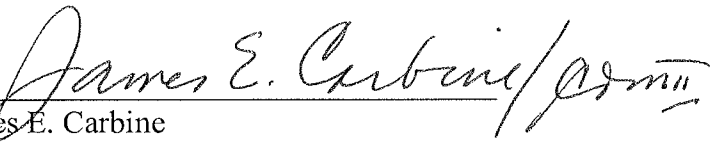
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