IN THE CIRCUIT COURT OF FAULKNER COUNTY, ARKANSAS
CIVIL DIVISION – SECOND DIVISION

RICHARD SHUMATE, JR. and
DAMON REED, on behalf of themselves
and all other similarly situated persons and entities **PLAINTIFFS**

v. **CASE NO. CV 2012-855**

CITY OF CONWAY, an Arkansas Municipality **DEFENDANT**

PLAINTIFFS' MEMORANDUM IN SUPPORT OF UNOPPOSED MOTION FOR PRELIMNARY APPROVAL OF CLASS SETTLEMENT AND APPROVAL OF NOTICE TO CLASS MEMBERS

Plaintiffs Richard Shumate, Jr. and Damon Reed, on behalf of themselves and the certified Class, submit this memorandum in support of the Unopposed Motion for Preliminary Approval of Class Settlement and Approval of Notice to Class Members. Preliminary approval of both is warranted for the reasons set forth below.

INTRODUCTION

In their Complaint filed on September 18, 2012, Plaintiffs alleged that Defendant entered into contracts with all persons employed or hired as Police Officers or Firefighters after December 1, 2001, and that those contracts obligated the City to pay its Police Officers and Firefighters pursuant to Police and Fire Pay Scales approved by the City Council. Plaintiffs seek recovery for Defendant's breach of those contracts by failing in 2010, 2011, and 2012 to make annual salary "step" increases – along with the failure during those years to recognize raises and promotions merited by employees' procurement of various "certificates" – as required by the Pay Scales.

At the end of years of discovery, the Parties[1] participated in a full day of Court-ordered mediation with noted attorney James W. Tilley on December 17, 2018. Since that time, with the

[1] Capitalized terms within this Memorandum have the same meaning ascribed to them in the Parties' Stipulation of Settlement.

assistance of the Mediator, the Parties have engaged in arms-length settlement discussions in an attempt to bring the controversy to a close. These discussions have included conversations concerning liability and damages underlying Plaintiffs' and Class Members' claims. With the trial date approaching, the Parties attended another in-person session with the Mediator on March 25, 2019. These negotiations culminated in the Parties' execution of a Stipulation of Settlement effective April 22, 2019.

The Stipulation, which is attached as Exhibit 1 to Plaintiffs' Preliminary Approval Motion (the "Motion"), requires Defendant to pay $1,150,000 to compensate Class Members for Defendant's failure in 2010, 2011, and 2012 to make pay raises pursuant to the Pay Scales. The Settlement Fund shall also be used to pay the cost of Notice to the Class, the cost of Settlement administration, and to reimburse Plaintiffs and Class Counsel for their fees and expenses incurred during this litigation. The Parties now seek this Court's approval of the Stipulation of Settlement under Rule 23(e) of the Arkansas Rules of Civil Procedure.

The Court may approve a class action settlement if it is "fair, reasonable, and adequate." Ark. R. Civ. P. 23(e)(1). Several factors guide this inquiry, but the fairness of a settlement turns, in large part, on the amount and form of relief offered against the plaintiff's likelihood of success. *See Ballard v. Martin*, 349 Ark. 564, 574, 79 S.W.3d 838, 844 (2002). As discussed below, it is reasonable to believe that Plaintiffs and the Class Members would not receive any greater benefits than will be provided by the proposed Settlement, given the cost and uncertainty of continued litigation and the consideration provided to Class Members under the proposed Settlement. The proposed Settlement is not the product of collusion among the parties, and it is fair, adequate, and reasonable for the Class.

I. Relevant Procedural History

Plaintiffs filed this putative class action lawsuit on September 18, 2012. The Complaint contained causes of action for illegal exaction and breach of contract. The Court on December 7, 2015 granted Defendant's Motion for Summary Judgment to dismiss Plaintiffs' claim for illegal exaction. On the same day, the Court certified the following Class to pursue Plaintiffs' breach of contract claim against Defendant:

> All City of Conway Policemen[2] and Firemen[3] (excluding department heads and elected officials) who were employed by the City of Conway during the period commencing December 1, 2001 through December 31, 2012.

According to the Complaint, the City breached contracts with its Police Officers and Firefighters when in 2010, 2011, and 2012 it did not honor pay raises required by established Pay Scales.

II. The Settlement Mediations And Other Extensive Negotiations

At the Court-ordered mediation on December 17, 2018, the Parties began discussing the possibility of an informal resolution of this lawsuit. The parties engaged in another mediation session on March 25, 2019. On April 22, 2019, following four months of arms-length negotiations – including multiple in-person and telephonic meetings (through the Mediator) between Defendant's counsel and Plaintiffs' counsel and the exchanges of offers and counter-offers – the Parties signed the Stipulation of Settlement now presented to this Court for approval.

III. The Parties' Settlement Agreement

The Stipulation obligates the City to pay $1,150,000 to compensate Class Members for the City allegedly breaching contracts with its Police Officers and Firefighters during the Class Period.[4] Because the City around January 2011 began printing on its Pay Scales a statement that

[2] Code Enforcement Officer, Officer I-IV, Master Officer, Sergeant, Lieutenant, Major, and Chief.
[3] Firefighter, Lieutenant, Captain, Division/District Chief, and Chief.
[4] To be clear, by entering into the Stipulation, the City has not admitted that it breached any contract

future "[s]tep increases are subject to the approval of the City Council for each fiscal year," no Settlement Benefits will be distributed to any person first hired as a Police Officer or Firefighter after January 2011. Also, given that Available Funds are less than the total damages suffered by the Class, each Eligible Class Member – as identified in Exhibit "A" to the Stipulation of Settlement – will receive a percentage of Available Funds equivalent to the ratio the Eligible Class Member's individual lost wages bear to the total lost wages sustained by the Class. Distribution of Settlement Benefits to Class Members will occur after the payment from the Settlement Fund of all attorneys' fees and litigation costs, Class Representatives' fees, and administrative costs of settlement.

In exchange for the consideration described in the preceding paragraph, and as further detailed in Part V.A.20 of the Stipulation of Settlement, Plaintiffs and Class Members will release all Released Persons of all claims, demands, rights, liabilities, and causes of action of every nature and description whatsoever, whether known or unknown, as asserted or that might have been asserted in this litigation against Released Persons, whether based upon contract or tort (including, without limitation, unjust enrichment, breach of contract, negligence, recklessness, misrepresentation, fraud, violations of the ADTPA, and suppression), contribution, indemnification, or violations of any federal, state, local, statutory, or common law or any other law, rule, or regulation, involving or arising out of Defendant's failure to make salary "step" increases pursuant to approved Pay Scales during 2010, 2011, and 2012. Should the Court grant Final Approval of this Settlement and enter Judgment, this action will be dismissed with prejudice, and all Released Claims (as defined in the Stipulation) would be deemed conclusively settled and resolved as to Plaintiffs and all Class Members.

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or engaged in any wrongdoing whatsoever.

Plaintiffs believe that this Settlement brings substantial benefits to the Class. That being so, they respectfully request that this Court grant preliminary approval of the parties' proposed Settlement and notice plan.

ARGUMENT

I. The Proposed Settlement Is Fair, Reasonable, And Adequate

A. Standards for Preliminary Approval of a Classwide Settlement

The Arkansas Supreme Court has recognized a strong public policy supporting the settlement of litigation. In the seminal case of *Burke v. Downing Co.*, 198 Ark. 405, 129 S.W.2d 946 (Ark. 1939), for example, the court explained:

> The law favors the amicable settlement of controversies, and it is the duty of courts rather to encourage than discourage parties in resorting to compromise as a move of adjusting conflicting claims. The nature or extent of the rights of each should not be too nicely scrutinized. Courts should, and do, so far as they can do so legally and properly, support agreements which have for their object the amicable settlement of doubtful rights by parties; the consideration for such agreements is not only valuable, but highly meritorious.

Id. at 405, 129 S.W.2d at 947 (quotation omitted); *see also Weaver v. AEGON USA, LLC*, Civil Action No. 4:14-cv-03436-RBH, 2015 WL 5691836, at *13 (D.S.C. Sept. 28, 2015) ("[There is] strong public policy favoring settlement under . . . Arkansas . . . law."), *modified on other grounds*, 2016 WL 1570158 (D.S.C. Apr. 19, 2016). Along these same lines, it is well-established that public and judicial policy strongly favor the settlement of class action litigation[5]:

> The compromise of complex litigation is favored both by strong judicial policy and public policy. Due to their uncertainty, difficulty of proof, and length, and in the interest of judicial economy, class action damage suits should be settled whenever possible, as soon as possible.

[5] The Arkansas Supreme Court recognizes that "federal courts can offer guidance" regarding the interpretation of Rule 23 of the Arkansas Rules of Civil Procedure. *Williamson v. Sanofi Winthrop Pharms., Inc.*, 347 Ark. 89, 99, 60 S.W.3d 428, 435 (2001).

In re Corrugated Container Antitrust Litig., 556 F. Supp. 1117, 1157 (S.D. Tex. 1982) (footnote omitted); *see also In re: Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir. 2004) ("[T]here is an overriding public interest in settling class action litigation, and it should therefore be encouraged."); *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996) ("Federal courts naturally favor the settlement of class action litigation."); *White v. Nat'l Football League*, 822 F. Supp. 1389, 1416 (D. Minn. 1993) ("The policy . . . favoring the voluntary resolution of litigation through settlement is particularly strong in the class action context. Settlement of the complex disputes often involved in class actions minimizes the substantial burdens to the parties and to scarce judicial resources that such litigation entails." (citations omitted)); *Colella v. Univ. of Pittsburgh*, 569 F. Supp. 2d 525, 530 (W.D. Pa. 2008) ("The strong public policy and high judicial favor for negotiated settlements of litigation is particularly keen in class actions and other complex cases . . . ." (quotation omitted)).

This strong policy favoring settlement comes into play under Rule 23(e) of the Arkansas Rules of Civil Procedure, which required that the Court approve any settlement made on a class basis. *See* Ark. R. Civ. P. 23(e)(1). Approval is appropriate if the proposed class settlement is "fair, reasonable, and adequate," *id.*, and Arkansas courts consider four factors in determining whether a proposed settlement meets this standard:

> (1) the strength of the case for the plaintiffs on the merits, balanced against the amount offered in the settlement;
>
> (2) the defendant's overall financial condition and ability to pay;
>
> (3) the complexity, length, and expense of further litigation; and
>
> (4) the amount of opposition to the settlement,

Ballard v. Martin, 349 Ark. 564, 574, 79 S.W.3d 838, 844 (2002) (citing *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 124 (8th Cir. 1975)). The first factor is "the primary measure of fairness

{with] the remaining three being secondary to the first." *Id.*

Approval of a class settlement is a two-step process. *See Dryer v. Nat'l Football League*, No. 09-2182 (PAM/AJB), 2013 WL 1408351, at *1 (D. Minn. Apr. 8, 2013). First, the court makes "a preliminary determination on the fairness, reasonableness, and adequacy of the settlement term," and, if preliminarily approved, "direct[s] the preparation of notice of the certification, proposed settlement, and date of the final fairness hearing." Manual for Complex Litigation (Fourth) § 21.632, at 320-21 (2004). Second, after providing notice of the proposed settlement to the class, the court conducts a final fairness hearing (during which the parties may present evidence and any objectors may appear) and considers a final approval order. *Id.* § 21.634, at 322; *Dryer*, 2013 WL 1408351, at *1. The last of the *Ballard* factors – the amount of settlement opposition – is analyzed only at the final approval stage.

The "fair, reasonable, and adequate" standard is "lowered" at the preliminary approval stage. *Schoenbaum v. E.I. DuPont de Nemours & Co.*, No. 4:05CV01108 ERW, 2009 WL 4782082, at *3 (E.D. Mo. Dec. 8, 2009). Preliminary approval is appropriate "[i]f the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls with[in] the range of possible approval." *In re Telectronics Pacing Sys., Inc.*, 137 F. Supp. 2d 985, 1015 (S.D. Ohio 2001) (quotation omitted); *see also Bredthauer v. Lundstrom*, Nos. 4:10CV3132, 4:10CV3139, 8:10CV326, 2012 WL 4904422, at *6 (D. Neb. Oct. 12, 2012) (granting preliminary approval to settlement that "appear[ed], on preliminary review, to be within the range of reasonableness"); *Schoenbaum*, 2009 WL 4782082, at *3 (observing that courts should consider "whether the settlement carries the hallmarks of collusive negotiation or uninformed decision-making, is unduly favorable to class representatives or certain

class members, or excessively compensates attorneys"). That is because preliminary approval "is at most a determination that there is what might be termed 'probable cause'" to submit the settlement proposal to the class. *Axinn & Sons Lumber Co. v. Long Island R.R.*, 627 F.2d 631, 634 (2d Cir. 1980).

Application of these factors demonstrates that the proposed settlement is fair, reasonable, and adequate and should be preliminarily approved.

B. The Terms of the Settlement are Objectively Reasonable, Particularly in Light of the Risks, Length, and Expense of Continued Class Litigation

The Settlement Agreement provides real, meaningful relief to the Class. It allows for cash payments to Eligible Class Members, which will represent a significant portion of the lost wages they suffered as a result of the City's failure to honor salary increases pursuant to the Pay Scales in 2010, 2011, and 2012. These terms are especially fair in light of the substantial risks that Plaintiffs would face if they were forced to litigated this class action through trial. The City has vigorously defended the case since its inception, evidenced by such actions as filing numerous motions for summary judgment and pursuing an interlocutory appeal to the Arkansas Supreme Court of this Court's Class Certification Order. The City would surely abide by this strategy through trial and beyond, resulting in the expenditure of significant time and resources by each Party and the Court. The complexities and uncertainties of this type of complex litigation in general, and this case in particular, dictate that Plaintiffs settle and compromise in a way that will immediately provide them and the Class with concrete, certain benefits. *Cf. Air Line Stewards and Stewardesses Ass'n v. Am. Airlines, Inc.*, 455 F.2d 101, 109 (7th Cir. 1972) ("[T]he public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation.").

Plaintiffs have achieved a significant settlement for the Class, causing both the first (the

strength of the plaintiff's case, compared to the amount of the settlement) and the third (the complexity, length, and expense of further litigation) *Ballard* factors to weigh heavily in favor of the Settlement.

C. The Defendant's Financial Condition

The City is a governmental body, for which monetary resources are always precious. Plaintiffs believe Defendant's representations that the cost of this settlement pushes the City's budget to its limits. It is doubtful whether the City could tolerate a judgment larger than the $1.15 million fund created by this Settlement. *See McAfee v. Hubbard*, Case No. 14-CV-1010-NJR-RJD, 2017 WL 1479304, at *4 (S.D. Ill. Apr. 25, 2017) (approving class action settlement upon consideration of the defendant's "inability to withstand a larger judgment"). In view of the risks of protracted litigation and the immediate benefit made available to Eligible Class Members through settlement, as addressed above, Plaintiffs' submit that the second *Ballard* factor weighs in favor of preliminary approval.

D. The Settlement was reached through Good-Faith Bargaining

Although not specifically mentioned in *Ballard*,[6] courts generally recognize that another important factor relevant to the fairness determination is whether the settlement was reached through good-faith bargaining among the parties. *See Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) ("A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery." (quotation omitted)); *In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 122 (S.D.N.Y. 2009) ("Where a settlement is the product of arm's

[6] Analysis of the final factor mentioned in *Ballard* – the amount of opposition to the settlement, *see Ballard*, 349 Ark. At 574, 79 S.W.3d at 844 – does not occur until the final approval stage, *see Dryer*, 2013 WL 1408351, at *1.

length negotiations conducted by experienced counsel knowledgeable in complex class litigation, the negotiation enjoys a presumption of fairness." (quotations omitted)). In this case, the settlement was reached after substantial good-faith bargaining involving a Court appointed Mediator. In particular, this case was mediated over a four-month period with a highly skilled Mediator. After over four months of negotiations and the exchanges of offers and counter-offers, the Parties ultimately agreed to the Settlement's essential terms.

The agreement also was negotiated between experienced, capable counsel. *Cf., e.g., DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1178 (8th Cir. 1995) (explaining that the settling parties' views as to the propriety of settlement are entitled to some weight and affirming class settlement where "class counsel is experienced in this type of litigation"). The firms serving as Class Counsel have a wealth of experience in litigating complex, class action litigation. By the same token, the City of Conway has been represented throughout this litigation by well-respected and eminently capable attorneys at a highly regarded defense firm.

Nothing about the history of this litigation or the terms of the Stipulation indicate that it is the product of fraud, collusion, or Plaintiffs' or their attorneys' abandonment of the Class's interests. Thus, this additional factor favors preliminary approval of the proposed settlement.

II. The Stipulation Of Settlement Provides For A Formal Fairness Hearing And The Best Notice Practicable In The Circumstances

The Stipulation provides for a formal Fairness Hearing. At the Fairness Hearing, the Court will consider, among other things, whether to grant final approval of the terms of the Stipulation, in light of any objections to the Settlement. To ensure that Class Members may exclude themselves from the Settlement or object to the Settlement, the Stipulation provides for notice designed to reach Class Members. Specifically, Class Counsel will send direct mail notice to the last known address of Class Members reflected in Defendant's files, and publication notice of the Settlement

will also appear in the *Conway Log Cabin Democrat*. In similar circumstances, other courts have concluded that the "combination of individual and publication notice provides the best notice practicable." *Hall v. Best Buy Co.*, 274 F.R.D. 154, 168 (E.D. Pa. 2011); *see also In re Prudential Inc. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 527-28 (D.N.J. 1997) (characterizing combination of mailed and publication notice as "ideal"). Plaintiffs respectfully suggest that their proposed Notice Plan constitutes "the best notice practicable under the circumstances." Ark. R. Civ. P. 23(c)(1).

CONCLUSION

For the reasons stated in this Memorandum, the proposed Settlement should be approved as fair, reasonable, and adequate, and the Notice should be approved as the best practicable in the circumstances.

DATED: April 22, 2019

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Marcus Bozeman, hereby certify that a true and correct copy of this document was filed with the Clerk via the eFlex system which will send notification of filing to the following:

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