[*1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Feinman Justice

PART 52

NAGER, ARNOLD H.

- v -

TEACHERS' RETIREMENT SYSTEM OF THE CITY OF NEW YORK, ET AL.

INDEX NO. 119294/02

MOTION DATE 5/17/07

MOTION SEQ. NO. 03

MOTION CAL. NO. 1

The following papers, numbered 1 to 14 were read on this motion to/for approve settlement; fees

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-7
Answering Affidavits — Exhibits	8-10
Replying Affidavits	11-12, 14
Sur-Reply	13

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION AND ORDER.

Settle Final Judgment,

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 7/19/07

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52

----------X

ARNOLD H. NAGER, individually and on behalf of all others similarly situated,

Plaintiffs,

- against -

TEACHERS' RETIREMENT SYSTEM OF THE CITY OF NEW YORK, TEACHERS' RETIREMENT BOARD OF THE TEACHERS' RETIREMENT SYSTEM OF THE CITY OF NEW YORK, BOARD OF EDUCATION CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, WILLIAM C. THOMPSON, JR., as Comptroller of the City of New York and the CITY OF NEW YORK,

Defendants.

----------X

Index No. 119294/02
Subm. Date 5/17/07
Mot. Seq. No. 003
Cal. No. 1

PAUL G. FEINMAN, J.:

Plaintiffs move for an order approving (1) the final settlement of this class action and (2) their application for an award of attorneys' fees and reimbursement of costs and expenses.

Background

Plaintiff Arnold H. Nager (class representative) is a retired teacher and principal in the New York City school system (System), and a member of the Teachers' Retirement Association (TRA) of the defendant Teachers' Retirement System (TRS) of the City of New York (City). Defendants include (1) the TRS, a pension plan created and amended from time to time by the legislature of the State of New York; (2) the Teachers' Retirement Board (Retirement Board) of the TRS, the governing body that, under Administrative Code of the City of New York (Administrative Code) § 13-507 and the New York State Retirement and Social Security Law (RSSL), administers and provides for the pension benefits of all members of the TRS; (3) the Board of Education of the City School District (now the Department of Education), a corporate

body that had been created by and existing under the laws of New York, pursuant to sections 2551 and 2590 of the Education Law, and that administers and manages the educational affairs of the City School District; (4) William C. Thompson, the Comptroller of the City, and, as such, the chief financial officer of the City, and a member of the Retirement Board; and (5) the City of New York, a municipal corporation, responsible for the payment of funds to the System pursuant to Administrative Code § 13-533 (a).

The monthly pension benefit that a retiree of the TRS receives depends, in part, on the retiree's tier, which is determined by the date that the retiree became a member of the TRS. Although there are different applicable pension rules based upon the tier in which a retiree is a member, generally, a member's monthly pension amount is derived from a percentage of the member's "average salary" multiplied by the number of years of accredited service.

"Per session" compensation is earned and paid to teachers and others for performance of duties in addition to their required academic workload, and it includes duties such as coaching, after-school teaching, and tutoring. The complaint alleges that while plaintiff and the class members were members of the TRS, they performed services on a per session basis for which they received per session pay. The City and the Board of Education (now, the Department of Education), however, have never reported the per session pay as being part of TRS members' wages, average salary, or final average salary for the purpose of calculating pension benefits.

In support of the allegations set forth in the complaint, the complaint refers to an action entitled *Weingarten v Board of Trustees of N.Y. City Teachers' Retirement Sys.* (287 AD2d 14 [1st Dept 2001], *affd* 98 NY2d 575 [2002] [*Weingarten*]), "a case involving precisely the same issue raised by this complaint." In that action, the Appellate Division, First Department, ruled

that per session pay is required to be included in calculating pension credits and pension benefits (Complaint, ¶ 27).

When this action was commenced on August 29, 2002, an appeal of the First Department's decision in *Weingarten* to the Court of Appeals was *sub judice*. In this action, plaintiff Nager and class members contend that defendants' failure to recognize and take into account per session pay for the purpose of calculating TRS members' pension benefits was arbitrary and capricious in that the services are necessary to the operation of the educational system and the academic requirements of the students. Prior to the proposed settlement, plaintiffs had been seeking a judgment (1) declaring that defendants' failure to recognize and take into account per session pay in calculating the pension benefits of the named plaintiff and the class members violates the Administrative Code, the RSSL, the General Municipal Law, the New York Constitution, and the common law of trusts, and (2) ordering defendants to make appropriate retroactive and prospective payments to the named plaintiff and all class members whose pension benefits are increased due to the inclusion of per session pay in their calculation (Complaint, ¶ 33). In essence, plaintiffs sought to have the prospective relief granted in *Weingarten* granted to them retroactively.

Approximately one month after the commencement of this action, the Court of Appeals affirmed *Weingarten* (98 NY2d 575 [2002]), holding that certain hourly compensation – i.e., per session compensation – earned by teachers in New York City public schools can be added to their base annual salaries for the purpose of calculating their retirement benefits. The class in *Weingarten* included all TRS members who were employees of the City's Board of Education as of the commencement of that action on November 24, 1998, and not retired.

In November 2002, defendants served their answer, which contained five affirmative defenses, including: (1) failure to state a cause of action, (2) statute of limitations, (3) the assertion that *Weingarten* rendered the recalculation of benefits prospective only, and, therefore, November 24, 1998, the date when *Weingarten* was commenced, would be the earliest date for the crediting of per session earnings, (4) laches, and (5) the assertion that the action failed to meet the statutory standards for the maintenance of a class action.

On June 9, 2003, plaintiffs moved for class certification. Defendants opposed, arguing that class action certification was unnecessary, because they intended to implement the adjustment based upon applicable law. Defendants contended further that if the named plaintiff prevailed – and the court determined that *Weingarten* should be applied retroactively – all TRS members similarly situated to plaintiff would be entitled to the same relief from defendants. Notwithstanding this assertion, the court (Soto, J.), in a decision dated January 20, 2004, granted the motion for class certification (Class Certification Order), defining the class as:

> "The named plaintiff and every other person who: (1) at any time has been deprived of pension benefits and/or pension credits due to the defendants' failure to credit per session pay in calculating his or her pension benefits; and (2) was previously or is currently receiving pension benefits from defendant Teachers' Retirement System of the City of New York (the System), or will be entitled to receive them at some time in the future; and (3) has not been a member of the Teachers' Retirement Association of the System any time after November 23, 1998; or (4) is the surviving beneficiary or the estate of a person who meets the foregoing criteria".

In so doing, Justice Soto stated that the parties had been unable to agree as to who would be covered by any relief granted to plaintiff, either prior, or subsequent, to the making of the motion for class certification, or at, or subsequent to, a November 19, 2003 court conference.

On February 5, 2004, defendants appealed the Class Certification Order to the Appellate

Division, First Department. However, as set forth in the parties' "Initial Stipulation and Agreement of Settlement" (Initial Settlement), so ordered by this court on March 2, 2005, following entry of the Class Certification Order, the parties began discussion about a negotiated resolution and settlement of the action. The parties, through counsel, investigated the facts pertaining to membership of the class, the means of identifying the members of the class, and of determining the amount of additional pension benefits that are due them on account of their receipt of per session pay, and the methods for compiling this information. In June 2004, the parties reached an agreement in principle to settle the action (Initial Settlement, at 3).

The parties entered into the "Second and Final Stipulation of Settlement and Discontinuance" on February 21, 2007 (Final Stipulation of Settlement). According to the Final Stipulation of Settlement, the class consists of those persons who satisfy the class definition set forth in the Class Certification Order, as determined from the records of the Department of Education for the period 1980-1998, or from documentation of receipt of per session pay prior to 1980, which is deemed sufficient to establish per session pay that is pensionable compensation regarding the class members. Subject to specified modification, TRS is to determine the amount of additional benefit to which each class member is entitled in accordance with applicable law governing the computation of pension benefits to the extent consistent with appropriate actuarial algorithm(s) and formulae that the parties agreed upon, as set forth in Exhibit 4 to the Final Stipulation of Settlement.

The benefit adjustments, as certified by the "Actuary," to be paid by TRS are to remedy the financial loss suffered by each class member as a result of TRS not taking per session pay into account in calculating or paying pension benefits, to the extent that such financial losses (1)

were previously suffered during the time period beginning on or after August 30, 1996, and continuing through the "Effective Date," or are suffered subsequent to the Effective Date, until the date that the benefits adjustments, that the Actuary certifies, are actually paid, or (2) otherwise would be suffered in the future if the monthly benefits amounts were not prospectively adjusted. In addition, TRS is to pay interest at the rate of five percent on the financial losses that each class member incurred. The Final Stipulation of Settlement contemplates that the process for the Actuary's certification of benefits adjustments, and for TRS payment of retroactive and prospective adjusted benefits to all class members will be completed within 26 months of the entry of the final order (Final Stipulation of Settlement, ¶ 17).

Plaintiffs now seek approval of the Final Stipulation of Settlement, and an award of attorneys' fees and expenses. In support of their request for an award of attorneys' fees and expenses, class counsel, the firm of Rosen Preminger & Bloom LLP (RP&B) submit as the amount of time that they expended (624.6 hours), multiplied by the respective billing rates of the three attorneys at the firm working on the matter (at current rather than historical rates), as $332,681.50, with costs amounting to $4,641.39, recorded through May 10, 2007 (*see* Affidavit and Reply Affidavit of David S. Preminger, sworn to April 6, 2007, and May 14, 2007, respectively). This amount is based on the following:

(1) David S. Preminger - 476.4 hours at $610 per hour = $290,604.

(2) H. Lukievics - 49.9 hours at $400 per hour = $19,960.

(3) R. Saxe - 98.3 hours at $225 per hour = $22,117.50.

Alan M. Sandals, Esq., of the firm Sandals & Associates, P.C. (Sandals Firm), co-counsel for the class, submits that the amount of time that his firm expended (249.1 hours) multiplied by

the respective billing rates of the two attorneys at the firm working on the matter (at current rather than historical rates), as $113,030, with costs amounting to $2,823.48, recorded through May 11, 2007, based on the following:

(1) Alan M. Sandals - 213.1 hours at $500 per hour = $106,550.

(2) Jonathan S. Levy - 36.0 hours at $180 per hour = $6,480.

Despite these submissions, however, counsel seeks a fee award using the common fund method, rather than a lodestar/multiplier method. Class counsel requests a fee equal to 19.97% of the retroactive portion of the common fund created by the settlement, or 14.98% of the overall value of the settlement. This amounts to a fee award of approximately $50 million based upon their estimation of the overall value of the settlement.

According to class counsel's expert, Michael R. Greenstein, the total value of the settlement is likely to total $332.4 million based upon (1) the retroactive benefits and full interest on a group of 900 retirees, totaling $22 million; (2) the retroactive benefits and full interest on an additional group of 11,000 retirees, totaling $227.2 million; (3) the present value of the group of 900 retirees as of June 30, 2008, totaling $10.5 million; and (4) the present value of the group of 11,000 retirees as of June 30, 2008, totaling $72.5 million.

According to Robert C. North, Jr., Chief Actuary of the City's five actuarially-funded retirement systems, including the TRS, Greenstein's estimate of the total value of the settlement ($332.4 million) is inflated. He opines that the estimated value of the obligations as of June 30, 2008, including per session earnings in pensionable income for TRS members who retired prior to November 24, 1998, and including interest adjustments, is more likely to be less than $200 million.

Defendants argue that the fee should be calculated using the lodestar approach, and that the billing rates for David Preminger and Alan Sandals, at $610 and $500 per hour, respectively, are inflated. Defendants argue that these are not reasonable rates, and that $325 per hour is a reasonable rate for New York ERISA attorneys who are in relatively small firms with lower overhead that attorneys in large firms. They urge, further, that the reasonable amount of time expended, multiplied by an hourly rate (the lodestar) should be subject to a reduction of at least 50% because of excessive or unnecessary billing. For example, they state that spending 20 hours to review the Court of Appeals decision in *Weingarten* is excessive, as is spending 20 hours in completing a notice of claim, filed in anticipation of this action.

DISCUSSION

1. Approval of the Final Stipulation of Settlement

In reviewing a settlement, the court should consider the likelihood of success, the extent of support from the parties, the judgment of counsel, the presence of bargaining in good faith, and the nature of the issues of law and fact (*Matter of Colt Indus. Shareholder Lit.*, 155 AD2d 154, 160 [1st Dept 1990], *affd* 77 NY2d 185 [1991]). Here, the Final Stipulation of Settlement provides the class members with the relief sought by this action, namely, a retroactive application of the *Weingarten* determination. The court is unaware of any additional relief that could have been accomplished through further litigation. Apparently, the parties conducted the settlement negotiations in good faith, and there is no evidence of collusion. Furthermore, the opposition to the settlement has not been substantial. Finally, defendants have agreed to bear all of the administrative costs (but not the costs of attorneys' fees and expenses), thus preserving the bulk of the benefit for the real parties in interest, i.e, the class members.

2. Attorneys' Fees

As a preliminary matter, the court is not persuaded by class counsel's argument that defendants have no cognizable legal interest in the attorneys' fee issue, nor any standing to object to a common fund fee award. This entire matter centers on the employer-employee relationship of defendants and the class members. Defendants pay the pension benefits, the proceeds of which are the source for the payment of any attorneys' fee award. [1]

Generally, the prevailing party in a lawsuit is not entitled to an award of attorneys' fees in the absence of an agreement, statute, or court rule authorizing the award (*Glenn v Hoteltron Sys., Inc.*, 74 NY2d 386 [1989]). CPLR 909 provides:

> If a judgment in an action maintained as a class action is rendered in favor of the class, the court in its discretion may award attorneys' fees to the representatives of the class based on the reasonable value of legal services rendered and if justice requires, allow recovery of the amount awarded from the opponent of the class.

Courts use two distinct methods to determine the amount of a reasonable attorneys' fee award in class action lawsuits. The first is the lodestar, under which the court scrutinizes the fee petition to ascertain the number of hours reasonably billed to the class, and then multiplies that amount by an appropriate hourly rate. Once the court makes that computation, the court may, in its discretion, increase the lodestar by applying a multiplier based on other less objective factors, such as the risk of litigation and the performance of the attorneys (*Goldberger v Integrated Resources, Inc.*, 209 F3d 43, 47 [2d Cir 2000]). In the second method, the court sets some percentage of the recovery as a fee. In determining the appropriate percentage, however, the court looks to the same less objective factors that it used to determine the lodestar multiplier

---

[1]Thus, class counsels' citation to *Boeing Co. v Van Gemert* (444 US 472 [1980]), where a fund was created for the benefit of a class of debenture holders, is unpersuasive.

(*id.*).

Courts may use either the lodestar method or the percentage method in calculating fees in common fund cases (*id.*). The reason that class counsel is urging the court to adopt the percentage approach is plain. The amount of the eventual benefit to the class appears to be somewhere between $200 and $300 million, based upon the projection of the number of eligible teachers. Counsel asserts that, typically, courts award counsel for successful class action plaintiffs as much as 40% of the common fund. They seek, however, a "reasonable" award of 15% of the overall estimated likely payment by defendants, amounting to approximately $50 million. To reach that amount, using the lodestar approach, the court would have to assign a very large multiplier (112) to the billed hours (based upon counsel's own calculations) of $445,711.50.

For the reasons set forth below, the court finds that taking all relevant factors into consideration, an award of the magnitude requested by class counsel is unwarranted. Counsel contends the $50 million award will compensate them for the "work they have performed, and will continue to perform" and the risks they assumed in pursuing this action (Petition and Supporting Memorandum, at 3). Because their billed services total $445,712, and the risks were relatively slight by counsel's own standard of measurement, they are not entitled to the fee requested. In the court's view, class counsel is entitled to an attorneys' fee award based on the lodestar method, but with neither an upward adjustment nor a downward adjustment, as urged by defendants.

A percentage of a common fund award is not appropriate because, among other reasons, there is no common fund, in the traditional sense, from which to derive a fee award percentage.

The exact amount of the eventual increased pension payments that defendants will make cannot be readily ascertained, as exemplified by the controverting affidavits setting forth differing theories as to the overall likely additional pension payments. Class counsel opines that the amount will exceed $300 million, while defendants contend that it is likely to be closer to $200 million. That there is no readily ascertainable fund is evidenced by the affidavit of class counsel's expert, which offers a conclusion based upon a mix of "actuarial estimates," "extrapolations," "assumptions," "presumptions," and "inferences." By utilizing the lodestar method, the court need not engage in the uncertainty of the ultimate payment amounts which will be made over time to the various class members (*cf. McDonald v Pension Plan of NYSA-ILA Pension Trust Fund*, 450 F3d 91 [2d Cir 2006]).

However, even if the settlement could be fairly characterized as a common fund recovery, use of the lodestar method is warranted because of the particular circumstances presented by this case. This action entailed very little risk for counsel, it did not involve the litigation of complex legal issues, plaintiffs did not face significant opposition, and, the time that class counsel expended was not substantial in relation to the fee award request. Awarding $50 million as compensation for what class counsel, by their own calculations, reports as a $445,711.50 lodestar calculation would result in an unjustified and unreasonable windfall to class counsel that would be in the mind of any reasonable person more than a tad excessive.

In any event, regardless of the method used, the award must represent the "reasonable value of legal services rendered" (CPLR 909). The factors to be considered in determining the reasonableness of the fee are: (1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of litigation; (4) the quality of representation; (5) the

requested fee in relation to the settlement; and (6) public policy considerations (*Goldberger v Integrated Resources, Inc.*, 209 F3d at 50). The court now turns to consideration of these factors.

A. Time and Labor Expended by Counsel

Plaintiffs have the burden of establishing the hours reasonably expended by class counsel and the prevailing hourly rate for similar work in the community (*Gutierrez v Direct Marketing Credit Servs.*, 267 AD2d 427 [2d Dept 1999]). Plaintiffs' counsel states that the amount of time expended, multiplied by their billing rates (at current rather than historical rates), amount to $332,681.50 for RP&B, and $113,030 for the Sandals Firm, based upon 624.6 hours and 249.1 hours, respectively. They support these assertions with time sheets and affidavits by counsel as to their background, experience, and services performed.

Of the 624.6 hours attributed to RP&B, 476.4, or 76% of the total hours billed are at the hourly rate of $610. The remainder is billed at $400 and $225 per hour. As for the Sandals firm, of the 249.1 total hours billed, 213.1, or 85% is billed at the hourly rate of $500, with the remainder at $180 per hour. The contemporaneous time records submitted are sufficiently detailed to enable the court to determine the type of legal services performed as well as the amount of time that the counsel spent thereon. The expenses are reasonable and adequately documented.[2]

To establish that $610 is a reasonable rate, Preminger states that, in September 2002, the Honorable Alvin K. Hellerstein appointed him as a Special Master in a class action ERISA

[2]The Reply Affidavit of David Preminger also contains a statement by Alan Sandals that his firm spent $5,000 for services relating to the design, hosting and maintenance of an internet website dedicated to the case. This expense is not documented. Counsel may seek reimbursement for this expense on a future application for additional attorneys' fees, as discussed below.

litigation, and set his hourly compensation at $500, and that, five years later, he now bills at $610 per hour. However, the retainer agreement between the named plaintiff, Arnold H. Nager, and class counsel, dated August 30, 2002, recites that the "current billing rate" of David S. Preminger is $435. Defendants contend that $325 is a more customary and reasonable charge for an ERISA attorney, but defendants did not provide any documentation to support this assertion.

Assuming that the rates are reasonable, it is remarkable that 76% of the services of RP&B, and 85% of the services of the Sandal's firm are billed at the top partner rates of these firms. Moreover the time sheets reflect that a substantial amount of time responding to inquiries from individual class members is billed at the hourly rate of $610. It would seem that an associate or other attorney billing at a lesser rate could have handled those inquiries. Furthermore, some of the hours are charged to time spent on the attorneys' fee matter, which is inappropriate where the fee is to be paid by the class members (*see Savoie v Merchants Bank*, 166 F3d 456, 461 [2d Cir 1999]).

B. Magnitude and Complexities of the Litigation

As indicated by the time sheets submitted and a review of the court file, the majority of the work that counsel rendered was not in actual litigation. Indeed, the court file in the County Clerk's office is relatively thin, and absent from it is any indication of substantial litigation. In their answer, defendants asserted five affirmative defenses, including the boilerplate-like failure to state a cause of action, statute of limitations, and laches, and one addressed solely to the propriety of class action certification. Although the other affirmative defense – that *Weingarten* rendered the recalculation of benefits prospective only – addresses the essence of the dispute, the record reveals that defendants never seriously pursued that defense. When plaintiffs moved for

class certification, defendants did not move to dismiss the complaint, as is often the case, nor did they assert any substantive defenses challenging the merits of plaintiffs' claim. Moreover, even though defendants opposed the motion for class certification, they did so on a very narrow ground. CPLR 901 authorizes certification of a class action if:

> (1) the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;
>
> (2) there are questions of law or fact common to the class which predominate over any questions affecting only individual members;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
>
> (4) the representative parties will fairly and adequately protect the interest of the class; and
>
> (5) a class action is superior to other available methods for the fair and efficient adjudication of the controversy

(CPLR 901 [a]; *Rabouin v Metropolitan Life Ins. Co.*, 25 AD3d 349 [1st Dept 2006]). In opposing the motion for class certification, defendants conceded for purposes of the motion that plaintiff satisfied the first four requirements. They only challenged the last – superiority. Defendants argued that, pursuant to the "governmental operations rule," class action certification is unnecessary, because TRS is ready and willing to apply any order of the court on the same across-the-board manner, and to treat all similarly-situated TRS retirees in identical fashion if the court decides the action in plaintiff's favor. In addition, although defendants filed a notice of appeal from the Class Certification Order, shortly thereafter the parties began settlement negotiations, and the appeal was withdrawn.

Furthermore, class counsel benefitted from *Weingarten*, and there was no "groundbreaking issue which loomed significant in this case"; the likelihood of non-payment was

slim because the defendants were solvent entities, and the use of high billing rates compensated counsel for the quality of their efforts and what risk there was in the case (*Goldberger v Integrated Resources, Inc.*, 209 F3d at 54). The Appellate Division, prior to the commencement of this action, and the Court of Appeals, shortly after the commencement of this action, decided the complex legal issues involving interpretation of administrative and statutory provisions, which complication was enhanced by the circumstance that the relevant statute creating the various tiers did not define "salary" (98 NY2d at 581). The sole issue, therefore, was whether defendants would agree to apply the *Weingarten* determination retroactively. Undoubtedly, this matter presented enormous complexities, but those complexities pertained primarily to the administration of the settlement, and not to the litigation of legal issues (*see e.g.* letter of David S. Preminger to this court, dated February 21, 2005).

Hence, the record does not support counsel's assertion that the settlement "comes despite Defendants' multiple efforts to frustrate relief" (Reply Memorandum in Further Support, at 3). This is not meant to imply that this action did not play a significant role in defendants' eventual agreement to apply *Weingarten* retroactively. Rather, this analysis relates to the lodestar multiplication factor of the magnitude and complexities of the litigation.

C. Risk of Litigation

Of the lodestar factors, risk of success has been historically considered the "foremost" factor to be considered in determining whether to award an enhancement (*Goldberger v Integrated Resources, Inc.*, 209 F3d at 54). Class counsel argues that the action presented substantial risks in establishing liability and enforcing a remedy that would provide increased benefits to the class (Petition and Supporting Memorandum, at 23). Counsel argues that,

although the Court of Appeals rendered the *Weingarten* decision in October 2002, and thereby established the legal rights of currently employed TRS members, the parties had not known the outcome at the time that plaintiff commenced the litigation. This argument is disingenuous in that that time period was exceedingly short.

Plaintiff commenced this action on August 29, 2002. The Court of Appeals issued the *Weingarten* decision less than two months later, on October 22, 2002. Moreover, in so doing, the Court of Appeals affirmed the Appellate Division which had issued its decision on November 8, 2001, which, in turn, had affirmed the trial court decision that had been entered on October 24, 2000, both events occurring well before the commencement of this action.

Moreover, the complaint itself refers to the *Weingarten* action (as decided by the Appellate Division) and states that it is "a case involving precisely the same issue raised by this complaint" (Complaint, ¶ 27). If the Court of Appeals had reversed the Appellate Division, instead of affirming, in its October 22, 2002 decision, the only event that, at that time, had transpired was the service of a complaint, which defendants had not yet answered (*cf. Brown & Williamson Tobacco Corp. v Chesley*, 7 AD3d 368 [1st Dept 2004] [with respect to risk, the risk remained great in 1996, when the action was filed, because up until then, the tobacco and cigarette industry had never paid a penny in settlement or judgment in more than 800 actions brought against it during the course of 40-odd years, and counsel committed itself to fund personally these actions for whatever amount and for as long as required]).

In short, there was very little risk, because the parties entered into settlement negotiations (which made an attorneys' fee award likely) shortly after issuance of the Class Certification Order.

D. Quality of Representation

Based upon the resumes submitted, and supporting affidavits as to the relevant experience of class counsel, and the services performed, the representation was always appropriate and more than satisfactory. Approval of the $610 and $500 hourly billing rates is due recognition of the quality of the services rendered, as is acceptance of the percentage of work billed at those rates commented upon in the first factor discussed. As discussed, of the 624.6 hours attributed to RP&B, 76% is billed at the hourly rate of $610, and, of the 249.1 hours attributed to the Sandals firm, 85% is billed at the hourly rate of $500.

E. Relation of the Attorneys' Fee to the Settlement

A large recovery does not necessarily justify a quality multiplier (*Goldberger v Integrated Resources, Inc.*, 209 F3d at 54). A "large settlement can as much reflect the number of potential class members or the scope of a defendant's past acts as it can indicate the prestige, skill, and vigor of the class's counsel" (*id.*, at 56). Indeed, that the fee request is excessive is a relevant factor in determining the reasonableness of a fee award (*see Brown v Stackler*, 612 F2d 1057 [7th Cir 1980]), and the court is not bound by the fee agreement entered into between the named plaintiff and class counsel (*Wal-Mart Stores, Inc. v Visa U.S.A., Inc.*, 396 F3d 96 [2d Cir], *cert denied* 544 US 1044 [2005]). Furthermore, it is not defendants that are incurring these costs; rather, it will be taken from the class members' pension benefits.

F. Policy Considerations

An award of $50 million as compensation for legal services totaling $445,711.50 at the hourly rate – most of which time is attributable to the motion for the class certification, and the working out of the parameters and mechanics of a settlement – would be neither justified nor

reasonable. Granting the relief requested would result in an unjustified "golden harvest" of fees for the lawyers (*Goldberger v Integrated Resources, Inc.*, 209 F3d at 47). It does not appear that this result will hinder plaintiffs who seek to obtain representation in putative class actions. Indeed, the record contains no indication that the named plaintiff faced any difficulty in obtaining legal representation in this matter that essentially followed the legal path blazed in *Weingarten*.

G. Other Considerations

Class counsel asserts, in a conclusory manner, that it will be required to expend a substantial amount of time and labor in implementing the award, and they emphasize the "magnitude and complexity" of the litigation. It is unclear, however, as to what substantial role counsel will play in the administration of the settlement, and the payment of pension benefits.

According to Jay Douglas Dean, Assistant Corporation Counsel, to implement the settlement, the City's law department retained the services of Glacier Systems, Inc., a document management company, to identify and duplicate records of the City's Department of Education that contain information on per session earnings. To date, it has spent $100,000 obtaining digital images of more than 300,000 pages of microfiche for data entry of approximately 90,000 lines of data for identification and analysis. The digital images and data were provided to the TRS to be used for calculating benefit adjustments, reflecting per session earnings, as contemplated by the Final Stipulation of Settlement. He contends that class counsel did not expend any time in this matter.

According to Robert C. North, Jr., of the City's five actuarially-funded retirement systems, the Office of the Actuary will be involved in implementing the settlement by certifying each benefit adjustment for each class member.

Joel P. Giller, the TRS's General Counsel, states that TRS will calculate the actual benefit adjustments, reflecting per session earnings, as contemplated by the Final Stipulation of Settlement. TRS professionals, including numerous information technology specialists, have spent dozens of hours developing the technology and protocols to be used to process the benefit adjustment data. Giller states further that, recently, TRS was involved in analyzing 95,000 records, and that class counsel has not been involved in this administrative effort. Furthermore, the Final Stipulation of Settlement provides that TRS will bear all administrative expenses.

Notwithstanding these assertions, the Final Stipulation of Settlement itself contemplates the continued involvement of counsel in that it provides that disputes will be resolved by a third-party arbitrator or claims reviewer in cases where counsel for the parties are unable to resolve a dispute by mutual agreement or a participant disputes the parties' recommended resolution (Final Stipulation of Settlement, ¶ 17). Thus, provision for the payment for future legal services is warranted.

In view of the foregoing consideration of the relevant facts, the court is not persuaded do not believe that the lodestar of the combined firms' billing of $445,711.50 should be adjusted upward. Nor is the court persuaded by defendants' request for a downward adjustment. Accordingly, class counsel's petition for an award of attorneys' fees and expenses is granted to the extent that (1) the law firm of Rosen Preminger & Bloom is awarded $332,681.50 in attorneys' fees, and $4,641.39 for reimbursement of expenses; and (2) the law firm of Sandals & Associates, P.C. is awarded $113,030 in attorneys' fees, and $2,823.48 for reimbursement of expenses. Counsel may, again, petition the court for additional fees and expenses based upon future work performed in connection with the Final Stipulation of Settlement. It is

ORDERED that the Final Stipulation of Settlement is approved; and it is further

ORDERED that class counsel's petition for an award of attorneys' fees and expenses is granted to the extent that (1) the law firm of Rosen Preminger & Bloom is awarded $332,681.50 in attorneys' fees, and $4,641.39 for reimbursement of expenses; and (2) the law firm of Sandals & Associates, P.C. is awarded $113,030 in attorneys' fees, and $2,823.48 for reimbursement of expenses, with leave to class counsel to petition the court for additional fees and expenses based upon future work performed in connection with the Final Stipulation of Settlement.

This constitutes the decision and order of the court. Settle final judgment on notice.

Dated: July 19, 2007
New York, New York

J.S.C.