STATE OF RHODE ISLAND **PROVIDENCE, SC.**	**SUPERIOR COURT**
RHODE ISLAND PUBLIC EMPLOYEES' RETIREE COALITION, et al., ***Plaintiffs,*** **vs.** **GINA RAIMONDO, et al.,** ***Defendants.***	**C.A. No. PC 15-1468**

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR CLASS CERTIFICATION AND APPOINTMENT OF CLASS REPRESENTATIVES AND CLASS COUNSEL

Pursuant to Rhode Island Rule of Civil Procedure 23 ("Rule 23"), the Plaintiffs, Rhode Island Public Employees' Retiree Coalition ("RIPERC"), et al., by and through their undersigned counsel, hereby file this Memorandum in Support of Motion for Class Certification and Appointment of Class Representatives and Class Counsel ("Motion"). As set forth more fully below, the Plaintiffs ask that the Court (1) certify the requested classes and subclasses; (2) appoint the requested class representatives; and (3) appoint the requested class counsel.

I. INTRODUCTION AND BACKGROUND.

A. Procedural History of the "Pension Cases."

In 2010, labor organizations representing state employees and teachers (including Plaintiffs Council 94 and NEARI) filed suit challenging pension changes that reduced retirement benefits of vested state employees and public school teachers enacted in 2009 (P.L. 2009, ch. 68, art. 7, "the 2009 Act") and 2010 (P.L. 2010, ch. 23, art. 16, "the 2010 Act") (PC 10-2859). While the 2010 suit was pending, in November 2011, the General Assembly enacted Public Law 2011, chapters 408 and 409, otherwise known as the Rhode Island Retirement Security Act of 2011 ("RIRSA"),

an act that further suspends and reduces retirement benefits of both vested and retired Rhode Island public employees. In June and July 2012, five actions were filed challenging RIRSA. All six actions asked that this Court declare RIRSA and/or the 2009 and 2010 Acts unconstitutional, under the Rhode Island Uniform Declaratory Judgments Act ("UDJA"), G.L. 1956 § 9-30-1 et seq., and alleged violations of the Contract Clause, Takings Clause, and Due Process Clause of the Rhode Island Constitution.

Shortly thereafter, all of the then-existing pension cases were consolidated for purposes of discovery. In the fall of 2012, the State Defendants moved to dismiss the 2012 pension cases pursuant to Rule 12(b)(6) and/or filed motions for more definite statements. Those motions were heard by the Court in December 2012. In or about January 2013, the parties began participating in court-ordered mediation with the Federal Mediation and Conciliation Service ("FMCS"). In February 2014, after approximately thirteen months of mediation with FMCS, the parties announced a settlement. One group disapproved the settlement leading the parties back to litigation in about May 2014.

Following the unsuccessful settlement, there were three additional pension cases filed, two by the Cranston Police and Cranston Firefighters who were originally parties to PC 12-3169 and PC 12-3579 and one new action filed in Kent County by approximately 200 individual retirees (the "Clifford" case).[1]

Between May 2014 and February 2015, various pre-trial motions were briefed and argued before the Court including motions to join indispensable parties, motions for a jury trial, a motion to consolidate all nine pension cases for trial, motions in limine regarding the appropriate burden

[1] This Motion is not filed on behalf of Plaintiffs in either of the 2014 Cranston cases, PC 12-3169, or in the Clifford case.

of proof at trial, and more than ten different summary judgment motions. During this time period, the Court ordered the joinder of various municipal entities with which any plaintiff claimed a contract right arising from a collective bargaining agreement ("CBA"). The result was the addition of more than 50 different municipal entities to the litigation. In addition, the Court granted the State's motion for a jury trial in all the pension cases. Finally, the Court ordered that the cases be consolidated for trial.

Dispositive motions were heard on March 26 and April 2. To date, no decisions have been issued with the exception of the granting of the State Defendants' motion concerning the Clifford Plaintiffs' conversion claim.

In March 2015, the parties, including approximately thirty-five municipal entities, revisited settlement negotiations reaching the instant proposed settlement ("Proposed Settlement"). Before filing this action, the Proposed Settlement was approved by the majority of members represented in the pension cases with the exception of PC 12-3169. In conjunction with the instant Motion, the Plaintiffs and Defendants have jointly moved to obtain preliminary approval of the Proposed Settlement and notice procedures.

B. The Proposed Class Representatives and Proposed Classes.

The Plaintiffs seek to have certified the following Plaintiff Class and Subclasses:

PLAINTIFF CLASS. All persons (and/or their beneficiaries) who, on or before July 1, 2015, are receiving benefits or are participating in the State Employees, Teachers, or Municipal Employees retirement systems administered by ERSRI and all future employees, excepting only those individuals who on July 1, 2015, are participating in a municipal retirement system administered by ERSRI for municipal police officers in any municipality and/or for fire personnel of the City of Cranston.

THE SUBCLASSES:

i. State Employees and Teachers: Participants in the Teachers and State Employees Retirement System ("ERS") who are employed on or before July 1, 2015 but who have not retired as of June 30, 2015 and all future employees.

ii. Participants in MERS, other than police or fire units: Participants in MERS, other than police or fire units, employed on or before July 1, 2015, but who have not retired as of June 30, 2015 and all future employees.

iii. Participants in all fire MERS units, except for fire personnel of Cranston: Participants in all fire MERS units, except for fire personnel of Cranston, employed on or before July 1, 2015 but who have not retired as of June 30, 2015 and all future employees.

iv. Retirees: All retired members and beneficiaries of retired members who retired on or before June 30, 2015, who are receiving a retirement benefit under ERS or any MERS unit.

The following are not members of the Plaintiff Class: (1) non-retired participants in the City of Cranston's fire MERS pension systems and (2) non-retired participants in a police pension system for any Rhode Island municipality participating in MERS.

Further, the Plaintiffs propose the following individuals should serve as Class Representatives for the Plaintiff Class:

Retirees:	Roger Boudreau, Michael Connolly and Kevin Schnell;
Teacher/State Employee:	John Lavery, Michael McDonald, Jason Kane and Amy Mullen;
Municipal Employee:	Susan Verdon
Firefighters:	Raymond Furtado and James Richards.

The Plaintiffs also seek to have certified the following Defendant Class:

DEFENDANT CLASS. All municipal entities that participate in MERS and all municipal entities that employ teachers who participate in the state employees and teachers' ERS.

Further, the Plaintiffs propose the following entities should serve as Class Representatives for the Defendant Class:

The Towns of Barrington, Middletown and South Kingstown.

II. ARGUMENT IN SUPPORT OF MOTION.

"In Rhode Island, '[a] finding by the court that a class action will fairly ensure the adequate representation of alleged parties is a condition precedent to the maintenance of a class action.'

Cabana v. Littler, 612 A.2d 678, 685 (R.I. 1992). 'The party pleading the class action bears the burden of proof.' Id. 'The initial burden is not heavy but requires more than mere conjective and conclusory allegations.' Id. at 686 (citing Janick v. Prudential Insurance Co. of America, 451 A.2d 451, 455 (Pa. 1982)). In order to satisfy that burden, the party pleading the class action must make, as a requirement of Super R. Civ. P. Rule 23, 'a timely motion to certify the suit as a class action and to present evidence from which the court can conclude that class-certification requirements are met.' Id. (citing Janick, 451 A.2d at 454)." Providence Retired Police & Firefighters Ass'n v. City of Providence, R.I. Super. Lexis 82, at *3-5 (R.I. Super., filed May 24, 2012) (hereinafter "Providence").

"To certify a proposed class, [the plaintiff] must demonstrate that it has satisfied the four prerequisite elements outlined in Rule 23(a). As specifically stated in the text of Rule 23(a):

> 'One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.' R.I. Super. R. Civ. Pro. 23(a); see also Cohen v. Harrington, 722 A.2d 1191, 1195-96 (R.I. 1999)." Id. at *4.

"Once the requirements of Rule 23(a) are satisfied, the prospective class must then fit into one of the categories provided for in Rule 23(b). 'In ruling on a motion for class certification, a court should not decide the merits of the case.' Zarella v. Minnesota Mutual Life Ins. Co., 1999 WL 226223, *3 (Super. Ct. April 14, 1999) (citing Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-78 (1974)). 'A court may, however, look past the pleadings in determining whether requirements of Rule 23 have been satisfied.' Id. (citing Castano v. American Tobacco Co., 84 F.3d 734, 744 (5th Cir.1996)). As noted by the Court in Zarella, there is a 'dearth of case law' in Rhode Island pertaining to class actions and Rule 23. Zarella, 1999 WL 226223 at *3, n. 5.

Therefore, it is proper for this Court to look to interpretations of Federal Rule 23 from the federal courts. Id. (citing Ciunci v. Logan, 652 A.2d 961, 962 (R.I. 1995))." Providence, at *4-5.

A. The Proposed Class Satisfies the Requirements of Rule 23(a)

1. The Members of the Class Are So Numerous That Joinder of All Members is Impracticable.

In assessing numerosity, the court may rely on "reasonable inferences drawn from available facts" because "precise calculation of the number of class members is not required." Vengurlekar v. Silverline Techs., Ltd., 220 F.R.D. 222, 227 (S.D.N.Y. 2003) (citing Robidoux v. Celani, 987 F.2d 931, 935 (2d Cir. 1993)). According to the Second and Third Circuits numerosity is presumed when a class consists of 40 or more members. See Consolidated Rail Corp. v. Town of Hyde Park, 47 F.3d 473, 483 (2d Cir. 1995); Stewart v. Abraham, 275 F.3d 220, 226-27 (3rd Cir. 2001) (citing 5 James Wm. Moore et al., Moore's Federal Practice § 23.22[3][a] (Matthew Bender 3d ed. 1999)). According to publicly available data from ERSRI, there are approximately 60,000 Rhode Island public employees and retirees in the suggested class. See ERSRI Actuarial Valuation Report ("AVR") as of June 30, 2014, pp. 26-27 (listing ERS membership data for participants and retirees); MERS AVR as of June 30, 2014, pp. 38-43 (listing MERS membership data for participants and retirees). A finding of numerosity based on a proposed Plaintiff Class of about 60,000 is consistent not only with the federal cases set forth above, but also with this Court's prior holding in Providence. See Providence, at *8 (finding the numerosity requirement satisfied by a class of 648 members). The same can be said for a Defendant Class of municipal entities, given that the current number of MERS entities is 113.[2]

[2] The impracticality of joining the municipal entities has already been demonstrated in the underlying pension cases. It took many months to successfully serve and receive answers and/or motions to dismiss from the majority of the municipal entities joined in four of those cases. As of the date of the settlement, some have still not appeared in the case and there were less entities joined than proposed in the Defendant Class.

Courts may also look to whether it is impractical to join all the plaintiffs in a single action. Baiker-McGee, Jannsen & Corr, Federal Rules of Civil Procedure 2012 at 651. Under this test, "a class comprised of many hundreds, or thousands, of members will almost surely meet this test." Id. (citing Bacon v. Honda of America Mfg., Inc., 370 F.3d 565, 570 (6th Cir. 2004)). Impracticality does not equate to impossibility - all the plaintiff needs to prove is difficulty or inconvenience of joining all members as sufficient to show that the class action process is appropriate. Central States Southeast & Southwest Areas Health & Welfare Fund v. Merck-Medco Managed Care, LLC, 504 F.3d 229, 244-45 (2d Cir. 2007). Here, it would be difficult and inconvenient to join approximately 60,000 individual Plaintiffs and over one hundred municipal entities to this lawsuit and thus, the Court should conclude that the numerosity requirement has been met by the proposed class.

2. There are Questions of Law and Fact Common to All Class Members.

At this stage of the analysis, it is not relevant whether the common question predominates, all that matters is whether there is a single common question that links together the members of the class that is appropriate for judicial resolution in the instant suit. See, e.g., Brown v. Kelly, 609 F.3d 467, 475 (2d Cir. 2010) ("The commonality requirement is met if there is a common question of law or fact shared by the class"); In re Alstom SA Sec. Litig., 253 F.R.D. 266, 275 (S.D.N.Y. 2008) (commonality is a "low hurdle"). Class certification will not necessarily be precluded by differing individual circumstances of class members; rather, the critical inquiry is whether the common questions are at the core of the cause of action alleged. Vengurlekar, 220 F.R.D. at 227. In DeCesare v. Lincoln Benefit Life Co., the Rhode Island Supreme Court noted that when a common question of contractual liability is present, class certification is appropriate under 23(a)(2) and 23(a)(3), even if individual damage assessments would be required later. 852 A.2d 474, 488 (R.I. 2004) (quoting Seidman v. American Mobile Systems, Inc., 157 F.R.D. 354,

366 (E.D. Pa. 1994); In re Visa Check/MasterMoney Antitrust Litigation, 280 F.3d 124, 139-140 (2nd Cir. 2001); Smilow v. Southwestern Bell Mobile Systems, Inc., 323 F.3d 32, 42 (1st Cir. 2003)).

In this case there are multiple common questions on liability for the members of the Plaintiff Class, for example: (1) Are the 2009 and/or 2010 Acts and/or RIRSA unconstitutional for violating the Contracts Clause? (2) Are the 2009 and/or 2010 Acts and/or RIRSA unconstitutional for violating the Takings Clause? (3) Are the 2009 and/or 2010 Acts and/or RIRSA unconstitutional for violating the Due Process Clause? These common questions of liability are the same for each and every Plaintiff Class Member. They are also "not peripheral but important to most of the individual class member's claims." Providence, at *9. Significantly, this Court has already found, based on the facts of the underlying pension cases, that the plaintiffs[3] have sufficient common interests and claims such that their cases should all be consolidated for trial. See Decision on State Defendants' Motion to Consolidate Pension Cases for Trial, Feb. 26, 2015, p. 5 ("The Court is satisfied that all of these cases involve common questions of law and fact.). Here, the resolution of the constitutionality of the enactments at issue that purport to change pension benefits of active and retired employees is central and important to all Plaintiff Class Members.

In the Providence case, this Court noted that "the R.I. Supreme Court found that class certification is appropriate when a common question of contractual liability is present, even if individual damage assessments would be required later. * * * The Association alleges multiple

[3] The plaintiffs in the underlying pension cases are labor organizations representing public employee members of ERS and MERS, associations of retired public employees who are receiving benefits under ERS and MERS and individual retirees receiving benefits under ERS and MERS. The Plaintiffs in this case are some of the labor organizations and retiree associations that were plaintiffs in the pension cases, as well as individuals who are members of those organizations or associations.

common questions regarding liability. The primary common contention is the constitutional challenge to the Statute and the Ordinance permitting the City to alter the health insurance coverage the Retirees are entitled to under their CBAs. * * * In this case, the common question of law is specific and defined, as is the challenged action, and therefore, the Court finds the commonality requirement to be met." Providence at *8-9 (Emphasis added). In this case, in addition to determining that all pension cases involve common questions of law and fact, this Court has found that all plaintiffs in the pension cases are primarily seeking equitable relief in a form similar to specific performance, not money damages. See Decision on State Defendants' Motion for Jury Trial, Dec. 12, 2014, Transcript pp. 17-19. Accordingly, no individual damage assessment would be necessary at any stage of this class action.

With regard to the Defendant Class, all share the same interests (sustainable and affordable retirement programs) and have the same potential defenses to the Plaintiffs' Class Members claims (i.e., that the changes made were necessary and reasonable to meet an important public purpose).

Accordingly, the commonality requirement is met for both Classes.

3. The Class Representatives' Claims Are Typical of the Class.

The commonality and typicality requirements often "tend to merge into one another, so that similar considerations animate analysis of both." Brown, 609 F.3d at 475; Walmart Stores, Inc., 131 S.Ct. at 2551 n.5. The typicality requirement is satisfied if "each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." In re: Flag Telecom Holdings, Ltd. Sec Litig., 574 F.3d 29, 35 (2d Cir. 2009) (quoting Robidoux, 987 F.2d at 936); Trombley v. Bank of Am. Corp., 2011 U.S. District Lexis 91124, at *3 (D.R.I. 2011); Van West v. Midland Nat. Life Ins. Co., 199 F.R.D. 448, 452 (D.R.I. 2001). "When it is alleged that the same unlawful conduct was directed at or affected

both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of minor variations in the fact patterns underlying individual claims." Robidoux, 987 F. 2d at 936-37; see also Lapin v. Goldman Sachs & Co., 254 F.R.D. 168, 176 (S.D.N.Y. 2008) ("Typicality does not require that the situations of the named representatives and the class members be identical.") (Emphasis added).

On the other hand, the claims of a purported class representative are not typical if, in order to prove the claims of other class members, the representative must prove something different from what is necessary to prove his own claim. Van West, 199 F.R.D. at 452 (citing In re Prudential Ins. Co. of America Sales Practices Litigation, 148 F.3d 283, 312 (3d Cir 1988) (quoting General Telephone Co. of the Southwest v. Falcon, 457 U.S. 147, 158 (1982) ("Falcon would need to prove much more than the validity of his own claim in order to prove the claims of the absentee class members, and thus his claims were not typical of the class."); Advertising Specialty National Assoc. v. FTC, 238 F.2d 108, 120 (1st Cir. 1956) (the interests of the representatives must be co-extensive with those of the class).

The proposed individual Plaintiff Class Representatives, like all class members, are either current participants and/or receiving pension benefits from either the ERS or MERS plans administered by ERSRI. These Plaintiff Class Representatives include members from different constituent groups – active teachers, state employees, municipal employees, public safety employees and retirees from each of those groups. The typicality requirement is satisfied because as previously presented supra at (2), the legal theories and evidence that the Class Representatives would have advanced to prove their claims is the same and would have simultaneously advanced the claims of the other class members. All have argued that they have a contractual right to the benefits at issue, arising out of a CBA or state law. All have argued that the State Defendants have violated those rights by the

enactments. All have argued that given the contracts at issue, the State Defendants and/or the Municipal Defendants have failed to establish a sufficient reason to impair the contracts at issue, among other things. Here, the "legal theories and evidence the class representatives will use to advance their claims will simultaneously advance the claims of other class members." Providence, at *10-11.

With regard to the Defendant Class typicality prong, as previously mentioned, because all Defendant Class members have the same status as employers participating in MERS they have the same interests in defending the instant case – they have the same available defenses and arguments, and thus, the typicality requirement is satisfied.

4. The Class Representatives and Class Counsel Will Fairly and Adequately Protect and Represent the Interests of the Class.

"Adequacy entails inquiry as to whether (1) Plaintiffs' interests are antagonistic to the interest of other members of the class; and (2) Plaintiffs' attorneys are qualified, experienced and able to conduct the litigation." Flag Telecom, 574 F.3d at 35; Trombley v. Bank of Am. Corp., 2011 U.S. District Lexis 91124, at *3 (D.R.I. 2011) (citing Ortiz v. Fireboard Corp., 527 U.S. 815, 856 (1999); Van West, 199 F.R.D. at 453. "The focus is on uncovering conflicts of interest between named parties and the class they seek to represent. In order to defeat a motion for certification, however, the conflict must be fundamental." Flag Telecom, 574 F.3d at 35. This inquiry considers "whether the proposed class representatives possess the same interest and suffer the same injury as the class members." In re NYSE Specialists Sec. Litig., 260 F.R.D. 55, 73 (S.D.N.Y. 2009) (quoting Amchem, 521 U.S. at 625-26). It also considers whether the class representative is an active participant in the litigation and understands its duty to represent the interests of the class. See Lapin, 254 F.R.D. at 177.

> "The test for adequacy of representation in a defendant class action been termed 'similar to' that in cases involving plaintiff classes. See 7 Wright & Miller, Federal Practice & Procedure, Civil

> § 1770 (1972). Generally speaking, the named parties must be represented by qualified counsel, see, e.g., Technograph Printed Circuits, Ltd. v. Methode Electronics, Inc., 285 F. Supp. 714, 721 (D.C. Ill. 1968); and they must have common interests with, and not be antagonistic towards, their fellow class members. See, e.g., Neal v. System Board of Adjustment, 348 F.2d 722 (8th Cir. 1965).
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> The difficult problem in particular cases is determining whether there is sufficient 'commonality' present to ensure fair treatment of absentees. This court takes the view that fair representation will be assured if the named parties--be they plaintiffs or defendants--share the interests of all class members with respect to the substantive issues in the suit. See generally Hansberry v. Lee, 311 U.S. 32, 85 L. Ed. 22, 61 S. Ct. 115 (1940); Developments, Class Actions, 89 Harv. L. Rev. 1317 (1976). If the interests of all class members coincide with respect to the merits of the suit, then in advocating their own interests the named parties will necessarily represent the interests of absentees as well." United States v. Trucking Employers, Inc., 75 F.R.D. 682, 687 (D.D.C. 1977) (emphasis added).

i. Plaintiff Class Representatives and Class Counsel.

The proposed Plaintiff Class Representatives' interests do not conflict with the interests of the proposed class members. The proposed Plaintiff Class Representatives are all active public employees or retirees that are, or were, participants in the same systems as the class members and were entitled to, or receiving, benefits under the ERS or MERS.

As for the retiree Class Representatives, each is retired and was receiving a 3% COLA (either simple or compounded) prior to RIRSA's enactment. Proposed Class Representative Roger Boudreau retired in 2001 from the Lincoln School Department and also leads the RIPERC organization as well as the Retired AFT chapter, representing thousands of similarly-situated retirees. Retiree Michael Connolly retired in 2008 from the City of Woonsocket after being employed for many years in the public works department. Finally, retiree Kevin Schnell retired from his position as a firefighter with the Central Coventry fire district. Each retiree representative suffered the same contractual impairment to the 3% annual COLA when it was changed by RIRSA

to a new formula (0-4%) based solely on investment performance, suspended until the plan at issue was 80% funded, and calculated only on the first $25,000 of the retiree's benefit. Each has the same interest in restoring the COLA at the pre-RIRSA level, and as such, none have a conflict with the remaining class members.

Four plaintiffs (John Lavery, Michael McDonald, Jason Kane and Amy Mullen) seek to serve as representatives of the teacher/state employee subclass. They include a Tiverton public school teacher with over 15 years of past service, and three state employees, with service ranging from over ten years to over thirty years of service, including a correctional officer. Finally, there are three plaintiffs who seek to serve as representatives of the municipal sub-classes, one for the general employees (Susan Verdon) and two for the firefighter sub-class (James Richards and Raymond Furtado. All have substantial years of service and are participants in MERS plans affected by RIRSA's changes.

The Class Representatives have the same interests in maintaining the pre-enactment level of pension and COLA benefits because if one contractual commitment must be kept, then they all must be kept. The proposed Class Representatives are committed to serving in such a role. Here there is no "evidence from the [Defendants] alleging that the named plaintiffs will not adequately represent the class" and thus, the proposed Class Representatives should be deemed adequate. Providence, at *15.

In addition, the Plaintiffs and proposed Class Representatives are represented by counsel who are qualified, experienced and able to conduct the litigation. The following counsel request to be designated as Class and Subclass Counsel as follows:

Class Counsel: Lynette Labinger, Esq.; Thomas Landry, Esq., Douglas Steele, Esq., Joseph F. Penza, Esq.; Carly Iafrate, Esq.; Maame Gyamfi, Esq.

Subclass Counsel: (1) Teacher/State Employee Subclass: Lynette Labinger, Esq.; (2) Municipal Subclass: Thomas Landry, Esq.; (3) Firefighter Subclass: Douglas Steele, Esq.; Joseph F. Penza, Esq.; and (4) Retiree Subclass: Carly Iafrate, Esq.; Maame Gyamfi, Esq.

Counsel Qualifications:

Attorneys Labinger, Penza, Landry, and Iafrate are all qualified members of the Rhode Island Bar. Attorneys Labinger and Penza have been members of the bar for approximately forty years. Attorney Penza's practice has been primarily devoted to handling labor law related matters on behalf of public safety employees. Attorney Labinger has handled, successfully, many constitutional law cases. Attorneys Landry and Iafrate have been members of the bar for about fifteen years. Both have spent nearly all that time representing public employees, public and private employee labor organizations, with a focus on enforcing contract rights of those constituencies. Attorneys Labinger, Penza, and Iafrate have each previously been appointed class counsel in matters in the Rhode Island state or federal courts. All counsel represented labor organizations representing public employees and/or public retirees and are intimately familiar with the concerns held by the proposed class members regarding the loss of retirement benefits having represented clients with the same or similar interests over the course of their careers, as well as over the past three years in the underlying pension cases.

Attorneys Steele and Gyamfi are admitted (or pending admission) pro hac vice. Attorney Steele is a partner in the law firm of Woodley & McGillivary in Washington, D.C. which specializes in representing unions and employees. For twenty five years, attorney Steele has represented unions and employees, with an emphasis on fire fighters and other public safety employees, at the federal, state, and local level throughout the United States, including the practice areas of public sector pension rights litigation, the impact of municipal bankruptcy, freedom of

speech and association, and wage and hour litigation under federal and state law. Attorney Steele has been representing the firefighters unions in the underlying pension cases since the inception of the case.

Attorney Gyamfi is Senior Attorney with AARP Foundation Litigation (AFL) where she represents third-party clients in impact and class action cases in federal and state trial and appellate courts nationwide. AARP Foundation is a 501(c)(3) affiliate of AARP, a non-profit, non-partisan organization with nearly 40 million members aged 50 and older. AFL litigates legal issues that affect the daily lives of older persons, such as pensions and benefits. AFL attorneys have served, and are serving, as class counsel in numerous cases in both state and federal courts. At AFL, Ms. Gyamfi specializes in matters involving health law, employee benefits and pensions, civil rights, and other public interest areas with an emphasis on litigation. The AFL has participated in the underlying pension case representing the retirees since the inception of the case.

The suggested Class Counsel do not have any known conflicts with the members of the class.

ii. The Defendant Class Representatives and Class Counsel.

The proposed Defendant Class Representatives' interests do not conflict with the interests of the proposed class members. The proposed Defendant Class Representatives (Towns of Barrington, Middletown and South Kingstown) are all municipalities that have employees who participate in MERS and/or are receiving retirement benefits as a result of their participation in MERS. The Defendant Class Representatives are all required to contribute to ERSRI under Title 45 and Title 16 on behalf of its teachers and/or municipal employees.

The Class Representatives have the same interests in maintaining the pre-enactment contribution levels, but also, the same interest in reaching a settlement that minimizes any potential

additional costs to municipal entities. The proposed Class Representatives are committed to serving in such a role. Here there is no "evidence from the [Defendants] alleging that the named plaintiffs will not adequately represent the class" and thus, the proposed Class Representatives should be deemed adequate. Providence, at *15.

In addition, the Defendant Class Representatives are represented by counsel who are qualified, experienced and able to conduct the litigation. The Plaintiffs are suggesting that the Defendant Class Counsel be Marc DeSisto, Esq. and Gerald Petros, Esq.

Counsel Qualifications:

Attorneys DeSisto and Petros are both well-respected, long-standing members of the Bar who are well known to the Court and who have significant experience representing municipalities. They have been representing the majority of the municipal entities in the underlying pension cases since those entities were joined and are more than capable to continue in that role as Defendant Class Counsel. Finally, the suggested Defendant Class Counsel do not have any known conflicts with the members of the class.

B. The Class Should be Certified under Rule 23(b)(1) or 23(b)(2).

In addition to the Rule 23(a) prerequisites, the class should be certified by the Court under either Rule 23(b)(1) and/or 23(b)(2). Only one of the 23(b) provisions needs to be satisfied in order for the Plaintiffs to be granted class certification. Amchem Products, Inc., 521 U.S. at 614. "'Although classes often qualify under more than one of the Rule 23(b) categories, courts generally prefer to certify classes under Rule 23(b)(1) or (2) before certifying under [rule 23(b)(3)]. [See] DeBoer v. Mellon Mortg. Co., 64 F.3d 1171, 1175 (8th Cir. 1995); 5 James W. Moore et al., Moore's Federal Practice § 23.40[2]. The reason for this preference is that members of a class certified under Rule 23(b)(1) or (2) cannot opt out of the action, while members of a class certified

under Rule 23(b)(3) are entitled to opt out and pursue individual suits. See DeBoer, 64 F.3d at 1175. Individual claims brought by members opting out of the class might prejudice other class members or cause inconsistencies and compromises in future litigation. See id.' Borcherding-Dittloff v. Transworld Systems, Inc., 185 F.R.D. 558, 562 (W.D. Wis. 1999)." DeCesare, 852 A.2d at 490. "Thus, courts prefer that classes proceed under Rule 23(b)(2) because of its broader res judicata effect. Wetzel v. Liberty Mutual Insurance Co., 508 F.2d 239, 252-53 (3d Cir. 1975); 7A Charles Alan Wright et al., at § 1775."[4] Id.

i. Rule 23(b)(1) Certification

"Certification is proper under Rule 23(b)(1) where a substantial risk of 'inconsistent or varying adjudications' will result in 'incompatible standards' governing Defendants' obligations" with respect to the Class Members. See United Steel v. Kelsey-Hayes Co., 290 F.R.D. 77, 82 (E.D. Mich. 2013) (internal citations omitted). In this case, there can be no question that if 60,000 participants and/or retirees were permitted to file independent, individual claims, challenging the 2009 and 2010 Acts and/or RIRSA there is a significant risk of inconsistent results. In Kelsey-Hayes, the Court dealt with a request to certify a class of about 1450 retirees who were challenging changes to retiree health insurance benefits under a collective bargaining agreement. Id. There, the Court noted that certification was appropriate under Rule 23(b)(1) because "there is a risk of inconsistent results if the 1450 retirees and surviving spouses of retirees file individual lawsuits to challenge [the former employer]'s threatened modification of their health insurance benefits." Id.

[4] As stated in DeCesare, "[c]ourts should proceed under Rule 23(b)(3) only when the class is heterogeneous in composition, thereby necessitating the additional procedural protections afforded by opt-out and notice. Wetzel, 508 F.2d at 253. In this case, the class members are entirely homogenous, presenting identical questions of fact and law." Id. at 490. Accordingly, certification under Rule 23(b)(1) or (2) is appropriate.

(citing Reese, 227 F.R.D. 489). "Thus, as in Reese, Defendants 'could be subject to incompatible standards of conduct-paying the full-costs of benefits for some plaintiffs but not others.' Id.; see also Fox, 172 F.R.D. at 665 (finding that the plaintiffs satisfied their burden for class certification under 23(b)(1) because 'the prosecution of separate actions' will inevitably lead to different results wherein the defendant 'could prevail in some cases and lose in others which, in turn, would lead to inconsistent and, perhaps, inequitable results.'); Sloan, 263 F.R.D. at 477 (As to class certification under Rule 23(b)(1), the Court finds that it too is not defeated by Plaintiff's request for 'back benefit' damages. Separate adjudications of Plaintiffs' claims for injunctive or declaratory relief clearly presents a risk of incompatible standards being applied to different members of the Class.')." Id. As noted, this Court has already declared that there would be an inherent risk in inconsistent decisions in the pension cases if each were tried to a separate jury. See Decision on Motion to Consolidate, Feb. 26, 2015 pp. 4-5. The same rationale applies here. If each Class Member were permitted to pursue a separate action, the risk of inconsistent decisions is significant, and thus, certification under Rule 23(b)(1) is appropriate.

ii. Rule 23(b)(2) Certification

"Rule 23(b)(2) provides that a class action is appropriate when 'the party opposing the class has acted or refused to act on grounds generally applicable to the class,' and the representatives are seeking 'final injunctive relief or corresponding declaratory relief.' The advisory committee notes to the federal rule make clear that Rule 23(b)(2) is intended to address those cases in which broad, class-wide injunctive or declaratory relief is necessary. See Advisory Committee Notes to Fed. R. Civ. P. 23(b)(2) at 128 (contemplating certification if behavior concerns 'class as whole'). Stated another way, this rule seeks to redress what "are really group, as opposed to individual injuries." Bolin v. Sears, Roebuck & Co., 231 F.3d 970, 975 n.22 (5th Cir. 2000) (quoting Barnes

v. American Tobacco Co., 161 F.3d 127, 143 n.18 (3d Cir. 1998)). Broken into its component parts, a prospective class must establish two factors under this subsection: '(1) the opposing party's conduct or refusal to act must be "generally applicable" to the class [as a whole], and (2) final injunctive or corresponding declaratory relief must be requested for the class.' 7A Charles Alan Wright et al., Federal Practice and Procedure, § 1775 at 447-48 (1986)." DeCesare, 852 A.2d at 489-90.

Here, the facts of the underlying pension cases establish that the State Defendants' actions were generally applicable to the class as a whole. All members are participants and/or retirees receiving benefits from ERS and/or MERS as a result of their status as Rhode Island public employees and/or retirees. All were entitled to a certain level of benefits and retirement eligibility as a result of the statutory schemes (Title 16, 36 and 45) administered by ERSRI and achieved their status as a result of employment, retirement and/or collective bargaining. The State Defendants "behavior" toward all class members was generally applicable in that by enacting the 2009 and 2010 Acts and/or RIRSA, the State reduced the retirement benefits to which class members were entitled and/or were receiving.

Turning to the second requirement for a Rule 23(b)(2) class, "[a] court may not certify a class under Rule 23(b)(2) if 'the appropriate final relief relates exclusively or predominantly to money damages.' Advisory Committee Notes to Fed. R. Civ. P. 23(b)(2) at 128 (emphasis added); Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 564 (2nd Cir. 1968) ('[Rule 23(b)(2)] * * * is only applicable where the relief sought is exclusively or predominantly injunctive or declaratory')." DeCesare, 852 A.2d at 489. As previously noted, this Court has previously determined that all plaintiffs in all pension cases were seeking the same type of equitable relief, not money damages. That same type of equitable relief, namely, the restoration of the pre-

enactment benefit levels, is sought in this action. "Such requests for specific performance of a contract are routinely recognized as an appropriate subject for Rule 23(b)(2) class [certification]. See Bradford v. AGCO Corp., 187 F.R.D. 600, 605 (W.D. Mo. 1999) (certifying class of retirees under Fed. R. Civ. P. 23(b)(2) when class 'sought injunctive relief by requiring the defendant to perform their contractual obligations'); Groover v. Michelin North America, Inc., 187 F.R.D. 662 (M.D. Ala. 1999) (same)." Id. Here, like in DeCesare, the only way to fully restore the benefits at issue is the issuance of injunctive relief, and accordingly, certification under Rule 23(b)(2) is appropriate.

III. CONCLUSION

Because the proposed classes satisfies all of the requirements of Rule 23(a) and 23(b)(1) and/or (b)(2), the Plaintiffs request that the Court issue an order (1) certifying the classes named in this motion; (2) designating Class Representatives named in this motion, and (3) appointing the designated Class Counsel for both the Plaintiffs and Defendants Classes.

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Dated: April 13, 2015

CERTIFICATION OF SERVICE

I hereby certify that, on the 13th day of April, 2015:

_X__ I filed and served this document through the electronic filing system on counsel of record in the above-captioned action. The document electronically filed and served is available for viewing and/or downloading from the Rhode Island Judiciary's Electronic Filing System.

_X__ I hereby certify that a copy of this document was also sent by e-mail to counsel of record.

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