

CAUSE NO. DC-16-15431

MICHAEL S. RAWLINGS,
Individually, as resident of the
City of Dallas,
Plaintiff,

v.

THE BOARD OF TRUSTEES OF
THE DALLAS POLICE AND FIRE
PENSION SYSTEM, *et al.*,
Defendants

LARRY EDDINGTON, *et al.*,
Intervenors.

JENNIFER STAUBACH GATES, SCOTT
GRIGGS, PHILIP T. KINGSTON, AND ERIK
WILSON, EACH AS TRUSTEE OF THE DALLAS
POLICE & FIRE PENSION SYSTEM
Trustee Intervenors,

v.

THE BOARD OF TRUSTEES OF THE DALLAS
POLICE & FIRE PENSION SYSTEM, THE
DALLAS POLICE & FIRE PENSION SYSTEM,
SAMUEL FRIAR, GERALD BROWN, CLINT
CONWAY, KEN HABEN, BRIAN HASS, JOE
SCHUTZ, KEN SPRECHER and THO TANG HO,
each in their official capacity as Trustees
Defendants.

§ IN THE DISTRICT COURT

§

§

§

§

§

§

§

§

§

§

§

§

§

§

§

§

§

§

§

§

§

§

§

§

§

§

§

§

§

§

§

DALLAS COUNTY, TEXAS

116th JUDICIAL DISTRICT

PETITION IN INTERVENTION BY TRUSTEES

Come now Jennifer Staubach Gates, Scott Griggs, Philip T. Kingston, and Erik Wilson (“Trustee Intervenors”), each as Trustee of the Dallas Police & Fire Pension System (“DPFPS or the “System”), and file this petition in intervention, stating as follows:

INTRODUCTION

1. Each of Trustee Intervenors is a trustee on the Board of DPFPS who resides within the City of Dallas (“City”). The Trustee Intervenors seek to intervene in this action in order to fulfill their fiduciary duties as trustees and to protect the constitutionally protected benefits of the pensioners of the Dallas Police and Fire-Rescue Departments. The remaining Trustees of DPFPS (the “System Participant Trustees”) are named herein in their official capacity.

2. The story of DPFPS is a tragic one. The governing Board of the System (the “Board”) chose a speculative and risky investment strategy in order to support benefits that were insupportable based upon the more limited returns provided by prudent and conservative investments.

3. Faced with a looming financial crisis caused by bad investments and a growing disparity between contributions and benefits, the Board chose cover-up and inaction rather than the correct fiduciary path. The Board has a constitutional obligation and a fiduciary duty to protect the benefits to monthly pensioners that are protected under the Texas Constitution. Instead, the Board has allowed hundreds of millions, if not billions of dollars of trust assets to be lost through mismanagement and bad investment choices. The Board has also authorized massive distribution of assets for payment of non-constitutionally protected claims while ignoring their constitutional duty to protect the benefits of monthly pensioners.

4. The condition of the DPFPS is dire. Years of mismanagement, self-serving actions and waste have left the System in a precarious financial position that will inevitably lead to insolvency if not firmly and immediately corrected. This Court must act, and must do so now, before tens or hundreds of millions of additional assets are forever lost.

5. The City of Dallas has an important interest in the financial health of the System, and the Trustee Intervenors intend that the City play a constructive role in the needed changes to, and rehabilitation of, the System. But no solution can be found so long as the majority of the Board of DPFPS refuses to fulfill their fiduciary duty to protect the financial integrity of the System. The City will not accept liability for the Board's wrongdoing, nor is the City willing to ask Dallas taxpayers to sacrifice paved streets, affordable housing, public safety, parks, and other necessities in order to cover all of the DPFPS losses caused by years of mismanagement. The System is a leaky bucket, with assets that have drained away through mismanagement and irresponsible payouts to members whose overall benefits were not matched to contributions, are not protected by the Constitution, and whose requests for immediate payments in staggering numbers have drained away precious assets. No responsible party would commit further assets until it is sure that the System is on sound financial footing with a plan for long term solvency. The Board must surrender control of the wellbeing of the members to this Court's equitable and statutory powers to protect DPFPS' trust beneficiaries' service retirement, disability, and death benefits.

6. Trustee Intervenors, through this proceeding, request injunctive relief ordering the Board and the System Participant Trustees to follow the proper course. But injunctive relief alone will be insufficient to cause the Board to comply with its fiduciary duty, particularly given the inherent conflicts that burden the Board and the System Participant Trustees. Thus, the Trustee Intervenors have no choice but to ask the Court to appoint a disinterested and expert receiver to take charge of certain assets of DPFPS and to manage and protect them pending further orders of this Court.

7. Trustee Intervenors have great respect and gratitude for the First Responders of the City of Dallas whose pension benefits are at risk. The wrongdoing here lies not with the brave men and women who serve our City and who reasonably relied on what they were told and promised by the Board. That responsibility instead lies with the managers and Board members who adopted a highly risky and speculative business strategy in a foolish attempt to support a demonstrably unsupportable level of benefits. Now that their reckless strategy and the tragic consequences have been exposed, and have been reflected in a billion dollar write down of the System assets, the day of reckoning is at hand.

8. The Board, through the System Participant Trustees, have thus far been unwilling or unable to take steps needed to turn around DPFPS's failing financial situation – perhaps in the mistaken belief that the City's taxpayers will assume the burden of repairing the disastrous results of its prolonged and continuous dereliction. Rather than comply with its fiduciary duty, the Board and the System Participant Trustees, have instead adopted a completely wrong-headed approach to the current crisis that involves the anticipated sale of significant income-producing assets in order to fund large withdrawals of Deferred Retirement Option Plan ("DROP") benefits in the short term. Such payments must be stopped because they are constitutionally unprotected and must be subordinated to the protection of the monthly pensions that are constitutionally protected.

9. Injunctive and other equitable relief is necessary to ensure effective and equitable supervision of billions of dollars that are required for the protection of service retirement benefits. The Board, through the System Participant Trustees, instead have chosen to disburse money needed for Constitutionally-protected monthly benefits to a favored group of DROP participants, rendering the System in danger of immediate illiquidity and ultimate insolvency.

Who then will foot the bill for the Board's and DPFPS's staff malfeasance and misfeasance? The System Participant Trustees may assume that the City will ride to the rescue, but the City has declined to assume such responsibility for the wrongs done by the Board. Unless and until a resolution of these issues is achieved, the only proper fiduciary path is to protect the remaining assets of the System and hold them for payment of constitutionally protected benefits. The Trustee Intervenors are convinced that only an independent receivership will provide a road toward rehabilitating DPFPS and the protection of members and pensioners and their beneficiaries.

10. The current Board plan contemplates the continued payout of enormous DROP balances as soon as hasty liquidation of assets allows, thereby depleting DPFPS trust assets and impairing the System's ability to pay service retirement, disability, and death benefits. The favoritism of the System Participant Trustees toward DROP participants has been an issue of long standing involving interest payments substantially exceeding market rates and exceeding returns on System assets, choice of speculative investments to support excessive payments, borrowing money and further leverage and risk on speculative investments, overstating asset values, misclassifying assets, and misinforming or hiding material information from the Legislature, the City, and its own members and pensioners and their beneficiaries. Some current Board members continue to speak and vote at Board meetings to favor DROP payments over service retirement, disability, and death benefits despite personally having considerable DROP balances or immediate family members with DROP balances – a clear conflict of interest.

11. This Court temporarily restrained the Board from disbursing unlimited DROP withdrawals that were quickly depleting DPFPS's assets and leading, in the words of the Board Chairman to "financial suicide." But instead of seizing the opportunity to reassess DPFPS's

priorities and to stop voluntarily processing excessive DROP disbursements that impair service retirement, disability, and death benefits, the Board, through the System Participant Trustees, has directed its staff to formulate a plan to sell DPFPS assets so that it can resume large DROP payments based on artificial liquidity and without regard to the resulting impairment. Collectively, these actions all but ensure destruction of DPFPS.

12. The situation is sufficiently dire to require relief beyond what may be available to the original plaintiff Rawlings. Technical attacks on the standing of Rawlings are little more than procedural gamesmanship distracting the parties and this Court from the critical substantive issues that urgently need to be addressed. The Trustee Intervenors have clear standing to assert equitable, mandamus, and other relief, including the appointment of an impartial and independent receiver over property of the Pension Trust.¹

13. Trustee Intervenors have urged the Board to act prudently and to seek long term solutions to this dire problem. Those efforts appear to have failed. The majority of the trustees cannot or are not willing to take sufficient action to prolong the payment of Constitutionally-protected monthly benefits. Instead the majority of the trustees, some with direct substantial personal financial interest in their Board votes, offer as the only solution a billion-dollar taxpayer bail-out. But the Board has no power to compel such a result, and it must be ordered to preserve the corpus of the trust, with System assets protected by an impartial and independent receiver. Trustee Intervenors join this action now because of the intransigence of the System Participant Trustees, the continued breaches of trustees' fiduciary duties, and the impossibility of achieving

¹ See the unanimous resolution of the Dallas City Council dated January 25, 2017, supporting and encouraging this legal action, and expressing the intent to rehabilitate DPFPS, possibly in cooperation with receiver, with appropriate aid and supervision so long as rehabilitation appears to be feasible.

a solution that is fair, balanced, and in compliance with fiduciary duty unless it is through court intervention.

NON-MONETARY RELIEF REQUESTED

14. At present, Trustee Intervenors seek only non-monetary relief, but reserve the right to seek all other relief to which they may show themselves justly entitled.

PARTIES

15. Trustee-Intervenor Jennifer Staubach Gates is an individual who is a duly appointed and serving member of the Board, a Dallas resident and a member of the Dallas City Council.

16. Trustee-Intervenor Scott Griggs is an individual who is a duly appointed and serving member of the Board, a Dallas resident and a member of the Dallas City Council.

17. Trustee-Intervenor Philip Kingston is an individual who is a duly appointed and serving member of the Board, a Dallas resident, and a member of the Dallas City Council.

18. Trustee-Intervenor Erik Wilson is an individual who is a duly appointed and serving member of the Board, a Dallas resident, and a member of the Dallas City Council.

19. The Board administers DPFPS, which is a public retirement system purportedly created in accordance with Article 6243a-1, Texas Revised Civil Statutes (“Article 6243a-1”). The Board has appeared and answered in this action, by and through its counsel of record.

20. DPFPS is a public retirement system purportedly created in accordance with Article 6243a-1, Texas Revised Civil Statutes (“Article 6243a-1”). The Board has appeared and answered in this action, by and through its counsel of record.

21. Defendant Samuel Friar is sued in his official capacity as a Trustee and Chairman of the Board of the Dallas Police and Fire Pension System, and may be served may be served at

the Board's home office of 4100 Harry Hines Boulevard, Suite 100, Dallas, Texas 75219, or wherever he may be found.

22. Defendant Ken Haben is sued in his official capacity as a Trustee of the Dallas Police and Fire Pension System, and may be served at may be served at the Board's home office of 4100 Harry Hines Boulevard, Suite 100, Dallas, Texas 75219, or wherever he may be found.

23. Defendant Joe Schutz is sued in his official capacity as a Trustee of the Dallas Police and Fire Pension System, and may be served at the Board's home office of 4100 Harry Hines Boulevard, Suite 100, Dallas, Texas 75219, or wherever he may be found.

24. Defendant Gerald Brown is sued in his official capacity as a Trustee of the Dallas Police and Fire Pension System, and may be served at may be served at the Board's home office of 4100 Harry Hines Boulevard, Suite 100, Dallas, Texas 75219, or wherever he may be found.

25. Defendant Clint Conway is sued in his official capacity as a Trustee of the Dallas Police and Fire Pension System, and may be served at may be served at the Board's home office of 4100 Harry Hines Boulevard, Suite 100, Dallas, Texas 75219, or wherever he may be found.

26. Defendant Brian Hass is sued as an individual and in his official capacity as a Trustee of the Dallas Police and Fire Pension System, and may be served at may be served at the Board's home office of 4100 Harry Hines Boulevard, Suite 100, Dallas, Texas 75219, or wherever he may be found.

27. Defendant Tho Tang Ho is sued in his official capacity as a Trustee of the Dallas Police and Fire Pension System, and may be served at may be served at the Board's home office of 4100 Harry Hines Boulevard, Suite 100, Dallas, Texas 75219, or wherever he may be found.

28. Defendant Ken Sprecher is sued in his official capacity as a Trustee of the Dallas Police and Fire Pension System, and may be served at may be served at the Board's home office of 4100 Harry Hines Boulevard, Suite 100, Dallas, Texas 75219, or wherever he may be found.

SUBJECT-MATTER JURISDICTION

29. The Court has subject-matter jurisdiction of this action pursuant to the Texas Uniform Declaratory Judgment Act, Texas Civil Practice and Remedies Code §§ 37.001-37.011, Texas Property Code §§ 112.054 and 114.008, Texas Government Code §§ 802.003(a) and 802.1024, and the allegations of statutory violations alleged in this petition in intervention. Plaintiffs have statutory standing under the Texas Trust Code to seek equitable relief, including receivership, and have statutory standing to seek mandamus and mandatory injunctive relief. Additionally, each Trustee Intervenor has a duty to prevent other trustees from committing *ultra vires* acts ,or serious breaches of trust, and to compel other trustees to redress serious breaches of trust and to comply with their fiduciary and constitutional duty, and therefore has standing in the matters presented by this action.

FACTS

30. DPFPS is in critical financial straits, on both a liquidity and balance-sheet basis, presenting the imminent likelihood that DPFPS soon will be unable to pay service retirement benefits, disability benefits, survivors' benefits, or any other monetary obligation as they come due.

31. There is really no dispute about these critical facts. Actuaries employed by the City show that DPFPS has unfunded liability of approximately \$3.7 billion dollars, and a funded

ratio of only 36.8%, a shockingly low number.² As a result, the DPFPS has an infinite amortization period³, whereas the State Pension Review Board recommends an amortization period of 15-25 years.⁴ The chart below summarizes key data that reflects that the System is in desperate financial condition as measured by virtually all metrics.

	As of 1/1/2017 (\$Millions)	Current Plan
1	Total Normal Cost*, before administrative expenses	\$92
2	Normal Cost as a % of Pay	23.6%
3	Actuarial Accrued Liability total	\$5,819
4	Actuarial value of Assets	\$2,144
5	Unfunded Liability: (3) - (4)	\$3,675
6	Funded Ratio: (4) / (3)	36.8%
7	30-year Amortization Payment of Unfunded Liability	\$222
8	Contribution Rate at 30-year Level % of Pay Amortization**	82.9%
9	Employee Contributions as a % of Pay	7.1%
10	Net Actuarially Determined Contribution as a % of Pay	75.8%
11	Net Actuarially Determined Contribution as a Dollar Amount	\$297

* Based on estimated 2017 computation pay of \$392 million

** Includes administrative expenses of \$10 million

32. Actuaries employed by the Board also acknowledge the looming insolvency of DPFPS under the preferred plan put forward by the Board.⁵ A draft analysis dated January 30, 2017 shows that even with the proposed changes, the Unfunded Liability is still a staggering \$2.698 billion dollars, and the funded ratio rises to a paltry 44.4%:

² See Deloitte Letter to Mary Elizabeth Reich dated January 23, 2017

³ See <https://www.comptroller.texas.gov/application.php/pension/search>

⁴ See http://www.prb.state.tx.us/files/reports/Financial_Health_Study_Final.pdf, pg 10

⁵ See Segal Consulting letter to Kelly Gottschalk dated January 30, 2017

	Estimated As of 1/1/2017 (\$Millions)	Current Plan	Board Proposal - COLA Adjustment - Excludes Equity Adjustments
1	Total Normal Cost, before administrative expenses	\$88	\$79
2	Total Normal Cost as a % of Pay *	22.6%	20.3%
3	Actuarial Accrued Liability	\$5,690	\$4,851
4	Actuarial Value of Assets	<u>2,153</u>	<u>2,153</u>
5	Unfunded Liability: (3) - (4)	\$3,537	\$2,698
6	Funded Ratio: (4) / (3)	37.8%	44.4%
7	30-Year Amortization Payment of Unfunded Liability	\$205	\$156
8	Contribution Rate at 30-Year Level % of Pay Amortization **	77.4%	62.7%
9	Employee Contributions as a % of Pay ***	<u>7.1%</u>	<u>13.5%</u>
10	Net Actuarially Determined Contribution as a % of Pay: (8) - (9)	70.3%	49.2%
11	Net Actuarially Determined Contribution as a Dollar Amount	\$276	\$193

* Based on estimated computation pay of \$392 Million as provided by the City

** Includes administrative expenses of \$10 Million; does not include interest adjustment to following fiscal year.

*** Under the Board's proposal, contribution rates would not actually increase to 13.5% until October 1, 2019.

33. T

he

actuarial analysis shows that the System Participant Trustees members are unwilling to take actions to address this financial crisis as they are authorized to do, and have a fiduciary duty to perform. The only action the Board has taken in amending its DROP policy further endangers the service retirement, disability, and death benefits by encouraging DPFPS to sell assets in order to pay DROP withdrawal requests, beginning at the end of March, 2017.

34. The crisis, described in more detail in the preceding paragraphs, is the product of the refusal of the Board through the System Participant Trustees to take serious and necessary action for the preservation of the System, its assets, and its ability continue to provide service retirement, disability, and survivors' benefits to the members of the police and fire departments.

Statutory Creation of the Dallas Police and Firemen Pension System

35. In 1989, the Texas legislature enacted art. 6243a-1. (See Chapter 553, 71st Session). The title of the statute was "Pension System for Police and Firefighters in Certain

Cities.” The Board was defined as the Board of Trustees of the Police and Fire Pension Fund of the City of Dallas, Texas. The statute directed that the System be governed by a 7-member board of trustees consisting of 3 councilmembers and 4 active police officers and fire fighters, 2 from each department. The statute directed that the City must appropriate certain monies to the System to pay for service retirement and death benefits. The amount was a percentage of the total wages and salaries paid to members of the police and fire department. The City’s minimum contribution was 21½% and maximum was 28½%. The statute also directed the City to appropriate funds “to carry out various other provisions of the Pension System that authorize expenditures in connection with the administration of the Pension System.” The statute authorized the System to hire professional consultants, investment counselors, attorneys, and an administrator and “any number of persons to assist him.” The statute specified the amounts to be paid to retirees and beneficiaries. The statute granted the Board the authority to hire an administrator to manage the System and provided that as long as the administrator was acting within the scope of his [her] authority, he [she] was not a fiduciary. Finally, the statute repealed the predecessor laws and any “laws or parts of law including City ordinances” that conflict with it except any other police and firemen pension law that applied to other cities.

36. The 1989 statute also required that any person receiving benefits should have his or her benefits arbitrarily increased by 4% each year, presumably as a cost of living adjustment, but without any correlation to the actual rate of inflation or the System’s rate of return.

37. In 1993, the Texas legislature amended art. 6243a-1 (See Chap. 872, 73rd Leg. Session). The amendment altered the definition of city from the City of Dallas to a municipality with a population greater than 1,000,000 but less than 1,500,000. The amendment granted the

right to the members of the System to “further amend any plan within the pension system in any manner.”

38. The 1993 amendment, for the first time, authorized a special incentive DROP provision. Under DROP, active members who were eligible to retire and receive service retirement payments could elect to continue to work and have the amounts pensioner would have received if they had elected to retire placed into a DROP account. The sums placed in the DROP account were credited with significant interest. The specified interest was a monthly amount at a rate approximately equal to 1/12 of the annual rate assumed by the System’s qualified actuary and approved by the Board of Trustees. The member’s service retirement benefit would not be increased by the years of service after the DROP election or by changes in salary. When the member retired, he or she would receive the service retirement pension based on the time up to his/her election to participate in DROP and also receive payment through the DROP account, either as a lump sum payment or payments made over time.

39. The 1993 amendment also mandated that the City “shall provide for the costs of administration if the board determines that the payment of the costs by the fund will have an adverse effect on the payment of benefits from any plan within the pension system.” It further stated that the City could request reconsideration of the appropriation of any expenditure but “the board shall make the final determination concerning any appropriation.”

40. In 2001, the Texas Legislature amended art. 6243a-1. The only amendment was altering the definition of “city” to a municipality having a population of more than 1.18 million and less than 1.9 million.

41. In 2011, the Texas Legislature amended art. 6243a-1. The only amendment was altering the definition of “city” to state it meant a municipality having a population of more than 1.18 million located predominantly in a county that a total area of less than 1,000 square miles.

42. Article 6243a-1 and its amendments did not grant the System or the Board the authority to incur debt, loan money, invest any funds other than surplus, or create other entities.

The Board Amends the Plan

43. Pursuant to the authority granted by article 6243a-1 to make any change they wanted, the Board convinced their members to amend their plan. In 1996, the plan was amended to convert alternate trustees into regular trustees, resulting in 4 council members and 6 police and fire members. In 2001, the Board was expanded to 12 trustees consisting still of only 4 council members, 6 active police and fire members, and 2 retired police and fire members. Given the quorum rules, the Board could, and did, meet and act with no council members present.

44. In 1998, the plan was amended to require that the interest rate for DROP accounts be set at a minimum of 8% and a maximum of 10%, compounded daily. This guaranteed rate of return was not in any way tied to any standard related to the performance of the System’s investment or the marketplace’s available interest rate. The interest rate remained in effect until 2014. This exorbitant and irresponsible interest rate, and a guaranteed 4% cost-of-living adjustment, again not tied to any benchmark and which was added to the principal in the DROP account and then compounded at 8-10 percent daily, was one of the primary causes of DPFPS’s financial crisis. Upon information and belief, several Board members who had personal DROP accounts deliberated and voted on these DROP enhancements when their personal interests should have disqualified them from deliberating and voting.

45. In 2001, the Plan was amended to allow those who left active service to continue to participate in DROP and thus maintain the remarkable interest rate for their DROP accounts. Upon information and belief, several Board members who had personal DROP accounts deliberated and voted on this DROP enhancement when their personal interests should have disqualified them from deliberating and voting.

The Board Finally Acknowledges its own Failures and the Looming Financial Crisis, in May of 2016

46. In May 2016, the chairman of the Board admitted that unless necessary steps were taken to rectify the situation, the System could run out of money in 15 to 20 years. He stated “the main reason is bad investments” adding that “many of the real estate deals were highly speculative and proved to be worth a fraction of what the fund paid for them.” He failed to disclose that the bad investments were made after various trustees participated in purported “due diligence,” sometimes involving travel to exotic locations. On information and belief and as reported in various news media accounts, various trustees traveled to exotic and posh resorts in Europe, United Arab Emirates, Hawaii, and Napa Valley to perform “due diligence,” and inspections. The 2016 budget allocated \$208,400 for the Board’s travel and the proposed budget for 2017 allocates \$153,335 for trustees’ travel. Thus, the proposed budget seeks more than \$12,000 of travel money for each trustee. Although the dollars are not material in the overall financial position of DPFPS, these expenditures, in the throes of a crisis which threatens the service retirement benefits for all, reflect the Board’s inattention to fiduciary duty and its constitutional and statutory duty to defray administrative expenses.

The Board Has Directed the System to Operate Outside Constitutional and Statutory Limitations Applicable to All Other Governmental Entities.

47. The Board has directed the System to operate outside the scope of constitutional and statutory limitations and prohibitions that govern the actions of other governmental entities

in the State of Texas. Article II, § 49 of the Texas constitution states “no debt shall be created by or on behalf of the State”; article XI, § 5 requires that “no debt shall ever be created by any city, unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and creating a sinking fund of at least two per cent;” and article XI, § 7 provides that “no debt for any purpose shall ever be incurred in any manner by any city or county unless provision is made, at the time of creating the same, for levying and collecting a sufficient tax to pay the interest thereon and provide at least two per cent (2%) as a sinking fund.”

Imprudent Borrowing

48. On information and belief, the System currently has a \$200 million line of credit with Bank of America with apparently \$160 million extended. It also has another \$140 million in loans from other lenders based on information provided by DPFPS.

49. Article III, § 52 states, “Except as otherwise provided by this section, the Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the State to lend its credit or to grant public money or thing of value in aid of, or to any individual, association, or corporation whatsoever ...”

50. In recent pleadings in another lawsuit, the System admitted it made a \$15 million unsecured loan to re Eagle project, a \$20 million unsecured loan re Sandstone project, a \$31 million unsecured loan re Southern Cross project, and provided a \$17 million line of credit for another project of which more than \$13 million has been extended and not repaid. By its own admission, the System has lent at least \$79 million in unsecured loans. This level of borrowing reflects the Board’s penchant for operating like a private hedge fund rather than a statutorily created pension system constrained by prudent and conservative management and limitations on the incurrence of debt.

Procurement of Goods and Services

51. The State has enacted statutes that govern all governmental entities in procuring goods and services. These statutes exist to ensure transparency, establish that the governmental entity gets the best value for the use of taxpayer monies, prevent favoritism, and prevent corruption. The System operates outside the scope of these prohibitions and retains goods and services without any of the safeguards and protections provided by procurement statutes. This behavior is highlighted by the investment managers and advisors that the System retained, and paid millions of dollars, all for the privilege of losing tens or hundreds of millions of dollars of System assets.

The DROP Crisis and the Board's Failures

52. The current pension crisis and the impossibility of sustaining the unrealistically high interest rates for DROP were acknowledged by the Board not later than 2014 when it finally amended the guaranteed 8-10% interest on DROP accounts. However, the Board took no meaningful action to make any effective change as to its DROP withdrawal policies, which it may do without membership approval, and which withdrawal policy is the primary cause of the liquidity and long-term solvency crisis.

53. In 2014, approximately 40% of the System's assets (roughly \$1.4 billion of the total \$3.4 billion) were in DROP accounts subject to the payment of an 8% to 10% interest rate. There was a great disparity between the high DROP interest rate and the declining return on System investments that created unfunded liability of staggering proportions that threatened, and currently threatens, the System's ability to pay monthly service retirement, disability, and death benefits. In 2014, the Board adopted a very limited amendment to alter the DROP interest rates. For fiscal year 2014-2015, the interest rate would be 8% compounded daily; for fiscal year 2015-

2016, the interest rate would be 7% compounded annually; for fiscal year 2016-2017, the interest rate would be 6% compounded annually; for fiscal year 2017-2018 and thereafter, the interest rate would be 5% compounded annually. The amendment had a provision that starting in October 2018, the interest rate could be further limited or reduced to 0% if certain conditions existed as to the Plan's returns, assets, and earned benefits.

54. The 2014 amendment did not resolve the financial crisis because it failed to realistically address it. Because of fears of further changes and fears of the financial stability of the System, certain members began to withdraw their DROP accounts balances in lump sum payments. According to the System's 2015 Comprehensive Annual Financial Report, during 2015, there was a \$26.9 million increase in DROP distributions. This significant increase came on the heels of an \$18.5 million increase in the preceding year. The report added that the fund was projected to become insolvent within 15 years if there were no changes to the plan provisions and all assumptions were met. The assumptions included an expected rate of return of 7.25%. However, an actuarial valuation and review report, dated January 1, 2016, prepared for the System, found that the actual rate of return for the previous year was a negative 8.47%. The actuarial report added \$1.505 billion (56.1%) of \$2.68 billion of assets of the System were in DROP account balances. The report assumed that participants would draw down their DROP balances over a ten-year period. Importantly, the report added, "the System's solvency will be significantly impacted if these funds are withdrawn more quickly."

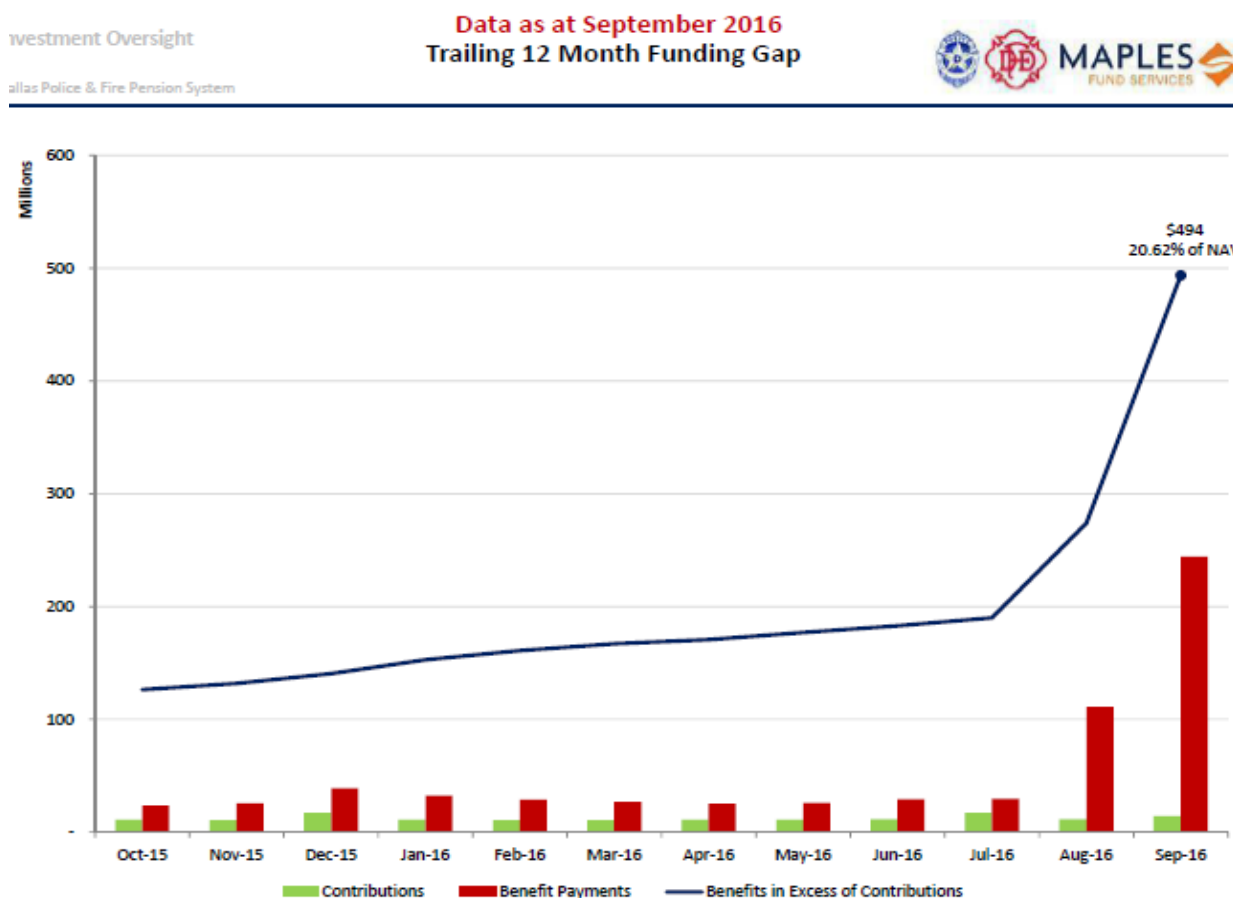
55. In May 2016, the chairman of the Board acknowledged that the System could run out of money in 15 to 20 years. He admitted that one of the reasons "we are in this untenable situation" is because of "the structure of DROP." He added that the fund lost 25 percent of its value but was obligated to pay between 8 and 10 percent interest on DROP accounts. Another

reason for the impending insolvency was the rapid rise in the size of the overall DROP account liability. He concluded, “We simply cannot maintain the practice of paying out significantly more than we have coming in—the continuation of this practice would be financial suicide.”

56. But the Board, through the System Participant Trustees has continued its course toward financial suicide and has taken no meaningful action to turn the System back toward solvency.

57. On August 11, 2016, the Board’s Long-term Financial Stability Sub-committee concluded that “DROP program provisions have contributed to increased accrued liabilities, resulted in a material loss to the Plan and have created a liquidity challenge,” and “past, plan amendments in 2011 and 2014 made were based on flawed information.” At that meeting, the Board could have, but did not, amend its DROP policy to prohibit lump-sum distributions from DROP accounts.

58. During 2016, the DROP withdrawals accelerated and increased. In a period of



approximately 7 weeks, nearly 20% of the DROP accounts were paid which was then approximately 11.3% of the System's total current assets as reported at the start of the year. Several of the accounts withdrawn were for amounts of more than \$1 million, including some accounts in excess of \$3 million⁶:

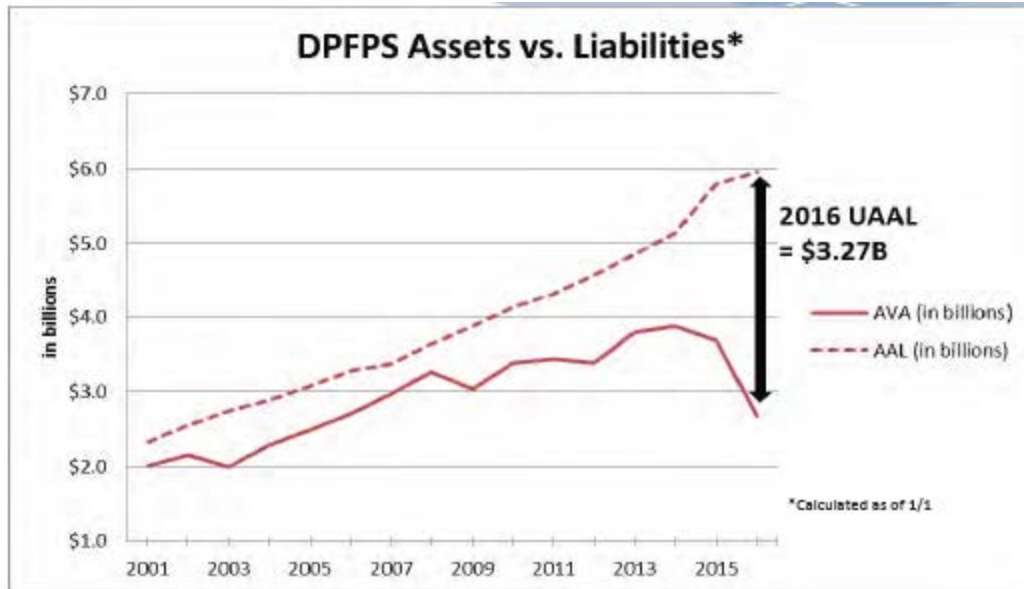
59. Despite these calamitous numbers and reports, on September 26, 2016, the Board voted not to implement any changes that would limit or restrict withdrawals from the DROP accounts.

60. On October 13, 2016, the Board again refused to take any action other than to claim that the City of Dallas should increase its contributions in excess of the statutory and constitutional limitations.

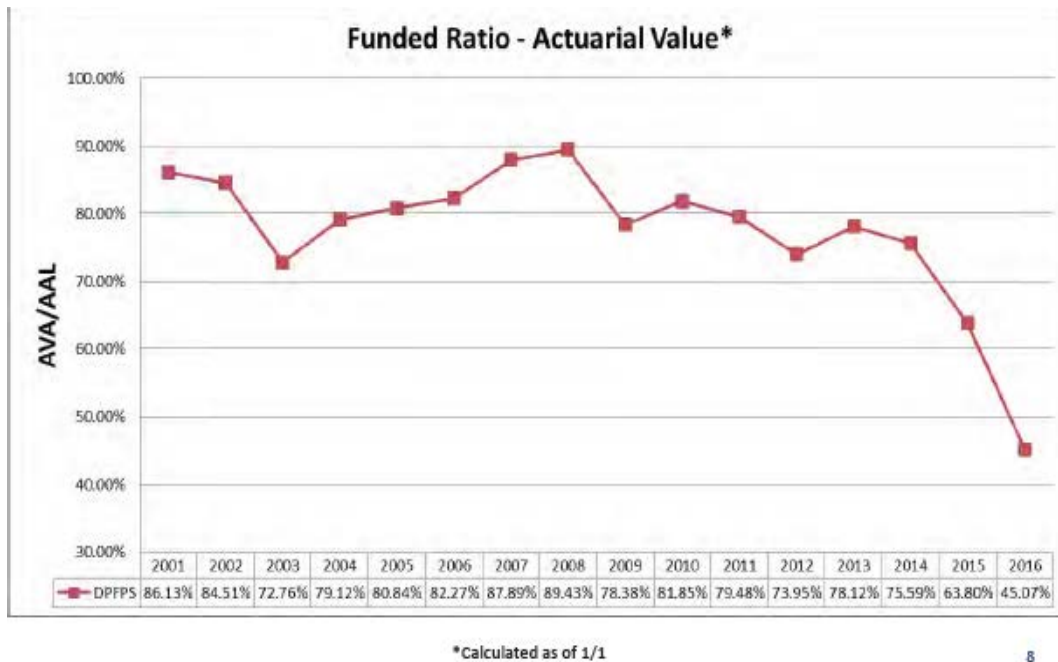
61. On November 3, 2016, the Texas Pension Review Board released a report showing the critical failure of the System and alarming trends created by continued DROP withdrawals:⁷ A comparison of assets and liabilities showed a very large and growing gap between assets and liabilities:

⁶ See Maples Fund Services Snapshot dated October 2016 (preliminary)

⁷ See the Texas Pension Review Board Analysis dated November 3, 2016



62. The Texas Pension Review Board also showed a staggering decline in the funded ratio of the System:



63. On November 10, 2016, the Board met again and refused to take any action to lessen or avert the ever increasing and impending financial disaster caused by the DROP accounts.

64. On December 5, 2016, Michael Rawlings, in his individual capacity as a Dallas citizen brought this mandamus action against the Board because of its failure to take any meaningful action to preserve the System's funds. A temporary restraining order ("TRO") was issued that prevented the Board from making any more lump-sum DROP payments.

65. The Board did not oppose the TRO, and on December 8, 2016, provided the following explanation for the non-opposition to its members:

The Dallas Police & Fire Pension System Board today adopted principles to guide DFPF staff to prepare changes to the DROP (Deferred Retirement Option Plan) Policy for consideration by the Board at its next regular meeting on January 12, 2017 and directed staff to immediately cease all DROP distributions except those necessary to satisfy required minimum distribution (RMD) payments. The principles adopted can be found [HERE](#). The Board determined that a revised policy for DROP withdrawals is needed to ensure DFPF's ability to satisfy all near-term monthly annuity payments and ongoing cash needs, including cash reserves for operating expenses, indebtedness and investment-related expenses. In order to maintain the financial integrity of the System, the Board directed that any revisions to the DROP Policy provide fair and equitable access for Retirees to withdraw some funds while allocating distribution amounts available to members. To satisfy ongoing DROP distribution requests, the DFPF Board and staff will work with investment professionals to sell selected assets prudently and efficiently in order to maximize sales prices for those assets. "These principles will allow continued, but measured access to DROP while preserving resources for all members and provide the Pension Board and staff time to work with the City to develop both short-term and long-term solutions," said DFPF Board Chairman Sam Friar. Because it was consistent with the motion made by the Board, in the hearing on December 8th, the System did not oppose the proposed Temporary Restraining Order presented by the plaintiff in the case brought by Mayor Rawlings. The Court order can be

seen HERE. The System continues to oppose the basis for the Rawlings lawsuit. A hearing has been set for January 17, 2017.⁸

66. On or about December 8, 2016, the Board adopted principles to be applied in formulating a new policy concerning DROP. The new policy was to be considered at the next Board meeting. The adopted principles provided:

1. The Board has been presented with cash flow scenarios that indicate there is a strong possibility that DFPF will not be able to satisfy *in the near term* all monthly annuity payments, anticipated DROP requests, and ongoing cash needs, including a prudent level of cash reserves for operating expenses, indebtedness, investment-related expenditures as noted in Paragraph 3 below (the “Cash Requirements”), through existing liquid assets.

2. Consistent with Texas law and Sections 3.01(s) and 6.14(e) of the Plan, the Board has determined that a revised Policy for DROP withdrawals is needed to ensure efficient administration, including DFPF’s ability to satisfy *in the near term* all monthly annuity payments and ongoing cash needs, such as a prudent level of cash reserves for operating expenses, indebtedness, and investment-related expenditures.

3. The Policy should provide that the Board will maintain a reserve of liquid assets consisting of all outstanding indebtedness, amounts to provide for unfunded capital commitments for investments and, initially, 12 months of operating expenses and 12 months of monthly benefit payments in excess of monthly contributions. *These reserve amounts may change over time as the Board determines how long it may take to sell assets in a prudent manner.*

4. The Policy should provide for a fair and equitable manner (i) by which Retirees shall be given an opportunity to withdraw amounts from DROP and (ii) to allocate among Retirees amounts available for distribution, all consistent with the interests identified in paragraphs 1 and 2, providing Retirees a fair amount of notice and details of the revised DROP Policy.

5. The Policy should provide that the Board and staff will work with its investment consultant to dispose of assets, if necessary, in a prudent and efficient manner, seeking to achieve sales in as short a time as possible to satisfy DROP distribution requests, while minimizing, to the greatest extent possible, discounts on such sales.

⁸ Statement from the Dallas Police & Fire Pension System December 8, 2016, online on the DFPF Web site at <https://www.dfpf.org/images/PDFs/Legal/Statement%20on%20Board%20Principles%2012%208%2016%20Web.pdf> (as of Dec. 27, 2016) (hypertext links omitted).

6. The Policy should provide that any distributions required to be made under federal tax law shall be made to any member by the end of any applicable year.

7. The Policy should provide for similar hardship exceptions to those described in Section 457(d)(1)(A)(iii) of the Internal Revenue Code and the Treasury Regulations and guidance promulgated thereunder.

8. The Policy should provide that it is the intention of the Board to repeal the changes at the earliest date upon which the Board determines that the policy changes are not necessary to ensure efficient administration and to protect the interests described in Paragraphs 1 and 2.⁹

67. On December 21, 2016, the Court amended its TRO to permit, but not require, the Board to approve and make “current regular [DROP] installment amounts added to a Pensioner's monthly benefit payment.”

The Board’s Amended January 2017 Drop Policy Confirms that the System Participant Trustees Will Not Comply with their Fiduciary Duty or Protect Constitutional Benefits

68. The Board adopted a DROP Addendum at its January 12, 2017, meeting. The revised DROP Policy authorizes the staff of DPFPS to liquidate assets in order to permit large DROP withdrawals to be made beginning at the end of March 2017. This amended policy confirms the System Participant Trustees’ breach of fiduciary duty and failure to adhere to constitutional and statutory obligation. In voting to permit continued large DROP withdrawals, certain Board members, on information and belief, have conflicts of interest because of their personal DROP accounts and because of their immediate family members who have DROP accounts, and should neither have voted nor participated in the process of adopting the amended policy.

⁹ Board Principles for Changes to DROP Policy, on DPFPS Web site at <https://www.dpfps.org/images/PDFs/Agendas/2016/12-Dec/C03%20DROP%20POLICY%20PRINCIPLES%20v2.pdf> (as of Dec. 27, 2016) (emphasis added).

The Trustees Actions Show a Continuing Pattern of Breach of Fiduciary Duties

69. The Board owes a fiduciary duty to the Fund and to the participants in the System. Further, the Board has a constitutional obligation not to impair the service retirement benefits, disability, and death benefits of members. But the System Participant Trustees' continued favoritism to DROP participants at the risk of the System and all other participants is a complete failure to fulfill the fiduciary obligations placed on the Board. The System continues to try to sell assets to pay DROP withdrawal requests even when such sales reduce ongoing income and impair or risk impairing DPFPS' ability to pay future and current service retirement, disability, and death benefits. The Board's new policy of selling assets to permit resuming full DROP disbursements at the end of March continues the Board's irresponsible and unconstitutional preference for DROP account holders over pensioners who are eligible for service retirement, disability, and death benefits.

70. DPFPS and the System Participant Trustees continue to shirk their fiduciary duty to protect DPFPS assets from the inherent danger posed by uncontrolled DROP withdrawals. The Board's actions were taken despite the Plan's authorization of delay or deferral of DROP benefits, as authorized by the DPFPS Combined Plan Document section 6.14(e),¹⁰ that provides in pertinent part:

The Pension System shall adopt uniform policies from time to time for the deferral of amounts into and the disbursement of amounts from the DROP accounts of DROP participants who have terminated Active Service and are eligible for a retirement pension.

71. Combined Plan Section 6.14(e) is significant not only because it provides explicit authority to the Board to defer DROP withdrawals, but also because it irrefutably disproves, and

¹⁰ The Combined Plan Document is online as PDF file linked from DPFPS' Web site at https://www.dpfps.org/images/PDFs/Plan/DPFP%20Plan%20Document_09082016.pdf (as of December 20, 2016).

estops the Board from making, any contention that DPFPS pensioners have any absolute right to withdraw funds from their DROP accounts or that the Board has a fiduciary duty to authorize DROP disbursements regardless of DPFPS' financial health. In the related *Eddington* lawsuit, the Board took the express position that DROP payments and benefits are completely unprotected from change under the Texas Constitution, and the Board and DFPS are judicially estopped from taking a different position in this case.

The Intervenor Trustees Have a Fiduciary Duty to Seek to Prevent the Board from Violating its Fiduciary Duty

72. All members of the DPFPS Board have an obligation to prevent and to try to stop breaches of fiduciary duty by other Board members. *See* Texas Trust Code, Tex. Prop. Code § 114.001; Tex. Gov't Code, § 802.302.

73. Given its fiduciary obligations and power to act, the Board and the System Participant Trustees have nonetheless grossly breached their fiduciary duty, and continue to aggravate DPFPS's terminal fiscal spiral by ignoring their fiduciary duty to administer the pension system for the exclusive benefit of DPFPS members, retirees, and their beneficiaries and to prevent impairment of service retirement, disability, and death benefits.

74. Among other wrongful actions, the Board through the System Participant Trustees have caused and continue to cause this fiscal emergency by refusing to defer all withdrawals from DPFPS members' DROP accounts until DPFPS is able to pay overly-generous DROP interest without impairing DPFPS' ability to pay service retirement, disability, or survivors pension benefits, by directing staff to explore the distress sale of non-surplus DPFPS assets to continue paying DROP interest, by incurring debts and expenses for which the System is not obligated, and by incurring debt to make investments instead of investing only surplus funds that are not needed to pay constitutionally-protected pension benefits, and by granting liens on public

property, each of which and together causing impairment of service retirement, disability, and death benefits, which are the only proper constitutionally-protected pension benefits that the Board administers.

75. Faced with an imminent temporary restraining order against DROP disbursements that would have preempted the Board's decision-making and barred or substantially curtailed DROP disbursements, the Board finally limited unrestricted DROP withdrawals in December 2016. However, even when reluctantly making that decision, the Board directed DPFPS staff to plan for divestiture of DPFPS assets so that DROP disbursements could be resumed with only minimal and wholly insufficient reserves available for constitutionally-protected pension benefits payments (a mere 12 months).

76. Upon information and belief, certain of the DPFPS Board members, past and current, who have improperly acted and refused to act respecting DROP withdrawals, are seriously conflicted with respect to DROP matters because their own substantial DROP account balances or those of their immediate family members have created a material personal interest in the outcome of those deliberations and votes adverse to the interests of the System and to the interests of DPFPS members and pensioners in receiving unimpaired payments of constitutionally-protected pension benefits. Such Board members should have recused themselves from directly or indirectly participating in DROP distribution discussions or votes. This misconduct was and continues to be a willful breach of their fiduciary duties. .

77. For a substantial number of years until 2014, DPFPS operated as if it were a free-wheeling unregulated private investment fund – placing risky and speculative bets with taxpayer dollars and borrowing money to make even more investments. The Board approved speculative investments in numerous restricted asset deals that included confidentiality provisions shielding

information about the deals, even from Board members. Luxury mansions and luxury cooperative residence buildings, useless desert land, and other speculative investments were among these bets. During and after this time period, the Board resisted attempts by the City to obtain documents that would have disclosed how overstated were DPFPS assets and how DPFPS's obligations, particularly but not exclusively, its obligations under DROP, were spiraling out of control. DPFPS misled both the City and the Legislature on the level of returns on investment and the effect of DROP enhancements. Even today, DPFPS's reporting of its losses since 2008 fails to demonstrate how badly DPFPS was damaged by the last recession. Because direct-ownership real estate assets were marked to market only after 2014, the losses were taken when those write-downs occurred, but because the actual value had left the system much earlier, the dire condition of the system has been present since 2008.

EQUITABLE RELIEF IS NECESSARY AND THE ONLY ADEQUATE REMEDY

Equitable relief, including Injunctive relief and Receivership Is Necessary Because the Board and the System Participant Trustees have and Continue to Breach their Fiduciary Duties

78. The extraordinary relief requested herein is necessary to protect the financial security of the members and pensioners of DPFPS, and their families. As detailed above, the Board and the System Participant Trustees have and continue to take actions contrary to health of the fund and in violation of the fiduciary duties. On information and belief, certain members are acting out of self-interest and interest of the limited few who are similarly situated while at the same time taking action that imperil the fund and the benefits to who other current and future plan participants. Votes have been taken by Board members with personal DROP accounts or who have immediate family members with DROP accounts on questions about whether to permit DROP disbursements, the Board has engaged in uncontrolled overspending on administrative activities; has permitted unauthorized custody of DPFPS accounts for use as collateral for

indebtedness and speculation; has favored DROP accounts at the risk of impairing constitutionally-protected pension benefits, and has claimed the right to impose unlimited and funded debts on the City without sufficient legal authority. For all of these reasons, the Court should grant all appropriate equitable relief, and should appoint an independent and impartial receiver over certain property of the System in a way that fulfills the fiduciary responsibilities owed to retirees and members.

Trustee Intervenors Support the Rawlings Petition for Injunctive Relief and Mandamus,

79. Trustee Intervenors support Rawlings petition for injunctive relief against further DROP distributions. However, Trustee Intervenors are convinced that more drastic remedies are necessary because the Board and the System Participant Trustees are stubbornly wedded to a plan to deplete assets in favor of DROP distributions even if this jeopardizes DPFPS' ability to pay service retirement, disability, or death benefits. Given the Board's irresponsible conduct in allowing hundreds of millions of dollars of System assets to be paid out improperly, and failure to prevent impairment of service retirement, disability, and death benefits, and the lack of City or State authority to intercede, a receivership is necessary and appropriate to protect DPFPS member and pensioner interests and beneficiaries of the DPFPS trust or trusts. The extraordinary facts presented here justify and virtually compel the extraordinary relief requested. No less onerous form of relief will adequately protect the security of DPFPS members and pensioners. The Plaintiffs-Intervenors have statutory authority to request additional relief, and the Court has statutory authority to grant it.

CLAIMS AND REQUEST FOR RELIEF

First Claim

Joinder in Plaintiff's Request for Mandamus, Declaratory, and Injunctive Relief, plus additional mandamus relief

80. Trustee Intervenors incorporate paragraphs 1 through 79 above.

81. Plaintiffs-Intervenors join in Rawlings claims for mandamus, injunctive, and declaratory relief.

82. In addition, Plaintiffs-Intervenors request such further mandamus relief as necessary to cause the Board to comply with its fiduciary duty to adopt a plan that will protect the solvency of DPFPS and preserve the constitutionally protected benefits owed to members for service retirement, disability and survivor benefits. The Board should be ordered to prepare a new and financially sound plan that suspends payments for DROP benefits, eliminates DROP interest accrual, ceases sale of assets driven by desire for DROP payouts, and provides a clear path to long term solvency of DPFPS. Any effort by the Board through the System Participant Trustees to authorize major liquidation of the portfolio purely for the purpose of enabling DROP withdrawals should be restrained and rejected.

Second Claim
Trustee Intervenors Seek Appointment of a Receiver Over Certain DPFPS Assets Under the Texas Trust Code

83. Trustee Intervenors incorporate paragraphs 1 through 79 above.

84. Pursuant to Texas Property Code § 114.008(5), the Court is authorized to appoint a receiver to take immediate possession and title of assets of DPFPS including real, personal, and intangible property and claims wherever located of which DPFPS has title, possession, custody, or control, and administer such assets as a fiduciary under the supervision of this Court and in accordance with the order appointing the receiver as it may be amended from time to time.

85. Trustee Intervenors allege that mere equitable or mandamus relief will be ineffective and that the Court is likely to be burdened by numerous hearings and requests for needed relief. Accordingly, Trustee Intervenors seek a receiver for certain DPFPS property

because the Board, through the System Participant Trustees will not cease wrongful conduct in managing the assets and will not fulfill their fiduciary duties to the System with respect to such assets. Further, the Board is burdened by serious conflicts of interest and has taken no steps to address that critical problem insofar as it impacts management of DPFPS assets.. In addition, the Board has covered up wrongdoing.

86. The Court's power to authorize receivership over property arises from the Texas Trust Code and principles of equity and includes the power to:

- i. Take immediate possession, custody and control over certain assets of DPFPS including real, personal, mixed, and intangible property and claims, and administer such assets;
- ii. Engage consultants and other professionals subject to Court approval.
- iii. Conduct the administration of the assets, including, without limitation, the power to distribute such assets at the request of the Board or other parties in interest, and to authorize or refuse to authorize payments in accordance with those decisions.
- iv. Authorize, modify, liquidate or terminate investments subject to the receivership, including decisions whether to honor cash calls from joint ventures, partnerships, and other ventures, subject to Court approval.
- v. Continue or further restrict the limits now in place on distribution of assets until additional distributions become actuarially justified without liquidating assets. The receiver may propose objective, actuarially supported standards to the Court for determining when this standard for making disbursements from the assets would be met.
- vi. Inventory and account to the Court and to other interested parties for all property of DPFPS subject to the receivership, including any and all direct and indirect interests in real property and in other entities, .
- vii. Demand, and if necessary sue to compel, accounting for DPFPS property subject to the receivership by anyone who is or has been in possession, custody, or control of such property, including anyone who has purported to control an entity purportedly created or operated for the benefit of DPFPS as to such property.
- viii. Invest surplus assets in debt instruments or arrangements, or engage or use investment managers for that purpose, subject to Court approval for investments with a term of over six months or in a principal amount exceeding \$100,000 and for choice of investment managers, but not to incur debt or create any partnership, joint venture, or entity for the purpose of investment.
- ix. Create, modify, or terminate investment policies as to such assets with due care that all such policies authorize only investment of surplus assets that

are not needed to pay constitutionally-protected pension benefits, and that such policies are prudent for trust investments, and that such policies ensure the ability of other governmental entities to conduct unimpeded investigations, audits and reviews of transactions relating to such assets.

- x. Exercise any other powers that the Court may authorize.

87. The Order appointing the receiver should include appropriate duties including the following:

- i. Take charge of the property described above, to the extent of insurable interests and prudence, insure it against hazards and risks, and attend to its periodic maintenance.
- ii. Subject to further order of this court, manage the assets of DPFPS subject to the receivership, and employ servants, agents, employees, clerks, and accountants, and for that purpose purchase merchandise, materials, supplies, and services, and to pay for them at ordinary and usual rates and prices out of funds that will come into the receiver's possession, and to do all things, and to incur the risks and obligations ordinarily incurred by owners or managers of similar assets, as the receiver, and no such risk or obligation so incurred will be the personal risk or obligation of the receiver, but a risk or obligation of the receivership estate.
- iii. For any property held for rental, collect the rents due coming due from tenants of any portion of the property taken, and tenants or the parties hereto will attorn to the receiver.
- iv. Take possession of and receive from each and every bank and other financial institution any money on deposit in the financial institution to the credit of DPFPS relating to receivership assets, or of any present or former officer or agent of DPFPS as to accounts nominally or actually opened or maintained for the benefit of DPFPS, and the receipt of the receiver for the funds will discharge the bank and other financial institution from further responsibility for accounting to the receiver and to DPFPS for funds for which the receiver has given a receipt.
- v. Negotiate subject to Court approval the sale or lease of receivership property including interests in property, and seek Court confirmation of such sales or leases.
- vi. Serve a copy of any application for judicial approval or other relief, , or other communication with the Court or with any party upon all parties to this cause and upon the City and the State Pension Review Board, except that the receiver may communicate with the Court ex parte in temporary confidence to the extent necessary to protect privileged or otherwise confidential information, subject to the Court requiring immediate or delayed, unrestricted or unrestricted, complete or redacted publication of the matter communication

88. The order appointing the receiver should further provide:
- i. That the receiver and the receiver's employees and other agents including attorneys be compensated based on hours worked, complexity of tasks, and other appropriate factors and considerations at a rate set by the Court, and reimbursed for actual, reasonable, and necessary expenses to the extent not paid directly by the receivership estate or other source, from assets of the receivership estate as a first priority claim. Initial fee and reimbursement awards would be provisional and partial, with a reasonable hold-back. Full and final award to the receiver and the receiver's agents will await final accountings and the close of the receivership.
 - ii. That money coming into the possession of the receiver and not expended for any of the purposes authorized by the order must be held by the receiver subject to such orders as this Court may thereafter issue.
 - iii. That all individuals and entities including governmental entities who receive notice of the order are thereby enjoined from proceeding to levy upon or from otherwise interfering with the receiver's exclusive possession of the above-described property until final judgment of this court.
 - iv. That the receiver must, within 14 calendar days of qualification, file in this action an inventory of all property of which the receiver has taken possession and of which the receiver is aware. If the receiver subsequently comes into possession of additional property or learns that he or she is in possession of property not previously accounted for, the receiver must file a supplemental inventory as soon as practical.
 - v. That within one business day of qualifying as receiver, the receiver will post surety bond in form approved by the Court for the faithful performance of the receivership in a penal amount of at least \$10,000, and maintain such bond or a replacement bond in a form approved by the Court is at least that amount so long as the receiver serves as receiver, and for ten years thereafter.
 - vi. That the receiver will recommend to the Court the payment or disbursement of assets as appropriate.
 - vii. That the receiver will recommend to the Court any expansion of the scope or powers of the receiver necessary to enable the receiver to fulfill the goals of the receivership.
 - viii. That this receivership will continue in effect until further order of this court.

Third Claim
Ultra Vires Claim against System Participant Trustees

89. Trustee Intervenors incorporate paragraphs 1 through 79 above.

90. The System Participant Trustees are required to comply with constitutional and statutory duties to protect the solvency of the System and the ability of the System to pay service retirement benefits. The System Participant Trustees have failed and refused to do so, and the failure is a failure to comply with a ministerial act. Trustee Intervenors seek declaratory and injunctive relief that such actions are ultra vires and must be corrected. This claim is brought against the System Participant Trustees in their official capacity.

Fourth Claim
Declaratory Judgment that DPFPS has a Constitutional and Fiduciary Duty to Protect the Solvency of the System and its Ability to Pay Service Retirement Benefits

91. Trustee Intervenors incorporate paragraphs 1 through 79 above.

92. Article 16, §66(f) of the Texas Constitution provides that “The political subdivision or subdivisions and the retirement system that finance benefits under the retirement system are jointly responsible for ensuring that benefits under this section are not reduced or otherwise impaired.” Accordingly, the Board has a constitutional duty to ensure that they do not impair the specifically defined constitutionally protected benefits-which benefits specifically include the monthly service retirement, disability, and death benefits. Such constitutional benefits specifically exclude the DROP withdrawals that the Board intends to authorize pursuant to its January 12 Policy as determined in the *Eddington* lawsuit.

93. Trustee Intervenors seek a declaratory judgment that authorizing such DROP withdrawals is a violation of the constitutional duty of the Board and a breach of fiduciary duty by the Board and the System Participant Trustees.

Fifth Claim
Declaratory Judgment that the Board is in violation of §117.008 of the Texas Property Code

94. Trustee Intervenors incorporate paragraphs 1 through 79 above.

95. Texas Property Code § 117.008 provides that: “If a trust has two or more beneficiaries, the trustee shall act impartially in investing and managing the trust assets, taking into account any differing interests of the beneficiaries.”

96. The beneficiaries of DPFPS have differing interests because their service retirement, disability, and death benefits are constitutionally protected, whereas DROP benefits are not protected. Yet, the Board has refused to acknowledge this critical difference or to adopt policies that serve to protect the constitutional interest of those beneficiaries that have service retirement, disability, and death benefits. Accordingly, the Intervenor Trustees seek a declaration that the Board is in violation of Texas Property Code § 117.008.

Sixth Claim
Declaratory Judgment that the Board is not properly formed under Article 6243a-1 and does not have authority to act.

97. Trustee Intervenors incorporate paragraphs 1 through 79 above.

98. Article 6243a-1, section 3.01, provides that “the board consists of seven trustees,” three of whom shall be city councilmembers, two active police officers, and two active firefighters. In addition, that same section states that there shall be three alternate trustees. See Article 6243a-1, § 3.01.

99. Despite the state law provision above, the DPFPS Combined Plan Document, section 3.01(b), currently states that “[e]ffective June 1, 2001, the Board shall consist of twelve Trustees.” The twelve are broken down as four city councilmember trustees, two active police

officer trustees, two active fire fighter trustees, and two pensioner trustees. See DPFPS Combined Plan Document, § 3.01. There are no alternate trustees. See id.

100. The only provision addressing amendments to DPFPS is found in Article 6243a-1, section 7.01, which states that DPFPS members “may...amend any plan within [DPFPS].” Assuming the amendment provision is valid, it is limited to changes to the pension plans themselves, including “benefits or eligibility requirements for those benefits.” See Article 6243a-1, § 7.01(a). The amendment provision does not allow DPFPS members to amend governance and administrative provisions, much less expand the Board from seven to 12 members.

101. Therefore, Trustee Intervenors seek a declaration that the 12-member Board is unlawfully constituted and does not have authority to act.

Seventh Claim

Declaratory Judgment that the Board is in violation of its responsibility under Section 66(f), Article 16, Texas Constitution, for ensuring that service retirement, disability, and death benefits are not impaired

102. Trustee Intervenors incorporate paragraphs 1 through 79 above.

103. Section 66(f), Article 16, Texas Constitution, provides in full that “The political subdivision or subdivisions and the retirement system that finance benefits under the retirement system are jointly responsible for ensuring that benefits under this section are not reduced or otherwise impaired.”

104. The “benefits under [section 66]” are the service retirement, disability, and death benefits delineated in the combined plan document of DPFPS, and no other benefits.

105. As applied to the Board, § 66(f) means, at the minimum, that the Board must exercise its fiduciary and statutory duties in a manner that prevents changes in service or

disability retirement benefits or death benefits of the system, except as permitted by § 66(d) and (e) . See Tex. Const. art. 16, § 66(d).

106. The Board's conduct and omissions as alleged above violate that constitutional responsibility and effectuate changes in service retirement, disability, and death benefits, by, among other means, unconstitutionally impairing service retirement, disability, and death benefits by depleting below necessary and prudent reserve levels the value of assets available to fund service retirement, disability, and death benefits on a timely basis starting within the next few years.

107. Accordingly, the Trustee Intervenors seek a declaration that the Board is in violation of Section 66(f), Article 16, Texas Constitution.

Eighth Claim
Trustee Intervenors Seek Additional and Alternative Mandamus Relief and
statutory orders and mandatory injunctions to the Board.

108. Plaintiffs-Intervenors incorporate paragraphs 1 through 71 above.

109. In the alternative, the Plaintiffs-Intervenors seek mandamus relief and court orders under Texas Property Code § 112.054(a)(1) – (3), and Texas Property Code § 114.008, if the Court declines to appoint a receiver, to allow the Court to direct Board members to take the actions that the receiver would have been ordered to take, including actions to compel the Board to perform the trustee's duty or duties; enjoin the Board from committing a breach of trust; and compel the Board to redress breaches of trust.

Conditions Precedent

110. Pursuant to *Tex. R. Civ. P.* 54, all conditions precedent to Trustee Intervenors' recovery against the Board has been performed, has occurred, or has been waived.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Plaintiff respectfully requests the following:

- (i) Declaratory relief as sought herein;
- (ii) Temporary injunctive relief be immediately issued, to enjoin the Board from permitting further DROP distributions from the Pension System until the time of trial, in order to preserve Plaintiff's right to effective, meaningful mandamus relief;
- (iii) Permanent injunctive relief permanently enjoining the Board from authorizing any distributions of DROP funds unless the Pension System, and payment of distributions is deemed (1) actuarially sound (as defined by the Texas Pension Review Board Guidelines for Actuarial Soundness); and (2) would not reduce or otherwise impair the constitutionally protected benefits of the Pension System's Members, Pensioners, and their Beneficiaries, as determined by this Court;
- (iv) further injunctive relief to require that the Board to adhere to its constitutional and fiduciary duty to protect the assets of the Fund for service retirement, disability and survivor benefits and for the Board to adopt plans and policies that (1) hold in trust the assets of the Pension System for the benefit of its Members, Pensioners, and their Beneficiaries; and (2) manage the Pension System according to sound actuarial principles; and commit to long term plans for financial solvency of the Fund;
- (v) appointment of a receiver or certain trust property held by DPFPS, and
- (vi) All other relief, at law or in equity, to which Trustee Intervenors are justly entitled.

Respectfully submitted,

/s/ Lewis T. LeClair

Lewis T. LeClair

Texas Bar No. 12072500

lleclair@mckoolsmith.com

Steven D. Wolens

Texas Bar No. 21847600

swolens@mckoolsmith.com

Robert Manley

Texas Bar No. 0078955

rmanley@mckoolsmith.com

McKool Smith, P.C.

300 Crescent Court, Suite 1500

Dallas, Texas 75201

Telephone: (214) 978-4000

Fax: (214) 978-4044

Charles E. Fowler

State Bar No. 24083014

cfowler@mckoolsmith.com

McKool Smith, P.C.

300 W. 6th St. Suite 1700

Austin, Texas 78701

McKool Smith, P.C.

Telephone: (512) 692-8700

Fax: (512) 692-8744

***ATTORNEYS FOR TRUSTEES OF THE DALLAS
POLICE & FIRE PENSION SYSTEM***

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 8, 2017, a true and correct copy of the foregoing document was sent in accordance with the Texas Rules of Civil Procedure to the following counsel of record:

G. Michael Gruber
Brian N. Hail
Jason T. Weber
mgruber@getrial.com
bhail@getrial.com
jweber@getrial.com
**GRUBER ELROD JOHANSEN HAIL
SHANK LLP**
1445 Ross Avenue, Suite 2500
Dallas, Texas 75202

David M. Feldman
Cris Feldman
Shannon Smittick
david.feldman@feldman.law
cris.feldman@feldman.law
shannon.smittick@feldman.law
FELDMAN & FELDMAN, P.C.
3355 West Alabama, Suite 1220
Houston, Texas 77098

Kirk L. Pittard
F. Leighton Durham, III
Thad D. Spalding
kpittard@kdplawfirm.com
ldurham@texasappeals.com
tspalding@texasappeals.com
KELLY, DURHAM & PITTARD, LLP
601 Haines Ave.
Dallas, Texas 75208

John Turner
Benjamin L. Mesches
Jason N. Jordan
Andrew W. Guthrie
john.turner@haynesboone.com
ben.mesches@haynesboone.com
jason.jordan@haynesboone.com
andrew.guthrie@haynesboone.com
HAYNES AND BOONE, LLP
2323 Victory Avenue, Ste. 700
Dallas, TX 75219

/s/Lewis T. LeClair

Lewis T. LeClair