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CAUSE NO. DC-16-15431

MICHAEL S. RAWLINGS, individually, as a resident of the City of Dallas,	§	**IN THE DISTRICT COURT**
Plaintiff,	§	
v.	§	**DALLAS COUNTY, TEXAS**
THE BOARD OF TRUSTEES OF THE DALLAS POLICE AND FIRE PENSION SYSTEM and THE DALLAS POLICE AND FIRE PENSION SYSTEM,	§	
Defendants.	§	**_____ JUDICIAL DISTRICT**

PLAINTIFF'S VERIFIED ORIGINAL PETITION FOR WRIT OF MANDAMUS, EMERGENCY APPLICATION FOR TEMPORARY RESTRAINING ORDER, AND REQUEST FOR TEMPORARY AND PERMANENT INJUNCTION

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff Michael S. Rawlings, individually, as a resident of the City of Dallas ("Plaintiff") files his Original Verified Petition for Writ of Mandamus, Emergency Application for Temporary Restraining Order, and Request for Temporary and Permanent Injunction against Defendant, the Board of Trustees of the Dallas Police and Fire Pension System (the "Board"),[1] and alleges as follows:

I. Local Rule 1.08 Disclosure

1. Pursuant to Local Rule 1.08, Plaintiff hereby discloses that this case is subject to transfer under Local Rule 1.06 because it involves a case arising out of the same

[1] Plaintiff also joins Defendant, the Dallas Police and Fire Pension System ("Pension System"), as an indispensable party pursuant to *Tex. R. Civ. P.* 39.

transaction or occurrence as an earlier case that was dismissed on Final Judgment.[2] Specifically, this case arises out of the same transaction or occurrence as the following previously adjudicated case ("*Eddington*"):

> Cause No. DC-14-12001; *Larry Eddington, Vincent J. Aurentz, and Roman Kilgore v. Dallas Police and Fire Pension System and George Tomasovic, in his Official Capacity as Board Chair*; In the 116th Judicial District Court of Dallas County, Texas.[3]

II. NATURE OF THE ACTION

2. This mandamus action is brought to compel the Board to perform its ministerial duty to safeguard the state constitutionally protected benefits of the approximately 10,000 members, pensioners, and their beneficiaries of the defined benefit plan for sworn police officers and firefighters employed by the City of Dallas (the "City").

3. The chief purpose of the defined benefit plan is to provide the City's police officers and firefighters with a monthly pension, known as "service retirement benefits," after they retire. These "service retirement benefits" are protected by the Constitution of the State of Texas ("Texas Constitution") and cannot be impaired or reduced.

4. The City's police officers' and firefighters' pensions are paid from the Pension System. Under the law, the Board has a ministerial duty to (1) hold the Pension System's assets in trust for the benefit of its members, pensioners, and their beneficiaries; and (2) manage the Pension System according to sound actuarial principles that do not impair or reduce state constitutionally protected benefits.

5. In performing these ministerial duties, the Board has a duty to ensure that programs, such as the Pension System's optional Deferred Retirement Option Plan

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[2] *See Dallas Cty. Loc. R.* 1.07(a).

[3] Pursuant to *Tex. R. Evid.* 201 & 202, Plaintiff requests that this Court take judicial notice of the pleadings and other documents on file in *Eddington*. *See also infra* notes 23–29, notes 32–36, and note 44. *Eddington* is currently on appeal in the Fifth Court of Appeals, Dallas, Texas (Case No. 05-15-00839-CV).

("DROP"), which is not a constitutionally protected benefit (or "benefit" at all), do not impair or reduce the Pension System's core constitutionally protected benefits, *e.g.*, service retirement benefits. The Board is willfully failing to perform these ministerial duties.

6. The Pension System, which the Board oversees, is in the midst of a financial crisis. In early 2016, the Board was warned by its own actuary that absent radical change, the Pension System would become insolvent within 15 years—irrevocably eradicating the constitutionally protected service retirement benefits (and other constitutionally protected benefits) of police and firefighter personnel of the City and their beneficiaries.

7. Critically, this 15-year projection of insolvency was based upon two overly optimistic assumptions that the Board has now known to be incorrect for several months. First, the actuary assumed that the Pension System's $2.7 billion in assets would remain stable, even though approximately 56% of these assets were composed of optional DROP funds, which have historically been permitted to be withdrawn in lump-sums upon demand (even though this option was used infrequently before this year). Second, the actuary assumed that the Pension System would achieve its targeted 7.25% return or more on its investments for the next 15 years.

8. Publication of this looming insolvency scenario prompted some DROP Participants to withdraw their DROP funds in lump-sum, which created a "snowball" effect, leading a staggering number of other DROP Participants to withdraw nearly $500 million in optional lump-sum DROP funds from the Pension System from August 13, 2016 to present. Over $80 million of these lump-sum DROP withdrawals have occurred within the first two weeks of November 2016 alone. Over this three-month time period, the Board has knowingly allowed DROP funds to continue to be withdrawn at record levels even

though it is aware that doing so is irreparably harming the Pension System's solvency and liquidity.

9. Lump-sum DROP withdrawals for 2016 are now on pace to be over 15 times higher than their historical average. This mass exodus of DROP funds amounts to a "run on the bank" and is exacerbating the financial peril of the Pension System as a whole—including the constitutionally protected benefits (*e.g.*, service retirement benefits) of active and retired police and firefighter personnel of the City and their beneficiaries.

10. Under the present actuarial and solvency position of the Pension System, every time a DROP withdrawal is made, every other member, pensioner, and beneficiary of the Pension System is being deprived of a constitutionally protected benefit, in favor of an optional program that does not even rise to the level of a benefit.

11. The Board has the power to limit the withdrawal of the constitutionally unprotected DROP funds so that the Pension System does not experience a massive liquidity event, which would accelerate the Pension System's descent into insolvency and further destroy its actuarial soundness. Despite this imminent danger, the Board has recklessly failed to take the required action to avoid this cataclysmic event.

12. Worse, instead of taking measures to restrict DROP withdrawals in order to safeguard the Pension System's constitutionally protected benefits, the Board has begun to cannibalize the Pension System's assets by liquidating its investments in order to fund continuing DROP withdrawals, even though these funds are secondary to the Pension System's core purpose, which is to provide a constitutionally protected monthly pension (*i.e.*, service retirement benefits). Doing so has further made the Pension System's targeted 7.25% return or more on its investments a near impossibility.

13. Already, DROP withdrawals have reduced the Pension System to no more than ten years of remaining solvency according to the Pension System's own actuary. If DROP withdrawals continue, they will further cripple the Pension System's ability to make state constitutionally protected benefit payments—including pension payments—to the detriment of *all* current and future retirees and their beneficiaries, including DROP Participants themselves. These DROP withdrawals will also undermine the ability of the Pension System to pay its employees, vendors, and creditors.

14. In sum, for the past several months the Board has been confronted with one clear-cut obligation: temporarily restrict DROP withdrawals until the Pension System is actuarially sound in order to safeguard the constitutionally protected benefits of the approximately 10,000 members, pensioners, and beneficiaries of the Pension System. The Board has inexplicably refused to perform this duty.

15. Instead, the Board has knowingly allowed DROP funds to continue to be withdrawn at record levels, cognizant that doing so is irreparably harming the Pension System's solvency and liquidity. As such, the Board is not (1) holding the assets of the Pension System in trust for the benefit of its members, pensioners, and their beneficiaries; or (2) managing the Pension System according to sound actuarial principles that do not impair or reduce state constitutionally protected benefits.

16. Therefore, mandamus is appropriate to compel the Board to comply with its ministerial duties—and to cease engaging in a clear abuse of discretion. Specifically, mandamus and injunctive relief are necessary to compel the Board to:

a. Hold the assets of the Pension System in trust for the benefit of its members, pensioners, and beneficiaries, by preserving the corpus of the Pension System instead of improperly providing preferential rights to DROP withdrawals, which are not constitutionally protected and do not even rise to the level of a "benefit," until such time as the Pension System is solvent, actuarially sound, and liquid.

b. Manage the Pension System according to sound actuarial principles that do not impair or reduce state constitutionally protected benefits, instead of knowingly depleting all of its cash and liquidating its hard assets for a small minority of its members, who are participants in a non-constitutionally protected program, and who would still have their DROP funds accruing interest at an above-market rate.

17. This request for mandamus and injunctive relief is extremely narrow in scope and is strictly limited to temporarily restricting all DROP withdrawals, which are not constitutionally protected. In no way does this action impair, reduce, or suspend any constitutionally protected benefits provided by the Pension System—including the payment of service retirement benefits (*i.e.*, monthly pensions) to DROP Participants.

18. Only through temporarily restricting all DROP withdrawals—as the Board should have already done—can the Pension System become stabilized in order to allow lawmakers, the City, and the Pension System to achieve a long-term solution to the Pension System's financial crisis. Absent doing so, no solution is possible.

III. DISCOVERY CONTROL PLAN

19. Plaintiff intends to conduct discovery under Level 3 of *Tex. R. Civ. P.* 190.4 and affirmatively pleads that this suit is not governed by the expedited actions process in *Tex. R. Civ. P.* 169.

IV. Claim For Relief

20. Plaintiff is not seeking any monetary relief in this action—only non-monetary relief.[4] Pursuant to *Tex. R. Civ. P.* 47, Plaintiff seeks monetary relief of $100,000 or less and non-monetary relief.

V. Parties

21. Plaintiff is an individual, a citizen and resident of Dallas County, Texas and he has standing to bring this action under Tex. Gov't Code Ann. § 802.003.

22. The Board is the governing body of the Pension System, a pension and retirement system for sworn employees of the police and fire-rescue departments of the City, and their beneficiaries, governed by Tex. Rev. Civ. Stat. Ann. art. 6243a-1, with its principal place of business located in Dallas County, Texas.

23. The Board may be served with citation by serving its Chairman of the Board, Samuel L. Friar ("Friar") at its home office of 4100 Harry Hines Boulevard, Suite 100, Dallas, Texas 75219, or wherever he may be found.

24. Similarly, the Pension System may be served with citation by serving its Chairman of the Board, Friar, or Executive Director, Kelly Gottschalk ("Gottschalk"), at its home office of 4100 Harry Hines Boulevard, Suite 100, Dallas, Texas 75219, or wherever either of them may be found.

VI. Jurisdiction And Venue

25. This Court has subject-matter jurisdiction over this lawsuit pursuant to Chapters 24 and 802 of the Texas Government Code and Article V, Section 8 of the Texas Constitution.[5]

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[4] To the extent required by *Tex. R. Civ. P.* 47, Plaintiff affirmatively pleads that he is seeking monetary relief of $100,000 or less (*i.e.*, no monetary relief in this action) and non-monetary relief.

26. The Board's immunity from suit is waived by TEX. GOV'T CODE ANN. § 802.003.

27. Venue is proper in Dallas County, Texas:

a. Under TEX. CIV. PRAC. & REM. CODE ANN. § 15.016 because a writ of mandamus is sought in Dallas County, Texas—*i.e.*, the county in which the Board and Pension System are located—seeking to compel the Board to protect its members, pensioners, and beneficiaries' protected benefits under the Texas Constitution;[6]

b. Under TEX. CIV. PRAC. & REM. CODE ANN. § 15.002(a)(1) because all or a substantial part of the events or omissions giving rise to the claims asserted herein occurred in Dallas County, Texas; and

c. Under TEX. CIV. PRAC. & REM. CODE ANN. § 15.002(a)(3) because the Board's and Pension System's principal office is located in Dallas County, Texas.

VII. FACTUAL BACKGROUND[7]

A. The Pension System Administers A Defined Benefit Plan

28. Like many other states, the State of Texas has created a series of defined benefit public retirement pension plans to attract and retain quality employees.

29. Local taxpayers contribute significantly each year to fund the two public retirement systems for City employees: (1) the Pension System, *i.e.*, a defined benefit plan

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[5] *See* Tex. Const. art. XI, § 5.

[6] *See* TEX. GOV'T CODE ANN. § 802.003.

[7] With respect to Plaintiff's application for injunctive relief, Plaintiff relies upon, adopts, and incorporates by reference as evidence in support of his application for injunctive relief the documents contained in his concurrently filed *Appendix in Support of Plaintiff's Emergency Application for Temporary Restraining Order and Request for Temporary and Permanent Injunction*. References to exhibits contained in this Appendix will be referred to by exhibit number as *TRO/TI App.*, Ex. ___.

for the City's sworn police officers and firefighters and their beneficiaries; and (2) the Employees' Retirement Fund, *i.e.*, a defined benefit plan for the City's civilian workers and their beneficiaries.[8]

30. The Pension System provides comprehensive retirement, death, and disability benefits for approximately 10,000 active and retired police officers and firefighters, and their beneficiaries. The Pension System is particularly important to these individuals because the City does not pay into Social Security. As such, many of the City's active and retired police officers and firefighters rely upon the Pension System as their chief—or even exclusive—source of retirement income.

31. The Pension System is governed by the Board.[9] Pursuant to the Pension System's Pension Plan Document ("Pension Plan"), the Board consists of twelve (12) trustees, composed of the following:

a. four (4) members of the City Council;

b. three (3) active members of the City's Police Department;

c. three (3) active members of the City's Fire-Rescue Department;

d. one (1) retiree from the City's Police Department; and

e. one (1) retiree from the City's Fire-Rescue Department.[10]

32. The City does not control the defined benefit plan for its police officers and firefighters. The defined benefit plan was created by the Texas Legislature through

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[8] The TEXAS GOVERNMENT CODE defines "public retirement system" to mean "a continuing, organized program of service retirement, disability retirement, or death benefits for officers or employees of the state or a political subdivision, or of an agency or instrumentality of the state or a political subdivision . . . ." TEX. GOV'T CODE ANN. § 802.001(3).

[9] *See TRO/TI App.*, Ex. 2, § 3.01(a); *see also* Tex. Rev. Civ. Stat. Ann. art. 6243a-1 § 3.01.

[10] *See TRO/TI App.*, Ex. 2, § 3.01(b); *see also* Tex. Rev. Civ. Stat. Ann. art. 6243a-1 § 3.01.

enactment of Article 6243a-1.[11] Generally speaking, Article 6243a-1 allows Members to amend any part of the defined benefit plan aside from the contribution caps for the City.[12]

B. The Defined Benefit Plan Is Controlled By The Pension Plan

33. The defined benefit plan is governed by the Pension System's Pension Plan.[13] As expressly listed in Part 6 "Benefits" of the Pension Plan, the Pension Plan provides for (1) monthly payments to eligible retirees; (2) monthly disability benefits; (3) monthly and sometimes lump sum death benefits; and (4) optional enrollment in DROP for eligible members.[14]

34. Once a person becomes employed by the City as a police officer or firefighter, that person automatically becomes a "Member" of the Pension Plan.[15]

35. Members of the Pension Plan accrue or earn a portion of their defined benefit plan each year pursuant to a formula. The accrued monthly annuity benefit is calculated under a three-part formula: A (Length of Service) x B (Average Computation Pay) x C (multiplier) = $ monthly accrued benefit.

36. Members currently become eligible to retire after attaining both a length of service and age (early at age 45 or normal at age 50[16]), but may continue working after becoming eligible to retire. Members are also eligible to retire after 20 or more years of service, regardless of age.[17]

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[11] *See* Tex. Rev. Civ. Stat. Ann. art. 6243a-1.
[12] *Id.* § 7.01.
[13] *See generally TRO/TI App.*, Ex. 2.
[14] *See TRO/TI App.*, Ex. 2, §§ 6.01–.21; *see also* Tex. Rev. Civ. Stat. Ann. art. 6243a-1 §§ 6.01–.19.
[15] *See TRO/TI App.*, Ex. 2, § 2.01(30); *see also* Tex. Rev. Civ. Stat. Ann. art. 6243a-1 § 2.01(30).
[16] Members hired before March 1, 2011 can retire at the earlier of 20 years of service or age 50. *See TRO/TI App.*, Ex. 2, § 6.21. Members hired on or after March 1, 2011 cannot retire until age 55. *See TRO/TI App.*, Ex. 2, § 6.21.
[17] *See TRO/TI App.*, Ex. 2, § 6.01.

37. If a Member continues working after becoming eligible to retire, the Member has the choice of (1) continuing to accrue additional pension benefits and deferring commencement of monthly pension benefits until retirement; or (2) entering DROP and having an amount equal to the monthly pension benefit he could have received, if he had retired, credited each month to his DROP account.

38. If the Member elects DROP and continues working, he continues to receive his regular paycheck. Furthermore, if the Member elects DROP and continues working—instead of receiving a monthly pension—an amount equal to his monthly pension is credited to his DROP account.[18]

39. Currently, the Pension Plan's DROP provisions also allow a retiree, known as a "Pensioner,"[19] to have his monthly pension credited to his DROP account up to age 70½, even though he has retired—and even though he has left active service with the City.

40. While some DROP Participants have amassed a small fortune under the DROP program, for the vast majority of DROP Participants, their constitutionally protected service retirements benefits are significantly greater than the value of their DROP accounts.

C. DROP Is Not Constitutionally Protected—Only Certain Benefits In the Pension Plan Are Constitutionally Protected

41. Under the Texas Constitution, three categories of pension benefits are constitutionally protected: (1) service retirement benefits;[20] (2) disability retirement benefits; and (3) death benefits.[21]

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[18] The Pension System's DROP Policy permits DROP funds to be withdrawn in any of the following three forms: (1) a lump-sum distribution of some or all of the amount of the DROP account credited to the DROP Participant; (2) substantially equal payments made for a specific period of time; or (3) regular installment amounts added to the monthly benefit payment. *See TRO/TI App.*, Ex. 3, Part E.3. Under the present actuarial and solvency position of the Pension System, all three distribution options are currently harmful to the Pension System's solvency and liquidity.

[19] A "Pensioner" means a former Member of the Pension System who is on either a Service or Disability Retirement. *See TRO/TI App.*, Ex. 2, § 2.01(33); *see also* Tex. Rev. Civ. Stat. Ann. art. 6243a-1 § 2.01(33).

42. Under the Texas Constitution, the Board is prohibited from taking any action—or inaction—that would reduce or impair these three categories of constitutionally protected benefits.[22]

43. DROP and DROP-related benefits (*i.e.*, above-market interest rates and withdrawal options) do not fall under the umbrella of any of these three categories of constitutionally protected benefits. As such, DROP and DROP-related benefits are not constitutionally protected.

44. The Board has repeatedly espoused this exact position. In *Eddington*, the Board repeatedly represented that DROP and DROP-related benefits are not constitutionally protected:

a. **December 22, 2014** – "DROP is not a 'benefit' within the scope of Article XVI, Section 66."[23]

b. **January 12, 2015** – "DROP is not a constitutionally protected 'benefit.'"[24]

c. **February 2, 2015** – "DROP is not a constitutionally protected 'benefit.'"[25]

d. **February 3, 2015** – "DROP and DROP-related interest and withdrawal options—are not service retirement benefits and thus fall outside the bounds of the constitutional provision."[26]

e. **March 3, 2015** – "DROP is not a constitutionally protected benefit."[27]

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[20] The term "service retirement benefits" means monthly pension annuities such as those described in Section 6.01 (Group A Retirement Pension) and Section 6.02 (Group B Retirement Pension) of the Pension Plan. The term "service retirement benefits" does not encompass all benefits related to service and/or retirement, and, more specifically, the term does not include DROP or any DROP-related benefits. *See TRO/TI App.*, Ex. 2, §§ 6.01–.02; *see also* Tex. Rev. Civ. Stat. Ann. art. 6243a-1 §§ 6.01–.02.
[21] *See* Tex. Const. art. XVI, § 66.
[22] *See* Tex. Const. art. XVI, § 66.
[23] *See TRO/TI App.*, Ex. 31, *Eddington*, Defs.' Bench Brief, p. 3 (Dec. 22, 2014).
[24] *See TRO/TI App.*, Ex. 32, *Eddington*, Defs.' Req. Addt'l Findings Fact & Concl. Law, p. 11 (Jan. 12, 2015).
[25] *See TRO/TI App.*, Ex. 33, *Eddington*, Defs.' 2d Req. Addt'l Findings Fact & Concl. Law, p. 16 (Feb. 2, 2015).
[26] *See TRO/TI App.*, Ex. 34, *Eddington*, Defs.' Mot. Recons., pp. 5–6 (Feb. 3, 2015) (internal footnote omitted).

f. **June 9, 2015** – "Because DROP and DROP interest are not 'service retirement benefits,['] Section 66 does not apply."[28]

45. The Court, in *Eddington*, reaffirmed this principle. Specifically, on May 11, 2015, the 116th Judicial District Court of Dallas County held, under the TEXAS UNIFORM DECLARATORY JUDGMENTS ACT, that DROP and DROP-related benefits are not constitutionally protected. In so finding, the Court stated:

> Article 16, § 66 applies to three categories of benefits (i) service retirement benefits; (ii) disability retirement benefits; and (iii) death benefits. Only service retirement benefits are at issue here.
>
> The term "service retirement benefits" means monthly pension annuities such as those described in Section 6.01 (Group A Retirement Pension) and Section 6.02 Group B Retirement Pension) of the Pension Plan.
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> The term "service retirement benefits" does not encompass all benefits related to service and/or retirement, and, more specifically, the term does not include DROP or any DROP-related benefits. . . . In this regard the Court also notes that (i) DROP and DROP interest are not a part of the monthly pension annuities available under the Pension Plan and Statute, and (ii) DROP and DROP interest are not a part of the monthly annuity formula.
>
> . . .
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> Accordingly, **the benefits that Plaintiffs claim are improperly reduced or otherwise impaired are not constitutionally protected benefits**.[29]

46. *Eddington* is significant for two reasons. First, *Eddington* reaffirmed that DROP and DROP-related benefits are not constitutionally protected. Because DROP and DROP-related benefits are not constitutionally protected, they are secondary to constitutionally protected benefits (*e.g.*, service retirement benefits) and cannot impair *any* Member's, Pensioner's, or Beneficiary's constitutionally protected benefits. Second,

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[27] *See TRO/TI App.*, Ex. 35, *Eddington*, Reply Support Defs.' Mot. Recons., p. 1 (Mar. 3, 2015).
[28] *See TRO/TI App.*, Ex. 37, *Eddington*, Defs.' Resp. Pl.'s Mot. New Trial, p. 4 (June 9, 2015).
[29] *See TRO/TI App.*, Ex. 36, *Eddington*, Ct.'s Findings Fact & Concl. Law, pp. 7–8 (May 11, 2015) (emphasis added).

Eddington demonstrates that the Board is plainly aware of the distinction between benefits/programs that are—and are not—constitutionally protected.

47. As a result of *Eddington*, the Board is judicially[30] and collaterally[31] estopped from attempting to claim that DROP and DROP-related benefits are protectable under the Texas Constitution.

D. DROP Is Merely A Program—DROP Participants Do Not Have Any Immutable Right To Lump-Sum DROP Distributions

48. The Board has made clear that DROP is not even an ***unprotected*** benefit; rather, it is an optional program: "DROP is an optional mechanism to account for accrued pension benefits."[32]

49. As stated by the Board, "[t]he Plan and statutory DROP provisions further distinguish between DROP and the core retirement pension and reinforce that the DROP account is a record-keeping device tracking the member's deferred retirement pension."[33]

50. Under this optional program, a lump-sum distribution of all DROP funds is merely one form of payment of accrued pension benefits. Just as DROP is not constitutionally protected, DROP Participants do not have any constitutional right to a lump-sum withdrawal of DROP funds.

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[30] The Board's statements in *Eddington* are clear, deliberate, and unequivocal and were repeatedly asserted within a series of separate filings. As such, Plaintiff invokes the doctrine of judicial estoppel, under which the Board is judicially estopped from taking a contrary position in this lawsuit based on justice and sound public policy. *See, e.g.*, *Pleasant Glade Assembly of God v. Schubert*, 264 S.W.3d 1, 6 (Tex. 2008).

[31] Plaintiff also invokes the doctrine of collateral estoppel, under which the Board is collaterally estopped from attempting to re-litigate state constitutional issues regarding DROP. *See, e.g.*, *Valley Intern. Props., Inc. v. Brownsville Sav. & Loan Ass'n*, 581 S.W.2d 222, 226 (Tex. App.—Corpus Christi 1979, ("[T]he general rule is that collateral estoppel also operates to prevent a question of law or an issue of fact which has once been litigated and adjudicated in a court of competent jurisdiction from being relitigated in a subsequent suit between the same parties or those in privity with them.").

[32] *See TRO/TI App.*, Ex. 33, *Eddington*, Defs.' 2d Req. Addt'l Findings Fact & Concl. Law, p. 8 (Feb. 2, 2015).

[33] *See TRO/TI App.*, Ex. 34, *Eddington*, Defs.' Mot. Recons., p. 8 (Feb. 3, 2015).

51. Again, the Board has repeatedly espoused this exact position. In *Eddington*, the Board repeatedly represented that the withdrawal options contemplated in DROP are not a protected benefit:

a. **January 12, 2015** – "Because Drop itself is not a constitutionally protected 'benefit' under Section 66, interest on DROP accounts that the Fund might elect to pay or **withdrawal rights that the Fund might elect to provide** are likewise not constitutionally protected 'benefits.'"[34]

b. **February 2, 2015** – "[DROP Participants] do not have rights to prospective interest **or future withdrawal options** because these are not 'benefits accrued[.]'"[35]

c. **February 3, 2016** – "At most, the claim to future interest is a claim to unaccrued interest, which is not protected by Section(d). **The same is true for future DROP withdrawal options**."[36]

52. Similar to above, as a result of *Eddington*, the Board is judicially estopped from claiming that it is obligated to make lump-sum distributions to DROP Participants upon request.[37]

53. Because DROP Participants do not have any right to a lump-sum withdrawal of DROP funds, this method of payment may ***only*** be used when the Pension System is solvent, liquid, and actuarially sound.[38]

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[34] *See TRO/TI App.*, Ex. 32, *Eddington*, Defs.' Req. Addt'l Findings Fact & Concl. Law, p. 12 (Jan. 12, 2015) (emphasis added).
[35] *See TRO/TI App.*, Ex. 33, *Eddington*, Defs.' 2d Req. Addt'l Findings Fact & Concl. Law, p. 8 (Feb. 2, 2015) (emphasis added).
[36] *See TRO/TI App.*, Ex. 34, *Eddington*, Defs.' Mot. Recons., p. 12 (Feb. 3, 2015) (emphasis added).
[37] *See supra* note 30.
[38] *See infra* Section VII(f).

54. As discussed below, given the present solvency and actuarial position of the Pension System, lump-sum distributions are impermissible. There is absolutely no discretion to make lump-sum DROP distributions when the Pension System is facing insolvency, illiquidity, and is not actuarially sound. There is no discretion because doing so would reduce and otherwise impair constitutionally protected benefits accrued (*e.g.*, service retirement benefits) by the Pension System's Members, Pensioners, and Beneficiaries.

55. Separately, under the present actuarial and solvency position of the Pension System, DROP Participants financially harm themselves each time they make a DROP withdrawal because doing so further depletes the corpus of the Pension System's assets at the expense of constitutionally protected benefits— including the payment of service retirement benefits (*i.e.*, monthly pensions) to DROP Participants themselves.

E. Historically, As An Unprotected Program, Most Members Have Never Valued Or Exercised The Option To Request Lump-Sum DROP Distributions

56. Historically, an extremely small percentage of DROP Participants have exercised the option to request lump-sum DROP distributions. Between 1999 and 2015, the Pension System processed approximately $321.6 million in lump-sum DROP withdrawal requests, *i.e.*, an average of $18.9 million a year.[39]

57. Earlier this year, the Pension System conducted a Member Survey to analyze Members' and Pensioners' opinions on certain Pension Plan items, including the optional DROP program.[40] When asked what DROP features were most important, only 8% of Active DROP Participants and 9% of Retirees stated "timeliness and frequency of accessing my money" were most important:[41]

[39] *See TRO/TI App.*, Ex. 15-10.
[40] *See TRO/TI App.*, Ex. 16.
[41] *Id.* at 4.

11. Which of the following DROP features are most important to you?

	Active DROP	Tier 1	Tier 2	Tier 3	Retiree	Disabled
a. Ability to keep my money in DPFP after retirement	12%	16%	14%	16%	15%	7%
	76	86	30	21	183	2
b. Interest rate earned on my DROP balance while in Active DROP prior to retirement	35%	47%	48%	45%	4%	3%
	233	247	104	60	43	1
c. Interest rate earned on my DROP balance after retirement	43%	19%	21%	18%	45%	13%
	280	101	46	24	548	4
d. Timeliness and frequency of accessing my money in DROP	8%	14%	13%	16%	9%	7%
	52	71	28	21	105	2

F. The Board Has Specific Ministerial Duties Under The Texas Constitution And The TEXAS GOVERNMENT CODE

58. Under the Texas Constitution, the Pension System must be managed according to sound actuarial principals for the benefit of *all* Members, Pensioners, and their Beneficiaries.[42]

59. In furtherance of safeguarding this constitutional right, the TEXAS GOVERNMENT CODE imposes a ministerial duty upon the Board to hold the assets of the Pension System in trust for the benefit of its Members, Pensioners, and their Beneficiaries.[43]

60. The Board acknowledged this ministerial duty in *Eddington*, when it explained that it has a fiduciary duty to manage the Pension System for the greater good of *all* Members, Pensioners, and their Beneficiaries, rather than in a manner that may only benefit a select few:

> . . . [The Board's] fiduciary duty is not only to the three [DROP Participants], but also to the System and the 9,300 Members, pensioners and beneficiaries [of the Pension System]. **[The Board has] no fiduciary duty to risk the future benefits of the 9,300 other Members, pensioners and beneficiaries in order to afford the three [DROP Participants] a low-risk opportunity** to earn

[42] *See* Tex. Const. art. XVI, § 67(a)(1).
[43] *See* TEX. GOV'T CODE ANN. § 802.201.

> above-market interest on the pension payments they are voluntarily deferring.[44]

61. Separate from the Board's ministerial duty to hold the assets of the Pension System in trust for the benefit of its Plan Members, Pensioners, and their Beneficiaries, it also has an obligation to manage the Pension System according to sound actuarial principles that do not reduce or otherwise impair the constitutionally protected benefits of its Members, Pensioners, and their Beneficiaries.[45] As such, the Board is required to safeguard these constitutionally protected benefits above all else (*e.g.*, DROP).

62. Even the Chairman of the Board has specifically admitted it is bound by this constitutional requirement:

> Additionally, **we are fulfilling our obligation under the Texas Constitution to do what is in our power to avoid having the protected benefits of our members impaired or reduced**.[46]

63. While the Board utilizes professional advisors in ensuring the Pension System is managed according to sound actuarial principles, the Board has the ultimate responsibility for the administration and investment of the Pension System's assets, which are held in trust for the benefit of its Members, Pensioners, and their Beneficiaries.[47] The Board's apex of responsibility is reflected in the administrative hierarchy of the Pension System:

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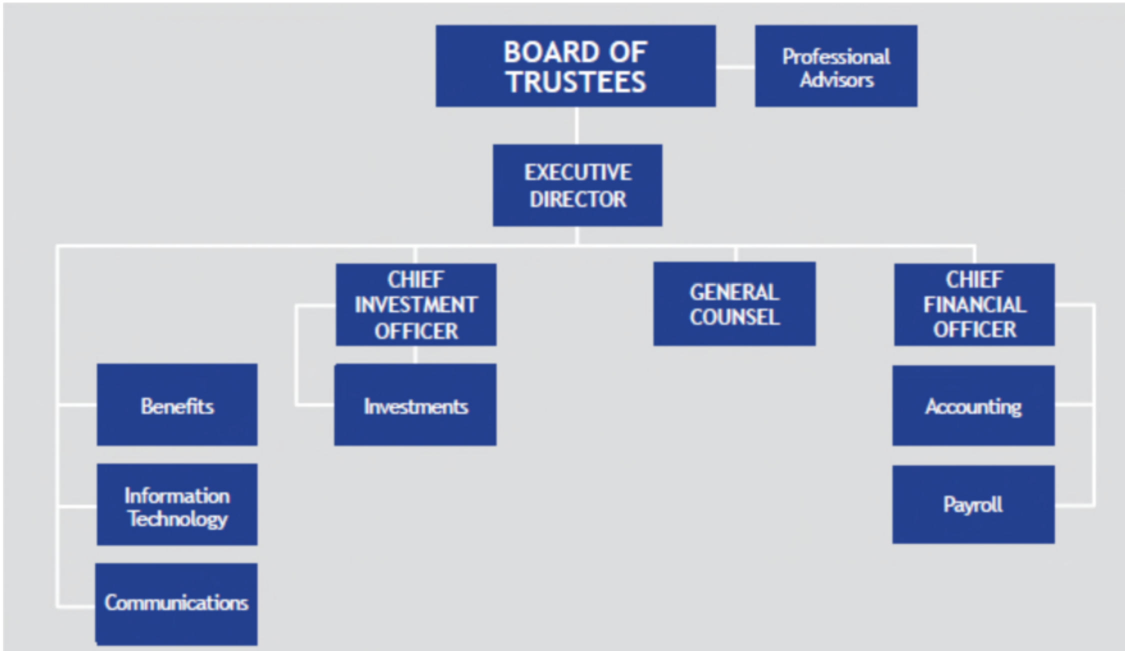
[44] *See TRO/TI App.*, Ex. 30, *Eddington*, Defs.' Brief Opp. Pls.' App. TI, p. 17 (Nov. 13, 2014) (emphasis added).
[45] *See* Tex. Const. art. XVI, § 66(f); Tex. Const. art. XVI, § 67(a)(1).
[46] *See TRO/TI App.*, Ex. 12, p. 1.
[47] *See* Tex. Rev. Civ. Stat. Ann. art. 6243a-1 § 6.14(k).

Pension System Hierarchy[48]



G. As With Every Municipal Public Pension In Texas, The City Has Statutory And Financial Constraints On How Much It Can Contribute To The Pension System Each Year

64. The City is the Plan Sponsor of the Pension System's defined benefit plan and is required to make contributions to the Pension System for the benefit of the City's police officers and firefighters, as their employer.[49] As with most public pension plans, Active Members contribute a percentage of their computation pay to the Pension System. Local taxpayers make the remaining direct contributions to the Pension System in an amount exceeding the contributions of the City's police officers and firefighters.

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[48] *See TRO/TI App.*, Ex. 5, p. 10.

[49] *See TRO/TI App.*, Ex. 2, § 4.02; *see also* Tex. Rev. Civ. Stat. Ann. art. 6243a-1 § 4.02. "Funds contributed by the city as its share of the amount required to finance the payment of benefits under the pension system **may be used for no other purpose**." *Id.* § 4.02(b) (emphasis added); *see also* Tex. Rev. Civ. Stat. Ann. art. 6243a-1 § 4.02(b). As discussed below, it is highly questionable whether the City's (*i.e.*, taxpayers') funds are being used by the Board "for no other purpose" than for the benefit of its Members, Pensioners, and their Beneficiaries. *See infra* § VII.P. In this regard the City is not required to put money into a system that is to be wasted on the DROP lump-sum withdrawal —which is not constitutionally protected, and which as its name suggests, *i.e.*, "plan," is strictly a program, not a benefit—at a time that the Pension System is not actuarially sound. *See id.*

65. The City currently contributes 27.5% of total pay per year to the Pension System, which is statutorily tied to the Active Members' contribution rate.[50] This contribution represents almost 10% of the City's annual General Fund Budget—an amount greater than approximately $120 million every year.[51]

66. To date, the City has never missed or failed to pay a single contribution payment to the Pension System.

67. If Active Members elect to increase their contribution rate to 9% of computation pay, the City will automatically increase its contribution to 28.5% of total pay per year, which is the highest rate of contribution permitted by statute.[52]

68. While there have been discussions about legislatively modifying the contribution caps in order to allow the City to legally contribute more annually, the City has its own financial constraints as to how much it can contribute, which has been exacerbated by the unrestrained over-withdrawal of DROP funds.

H. As With Every Public Pension, Contributions From the Pension System's Net Investment Earnings Are Essential To Its Actuarial Soundness And Ability To Provide Constitutionally Protected Benefits

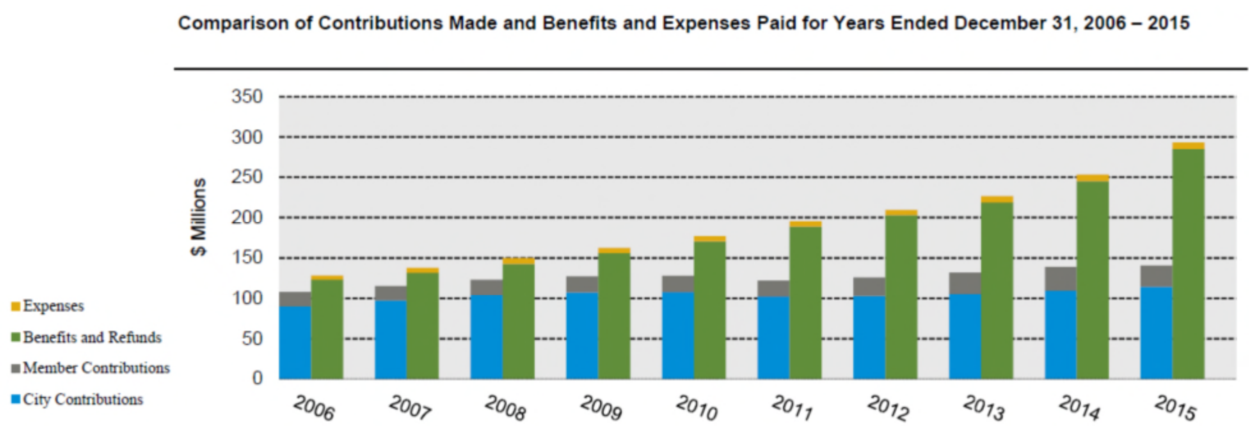
69. Ultimately, no public pension plan can continue in perpetuity based exclusively on member and municipal-employer, *i.e.*, taxpayer contributions.

70. Rather, as with every public pension, the Pension System's ability to continue to fund constitutionally protected pensions is largely supplemented by its net investment

[50] *See* Tex. Rev. Civ. Stat. Ann. art. 6243a-1 § 4.02(d).
[51] Over 50% of the City's annual General Budget is appropriated to its uniformed police and firefighter personnel. *See TRO/TI App.*, Ex. 15-1, p. 1.
[52] *See* Tex. Rev. Civ. Stat. Ann. art. 6243a-1 § 4.02(d). In anticipation of contributing to the highest extent permitted by statute, the City has already budgeted for a 28.5% contribution this year. *See TRO/TI App.*, Ex. 15-13, p. 2.

earnings (*i.e.*, ability to generate yield). Indeed, this is evidenced by the fact that the payment of benefits has always exceeded contributions per annum:

Contributions vs. Benefits[53]



71. Historically, the Pension System has had a large portfolio of assets to invest, which has resulted in a sizable nine-figure net gain in any year in which the Pension System makes its targeted 7.25% return or more on its investments.[54]

72. However, a series of reckless investment decisions by the Pension System's former leadership led to a $1 billion investment shortfall at the beginning of 2016 and hundreds of millions of dollars in asset devaluations.[55] This has resulted in the portfolio size of the Pension System significantly shrinking, which now leads to significantly diminished net returns on its investment portfolio.

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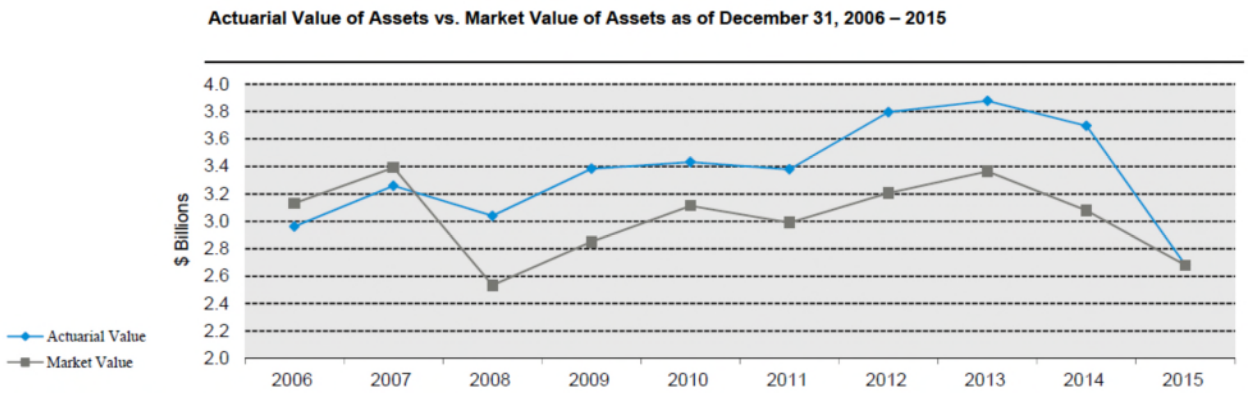
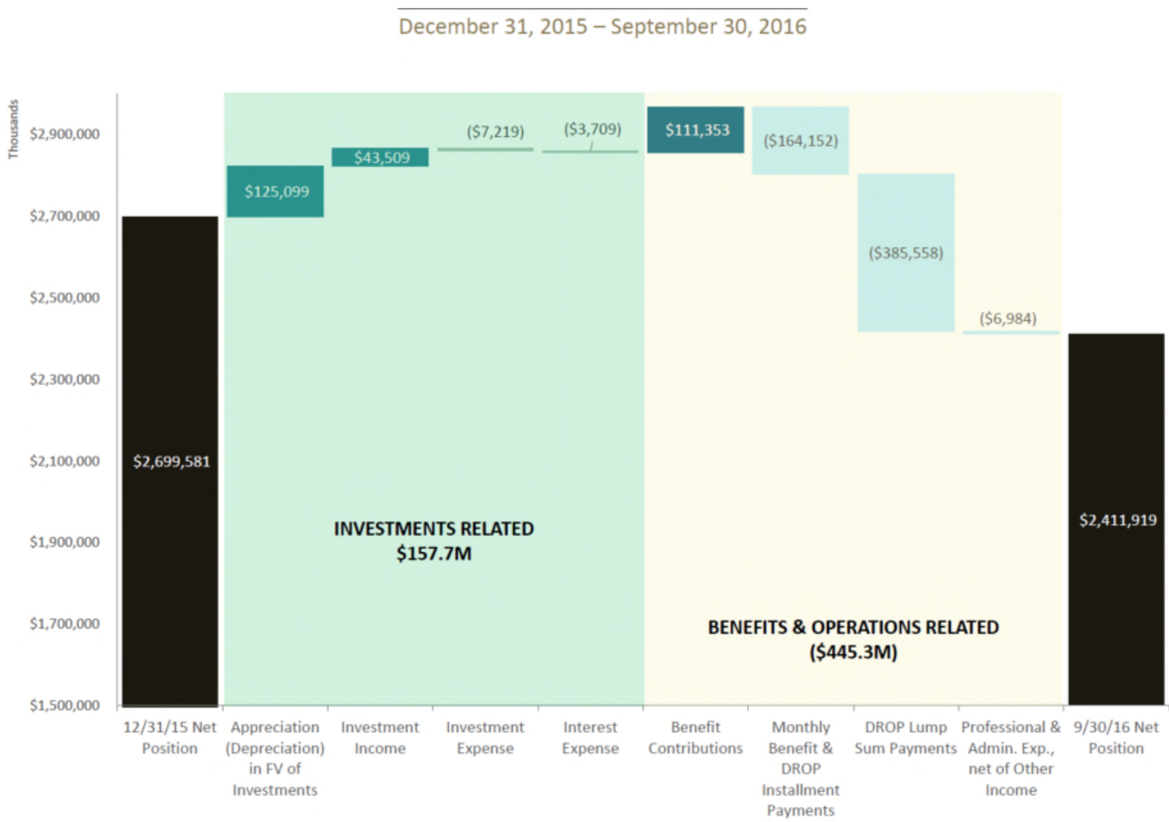
[53] *See TRO/TI App.*, Ex. 6, p. 4.
[54] *See TRO/TI App.*, Ex. 2, p. iii.
[55] *See TRO/TI App.*, Ex. 5, p. 5. In July 2015, the Board's actuarial consultant first concluded that the Pension System is on the path to insolvency. *Id.* This was later confirmed by the 2016 Actuarial Valuation. *See TRO/TI App.*, Ex. 6, p. ii. The outlook was based on a recent reduction in the valuation of certain real estate and private equity investments and recognition that the investment portfolio was not expected to earn the rate of return previously projected. *Id.*

Pension System's Diminishing Assets[56]



73. If the continued erosion of the corpus of the Pension System is permitted, this will further minimize the Pension System's already diminished returns, resulting in further irreparable harm to the Pension System.

Pension System's Change In Net Fiduciary Position[57]



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[56] *See TRO/TI App.*, Ex. 6, p. 6.
[57] *See TRO/TI App.*, Ex. 10, p. 94. Note over $385 million in lump-sum withdrawals made in a nine-month period, as the net position of the Pension System fell almost $300 million. *Id.*

I. In Early 2016, The Board Was Warned By Its Own Actuary That The Pension System Was On The Precipice Of Insolvency And That This Would Accelerate If DROP Funds Are Over-Withdrawn

74. Notwithstanding the contributions by Members and the City, the solvency of the Pension System is in serious financial jeopardy. In early 2016, an actuarial valuation of the Pension System was conducted by the Board's actuary (the "2016 Actuarial Valuation"). The Pension System's own actuary stated at the time that the Pension System is projected to become insolvent within 15 years if meaningful changes are not implemented:

> The current contribution rates are not sufficient to fund the System over a finite period. In fact, **the System is projected to become insolvent within 15 years if no changes to plan provisions or contribution rates are made** and all assumptions are met in the aggregate.[58]

75. This projection of insolvency was premised upon the actuary's conservative—and as the Board now knows, incorrect—assumption that DROP Participants would draw down their DROP accounts over a ten-year period following their retirement:

> Members who retired prior to January 1, 2015 are assumed to receive their DROP payments over a ten-year period from January 1, 2015. All future retirees who retire with a DROP account are **assumed to receive their DROP account over a ten-year period from their retirement date**.[59]

76. Critically, the Pension System's actuary warned, in early 2016, that the Pension System would become insolvent even sooner if DROP funds are drawn down in less than a ten-year period:

> The market value of assets as of the valuation date is $2.680 billion, based on unaudited financial statements. It should be noted that DROP account balances as reported for valuation purposes account for $1.505 billion (56.1%). It is assumed that participants will draw down these balances over a ten-year period. **The System's solvency will be significantly impacted if these funds are withdrawn more quickly**.[60]

[58] *See TRO/TI App.*, Ex. 6, p. ii (emphasis added).
[59] *See TRO/TI App.*, Ex. 6, p. 34.
[60] *See TRO/TI App.*, Ex. 6, p. ii (emphasis added).

77. Yet, far worse has happened. The Pension System has paid out nearly $500 million in lump-sum DROP distributions over a matter of months, which is drastically different from the actuary's original overly optimistic assumption that DROP funds would be drawn down in a stable manner over a 10-year period following DROP Participants' retirement.

78. In fact, by October 2016, the Pension System's solvency was already reduced to just ten years according to its own actuary:

> The fund consulting actuary did say if nothing changes, the fund is now set to be insolvent in just 10 years.[61]

79. This one-third reduction of the life expectancy of the Pension System occurred over a period of mere months as a direct result of the Board's refusal to perform its ministerial duties.

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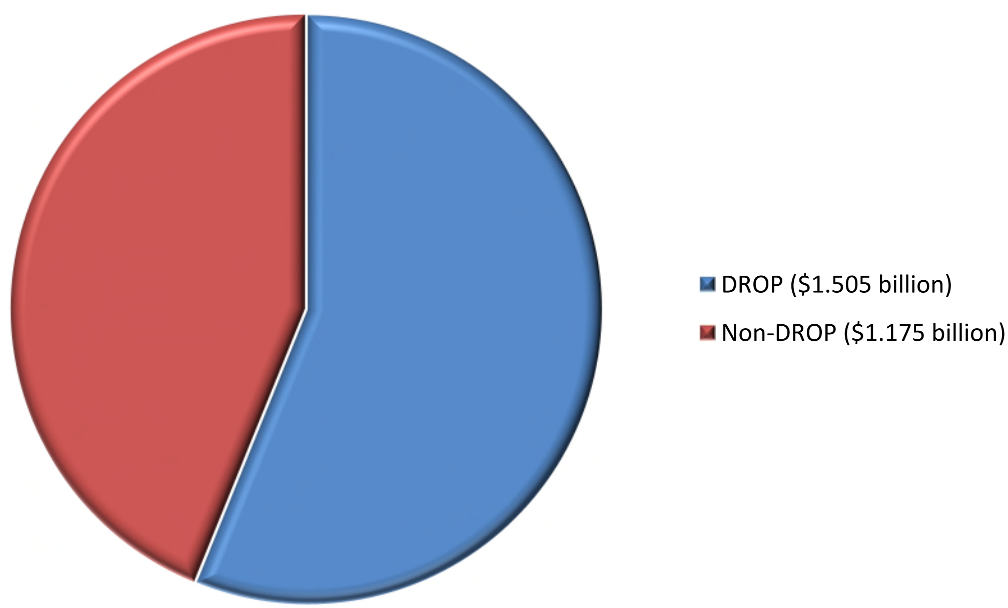
[61] *See TRO/TI App.*, Ex. 37, *Dallas Police and Fire Pension Fund Could Be Out of Cash By January*, FOX 4 NEWS (Oct. 13, 2016), http://www.fox4news.com/news/211451491-story.

K. As Warned, The Over-Withdrawal Of DROP Funds Is Irreparably Harming The Pension System's Solvency And Liquidity, Thereby Unlawfully Impairing And Reducing Constitutionally Protected Benefits

80. Actuaries generally consider the financial wellbeing of a public pension to be in danger if its funding ratio is less than 80%.[62] At 2015 year-end, the Pension System had approximately $3.27 billion in unfunded liabilities and less than $2.7 billion in assets—a funding ratio of 45%.

2015 Year-End Pension System Assets ($2.68B)[63]



[62] *See, e.g.*, *TRO/TI App.*, Ex. 38, U.S. GOV'T ACCOUNTABILITY OFFICE, *State and Local Government Retiree Benefits—Current Status of Benefit Structures, Protections, and Fiscal Outlook for Funding Future Costs* (Sept. 2007), *available at* http://www/gao.gov/assets/270/267150.pdf ("A funded ratio of 80% or more is within the range that many public sector experts, union officials, and advocates view as a healthy pension system."); BLOOMBERG, "Texas Teacher Pension Needs 21% Return to Keep 80% Funded Ratio" (Apr. 19, 2011), *available at* http://www.bloomberg.com/news/articles/2011-04-19/texas-teacher-pension-needs-21-return-to-keep-80funded-ratio ("The Teacher Retirement System in Texas needs an annual return of 21% in the year ending Aug. 31 to maintain an 80% funded ratio, the level actuaries consider adequate to cover liabilities, said its deputy director."). Recently, commentators have begun to question whether a funding ratio of 80% is even actuarially sound. For example, the Government Finance Officers Association recommends that public officials and associated trustees should, at a minimum, adopt a funding policy with a target funded ratio of 100% or more." *See TRO/TI App.*, Ex. 40, GOV'T FIN. OFFICERS ASS'N, *Sustainable Funding Practices for Defined Benefit Pensions and Other Postemployment Benefits* (Jan. 2016), *available at* http://www.gfoa.org/sustainable-funding-practices-defined-benefit-pensions-and-other-postemployment-benefits-opeb.

[63] This pie chart is a compilation of the data that is recorded in *TRO/TI App.*, Ex. 6, p iii.

81. Worse, more than 50% of the Pension System's total remaining assets were attributable to DROP accounts. Specifically, as of December 31, 2015:

a. The Pension System had $2.7 billion in assets, $1.5 billion of which was composed of DROP funds.[64]

b. The Pension System had 5,415 Members, 1,338 of whom were DROP Participants, with an aggregate of $474.3 million in DROP funds.[65]

c. The Pension System had 3,115 Pensioners, who had an aggregate of $986.5 million in DROP funds.[66]

d. The Pension System had 1,115 Beneficiaries, who had an aggregate of $34.4 million in DROP funds.[67]

82. These statistics make the Pension System extremely volatile because (1) Members enrolled in DROP are eligible to retire at any time; and (2) the DROP Policy allows Pensioners to elect a single-sum distribution of *all* DROP funds on demand, which are paid out weekly.[68] Consequently, as of December 31, 2015, over 50% of the Pension System's assets were contingent liabilities.

83. These ratios have not improved. As of November 10, 2016, the Pension System now has less than $2.2 billion in assets and its unfunded liabilities have not improved.

84. Of these remaining assets, approximately 50% is attributable to DROP funds. Specifically, as of November 10, 2016:

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[64] *See TRO/TI App.*, Ex. 6, p. ii.
[65] *See TRO/TI App.*, Ex. 6, p. 14.
[66] *See TRO/TI App.*, Ex. 6, p. 15.
[67] *See TRO/TI App.*, Ex. 6, p. 15.
[68] *See TRO/TI App.*, Ex. 3, Part E.3.

a. The Pension System now has approximately $2.2 billion in assets, $1.1 billion of which is composed of DROP funds.[69]

b. The Pension System now has 1,122 Members, with an aggregate of $397.1 million in DROP funds.[70]

c. The Pension System now has 1,945 Pensioners, who have an aggregate of $682.6 million in DROP funds.[71]

d. The Pension System now has 7 remaining DROP accounts with over $3 million in DROP funds.[72]

e. The Pension System now has 39 remaining DROP accounts with over $2 million in DROP funds.[73]

f. The Pension System now has 517 remaining DROP accounts with over $1 million in DROP funds.[74]

85. Following the release of the 2016 Actuarial Valuation in July 2016, from August 13, 2016 through November 10, 2016, amid concerns about the Pension System's solvency, DROP Participants withdrew $474 million from DROP. Specifically, from September 23, 2016 through November 10, 2016:

a. There were 74 lump-sum DROP withdrawals for more than $1 million.[75]

b. There were 261 lump-sum DROP withdrawals for over $500,000.[76]

c. There were an additional 960 lump-sum DROP withdrawals for varying amounts under $500,000.[77]

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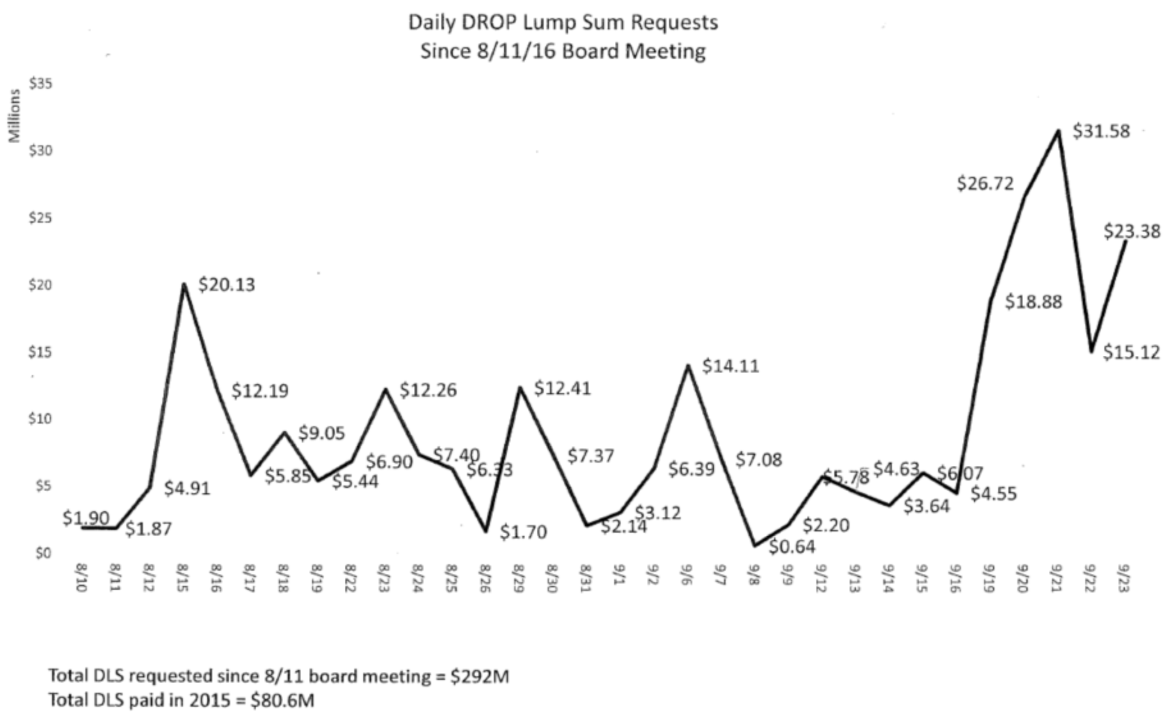
[69] *See TRO/TRO App.*, Ex. 15-14.
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *See TRO/TI App.*, Ex. 15-2.
[76] *See id.*

<u>Lump-Sum DROP Distributions</u>[78]



86. In total, DROP Participants have already withdrawn over $568 million in lump-sum DROP funds in this year alone. This is a <u>1,115% increase in lump-sum DROP withdrawals</u> from the $46.7 million that has historically been withdrawn from DROP within this timeframe[79] and is <u>radically worse that the 10-year DROP withdrawal assumption that was made in the 2016 Actuarial Valuation</u>.

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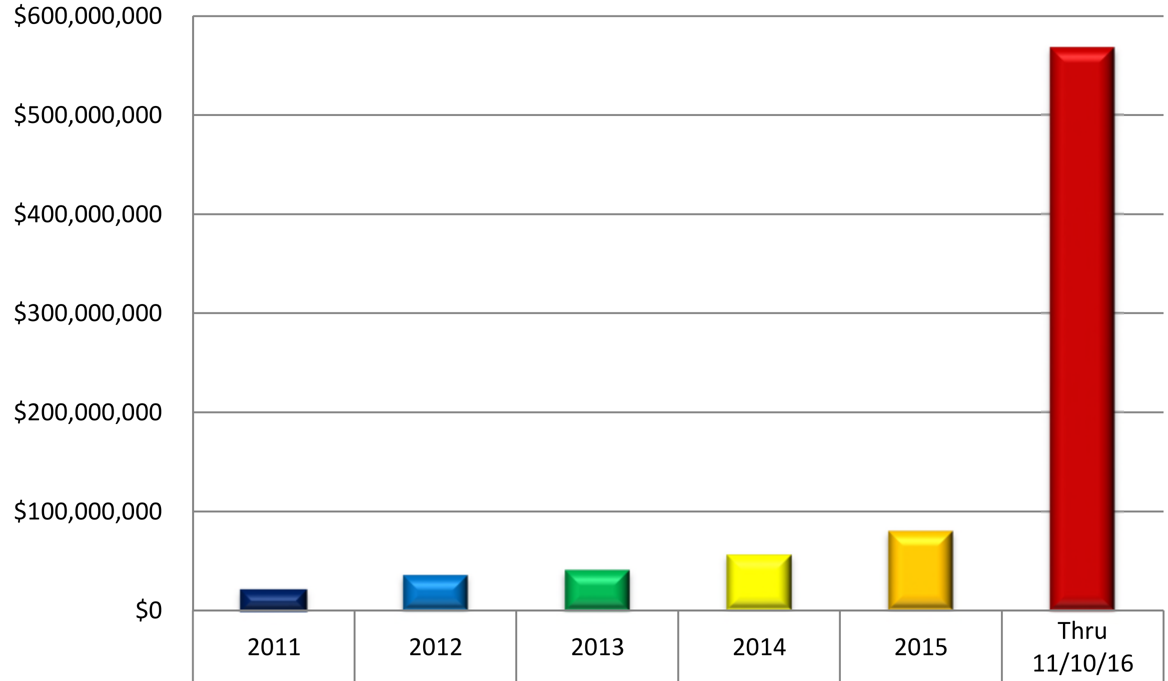
[77] *See id.*
[78] *See TRO/TI App.*, Ex. 15-10.
[79] Aggregate annual lump-sum DROP withdrawals from the Pension System for the past five years are as follows: (1) $20,053.054 (2011); (2) $35,879,000 (2012); (3) $41,132,000 (2013); (4) $56,126,000 (2014); and (5) $80,572,000 (2015). *See TRO/TI App.*, Ex. 15-10. This averages $46.7 million in lump-sum DROP withdrawals per year. *See id.*

Historical Lump-Sum DROP Withdrawals[80]



	2011	2012	2013	2014	2015	Thru 11/10/16
DROP Withdrawals	$20,053,054	$35,879,000	$41,132,000	$56,126,000	$80,572,000	$568,444,368

87. Furthermore, this problem is becoming more acute. Within the first two weeks of November 2016 alone, over $80 million in DROP funds were withdrawn, suggesting that DROP withdrawals will continue unabated. If lump-sum DROP withdrawals continue at the current rate, by year end, they will be 1,288% higher than the historical average.

88. This mass exodus of DROP funds, which, as of November 10, 2016, has averaged $36.4 million per week for the past three months,[81] amounts to a "run on the bank" and is exacerbating the financial peril of the Pension System.

89. Left unchecked, at the current rate of withdrawal, **the Pension System will be depleted of all cash reserves and liquid assets by as early as February 10, 2017**,[82] which

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[80] This graph is a compilation of the data that is recorded in *TRO/TI App.*, Ex. 5, p. 20.
[81] Historically, DROP withdrawals have averaged $2 million per week.

would force it to then begin to sell its remaining illiquid assets at distressed and sub-fair market value prices in order to make monthly, constitutionally protected, pension payments to its retirees—at least until it completely runs out of assets and money to make any payments.[83]

90. According to the DALLAS MORNING NEWS, the Board's Executive Director, Gottschalk, acknowledged this apocalyptic scenario in September 2016:

> [Gottschalk] said **if withdrawals continue at the current pace, the fund will have to start selling its assets to come up with the cash**. That could mean selling assets at a loss. It also means the fund as a whole won't be able to make its investment return targets. The fund depends on those investment returns to pay its current and future bills.
>
> **That effectively leaves the fund at the whims of thousands of retirees and active workers who have their own financial interests in mind**.[84]

91. Indeed, in September 2016, the Board conducted its own liquidity analysis, which recognized that the Pension System is likely to lose all cash reserves and liquid assets early this next year:

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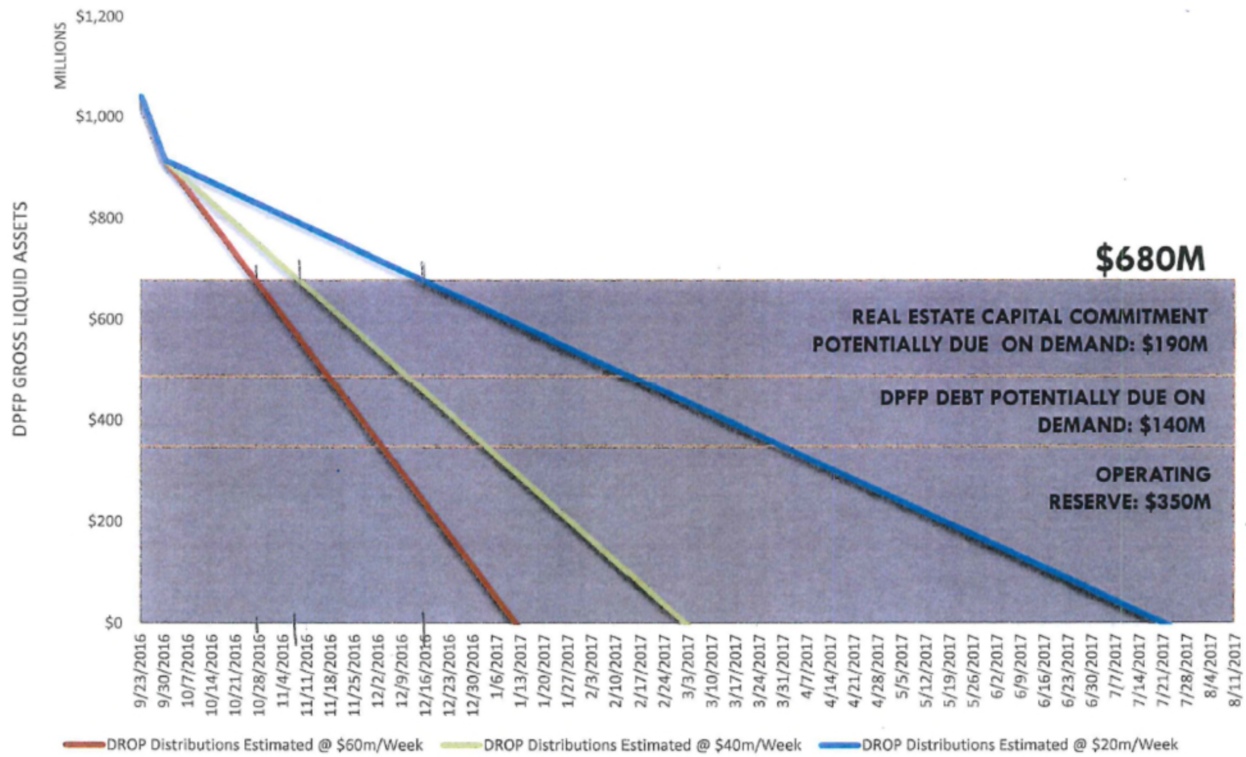
[82] As of November 4, 2016, the Pension System only had $830.4 million in liquid assets. Assuming lump-sum DROP withdrawals continue to average $36.4 million per week, the Pension System will be depleted of all cash reserves and liquid assets within less than 23 weeks. However, this scenario is likely to become much worse. Once the Pension Systems' liquid assets dip below $680 million, two notes, which total $330 million, can—and likely will—be called by the Pension System's creditors. In turn, there is a very strong possibly that once the Pension System's liquid assets dip below $680 million, it will incur another immediate reduction of $330 million. Should this happen, and DROP withdrawals continue to average $36.4 million per week, the Pension System's cash reserves and liquid assets will be depleted by February 10, 2017. Moreover, this timetable is likely to shorten if lump-sum DROP withdrawals are not restricted.

[83] As reported by Fox 4 News, Economist Michael Davis, a professor at Southern Methodist University, explained that such a result would have deadly consequences: "What we are seeing is a lot like a run on the bank. Even a strong solvent bank can't stand it when everyone wants to take all their money out at once. . . . This Pension System is not strong, and it's not solvent. So when the members start knocking on the door saying we want our money now, it puts a tremendous strain on the Pension System. . . . **It's deadly for a Pension System that's made long-term investments to have to sell short term to generate cash**." *See TRO/TI App.*, Ex. 43, Lori Brown, *Dallas Police and Firefighters Retiring at Record-Setting Pace*, FOX 4 NEWS (Sept. 29, 2016), http://www.fox4news.com/news/208727291-story (emphasis added).

[84] *See TRO/TI App.*, Ex. 42, Tristan Hallman, *Bank Run? $220 Million Withdrawn In 6 Weeks from Troubled Dallas Police and Fire Pension System*, DALLAS MORNING NEWS (Sept. 26, 2016), http://www.dallasnews.com/news/news/2016/09/26/bank-run-220-million-withdrawn-6-weeks-troubled-dallas-police-fire-pension-fund (emphasis added).

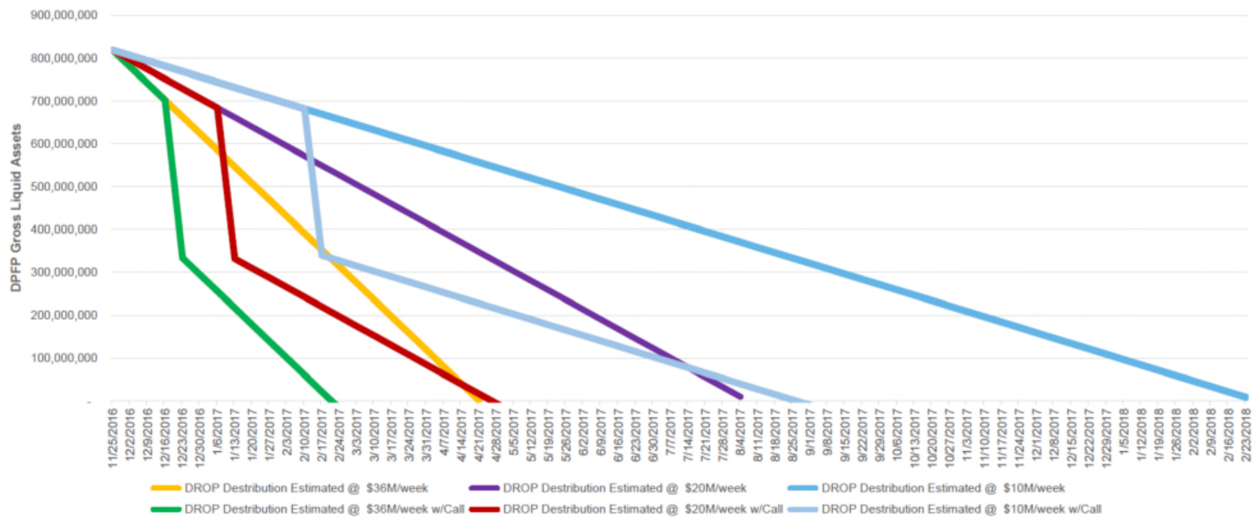
Liquidity Analysis As Of September 23, 2016[85]



92. As of November 11, 2016, the Pension System remains on pace to lose all cash reserves and liquid assets early this next year before all DROP funds are even withdrawn—even if the average rate of DROP withdrawals decreases by $16 million per week:

[85] *See TRO/TI App.*, Ex. 14, p. 2.

<u>Liquidity Analysis As Of November 25, 2016</u>[86]



L. The Board Has Admitted That The Over-Withdrawal Of DROP Funds Is Irreparably Harming The Pension System's Solvency And Liquidity

93. As reported by media outlets, the Board has repeatedly acknowledged that DROP withdrawals are jeopardizing the Pension System's solvency and liquidity.

94. On September 26, 2016, the DALLAS MORNING NEWS reported: "Retired police and firefighters have withdrawn $220 million [<u>now nearly $500 million</u>] from the Dallas Police and Fire Pension System in the last six weeks -- a time when trustees debated significant benefit cuts to rescue the troubled retirement system from insolvency. The system has received another $82 million in withdrawal requests since Wednesday. **The numbers have the makings of a run on the bank -- something pension officials fear will drive the fund deeper into a multibillion-dollar hole**."[87]

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[86] *See TRO/TI App.*, Ex. 15-1, p. 56.

[87] *See TRO/TI App.*, Ex. 42, Tristan Hallman, *Bank Run? $220 Million Withdrawn In 6 Weeks from Troubled Dallas Police and Fire Pension System*, DALLAS MORNING NEWS (Sept. 26, 2016), http://www.dallasnews.com/news/news/2016/09/26/bank-run-220-million-withdrawn-6-weeks-troubled-dallas-police-fire-pension-fund (emphasis added).

95. On September 29, 2016, the DALLAS MORNING NEWS reported: "Kelly Gottschalk, **the executive director of the fund, said the fund will be in jeopardy if the pace of withdrawals continued** because it would force the fund to sell its assets."[88]

96. On October 6, 2016, the DALLAS MORNING NEWS reported: "Pension Executive Director Kelly Gottschalk said at a recent meeting that proposed cuts, including to the DROP program, sparked $220 million in withdrawals in less than six weeks. The fund had the cash to cover the withdrawals, but **Gottschalk warned that if the pace continues, the fund will have to sell off assets before it was prudent to do so**."[89]

97. On October 13, 2016, Fox 4 News reported: "New numbers made public for the first time show the Dallas Police and Fire Pension System **could be out of cash as early as January**. Retirees are pulling out their money at the rapid rate of $20 million dollars a week [<u>which has since increased to an average of $36.4 million per week</u>] instead of the typical $2 million. **Board members openly discussed the run on the bank** at a Thursday meeting."[90]

98. These admissions are not limited to reports by the media. The Board's Chairman, Friar, has publicly acknowledged that DROP withdrawals are jeopardizing the Pension System's solvency and liquidity.

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[88] *See TRO/TI App.*, Ex. 44, Tristan Hallman, *Texas House Committee Vows Support, Bus Absolutely No Money, for Dallas Police and Fire Pension Fixes*, DALLAS MORNING NEWS (Sept. 29, 2016), http://www.dallasnews.com/news/news/2016/09/29/texas-house-committee-vows-support-absolutely-money-dallas-police-fire-pension-fixes (emphasis added).

[89] *See TRO/TI App.*, Ex. 45, Tristan Hallman, *Dallas Sees Its Credit Score Drop; Fitch Downgrades Bond Rating Amid Pension Fears*, DALLAS MORNING NEWS (Oct. 6, 2016), http://www.dallasnews.com/news/dallas-city-hall/2016/10/06/dallas-sees-credit-score-drop-fitch-downgrades-bond-rating-amid-pension-fears (emphasis added).

[90] *See TRO/TI App.*, Ex. 47, *Dallas Police and Fire Pension System Could Be Out of Cash by January*, FOX 4 NEWS (Oct. 13, 2016) http://www.fox4news.com/news/211451491-story (emphasis added).

99. On September 26, 2016, at a specially convened Pension System meeting, Friar read aloud the following statement, pleading for lump-sum DROP withdrawals to cease before they further irreparably damage the Pension System:

> **As more people withdraw funds from the System, our long-term solvency will become much more challenging**. Since August 11, 2016, when the proposed plan amendments were first discussed, approximately $220 million in DROP payments have been distributed. Requests since last Wednesday, September 21, 2016, have been an additional $82 million. We expect to process over 80 retirements for the October 13, 2016, Board meeting. The average number of retirements in a typical month is 14.
>
> **The Board is pleading that you not take actions that in total will ultimately cause further damage to the Fund and your long-term benefits**.[91]

100. Later, Friar further acknowledged that the depletion of DROP accounts from the Pension System would be financial suicide:

> When DROP accounts accounted for only 10, 15, even 20 percent of the overall fund value, we could take the hit so to speak, of paying out more than the fund was making. The size of the DROP accounts are now approximately 55 percent of the overall fund value. 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**.[92]

101. The Board's Executive Director, Gottschalk, has also publicly acknowledged that payments from the Pension System are jeopardizing the Pension System's payment of constitutionally protected benefits. In a letter to Members that was released in October 2016, Gottschalk stated:

> As we have been reporting for some time, the Fund is projected to be insolvent in the future. As a result, **as we expected, the Actuary concluded that any payments made out of the Fund have an adverse effect on the payment of benefits**.[93]

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[91] *See TRO/TI App.*, Ex. 9, p. 3 (emphasis added).
[92] *See TRO/TI App.*, Ex. 53, PENSION SYSTEM, *Update from Chairman Sam Friar – Straight Talk*, *available at* https://www.dpfp.org/001-sbsmb/News_item-001-2016-05-Chairman.html (emphasis added).
[93] *See TRO/TI App.*, Ex. 11, p. 1.

M. All Valuations And Reports Have Reiterated That DROP Withdrawals Need To Be Restricted In Order To Protect The Solvency And Liquidity Of The Pension System

102. Multiple valuations and reports have reiterated that the Pension System will encounter an irreparable cash flow shortage if DROP withdrawals are left unchecked.

103. The 2016 Actuarial Valuation recognizes that the corpus of the Pension System must be left intact in order for the Pension System to recover. Specifically, the 2016 Actuarial Valuation recommends that assets will need to be reallocated over a number of years in order to increase stability of the fund. Yet, this reallocation will not be possible if a substantial portion of the assets are drawn down or forced to be drawn down or sold in order to combat a looming cash flow crisis that is being created by the over-withdrawal of DROP funds.

104. In October 2016, the Laura and John Arnold Foundation, a private foundation dedicated to strengthening social, governmental and economic systems, issued a publication entitled, "The Dallas Public Pension Crisis: A Warning for Cities Across Texas."[94]

105. The report provided an objective critique of the Pension System's downfall and reiterated that DROP funds need to be kept in the Pension System in order to avoid a cash flow crisis:

> In the short term, **plan managers must find a reasonable way to limit withdrawals from the police and fire DROP so that the fund does not experience a massive cash flow problem**. If withdrawals continue at the current rate or accelerate, they will affect the plan's ability to make benefit payments. The pension board has yet to take meaningful action to address

[94] *See TRO/TI App.*, Ex. 51, Josh McGee & Paulina Diaz, *The Dallas Public Pension Crisis: A Warning for Cities Across Texas* (Laura & John Arnold Found., Oct. 2016), *available at* http://www.arnoldfoundation.org (emphasis added).

> this problem and is currently relying on plan members' goodwill to keep the fund solvent, which is jeopardizing workers' retirement security.[95]

106. Indicative of the Board's refusal to confront this problem head-on, it has downplayed the report's criticism of the Board by suggesting "the Arnold Foundation is one of the leading organizations in the national attack against public pensions."[96]

107. Yet, such conviction has also been expressed by the Board's Chairman. As reported by the DALLAS MORNING NEWS, in September 2016, Board Chairman Friar "pleaded with members to keep their money in the fund to keep from further damaging a system that's set to go broke . . . ."[97] Friar was quoted as saying: "**We've got to stop this runaway train.**"[98]

108. Remarkably, in September 2016, Friar acknowledged that restricting DROP withdrawals may be the only solution to the Pension System's liquidity crisis: "This may be the only way the pension can limit the cash outflow because we are in a bad situation right now[;] the existence of the system is at stake."[99]

109. Friar has continued to echo these sentiments. In October 2016, Fox 4 News, reported that Friar again stressed that it is important to keep DROP funds in the Pension System.[100]

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[95] *Id.* at p. 10.
[96] *See TRO/TI App.*, Ex. 12, p. 1.
[97] *See TRO/TI App.*, Ex. 42, Tristan Hallman, *Bank Run? $220 Million Withdrawn In 6 Weeks from Troubled Dallas Police and Fire Pension System*, DALLAS MORNING NEWS (Sept. 26, 2016), http://www.dallasnews.com/news/news/2016/09/26/bank-run-220-million-withdrawn-6-weeks-troubled-dallas-police-fire-pension-fund.
[98] *See id.* (emphasis added).
[99] *See TRO/TI App.*, Ex. 41, Rebecca Lopez, *Pension Fund Money Removed at Alarming Rate*, WFAA-TV (Sept. 16, 2016) http://www.wfaa.com/news/local/dallas-county/police-pension-fund-money-removed-at-alarming-rate/319470741.
[100] *See TRO/TI App.*, Ex. 47, *Dallas Police and Fire Pension System Could Be Out of Cash by January*, FOX 4 NEWS (Oct. 13, 2016) http://www.fox4news.com/news/211451491-story ("We need to do what we can to keep the money in the plan.").

N. The Board Has—And Has Acknowledged It Has—The Power To Restrict DROP Distributions In Order To Protect The Solvency And Liquidity Of The Pension System

110. Pursuant to the Pension Plan, "[t]he Board has the responsibility for the administration of the Pension System and shall order payment from the Fund in accordance with the terms of the appropriate plans within the Pension System. **Money from the Fund may not be paid except on order of the Board**."[101]

111. As an extension of this authority, the Board is authorized under the DROP Policy to limit DROP withdrawals: "The Board of Trustees may at any time extend the time necessary to process DROP distributions."[102]

112. In fact, the DROP Policy specifically provides that it "may be amended at any time by the Board of Trustees . . . consistent with the terms of the Plan."[103]

113. The Board is cognizant of this authority. Indeed, on September 26, 2016, the Board held a special meeting to decide whether it would reduce or restrict DROP withdrawals.[104]

114. By putting the matter of lump-sum DROP withdrawals to a vote, the Board acknowledged that it has the authority to unilaterally determine whether DROP distributions may be authorized.

115. Similarly, the Board's public comments reaffirm that it is cognizant of its authority to unilaterally reduce or restrict DROP distributions:

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[101] *TRO/TI App.*, Ex. 2, § 3.01(k); *see also* Tex. Rev. Civ. Stat. Ann. art. 6243a-1 § 3.01(l).
[102] *TRO/TI App.*, Ex. 3, Part E.1. This same public policy rationale is codified in other pension statutes. *See, e.g.*, Tex. Rev. Civ. Stat. Ann. art. 6243h ("If the pension board determines that the Pension System is seriously depleted, the pension board may proportionately and temporarily reduce the benefits to all retirees, eligible survivors, alternate payees, and beneficiaries.").
[103] *See TRO/TI App.*, Ex. 3, Part A.4.
[104] *See TRO/TI App.*, Ex. 8, p. 1.

> [T]he pension board trustees made a bet Monday that they could allay fears and stop the bleeding simply by doing nothing. After a three-and-a-half hour discussion behind doors in executive session, the board members told a packed room that they **decided not to restrict withdrawals from the pension's lucrative lump-sum [DROP] payment accounts**.[105]

116. Likewise, Gottschalk acknowledged the Board's authority to reduce or restrict DROP distributions in a letter she authored in October 2016:

> As has been widely reported, by DPFP and others, the pace of DROP withdrawals has increased since the August 11th Board meeting when proposed Plan amendments were first announced[.] The Board considered that reality at the Special Board meeting on September 26th. On that date, the Board unanimously voted to not limit the DROP withdrawals by Retirees and issued a statement asking Retirees to have patience as we diligently work through our funding issues.[106]

O. The Board Has Violated Its Ministerial Duties By Recklessly Refusing To Restrict DROP Withdrawals Instead Of Holding The Assets Of The Pension System In Trust For The Benefit Of Its Members, Pensioners, And Their Beneficiaries

117. Despite clear evidence that the escalating withdrawal of DROP funds is driving the insolvency of the Pension System, the Board has done nothing to address this "runaway train" (as characterized by the Board's own Chairman).[107]

118. As referenced above, on September 26, 2016, the Board held a special meeting to decide whether it would reduce or restrict DROP withdrawals.[108] The measure failed and the Board recklessly—and unanimously—voted against taking any action to reduce or restrict DROP withdrawals:

> After discussion [at 5:38 p.m. on September 26, 2016], Mr. Haben made a motion that no change be made which would limit or restrict withdrawals

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[105] *See TRO/TI App.*, Ex. 42, Tristan Hallman, *Bank Run? $220 Million Withdrawn In 6 Weeks from Troubled Dallas Police and Fire Pension System*, DALLAS MORNING NEWS (Sept. 26, 2016), http://www.dallasnews.com/news/news/2016/09/26/bank-run-220-million-withdrawn-6-weeks-troubled-dallas-police-fire-pension-fund (emphasis added).
[106] *TRO/TI App.*, Ex. 11, p. 1.
[107] *See supra* note 98.
[108] *See TRO/TI App.*, Ex. 8, p. 1.

from Retirees' DROP accounts. Mr. Conway seconded the motion, which was **unanimously approved by the Board**.[109]

119. Under the present actuarial and solvency position of the Pension System, each time a DROP distribution is made, every other Member, Pensioner, and Beneficiary of the Pension System is being deprived of a constitutionally protected benefit, in favor of an optional program that does not even rise to the level of a benefit.

120. In doing so, the Board has (1) failed to hold the assets of the Pension System in trust for the benefit of its Members, Pensioners, and their Beneficiaries; and (2) allowed, through willful indifference, every Member, Pensioner, and Beneficiary of the Pension System to be deprived of their constitutionally protected benefits, *e.g.*, service retirement benefits, in favor of DROP—*i.e.*, a program that does not even rise to the level of a "benefit."

P. The Board Has Violated Its Ministerial Duties By Cannibalizing The Pension System's Assets Instead Of Managing The Pension System According To Sound Actuarial Principles That Do Not Impair Or Reduce State Constitutionally Protected Benefits

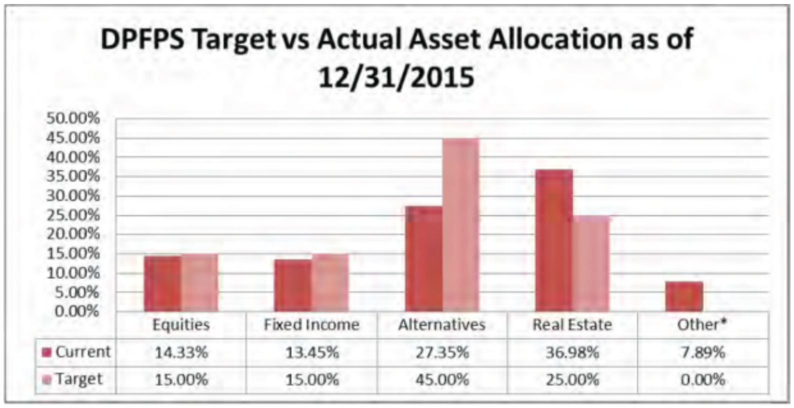
121. Since August 13, 2016, $474 million in lump-sum DROP withdrawals have been made. This averages $36.4 million in lump-sum DROP distributions per week. The total amount for the year now is now close to eclipsing $600 million.

122. At the current rate of withdrawal, the Pension System will be depleted of all cash reserves and liquid assets by as early as February 10, 2017 (before all DROP funds are even withdrawn), which would force it to then begin to sell its remaining illiquid assets at distressed prices in order to make monthly—constitutionally protected—pension payments to its Pensioners.

[109] *See TRO/TI App.*, Ex. 9, p. 2.

123. However, it appears that the Board is already cannibalizing the Pension System's assets. According to the Pension System's 2015 Year-End Asset Allocation, the fund only had approximately $211.4 million in cash and capital assets (*i.e.*, 7.89% of $2.68 billion):[110]

Pension System's Asset Allocation[111]



*Includes Cash, Securities Lending, Capital Assets, and Receivables

124. This begs the question of *where* the Board has sourced the remaining $356.6 million in funds to provide the $568 million in DROP distributions over the past year. To the extent the DROP distributions have been sourced through the liquidation of hard assets, this is particularly troubling because in order to sell these illiquid assets within a constrained time period, they have likely been sold at distressed prices.

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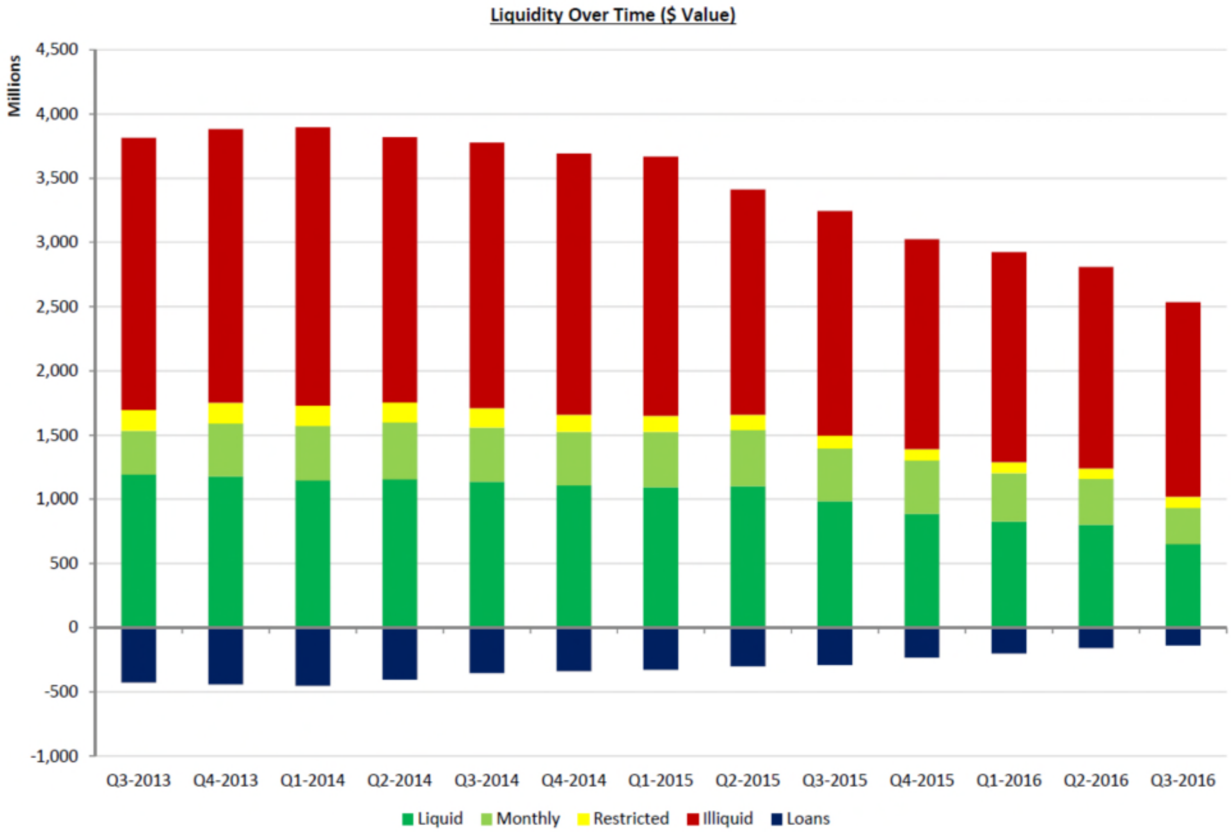
[110] *See TRO/TI App.*, Ex. 13, p. 1.
[111] *See TRO/TI App.*, Ex. 13, p. 14.

<u>Pension System's Liquidity</u>[112]



125. Separately, to the extent the Board has shifted its investment strategy to only investing in liquid assets, and keeping hundreds of millions of dollars of cash available, as a quick-fix to its DROP-induced liquidity crisis, this is equally troubling because doing so severely restricts the Pension System's rate of return on its assets, further undermining its actuarial insolvency.

126. This is particularly problematic because the 2016 Actuarial Valuation was premised upon the assumption that the Pensions System's investment portfolio would achieve a 7.25% net rate of return in each fiscal year. Investing in liquid assets makes a 7.25% net rate of return nearly impossible and any such investment strategy will merely accelerate the Pension System's path to insolvency.

[112] *See TRO/TI App.*, Ex. 7, p. 14.

127. Ultimately, either action is a direct violation of the Board's ministerial duty to manage the Pension System according to sound actuarial principles. Neither action can be justified given that the denial of DROP withdrawals simply means that a DROP Participant's account will be held by the Pension System, while accruing interest at a higher-than market rate, and only until such time as the long-term solvency of the Pension System can be restored.

Q. The Board's Reckless Refusal To Reduce Or Restrict DROP Withdrawals Suggests That It Views The City, *i.e.*, Taxpayers, As A Failsafe To Any Action—Or Inaction—It Takes

128. In a letter to Members, dated October 27, 2016, Friar attempted to defend the actions of the Board while acknowledging that the Pension System is insolvent and needs the help of the City:

> **We must put our fund back on the road to solvency**, as well as demonstrate to our state legislature that we are serious about our share of responsibility in fixing the problem. I have no doubt that the City of Dallas will be lobbying the state legislature to be handed control of your pension plan. City officials have stated that taxpayers should not have responsibility for bridging the gap and that the City will need to look at further benefit cuts to address the funding issue. . . . **No doubt we need the help of the City**. . . . Additionally, **we are fulfilling our obligation under the Texas Constitution to do what is in our power to avoid having the protected benefits of our members impaired or reduced**.[113]

129. Yet, the Board has utterly failed to exercise its power to avoid having the protected benefits of the Pension System's Members, Pensioners, and their Beneficiaries impaired or reduced. The Board has done the exact opposite, depleting the assets of the Pension System by over $500 million this year, when doing so is not actuarially sound.

130. Already, as a result of the Board's reckless refusal to reduce or restrict DROP withdrawals, the Pension System is projected to become insolvent five years earlier than was

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[113] *See TRO/TI App.*, Ex. 12, p. 1.

predicted in the 2016 Actuarial Analysis. Furthermore, at the current rate of withdrawal, the Pension System will be depleted of all cash reserves and liquid assets by as early as February 10, 2017. This is clearly not an attempt to safeguard the constitutionally protected benefits of the Pension System's Members, Pensioners, and their Beneficiaries.

131. The root of the Board's willful indifference to further depleting the corpus of the Pension System, through continued DROP withdrawals at the expense of constitutionally protected benefits, appears to be the Board's expectation that the City will eventually provide a bailout and the Board will get a "redo."

132. Board Chairman Friar's comments reinforce the Board's indication that it believes the City will bail the Pension System out of its insolvency:

a. **December 31, 2015** – "We know that you are wondering what the city is doing to help with our pension's dilemma. We are having those discussions through the committee and will soon provide the city with proposals for their support to make our pension healthier. I can assure you that the amount that will be necessary to be contributed by the city, even with our own sacrifices, will be significant."[114]

b. **October 13, 2016** – "We are in dire straits here. We need some support from the City. We cannot do it ourselves. We're in that bad a condition."[115]

133. On August 10, 2016, the Board informed City Council that an immediate infusion of $650 million—equal to 20 cents of every dollar the City spends this year—would be required to keep the fund solvent.

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[114] *See TRO/TI App.*, Ex. 39, PENSION SYSTEM, *Update from Chairman Sam Friar – Plans for 2016* (Dec. 31, 2015), *available at* https://www.dpfp.org/001-sbsmb/News_item-2015-12-Chairman.html (emphasis added).
[115] *See TRO/TI App.*, Ex. 49, Ken Kalthoff, *Dallas Police, Fire Pension Crisis Worsens*, NBC DFW (Oct. 13, 2016), http://www.nbcdfw.-com/news/local/Dallas-Police-Fire-Pension-Crisis-Worsens-397026181.html.

134. As the Board's reckless refusal to restrict or reduce DROP withdrawals has further driven the Pension System into insolvency, its appetite for a taxpayer-funded bailout has merely increased.

135. On October 13, 2016, the Board informed City Council that it now requires a $1.1 billion bailout in order to avoid impending insolvency. In order to fund such a massive buyout, the City would be forced to increase property taxes by 130%.[116] This would increase the average residential tax bill with a homestead by $1,965 per year.[117]

136. Contrary to the Board's misguided belief, there is no "reset button" to the solvency of the Pension System. While the City is committed to finding a workable solution, no workable solution is possible until the Pension System is stabilized. In order for the Pension System to become stabilized, DROP withdrawals must be restrained while the Pension System is not actuarially sound.

137. Indeed, even the City's Chief Financial Officer has sounded a call to action regarding the Pension System's crisis in a memo that was circulated to the City Manager on November 18, 2016:

> [I]t is vitally important that we address the crisis facing the Dallas Police and Fire Pension System now. In addition to our commitment to public safety and to providing a secure retirement for police and fire sworn employees, Dallas taxpayers expect and deserve stable infrastructure, and for the City to be able to borrow for such capital improvements at the best possible rate.[118]

138. Separately, it is doubtful whether the City is even statutorily permitted to provide a cash infusion to the Pension System when the Board is disregarding its fiduciary

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[116] This does not account for the tax increase limitations on homesteads imposed by TEX. PROP. CODE ANN. § 23.23(a).
[117] The average residential homesteaded property value in the City is $240,000. *See TRO/TI App.*, Ex. 15-6, p. 2.
[118] *See TRO/TI*, Ex. 15-13, p. 2.

responsibility for the assets in the Pension System. The TEXAS LOCAL GOVERNMENT CODE states:

> A municipality may issue obligations to fund all or any part of an unfunded liability. Before authorizing issuance and delivery of an obligation under this section, the governing body of the municipality must enter into a written agreement with the governing body of the public retirement system that: (1) **has fiduciary responsibility for assets** of the public fund or public pension funds **that are to receive the net proceeds** of the obligations to be issued; and (2) **has the duty to oversee the investment and expenditure of the assets** of the public pension fund.[119]

139. In this vein, even if the City were legally allowed to do so at this time, neither the City nor the legislature would reasonably allow large sums of money to go in the front door of the Pension System for the benefit of every Member, Pensioner, and Beneficiary, while the Board unconstitutionally sends it out the back door to a small minority of its members, who are participants in a non-constitutionally protected program.

R. Separately, The Over-Withdrawal Of DROP Funds Is Irreparably Harming The City's Workforce

140. Historically, each year approximately 100 police officers and approximately 70 firefighters retire from their employment with the City.

141. Following the 2016 Actuarial Valuation, the rate of retirement has skyrocketed. Between January 1, 2016 and through September 23, 2016, 228 police officers and firefighters have retired.[120] This is a 34% increase in the number of retirees from the City's historical average and does not yet even account for the remaining three months of retirement data for 2016.

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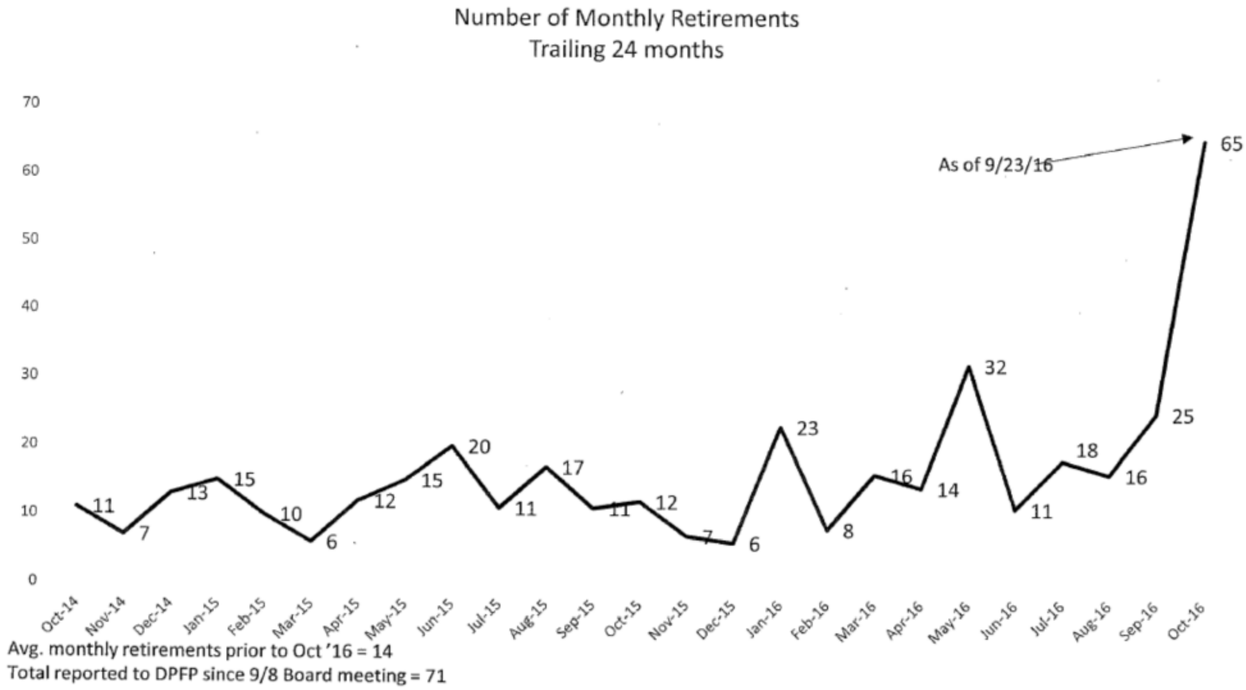
[119] TEX. LOC. GOV'T CODE ANN. § 107.003 (emphasis added). Separately, Texas State Senator Paul Bettencourt recently introduced a new bill that would require voter approval. *See* Tex. S.B. 151, 85th Leg., R.S. (2017). Should this bill pass, a municipality may issue such funds "only if the issuance is approved by a majority of the qualified voters of the municipality voting at an election held for that purpose." *Id.*

[120] *See TRO/TI App.*, Ex. 15-8.

Monthly Retirement Figures[121]



142. These retirements correspond with an influx in lump-sum DROP withdrawals, suggesting the timing of DROP Participants' retirement was motivated by their desire to immediately cash out their DROP funds.

143. In effect, concerns about the Pensions System's solvency appear to now be having a direct impact on the City's retention of its workforce.

S. Separately, The Over-Withdrawal Of DROP Funds Is Irreparably Harming The City's General Bond Rating

144. The financial harm that over-withdrawal of DROP funds is causing is not limited to the Pension System. In October 2016, two independent ratings agencies downgraded the City's general bond rating based upon concerns regarding DROP withdrawals.

145. On October 6, 2016, Fitch Ratings ("Fitch") lowered the City's bond rating to "AA" and changed the outlook from "stable" to "negative." In making this adjustment,

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[121] *See TRO/TI App.*, Ex. 14, p. 5.

Fitch cited the over-withdrawal of DROP funds as a driver for its decision to reduce the City's bond rating:

> The DROP provisions of the city's DPFP have been a particular concern. . . . **The ability of retirees to withdraw these funds on demand exposes the plan to the risk of a materially reduced asset position, which in turn would pose near-term liquidity challenges and further increase the net pension liability**. In recent weeks, the plan has been confronted with an unexpectedly high level of withdrawals that, while they appear to have abated, are expected to require investment portfolio rebalancing.[122]

146. Unfortunately, DROP withdrawals did not abate. On October 14, 2016, citing concerns about continued DROP withdrawals, Moody's Investors Service ("Moody's") similarly downgraded the City's bond rating:

> The negative outlook reflects the challenging and complex landscape that the city must navigate to reign-in its **growing pension predicament**. . . . [T]he system facing a severe threat of insolvency due to significant write-downs in its investment portfolio, expected negative cash flow in the coming years even if investment returns are relatively cooperative, and **an increase in employee withdrawals from Deferred Retirement Option Plan (DROP) accounts**.[123]

147. The full magnitude of the harm caused by the downgrade in the City's general bond rating remains to be seen. The Board has made public its intent to ask the City to increase it contributions and also provide a $1.1 billion bailout for the failing Pension System. Yet, the City's downgraded bond rating—a direct result of the unrestrained DROP withdrawals—may make it more costly or difficult for the City to find or accomplish a solution.

148. In this regard, the Board, by refusing to reduce or restrict DROP withdrawals, essentially bites the hand that feeds it.

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[122] *TRO/TI App.*, Ex. 46, Press Release, Fitch Downgrades City of Dallas, TX GOs to 'AA' on Pensions; Outlook Negative (Oct. 6, 2016), *available at* https://www.fitchratings.com/site/pr/1012788 (emphasis added).

[123] *TRO/TI App.*, Ex. 50, Press Release, Moody's Downgrades to Aa3 Dallas, TX's GOLT; Outlook Revised to Negative (Oct. 14, 2016), available at https://www.moodys.com/research/Moodys-Downgrades-to-Aa3-Dallas-TXs-GOLT-Outlook-Revised-to--PR (emphasis added).

VIII. CLAIMS AND CAUSES OF ACTION

<u>Count 1</u>: Request for Writ of Mandamus

149. The preceding paragraphs are incorporated herein by reference as if repeated verbatim.

150. The TEXAS GOVERNMENT CODE authorizes a district court to issue a writ of mandamus compelling the governing body of a public retirement system to comply with any requirement of Chapter 802 where it fails or refuses to do so:

> (a) Except as provided by Subsection (b), **if the governing body of a public retirement systems fails or refuses to comply with a requirement of this chapter** that applies to it, a person residing in the political subdivision in which the members of the governing body are officers **may file a motion, petition, or other appropriate pleading** in a district court having jurisdiction in a county in which the political subdivision is located in whole or in part, **for a writ of mandamus to compel the governing body to comply with the applicable requirement**.[124]

151. "An act is ministerial, or nondiscretionary, when the law spells out the duty to be performed with sufficient certainty that nothing is left to the exercise of discretion."[125]

A. The Board Has A Ministerial Duty To Hold The Assets Of The Pension System In Trust For The Benefit Of Its Members, Pensioners, And Their Beneficiaries

152. The Board has a ministerial duty to manage the Pension System according to the terms of the Texas Constitution and TEXAS GOVERNMENT CODE. Indeed, the Board recognizes this obligation in its Mission Statement.[126] Any deviation from this ministerial duty is a clear abuse of discretion.

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[124] TEX. GOV'T CODE ANN. § 802.003 (emphasis added).
[125] *Bd. of Trs. of Houston Firefighters' Relief & Ret. Fund v. City of Houston*, 466 S.W.3d 182, 187 (Tex. App.—Houston [1st Dist.] 2015, pet. filed) (quoting *Anderson v. City of Seven Points*, 806 S.W.2d 791, 793 (Tex. 1991)).
[126] *See TRO/TI App.*, Ex. 52, *Mission Statement*, DALLAS POLICE & FIRE PENSION SYS., https://www.dpfp.org/mission.html.

153. Under the Texas Constitution, the Board has a ministerial duty to hold in trust the assets of the Pension System for the benefit of its Members, Pensioners, and their Beneficiaries:

> The board of trustees . . . ***shall*** . . . hold the assets of the system or program for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the system or program.[127]

154. Moreover, this ministerial duty is reiterated in the TEXAS GOVERNMENT CODE:

> The governing body of the public retirement system ***shall*** **hold or cause to be held in trust the assets** appropriated or dedicated to the system, for the benefit of the members and retirees of the system and their beneficiaries.[128]

155. The TEXAS TRUST CODE, which applies to public pensions,[129] is further instructive on the Board's unqualified duty of loyalty to its Beneficiaries of the Pension System:

a. The Board has a duty to manage the Pension System for all Beneficiaries: "The trustee ***shall*** invest and manage the trust assets solely in the interest of the Beneficiaries."[130]

b. The Board has a duty to deal impartially with all Beneficiaries: "If a trust has two or more beneficiaries, the trustee shall act impartially in investing and

[127] Tex. Const. art. XVI, § 67(f)(2) (emphasis added).
[128] TEX. GOV'T CODE ANN. § 802.201 (emphasis added); *see also id.* § 311.016(2) (noting that unless context requires otherwise, "shall" imposes a duty); *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001) (stating that both "must" and "shall" and generally recognized as mandatory).
[129] "Texas Trust Code (Chapters 111 through 117) applies to a pension trust." TEX. PROP. CODE ANN. § 121.003; *see also Herschbach v. City of Corpus Christi*, 883 S.W.2d 720, 735 (Tex. App.—Corpus Christi 1994, writ denied) (recognizing the TEXAS TRUST CODE applies to public pensions).
[130] TEX. PROP. CODE ANN. § 117.007 (emphasis added).

managing the trust assets, taking into account any differing interests of the beneficiaries."[131]

B. The Board Has A Ministerial Duty To Manage The Pension System According To Sound Actuarial Principles That Do Not Reduce Or Impair Constitutionally Protected Benefits

156. Under the Texas Constitution, the Board has a ministerial duty to manage the Pension System according to sound actuarial principles:

> The legislature may enact general laws establishing systems and programs of retirement and related disability and death benefits for public employees and officers. **Financing of benefits must be based on sound actuarial principles. The assets of a system are held in trust for the benefit of members and may not be diverted**.[132]

157. In managing the Pension System according to sound actuarial principles, the Board has an obligation to ensure the constitutionally protected benefits of its Members, Pensioners, and their Beneficiaries "are not reduced or otherwise impaired."[133] As such, the Board is required to safeguard these constitutionally protected benefits above all else (*e.g.*, DROP withdrawals).

158. The TEXAS REVISED CIVIL STATUTES reiterate that "the board has the ultimate responsibility for the investment of the funds."[134]

159. Similarly, the TEXAS TRUST CODE is further instructive on the Board's unqualified duty to manage the Pension System according to sound actuarial principles:

a. <u>The Board has a duty to act as a prudent investor</u>: "A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In

[131] TEX. PROP. CODE ANN. § 117.008.
[132] Tex. Const. art. XVI, § 67(a)(1) (emphasis added).
[133] *See* Tex. Const. art. XVI, § 66(f).
[134] Tex. Rev. Civ. Stat. Ann. art. 6243a-1, § 3.01(l).

satisfying this standard, the trustee shall exercise reasonable care, skill and caution."[135]

b. The Board must avoid managing assets in isolation: "A trustee's investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust."[136]

C. The Board Has Failed To Perform Its Ministerial Duties And Committed A Clear Abuse Of Discretion In The Exercise Of Its Ministerial Duties

160. The Board has failed to perform its ministerial duties under the Texas Constitution and the TEXAS GOVERNMENT CODE.

161. First, the Board has failed to hold in trust the assets of the Pension System for the benefit of its Members, Pensioners, and their Beneficiaries. Specifically:

a. The Board has a ministerial duty to manage, and hold in trust, the assets of the Pension System, for the benefit of its Members, Pensioners, and their Beneficiaries of the Pension System.

b. The Board is plainly aware of the distinction between benefits that are, and are not, constitutionally protected in the Pension Plan, and it understands that DROP is not a constitutionally protected benefit—DROP is merely an optional mechanism to account for accrued pension benefits.

c. Under the present actuarial and solvency position of the Pension System, every time a DROP withdrawal is made, every Member, Pensioner, and Beneficiary of the Pension System is being deprived of a constitutionally

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[135] TEX. PROP. CODE ANN. § 117.004(a).
[136] TEX. PROP. CODE ANN. § 117.004(b).

protected benefit, in favor of a program that does not rise to the level of a protected benefit, or a benefit at all.

d. The Board has acknowledged that the financial well-being of the Pension System, including service retirement benefits, is being jeopardized by the over-withdrawal of DROP funds.

e. Under the present actuarial and solvency position of the Pension System, there is no alternative but to restrict the withdrawal of DROP funds, as the Board is authorized to do.

f. Nonetheless, the Board has recklessly refused to reduce or restrict the withdrawal of DROP funds.

g. By refusing to reduce or restrict the withdrawal of DROP funds, the Board has failed to adhere to its ministerial duty to hold in trust the assets of the Pension System for the benefit of its Members, Pensioners, and their Beneficiaries.

162. Second, the Board has failed to manage the Pension System according to sound actuarial principles that do not reduce or impair constitutionally protected benefits. Specifically:

a. The Board has a ministerial duty to manage the Pension System according to sound actuarial principles.

b. Again, the Board has acknowledged that the financial well-being of the Pension System, including its liquidity, is being jeopardized by the over-withdrawal of DROP funds.

c. At the current rate of withdrawal, the Pension System will be depleted of all cash reserves and liquid assets by as early as February 10, 2017, which would force it to then begin to sell its remaining illiquid assets at distressed prices in order to make monthly—constitutionally protected—pension payments to its Pensioners.

d. In doing so, the Board is depleting the Pension System of all of its cash and liquidating its hard assets for the benefit of a select few, at the expense of constitutionally protected benefits for all.

e. If a fund is depleting all of its cash, turning all of its liquid assets into cash, and liquidating its hard assets for the benefit of a few, the fund is not being managed according to sound actuarial principles.

f. As such, the Board has failed to manage the Pension System according to actuarially sound principles.

163. Separately, the Board has committed a clear abuse of discretion in the exercise of its aforementioned ministerial duties.

IX. APPLICATION FOR EMERGENCY TEMPORARY RESTRAINING ORDER

164. The preceding paragraphs are incorporated herein by reference as if repeated verbatim.

165. Plaintiff asks the Court to immediately enjoin the Board from permitting any DROP distributions from the Pension System until the time of trial.

166. The issuance of injunctive relief sought herein is warranted because as described herein:

a. the unrestrained over-withdrawal of DROP funds has and continues to jeopardize the financial well-being of the Pension System;

b. the unrestrained over-withdrawal of DROP funds has and continues to prejudice the constitutional rights of the Pension System's Members, Pensioners, and their Beneficiaries;

c. the unrestrained over-withdrawal of DROP funds has and continues to adversely impact the City's workforce; and

d. the unrestrained over-withdrawal of DROP funds has and continues to adversely impact the City's bond rating.

167. Plaintiff has demonstrated a probable right of recovery against the Board based on the facts and causes of action described herein.

168. The imminent harm described above is not isolated to the Pension System's Members, Pensioners and their Beneficiaries—it affects all residents of the City and members of its community.

169. The Pension System's financial crisis is a community problem that is shared by all residents of the City, including Plaintiff. The Board has admitted this very fact, given its position that insolvency is inevitable if the City (*i.e.*, taxpayers) does not provide an—ever-increasing—financial bailout.

170. Furthermore, the fact that harm to a public pension impacts the entire local community is reinforced by the Texas Legislature's enactment of statutorily created standing for any "person residing in the political subdivision in which the members of the governing body are officers" to file mandamus action against the Pension System.[137]

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[137] *See* TEX. GOV'T CODE ANN. § 802.003.

171. Ultimately, the Board's conduct is irreparably harming the Pension System, the Pension System's Members, Pensioners, and their Beneficiaries, the City and its taxpayers, for which there is no adequate remedy at law because the Court's ability to order mandamus relief will be significantly diminished, if not futile, if the over-withdrawal of DROP funds is not restrained before the time of trial.

172. Specifically, at the current rate of withdrawal, the Pension System will be depleted of all cash reserves and liquid assets by as early as February 10, 2017, which would force it to then begin to sell its remaining illiquid assets at distressed prices—a chain of events that cannot be reversed; thus, creating imminent harm.

173. Unless and until Plaintiff obtains the injunctive relief sought herein, his right to effective, meaningful mandamus relief will continue to be irreparably impaired.

174. Plaintiff asks the Court to set this application for a temporary restraining order on an expedited basis and that the Board be commanded to appear and show cause why a temporary injunction should not issue.

175. Plaintiff is willing and able to post bond in an amount specified by the Court.

176. In light of the fact that (1) this lawsuit is not brought for profit; (2) this injunction is sought for the public welfare of all Members, Pensioners, and their Beneficiaries; and (3) this injunction does not harm DROP Participants—*i.e.*, their DROP funds will continue to accrue above-market interest—Plaintiff proposes that a nominal bond would be appropriate in this instance.

X. APPLICATION FOR TEMPORARY AND PERMANENT INJUNCTION

177. The preceding paragraphs are incorporated by reference herein as if repeated verbatim.

178. Plaintiff's application for temporary and permanent injunction is authorized by TEX. CIV. PRAC. & REM. CODE ANN. § 65.011.

179. Plaintiff asks the Court to set his application for temporary injunction for a hearing and, after the hearing, issue a temporary injunction against the Board in conformity with the same enjoined conduct requested above.

180. Additionally, Plaintiff asks the Court to set his request for a permanent injunction for a full trial on the merits and, after trial, issue a permanent injunction against the Board permanently enjoining the Board from authorizing any distributions of DROP funds unless the Pension System, and payment of DROP 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.

181. Plaintiff has joined all indispensable parties under *Tex. R. Civ. P.* 39.

XI. CONDITIONS PRECEDENT

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

XII. PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Plaintiff respectfully requests the following:

(i) Temporary injunctive relief be immediately issued, to enjoin the Board from permitting any DROP distributions from the Pension System until the time of trial, in order to preserve Plaintiff's right to effective, meaningful mandamus relief;

(ii) 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;

(iii) A writ of mandamus be issued under TEX. GOV'T CODE ANN. § 802.003, compelling the Board to comply with its ministerial duty to (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

(iv) All other relief, at law or in equity, to which Plaintiff is justly entitled.

XIII. VERIFICATION

I, Michael S. Rawlings, hereby verify that the facts stated in paragraphs 28, 29, 30, 31**(1)**,[138] 32**(1)**, 33**(1)**, 34, 35, 37, 38, 39, 50**(1)**, 54(1), 55, 56, 63, 64, 65, 66, 67, 68, 69, 70**(1)**, 71, 72, 73, 74**(1)**, 77, 79, 80, 81, 83, 84, 85, 86, 87, 88, 89, 92, 93, 98, 102, 103, 106, 113, 114, 117, 118**(1)**, 119, 120, 121, 122, 123, 124, 125, 126, 127, 129, 130**(1)**, 131, 133, 134, 135, 136, 138**(1)**, 139, 140, 141, 142, 143, 144, 145**(1)**, 146**(1)**, 147, and 148, and in footnotes 18, 49**(2–3)**, 51, 52, 55, 79, 81, 82, 117 are within my personal knowledge and are true and correct, under penalty of perjury.

Michael S. Rawlings

STATE OF New York)
)
COUNTY OF New York)

On this date personally appeared before me Michael S. Rawlings, a person known to me, who, after taking an oath swore the foregoing statements were on personal knowledge and were true and correct, under penalty of perjury. Subscribed and sworn to before me, a notary public this 4th day of December 2016.

Kathleen A. [illegible]
Notary Public KAW

My Commission Expires: [illegible] 2017

[SEAL]

138 "**(#)**" indicates which sentence (*i.e.*, statement) in the referenced paragraph /footnote is being verified. For example, "**(1)**" would indicate that only the first sentence in the referenced paragraph/footnote is being verified. Absent this indicator, all statements in the referenced paragraph/footnote are being verified under *Tex. R. Civ. P.* 682.

Dated: December 5, 2016

Respectfully submitted,

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