

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

v.

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

LARRY EDDINGTON, *et al.*
Intervenors.

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

v.

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

DON POUNDERS, Individually and on Behalf of
All Others Similarly Situated,
Pensioner Class Intervenor,

v.

SAMUEL FRIAR, GERALD BROWN, CLINT
CONWAY, KEN HABEN, BRIAN HASS, JOE
SCHUTZ, KEN SPRECHER and THO TANG HO,
each in their individual capacity as Trustees,
Defendants,

IN THE DISTRICT COURT

DALLAS COUNTY, TEXAS

116th JUDICIAL DISTRICT

PETITION IN INTERVENTION BY PENSIONER AND NON-DROP CLASS

Comes now Don Pounders, Individually and on Behalf of All Others Similarly Situated, and files this Petition In Intervention, stating as follows:

INTRODUCTION

1. Intervenor Don Pounders is an individual who served as a Dallas firefighter for a total of 16 years, is retired, and is a member in the Dallas Police & Fire Pension System (“DPFPS” or “System”). Intervenor Don Pounders and the putative Class he seeks to represent do not have any funds placed into the Deferred Retirement Option Program (“DROP”). Intervenor Don Pounders is suing certain Trustees for their self-dealing and breach of their fiduciary duties as well as injunctive and other equitable relief on behalf of himself and on behalf of all other similarly situation persons, defined as: “All members of the Dallas Police and Fire Pension System not participating in the Deferred Retirement Option Program.”

2. DROP was created by the City of Dallas as a benefit to retain senior public-safety personnel and keep them from retiring. Under DROP, active members who are eligible to retire and receive service retirement payments can elect to continue to work and have the amounts they would have received if they had elected to retire placed into a DROP account. The sums placed in the DROP account are credited with significant interest, and DROP participants are guaranteed significant returns on their investment.

3. The tragic story of DPFPS and the speculative and risky investment strategy by the members of its Board of Trustees (“the Board”) is well documented in the record herein. Simply stated, without any due diligence certain individual board members chose an investment strategy to benefit themselves to the detriment of their fellow public servant members. To

support these benefits, those board members chose to put their interests ahead of those members of the DPFPS like Intervenor Pounders and the putative Class who do not have funds placed into DROP accounts.

4. These members of the Board are also members of the DPFPS (“the System Participant Trustees”) who engaged in self-dealing and demonstrated unwarranted favoritism toward DROP participants. The System Participant Trustees have overseen and authorized interest payments substantially exceeding market rates and exceeding returns on System assets, chosen speculative investments to support excessive payments, borrowed money and leveraged speculative investments, overstated asset values, misclassified assets, and misinformed or hidden material information from the Legislature, the City of Dallas, and their own members. All of this was done despite the threat of a collapsing System. Even after the many speculative investments and implosion of the System, the System Participant Trustees continue to engage in self-dealing and act in favor of DROP payments over the interests of the service retirement, disability, and death benefits of all System participants.

5. Participants in the DROP have intervened in this lawsuit seeking to protect their interests in the corpus of the trust.

6. Certain Trustee members of the Board, the Trustee Intervenor, have also intervened in this suit seeking injunctive relief to stop the hemorrhaging and to protect the corpus of the trust. But, the Trustee Intervenor has an inherent conflict in representing the interests of the Board and the now competing interests of the DROP participants and non-DROP participants in the System.

7. Intervenor Pounders has a justiciable interest in the matters in controversy in this litigation because he and the putative Class he seeks to represent are members of the DPFPS that

do not have funds placed into the DROP. To date no other party in this litigation exclusively represents the interests of Intervenor Pounders and the putative Class as non-DROP members. As such, Intervenor Pounders and the putative Class's interest are not adequately served by any other party in this litigation.

8. This action should not proceed without Intervenor Don Pounders and the other members of the putative Class as they are necessary and indispensable parties. “[A]ll persons who have or claim to have a direct interest in the object and subject matter of this suit and whose interests will necessarily be affected by any judgment that may be rendered therein, are not only proper parties, but are necessary and indispensable parties.” *Armstrong v. Armstrong*, 532 S.W.2d 406 (Tex. Civ. App.—Eastland 1976, no writ). Intervenor Pounders and the other members of the putative Class are retired Dallas police officers and fire fighters who are members of DPFPS and do not participate in the DROP. Any action that affects how DROP is distributed by the Board directly affects Intervenor and the putative Class and their funds held in trust by the Board.

9. Intervenor Pounders seeks to intervene in this action in order to protect his and the putative Class's interest in seeking recovery for the breaches of fiduciary duties resulting from the implementation and execution of the DROP.

PARTIES

10. Intervenor Don Pounders is an individual who served as a Dallas firefighter for a total of 16 years, is retired, and is a member in the DPFPS who does not have any funds placed into DROP account. Intervenor Don Pounders asserts claims in his individual capacity and on behalf of those similarly situation (the “Class” as defined above).

11. DROP-Intervenor Larry Eddington is an individual who served as a Dallas police officer and has money in a DROP account.

12. DROP-Intervenor William Butler is an individual who served as a Dallas police officer and has money in a DROP account.

13. DROP-Intervenor Vincent Aurentz is an individual who served as a Dallas police officer and has money in a DROP account.

14. DROP-Intervenor Ben Caperton is an individual who served as a Dallas police officer and has money in a DROP account.

15. DROP-Intervenor Bob Neuman is an individual who served as a Dallas police officer and has money in a DROP account.

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

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

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

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

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

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

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

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

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

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

26. System Participant Trustee Defendant Brian Hass is sued in his official capacity as a Trustee of the Dallas Police and Fire Pension System, and may be served at may be served at

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

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

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

SUBJECT MATTER JURISDICTION

29. This Court has jurisdiction over this action pursuant to Article V Section 8 of the Texas Constitution and section 24.007 of the Texas Government Code. This Court has subject matter jurisdiction over all claims asserted in this action because they are common law and/or statutory causes of action existing under Texas law by which Intervenor Pounder seeks recoverable relief within this Court's jurisdiction.

FACTUAL BACKGROUND

30. As is set forth fully in the pleadings already on file in this matter, DPFPS is in critical financial straits, presenting the imminent reality that DPFPS will be unable to pay service retirement benefits, disability benefits, survivors' benefits, or any other monetary obligations to its participants. Members of DPSPS who are not participants in DROP are particularly vulnerable and at risk of losing benefits.

31. The history of the statutory creation of DPSPS, the Board's amendment of the Plan, including the implementation and operation of DROP, the Board's many failures with the Plan, and the resulting financial crisis, are set forth fully in the pleadings herein. Intervenor Pounders incorporates the Trustee Intervenors' Petition in Intervention in full.

32. Allegations in the Trustees Intervenors' Petition in Intervention critical to Intervenor Pounders and other non-DROP participants, include:

- ...In 2001, the Board was expanded to 12 trustees consisting still of only 4 council members, 6 active police and fire members, and 2 retired police and fire members. Given the quorum rules, the Board could, and did, meet and act with no council members present.
- In 1998, the plan was amended to require that the interest rate for DROP accounts be set at a minimum of 8% and a maximum of 10%, compounded daily. This guaranteed rate of return was not in any way tied to any standard related to the performance of the System's investment or the marketplace's available interest rate. The interest rate remained in effect until 2014. This exorbitant and irresponsible interest rate, and a guaranteed 4% cost-of-living adjustment, again not tied to any benchmark and which was added to the principal in the DROP account and then compounded at 8-10 percent daily, was one of the primary causes of DPSPS's financial crisis. Upon information and belief, several Board members who had personal DROP accounts deliberated and voted on these DROP enhancements when their personal interests should have disqualified them from deliberating and voting.
- In 2001, the Plan was amended to allow those who left active service to continue to participate in DROP and thus maintain the remarkable interest rate for their DROP accounts. Upon information and belief, several Board members who had personal DROP accounts deliberated and voted on this DROP enhancement when their personal interests should have disqualified them from deliberating and voting.
- The current pension crisis and the impossibility of sustaining the unrealistically high interest rates for DROP were acknowledged by the Board not later than 2014 when it finally amended the guaranteed 8-10% interest on DROP accounts. However, the Board took no meaningful action to make any effective change as to its DROP withdrawal policies, which it may do without membership approval, and which withdrawal policy is the primary cause of the liquidity and long-term solvency crisis.

- In May 2016, the chairman of the Board acknowledged that the System could run out of money in 15 to 20 years. He admitted that one of the reasons “we are in this untenable situation” is because of “the structure of DROP.” He added that the fund lost 25 percent of its value but was obligated to pay between 8 and 10 percent interest on DROP accounts. Another reason for the impending insolvency was the rapid rise in the size of the overall DROP account liability. He concluded, “We simply cannot maintain the practice of paying out significantly more than we have coming in—the continuation of this practice would be financial suicide.”
- But the Board, through the System Participant Trustees has continued its course toward financial suicide and has taken no meaningful action to turn the System back toward solvency.¹

33. Trustees have specific fiduciary duties imposed by common law and the Texas Trust Code. *See* TEX. PROP. CODE § 113.051, *et seq.*

34. As is clear from the record herein, the System Participant Trustees, as members of the Board, owe a fiduciary duty to *all* participants in the System, including Pounders and other non-DROP participants, to administer the pension system for the benefit of all DPFPS members, retirees, and their beneficiaries, not just those participating in the DROP program.

35. The System Participant Trustees, as members of the Board, owe a fiduciary duty to the participants in the System, including Pounders and other non-DROP participants, to maintain the integrity of the fund and the System’s ability to pay service retirement, disability, and death benefits for all participants.

36. The System Participant Trustees, as members of the Board, have a fiduciary duty to protect the benefits owed to Pensioners in DPFPS, including those who do not participate in the DROP.

37. The System Participant Trustees, further have a fiduciary duty to protect DPFPS’s assets from the inherent danger posed by uncontrolled DROP withdrawals.

¹ *See* Petition in Intervention by Trustees at §§43-45, 52, 55-56.

38. And, most critically, the System Participant Trustees have a fiduciary duty to refrain from self-dealing and to act in the best interests in DPFPS participants, not merely those in the DROP.

39. Nonetheless, because of the self-induced conflicts that burden them, the System Participant Trustees have allowed hundreds of millions, if not billions of dollars of trust assets, to be depleted through self-dealing and reckless choices.

CLASS ACTION ALLEGATIONS

40. The preceding allegations are incorporated by reference and re-alleged as if fully set forth herein.

41. Pursuant to Texas Rule of Civil Procedure 42, Intervenor Pounders brings this action on his own behalf and on behalf of a proposed class of all other similarly situated persons (“Class Members” of the “Class”) consisting of: “All members of the Dallas Police and Fire Pension System not participating in the Deferred Retirement Option Program.”

42. Excluded from the Class are: (a) federal, state, and/or local governments, including, but not limited to, their departments, agencies, divisions, bureaus, boards, sections, groups, counsels, and/or subdivisions; (b) any entity in which the System Participant Trustees have a controlling interest, to include, but not limited to, their legal representative, heirs, and successors; (c) all persons who are presently in bankruptcy proceedings or who obtained a bankruptcy discharge in the last three years; and (d) any judicial officer in the lawsuit and/or persons within the third degree of consanguinity to such judge.

43. Upon information and belief, the Class consists of over one thousand pensioners. Accordingly, it would be impracticable to join all Class Members before the Court.

44. There are numerous and substantial questions of law or fact common to all of the members of the Class and which predominate over any individual issues. Included within the common question of law or fact are:

- a. Whether the System Participant Trustees owed a fiduciary duty to members of the System not participating in DROP;
- b. Whether the System Participant Trustees engaged in self-dealing;
- c. Whether the System Participant Trustees' self-dealing breached a fiduciary duty;
- d. Whether members of the System not participating in DROP were damaged by the System Participant Trustee's self-dealing and breach of fiduciary duties; and
- e. The proper relief required to protect Intervenor Pounders and the Class Members' investment in the System.

45. The claims of Intervenor Pounders are typical of the claims of Class Members, in that they share the above-referenced facts and legal claims or questions with Class Members, there is a sufficient relationship between the damage to Intervenor Pounders and the System Participant Trustees' conduct affecting Class Members, and Intervenor Pounders has no interests adverse to the interests other Class Members.

46. Intervenor Pounders will fairly and adequately protect the interests of Class Members and has retained counsel experienced and competent in the prosecution of complex class actions.

47. The System Participant Trustees have acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

48. The questions of law and fact common to the members of the class predominate over any questions affecting only individual members, if any.

49. A class action is superior to other methods for the fair and efficient adjudication of this controversy because (i) there has been no interest shown of members of the class in individually controlling the prosecution of separate actions; (2) Intervenor Pounders is aware of no other litigation concerning the controversy already commenced by any member of the class other than the underlying suit; (3) it is desirable to concentrate the litigation in this forum, which is familiar to all parties; and (4) there are no difficulties likely to be encountered in the management of this class action.

CAUSES OF ACTION

First Cause of Action

Breach of Fiduciary Duty and Self-Dealing by the System Participant Trustees

50. The preceding allegations are incorporated by reference and re-alleged as if fully set forth herein.

51. The System Participant Trustees owe a duty to Intervenor Pounders and the putative class members who are members of the Dallas Police and Fire Pension System not participating in DROP to refrain from self-dealing.

52. By engaging in self-dealing and acting outside of their authority as Trustees, the System Participant Trustees have continuously and systematically breached their fiduciary duties

to Intervenor Pounders and the putative class members who are members of the Dallas Police and Fire Pension System not participating in DROP.

53. The System Participant Trustees' breach resulted in injury and continues to result in injury to Intervenor Pounders and the putative class members who are members of the Dallas Police and Fire Pension System not participating in DROP and benefit to the System Participant Trustees.

Second Cause of Action

Aiding and Abetting a Breach of Fiduciary Duty by the System Participant Trustees

54. The preceding allegations are incorporated by reference and re-alleged as if fully set forth herein.

55. The Board as a whole owed fiduciary duties to administer the pension system for the benefit of all DPFPS members, retirees, and their beneficiaries, not just those participating in the DROP program.

56. The Board as a whole has breached that duty.

57. The System Participant Trustees assisted and/or encouraged the Board's breach of its fiduciary duty.

58. The System Participant Trustees knowingly participated in the Board's breach of its fiduciary duty.

59. This breach resulted in, and continues to result in injury to Intervenor Pounders and the putative class members who are members of the Dallas Police and Fire Pension System not participating in DROP.

UNJUST ENRICHMENT AND REQUEST FOR ACCOUNTING

60. The System Participant Trustees who are DROP participants have been unjustly enriched to the detriment of all members of the DPFPS who are not participants in the DROP.

61. Intervenor Pounders and the Class seek an order compelling the System Participant Trustees to deliver an accounting regarding their personal DROP accounts. *See* TEX. PROP. CODE § 113.151, *et seq.*

DISGORGEMENT AND INJUNCTIVE RELIEF

62. Intervenor Pounders and the Class seek an order directing that all profits obtained by the System Participant Trustees' personal DROP accounts as a result of their participation in DROP be disgorged.

63. Intervenor Pounders and the Class seek an order directing that all interest paid on DROP accounts be returned to the System for the benefit of all participants, including those not participating in the DROP.

64. Intervenor Pounders and the Class seek temporary injunctive relief to enjoin the Board from permitting further DROP distributions from the Pension System until the time of trial.

65. Intervenor Pounders and the Class seek permanent injunctive relief permanently enjoining the Board, including the System Participant Trustees, from authorizing any distributions of DROP funds unless the 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 the Court, including those not participating in the DROP.

66. Intervenor Pounders and the Class seek further injunctive relief to require that the System Participant Trustees refrain from any further self-dealing and adhere to their fiduciary duties to protect the assets of the Fund for service retirement, disability and survivor benefits and for the Board to adopt plans and policies that (1) hold in trust the assets of the Pension System for the benefit of *all* its Members, Pensioners, and their Beneficiaries, including those not participating in the DROP; and (2) manage the Pension System according to sound actuarial principles; and commit to long term plans for financial solvency of the Fund, including the portion of the Fund not participating in the DROP.

67. Finally, Intervenor Pounders and the Class seek the appointment of a receiver over certain trust property held by DPFPS and/or the imposition of a constructive trust on the funds diverted to the DROP as a result of the System Participant Trustees' self-dealing.

CONDITIONS PRECEDENT

Pursuant to Texas Rule of Civil Procedure 54, all conditions precedent to Intervenor's recovery against the System Participant Trustees have been performed, has occurred, or has been waived due to futility.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Intervenor and the Class respectfully request the following:

- a. An order certifying their class claims and appointing Steckler Gresham Cochran PLLC as class counsel and Intervenor Pounders as Class Representative;
- b. Equitable relief in the amount of the unjust enrichment;
- c. An order directing the System Participant Trustees who are members of DROP to produce an accounting;

- d. An order directing the System Participant Trustees who are members of DROP to disgorge any profits resulting from their self-dealing;
- e. An order directed that all interest paid on DROP accounts be returned to the System for the benefit of all participants;
- f. Injunctive and equitable relief as set forth herein;
- g. Costs;
- h. Pre-judgment and post-judgment interest as provided by law;
- i. Attorneys' fees; and
- j. All other relief, at law or in equity, to which Intervenor and the putative Class are entitled.

March 2, 2017

Respectfully submitted,

STECKLER GRESHAM COCHRAN PLLC

/s/ Dean Gresham

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**ATTORNEYS FOR INTERVENOR AND
PUTATIVE PENSIONER CLASS**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served in accordance with Rule 21a of the TEXAS RULES OF CIVIL PROCEDURE on all counsel of record on March 2, 2017.

/s/ Dean Gresham

Dean Gresham