UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re:	Case No. 13-53846
	Chapter 9
CITY OF DETROIT, MICHIGAN	Hon. Thomas J. Tucker

THE POLICE AND FIRE RETIREMENT SYSTEM OF THE CITY OF DETROIT,	Adversary No. 20-04042-tjt
Plaintiff and Counter-Defendant,	
vs.	
INVESTMENT COMMITTEE OF THE POLICE AND FIRE RETIREMENT SYSTEM OF THE CITY OF DETROIT,	
Defendant and Counter-Plaintiff.	

ANSWER AND AFFIRMATIVE DEFENSES OF DEFENDANT INVESTMENT COMMITTEE OF THE POLICE AND FIRE RETIREMENT SYSTEM OF THE CITY OF DETROIT TO PLAINTIFF'S COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

AND

COUNTERCLAIM OF INVESTMENT COMMITTEE OF THE POLICE AND FIRE RETIREMENT SYSTEM OF THE CITY OF DETROIT

Defendant Investment Committee of the Police and Fire Retirement System

of the City of Detroit ("Investment Committee") answers plaintiff's Complaint for Injunctive and Declaratory Relief ("complaint") as follows:

PRELIMINARY STATEMENT

A. Introduction

A critical piece of the City of Detroit's Plan of Adjustment, confirmed by this Court in November 2014, was the creation of an Investment Committee (the defendant) to provide independent oversight over the Police and Fire Retirement System for the City of Detroit ("PFRS") (the plaintiff). The formation of the Investment Committee is also mandated under State law. MCL 38.1133(g). The Investment Committee, whose independent members are all highly-qualified financial professionals, saw a need for additional monitoring, oversight, and due diligence of PFRS investments, and decided to prioritize the retention of investment professionals as an efficient way to get that done. In an attempt to frustrate the Investment Committee's ability to carry out its intended function, the PFRS unlawfully refused to pay for the investment expertise the Investment Committee authorized, and then filed this suit, against its own Investment Committee, seeking various, vague relief.

B. The Investment Committee's Formation

During the negotiations in the City's bankruptcy case, the parties

contributing hundreds of millions of dollars to the PFRS (and the General Retirement System – "GRS") insisted on independent oversight by an investment committee in exchange for the contributions.

> "2. Governance Requirements of the GRS and PFRS. At all times during the 20 year period following the disbursement of the State Contribution to the GRS and PFRS, the GRS and PFRS each must establish an investment committee (the "Investment Committee") for the purpose of making recommendations to, and approving certain actions by, the respective System's board of trustees and/or making determinations and taking action under and with respect to Investment Management, as set forth in the terms and conditions enumerated on *** **Exhibit B** [PFRS Governance Terms], *** attached to and incorporated by reference into this Agreement."
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> State Contribution Agreement, DOC. 8045-1, Ex. 1.A.332, Oct. 22, 2014 ("SCA"), p 2; emphasis added.

State law also mandates the formation of an investment committee for the PFRS: "Subject to a plan for adjustment, each large sponsored system shall establish an investment committee." MCL 38.1133(g)(1); emphasis added.

The Investment Committee is made up of five independent members, two employee members, and two retiree members (the latter four are also referred to as the "uniformed members"). The uniformed members are entitled to ½ vote each, while the independent members get one vote each.

The current independent members, who sit on the Investment Committee without compensation, were chosen because they are highly accomplished and

experienced investment professionals with impressive resumes. It is this core group that the funders under the City's Plan of Adjustment rely on to provide independent oversight of the investment activities of the PFRS.

C. The Investment Committee's Authority Under State Law and the Combined Plan

The Investment Committee was granted broad responsibilities and powers with respect to "Investment Management" and the resources and tools necessary to carry out its objectives. Very specifically, it was given explicit power to retain professional support:

> "The IC shall evaluate and select the CIO, set and approve any and all compensation for, and terms of employment of, the CIO. With respect to plan assets, the CIO shall report directly to the IC and the Executive Director of the Board. The CIO shall be responsible for assisting the IC and the Board in overseeing the PFRS's investment portfolio."
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> * * *
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> "The IC may retain actuarial, legal counsel, audit or other professional or support personnel to provide advice to the IC as it deems reasonably necessary to perform its functions and such parties or persons may be reasonably compensated from the assets of the Plan; such engagements shall not be subject to the approval of the Board."

SCA, Ex. B, Investment Committee Governance, pp. 3, 7; emphasis added.

The Investment Committee Governance terms also state: "The IC shall have all the powers as a fiduciary under the first sentence of MCL § 38.1133(5) * * *." SCA, Ex B., Investment Committee Governance, p. 4.

That authority granted to the Investment Committee as an investment

fiduciary under State law is even broader:

> "(5) Subject to section 13g, an investment fiduciary may use a portion of the system's income to defray the costs of investing, managing, and protecting the assets of the system; may retain investment and all other goods and services necessary for the conduct of the affairs of the system, including investment advisors, consultants, custodians, accountants, auditors, attorneys, actuaries, investment personnel, administrators, and physicians; and may enter into contracts for and pay reasonable compensation for those services. * * *"
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> MCL 38.1133(5); emphasis added.

The PFRS's arguments that these rights and duties are subject to PFRS oversight are contradicted by the terms and conditions themselves, which note specifically that such engagements are not subject to Board approval. The general power of the PFRS board to oversee the pension simply cannot override these specific mandates. Similarly, the attempt of the PFRS to substitute its judgment for that of the Investment Committee is counter to the purpose of the Investment Committee, as evidenced by its express authority. Notwithstanding those facts, the PFRS refuses to pay the personnel chosen to be retained by the Investment Committee. The decision by the PFRS to refuse payment to Mr. Kenneally and file this suit only (sadly) reaffirms the decision of the contributing constituents to the Plan of Adjustment to insist on independent oversight. The fact that Mr. Kenneally continues to work without pay in the face of this dispute evidences his commitment to do the job for which he was hired.

The PFRS historically has spent too little on managing its assets properly and too much on litigation. Simply put, the investment professionals on the Investment Committee immediately saw that the failure to do sufficient due diligence on the front end and during the term of investments leads to losses, which are rarely made up by bearing the costs of suing investment partners and others in the wake of failed investments. This is a pernicious and unsustainable cycle that has harmed the PFRS, and which the Investment Committee is trying to break. The PFRS has traditionally committed far too few resources to internal administration of its assets.[1] The Investment Committee and the CIO believe that more than one investment professional is required for the Investment Committee and the GRS investment committee. The combined PFRS and GRS are served by only two investment officers, covering $4.5 billion of combined assets.

To aid it in its endeavor to increase and further in-source investment monitoring, oversight, and due diligence, and keep talent, and thus increase return and decrease litigation costs, the Investment Committee has determined it is important to be able to retain more than one investment professional. Soon after it began its responsibilities, the Investment Committee ensured that the CIO would

[1] The PFRS received an Investment Cost Effective Analysis performed by CEM Benchmarking for the five years ending December 31, 2015. It showed that expenditure on external investment management and oversight, custodial and other were both higher than the benchmarks, and its spending on internal investment oversight was below benchmarks. The report stated: "The greatest cost impact is usually caused by differences in the use of: [e]xternal active management because it tends to be much more expensive than internal or passive management. You used more external active management than your peers (your 86% versus 76% for your peers)."

no longer be the sole individual on staff with investment experience. It established the position of a Deputy Investment Officer, and an individual was hired soon after. Due in part to the ability to increase his compensation elsewhere, that individual left after only two years. Mr. Kenneally was then hired. To ensure it could retain the necessary investment professionals to provide experienced service to PFRS, the Investment Committee commissioned an analysis by McLagen as to the proper compensation for its investment personnel. The study showed that compensation being paid by the Investment Committee at that time was in the bottom quartile of the comparative analysis. This is especially telling because the PFRS is likely not the most attractive option for investment professionals: the governance structure of the PFRS and GRS is more complex than many systems, and there is a history of investments made under questionable circumstances (as demonstrated, for example, by the indictment and conviction for bribery of a previous PFRS trustee), which can make achieving investment returns more difficult. Recognizing the historical difficulty of retaining the investment professionals needed to achieve the necessary returns through appropriate monitoring, oversight, and due diligence, and thus reduce overall costs to the PFRS, the Investment Committee increased salaries for the investment professionals, choosing amounts in the median ranges for both Mr. Kenneally and Mr. Bigelow.

The Investment Committee believes it is critical to be in this median range to attract and retain professionals, especially when similar, even more desirable positions are available to those professionals. The last deputy investment officer quit after two years. Notably, the PFRS never took formal action on his hiring or compensation. Further, the PFRS ignores the lost savings (and increased return) that the Investment Committee seeks in making its changes, compared to historic practices of paying lawyers on the back end instead of the staff on the front end to avoid costly errors.

D. The Complaint

Initially, the PFRS raises several red-herrings in an attempt to dramatize its baseless complaint surrounding the contract of Mr. Kenneally ("Kenneally Contract"), an investment professional hired by the Investment Committee under its authority discussed above. First, the complaint states that the PFRS is taking on the full compensation of Mr. Kenneally when he in the past provided services to both the Investment Committee and the investment committee of the GRS. In fact, the intent has always been for Mr. Kenneally to continue to provide services to both the Investment Committee and the GRS investment committee. Recently, the GRS directed their counsel to prepare an independent contractor agreement for Mr. Kenneally, which will cover (without duplication) 40% of the compensation to be paid under the Kenneally Contract. Second, the PFRS makes much of its

allegations that the independent contractor agreement is not properly constructed and the payment of Mr. Kenneally as the deputy investment professional cannot be accomplished under the City's payroll system.

If the first point is accurate, the Investment Committee will revise the Kenneally Contract to correct any real or perceived defects. It is already working to coordinate the Kenneally Contract with the GRS contract being drafted. One would think that, when arguing that a contract should be void, the PFRS would want to work with its Investment Committee to achieve a suitable contract instead of suing it. But, as this case will show, the PFRS appears to have a blind spot when it comes to spending legal fees, putting politics over business sense, further proving the necessity of the Investment Committee's oversight.

Similarly, on the second point, the payment logistics are not an issue over which to bring suit. Historically, the City has paid both the CIO and the deputy investment professional up to City payroll limits and the GRS and/or PFRS have paid the difference. The rantings over the "White Book" and payment logistics are of no moment.

With those distractions aside, the gravamen of the complaint is that, notwithstanding its clear authority to set compensation for the Chief Investment Officer, <u>any other investment professionals or investment personnel</u>, and any other "support personnel", the PFRS asserts that the Investment Committee lacks the

authority to set compensation for the deputy investment professional and that it set the compensation for the CIO and one deputy too high. The claims, in the face of clear authority to the contrary, are perhaps an attempt to intimidate or wear down the volunteer members of the Investment Committee.

E. Conclusion

In summary, the complaints of the PFRS are unfounded and unsupportable. Its stubborn refusal to allow the Investment Committee to do the job it was created for and its unwarranted withholding of pay of Mr. Kenneally as the deputy investment professional constitute breaches of the board's fiduciary duty and may violate the Plan of Adjustment. The failure to acknowledge the clear authority of the Investment Committee in this matter, and the decision to engage in costly litigation, points to the need for a clear, unmistakable statement regarding the Investment Committee's authority, to avoid more ill-considered litigation in the future.

INTRODUCTION

1. The Police and Fire Retirement System of the City of Detroit ("PFRS") is a pension plan and trust established by the City of Detroit Charter and Municipal Code with its offices in Detroit, Michigan. It is governed by an appointed and elected Board of Trustees (the "Board").

ANSWER: The Investment Committee admits the allegations in paragraph 1 of plaintiff's complaint. The Investment Committee answers further that the PFRS is "governed by" statutes and agreements in addition to the Board.

2. This adversary proceeding is brought to remedy the breaches of fiduciary duty committed by the PFRS Investment Committee (the "IC") and/or its individual committee members and the PFRS Chief Investment Officer ("CIO"), obtain injunctive relief and to declare the parties' rights and responsibilities regarding the administration and operation of the PFRS pursuant to: i) the terms of the Eighth Amended Plan of Adjustment of Debts of the City of Detroit (the "Plan of Adjustment" or "Plan") (Dkt. No. 8045), confirmed by this Court's November 12, 2014 Order Confirming Eighth Amended Plan of Adjustment of Debts of the City of Detroit (Dkt. No. 8272) (effective December 10, 2014); ii) certain exhibits that are made part of the Plan of Adjustment; and iii) agreements that were executed in connection with confirmation of the Plan.

ANSWER: The Investment Committee acknowledges that plaintiff seeks the relief described, but denies that plaintiff is entitled to the relief being sought in the complaint.

3. The relevant duties and powers of the Board and the IC are set forth in the following documents:

a. The State Contribution Agreement dated as of October 17, 2014, by

and among the Michigan Settlement Administration Authority, the General Retirement System of the City of Detroit, PFRS, and the City of Detroit (the "City"). *See* Exhibit I.A.332 to the Plan of Adjustment (Dkt. No. 8045-1).

b. Exhibit B to the State Contribution Agreement – the PFRS Governance Terms. *See* Exhibit I.A.332 to the Plan of Adjustment (Dkt. No. 8045-1).

c. The Combined Plan (Components I and II) for the Police and Fire Retirement System of the City of Detroit, Michigan, amended and restated Effective July 1, 2014 (the "Combined Plan"). *See* Exhibit I.A.254.a to the Plan of Adjustment (Dkt. No. 8045-1).

d. The Combined Plan was further amended and restated as Exhibit E to Emergency Manager City of Detroit Order 44, Final Emergency Manager Order dated December 8, 2014 (attached as **Exhibit A**).

ANSWER: The Investment Committee admits that the documents referenced in paragraph 3 of plaintiff's complaint set forth certain duties and powers of the Board and Investment Committee and affirmatively states that the documents speak for themselves. By way of further response, the Public Employee Retirement System Investment Act, as amended, MCL 38.1132 *et seq.* is a major source of the parties' duties and powers and there are other

relevant documents that set forth the duties and powers of the Board and Investment Committee.

4. A dispute has arisen between the Board and the IC regarding the IC's unlawful efforts to dramatically increase the annual compensation of PFRS's former Deputy Chief Investment Officer ("DCIO"), Kevin Kenneally ("Kenneally"), from $166,855 to $224,000 (a 33% increase) after one year of employment.

ANSWER: The Investment Committee admits that the Board disputes the Investment Committee's lawful approval to increase Mr. Kenneally's annual compensation from approximately $170,000 to $224,000 after being employed for one year. As to the remainder of the allegations in paragraph 4 of plaintiff's complaint, the Investment Committee denies them as untrue.

5. The Board appropriately exercised its exclusive authority over the management and compensation of all its employees (except the Chief Investment Officer ("CIO")), and prudently refused the efforts of the IC to implement the excessive raise.

ANSWER: The Investment Committee denies the allegations in paragraph 5 of plaintiff's complaint as untrue.

6. Further, the Board, through PFRS Executive Director David Cetlinski, offered to compromise very early in the IC's unlawful campaign by offering a

more reasonable compensation of $187,305, still a 12% raise.

ANSWER: The Investment Committee admits that the parties discussed the DCIO's compensation. As to the remainder of the allegations contained in paragraph 6 of plaintiff's complaint, the Investment Committee denies them as untrue.

7. The IC summarily rejected the attempted compromise and, instead, sought to avoid the clear parameters set forth in the Plan of Adjustment by conspiring with Kenneally to terminate his employment with PFRS and on December 2, 2019 entered into an illegal "Independent Contractor Agreement" between the IC and KJK Associates, LLC ("KJK") (an entity formed by Kenneally on November 22, 2019). A copy of the purported Independent Contractor Agreement (the "Contractor Agreement") is attached as **Exhibit B.**

ANSWER: The Investment Committee admits only that it entered into the agreement attached as Exhibit B. As to when KJK was formed, the Investment Committee lacks sufficient information to determine whether the allegation is true. The Investment Committee denies as untrue plaintiff's characterization of the agreement, as well as the remaining allegations in paragraph 7 of plaintiff's complaint.

8. Kenneally resigned his employment with PFRS on December 27, 2019. At all relevant times prior to December 27, 2019, Kenneally was an

employee of both the PFRS and GRS.

ANSWER: The Investment Committee admits only that Mr. Kenneally resigned his employment on December 27, 2019. As to the remainder of the allegations in paragraph 8 of plaintiff's complaint, the Investment Committee denies as untrue.

9. The Contractor Agreement calls for Kenneally to provide the same services he did as an employee of PFRS only, but his compensation would increase from $166,855 (his salary as DCIO) to an excessive $285,000 per year (a 70% increase), plus an "incentive payment" representing retroactive pay for 2019 in the amount of $60,000.

ANSWER: The Contractor Agreement speaks for itself and the Investment Committee denies plaintiff's characterization of it.

10. Since in his capacity as DCIO, Kenneally also worked for and on behalf of the GRS, with GRS and PFRS sharing the cost of his employment, Kenneally's separation from the PFRS also resulted in a separation from GRS.

ANSWER: The Investment Committee admits that Mr. Kenneally did work related to both the PFRS and GRS, as authorized by the Investment Committee and the GRS investment committee.

11. The Contractor Agreement is between only the PFRS IC and KJK.

ANSWER: The Contractor Agreement speaks for itself.

12. One of the purported bases for Kenneally's increase in compensation was that the DCIO position was more complex because it served both the PFRS IC and GRS IC. That is not true for KJK which only works for PFRS. In practical terms, the IC has contracted with Kenneally to do half of the work he was previously performing at nearly twice the pay.

ANSWER: The Contractor Agreement speaks for itself and the Investment Committee denies plaintiff's characterization of it. As to the remainder of the allegations in paragraph 12 of plaintiff's complaint, the Investment Committee denies as untrue.

13. Despite IC Chairman Smith's request that GRS share the costs of the higher CIO and DCIO compensation costs, the GRS Board and GRS IC have refused to take any action in support of the PFRS IC's effort with respect to Kenneally.

ANSWER: The Investment Committee denies the allegations in paragraph 13 of plaintiff's complaint as untrue.

14. Following execution of the Contractor Agreement, the IC then improperly demanded that the Board make payments to Kenneally/KJK under the terms of the Contractor Agreement out of the assets of PFRS.

ANSWER: The Investment Committee denies the allegations in paragraph 14 of plaintiff's complaint as untrue.

15. The Board refused because the IC's scheme violates the Plan of Adjustment and the Contractor Agreement violates state and federal law as well as the Michigan Constitution.

ANSWER: The allegations in paragraph 15 of plaintiff's complaint state a legal conclusion to which no response is required. To the extent a response is required, the Investment Committee denies the allegations in paragraph 15 of plaintiff's complaint as untrue.

16. Kenneally clearly does not meet the definition of an "independent contractor" and treating him as a 1099 contractor, rather than a W-2 employee, exposes the Board, PFRS staff and PFRS to liability regarding state and federal taxes, unemployment insurance, workers compensation and employee benefits.

ANSWER: The allegations in paragraph 16 of plaintiff's complaint state a legal conclusion to which no response is required. To the extent a response is required, the Investment Committee denies the allegations in paragraph 16 of plaintiff's complaint as untrue. This allegation is inconsistent with the allegations in paragraph 95 of plaintiff's complaint.

17. The IC entered into the Contractor Agreement as a blatant circumvention of the Board's exclusive authority to hire, manage and set compensation for all employees necessary for the operation of PFRS (other than

the CIO), and approve all terms of employment for those employees.

ANSWER: The Investment Committee denies the allegations in paragraph 17 of plaintiff's complaint as untrue.

18. By conspiring with Kenneally to resign from his employment with PFRS and entering into the Contractor Agreement, the IC has exceeded the terms of its authority under the Plan of Adjustment, State Contribution Agreement and Combined Plan, and has violated its fiduciary duty to PFRS and the active and retired police officers, firefighters and their beneficiaries it is bound to serve.

ANSWER: The allegations in paragraph 18 of plaintiff's complaint state a legal conclusion to which no response is required. To the extent a response is required, the Investment Committee denies the allegations in paragraph 18 of plaintiff's complaint as untrue.

19. In this action, the Board seeks a determination that the IC breached its fiduciary duty and a declaratory judgment that the Contractor Agreement is *ultra vires* and *void ab initio.* Additionally, the Board seeks a declaration that the sole and exclusive management of PFRS employees, except the CIO, lies with the Executive Director and the Board.

ANSWER: The Investment Committee acknowledges that plaintiff seeks the relief described, but denies that plaintiff is entitled to the relief being sought in the complaint.

20. The State Contribution Agreement and Combined Plan each provide that in the event the IC takes action in violation of the terms thereof, the Board "is granted the express right to seek to preliminarily enjoin such action without the need to show irreparable harm." *See* State Contribution Agreement - Governance Terms, Page 5; *see also* Combined Plan §16.1, Page 40 (Dkt. No. 8045-1).

ANSWER: The Investment Committee denies that it took any action in violation of the State Contribution Agreement or Combined Plan. By way of further response, the State Contribution Agreement and Combined Plan each speaks for itself.

21. Accordingly, the Board also seeks an injunction preventing the implementation and enforcement of the Contractor Agreement.

ANSWER: The Investment Committee acknowledges that plaintiff seeks the relief described, but denies that plaintiff is entitled to the relief being sought in the complaint.

JURISDICTION

22. This Court retained exclusive jurisdiction over all matters arising out of and related to the Plan of Adjustment to the fullest extent permitted by law, including jurisdiction to resolve "disputes that may arise in connection with the consummation, interpretation or enforcement of the Plan of Adjustment or any contract, instrument, release or other agreement or document that is entered into or

delivered pursuant to the Plan…" *See* Plan of Adjustment, Article VII, Paragraph G.

ANSWER: The Investment Committee admits that plaintiff purports to quote a portion of the Plan of Adjustment and affirmatively states that the Plan of Adjustment speaks for itself. The Investment Committee does not contest jurisdiction. The Investment Committee further affirmatively states that there are statues of the State of Michigan that apply directly to this matter.

23. This adversary proceeding is brought under Rule 7001 *et seq*., of the Federal Rules of Bankruptcy Procedure. It constitutes a core proceeding under 28 U.S.C. §157(b)(2)(O).

ANSWER: To the extent that paragraph 23 of plaintiff's complaint seeks relief, the Investment Committee requests that said relief be denied. The Investment Committee admits that this action is a core proceeding.

24. Venue is proper in this District under 28 U.S.C. §1409.

ANSWER: The Investment Committee does not contest venue.

THE PARTIES

25. The Board of Trustees of the Police and Fire Retirement System of the City of Detroit was created on July 1, 1941. It is vested with responsibility for the general administration, management and operation of the retirement system and is an investment fiduciary as defined in the Public Employee Retirement System

Investment Act, as amended, MCL 38.1132 *et seq.* (the "Act").

ANSWER: The Investment Committee admits that the Board was created on July 1, 1941 and that it is an investment fiduciary as defined in the Act. By way of further response, the Board's "general administration, management and operation of the retirement system" is subject to, among other things, the Investment Committee's oversight as described in the State Contribution Agreement, Plan of Adjustment, Combined Plan, and MCL 38.1132 *et seq*.

26. The IC was created as a committee of PFRS pursuant to the Plan of Adjustment and its related agreements and attachments on November 12, 2014 (effective February 2015) and, is also specifically defined as investment fiduciary under the Act.

ANSWER: The Investment Committee admits that it is an investment fiduciary under the Act. As to the remainder of the allegations in paragraph 26 of plaintiff's complaint, the Investment Committee denies them as phrased. By way of further response, the laws of Michigan, the Plan of Adjustment and related agreements speak for themselves.

27. As part of the resolution of certain claims by the GRS, PFRS and City of Detroit retirees in the City's bankruptcy case, the State agreed to make a contribution to the Retirement Systems under the terms and conditions set forth in the State Contribution Agreement. The State contribution is part of the agreement

referred to by certain persons as the "Grand Bargain."

ANSWER: The Investment Committee admits that the Michigan Settlement Administration Authority, General Retirement System of the City of Detroit, the Police and Fire Retirement System of the City of Detroit and the City of Detroit entered into the State Contribution Agreement. By way of further response, the State Contribution Agreement speaks for itself.

28. The State Contribution Agreement requires each Retirement System to "establish an investment committee…for the purposes of making recommendations to, and approving certain actions by, the respective System's board of trustees and/or making determinations and taking action under and with respect to Investment Management, as set forth in the terms and conditions enumerated on Exhibit A and Exhibit B, respectively, each attached to and incorporated by reference into this Agreement." (Dkt. No. 8045-1, Exhibit I.A.332).

ANSWER: The Investment Committee admits that plaintiff purports to quote a portion of the State Contribution Agreement and affirmatively states that the State Contribution Agreement speaks for itself.

29. "Investment Management" is a defined term in Exhibit B to the State Contribution Agreement.

ANSWER: The Investment Committee admits that "Investment

Management" is a defined term in Exhibit B to the State Contribution Agreement and affirmatively states that the State Contribution Agreement speaks for itself.

30. Investment Management sets forth twelve (12) defined and limited tasks/obligations of the IC, all related to the management of PFRS assets and liabilities, none of which address in any manner the retention, management or compensation of PFRS employees.

ANSWER: The State Contribution Agreement speaks for itself. By way of further response, "the retention, management, and compensation" of individuals by the Investment Committee is elsewhere in Exhibit B to the State Contribution Agreement and also provided for in MCL 38.1132 *et seq*.

31. The sole purpose of the IC is to oversee and assist in managing the investment assets of the PFRS. The scope of its authority is prescribed and limited.

ANSWER: The Investment Committee denies the allegations in paragraph 31 of plaintiff's complaint as untrue.

32. The IC consists of nine (9) voting members: five (5) independent members who were initially appointed by this court; two (2) active police and fire employee members from the Board; and (2) retiree police and fire members from the Board. The independent members have a full vote each, while the employee and retiree members have only a one-half vote each.

ANSWER: The Investment Committee admits the allegations in paragraph 32 of plaintiff's complaint. By way of further response, the State Contribution Agreement speaks for itself.

33. The current independent members of the IC are Robert Smith ("Chairperson Smith"), McCullough Williams III (Vice Chairperson), Joseph Bogdahn, Robert Skandalaris, and Woodrow Tyler.

ANSWER: The Investment Committee admits the allegations in paragraph 33 of plaintiff's complaint.

34. The current employee members of the IC are Matthew Gnatek and Jeffrey Pegg. Gnatek and Pegg are also Board Trustees.

ANSWER: The Investment Committee admits the allegations in paragraph 34 of plaintiff's complaint.

35. The current retiree members of the IC are George Orzech and Gregory Trozak. Orzech and Trozak are also Board Trustees.

ANSWER: The Investment Committee admits the allegations in paragraph 35 of plaintiff's complaint.

36. Ryan Bigelow is the current Chief Investment Officer for PFRS and GRS ("CIO Bigelow").

ANSWER: The Investment Committee admits the allegations in paragraph 36

of plaintiff's complaint.

37. Kevin Kenneally is the former Deputy Chief Investment Officer for PFRS and GRS and is currently the principal of KJK Associates LLC ("DCIO Kenneally").

ANSWER: The Investment Committee admits that Mr. Kenneally served as the DCIO at the direction of the Investment Committee and the GRS investment committee and, upon information and belief, admits that Mr. Kenneally is the principal of KJK Associates LLC.

RELEVANT FACTS

38. The respective powers and duties of the Board and the IC are set forth in the Governance Terms (Exhibit B to the State Contribution Agreement) and Component I of the Combined Plan.

ANSWER: The Investment Committee admits in part and denies in part the allegations in paragraph 38 of plaintiff's complaint and affirmatively states that the State Contribution Agreement and Combined Plan speak for themselves. By way of further response, the State Contribution Agreement and Combined Plan are not the only documents relevant to the duties and powers of the Board and Investment Committee as the duties and powers of the Board and Investment Committee are also set forth in MCL 38.1132 *et seq.*, which speaks for itself.

39. In relevant part, the Governance Terms state:

a. "All administrative, managerial, and operational matters not addressed in this Term Sheet shall continue to be addressed by the Board in the ordinary course of its affairs." Governance Terms, Page 1.

b. "The IC may retain actuarial, legal counsel, audit or other professional or support personnel to provide advice to the IC as it deems reasonably necessary to perform its functions and such parties or persons may be reasonably compensated from the assets of the Plan; such engagements shall not be subject to the approval of the Board." Governance Terms, Page 3.

c. "The IC shall be an investment fiduciary to the PFRS. An IC Member or other fiduciary under the PFRS shall discharge his or her duties with respect to the PFRS in compliance with the provisions of Public Act 314 of 1965, as amended." Governance Terms, Page 3-4.

d. "Members of the IC shall comply with all Board governance policies and procedures, including the Ethics and Code of Conduct Policies, unless such compliance violates the Member's fiduciary duties or conflicts with the terms and conditions of this agreement." Governance Terms, Page 4.

e. "'Investment Management' with respect to plan assets also includes: *

* * Complying with the provisions of pertinent federal, state and local laws and regulations, specifically Public Act 314 and Plan Investment Guidelines." Governance Terms, Page 5-6.

f. "The IC shall evaluate and select the CIO, set and approve and all compensation for, and terms of employment of, the CIO." Governance Terms, Page 7.

(Dkt. No. 8045-1, Exhibit I.A.332)

ANSWER: The Investment Committee admits that it "may retain actuarial, legal counsel, audit or other professional or support personnel to provide advice to the IC as it deems reasonably necessary to perform its functions and such parties or persons may be reasonably compensated from the assets of the Plan; such engagements shall not be subject to the approval of the Board" and that plaintiff has purported to quote portions of the State Contribution Agreement, which speaks for itself. By way of further response, MCL 38.1133(5) states, in relevant part, that "an investment fiduciary may use a portion of the system's income to defray the costs of investing, managing, and protecting the assets of the system; may retain investment and all other goods and services necessary for the conduct of the affairs of the system, including investment advisors, consultants, custodians, accountants, auditors, attorneys, actuaries, investment personnel, administrators, and physicians; and may

enter into contracts for and pay reasonable compensation for those services" (emphasis added).

40. Consistent with the requirements of the Plan of Adjustment and the State Contribution Agreement, the City adopted the Combined Plan for PFRS. Adoption of the Combined Plan was a required part of confirmation of the Plan of Adjustment. In relevant part, Component I of the Combined Plan states:

a. "The Board is vested with responsibility for the general administration, management and operation of the Police and Fire Retirement System of the City of Detroit and with the trust and investment powers conferred in this Combined Plan Document." Component I §1.4.

b. "As of the effective date of the Plan of Adjustment, but subject to consummation of the State Contribution Agreement, an Investment Committee is hereby created for the purpose of making recommendations to, and approving certain actions by, the Board of Trustees and/or making determinations and taking action under and with respect to certain investment management matters relating to the Retirement System. The creation and operation of the Investment Committee is controlled by the Governance Term Sheet." Component I §1.21.

c. "The Investment Committee may retain actuarial, legal counsel, audit or other professional or support personnel to provide advice to the Investment Committee as it deems reasonably necessary to perform its functions, and such parties or persons may be reasonably compensated from the assets of the Retirement System. Such engagements shall not be subject to approval of the Board." Component I §1.25.

d. "The Retirement Board shall have the power and authority to manage and administer the Retirement System in accordance with the provisions of this Combined Plan Document." Component I §14.1(a).

e. "The Board shall have the following powers and duties: (a) exclusive authority regarding the administration, management and operation of the Retirement System…." Component I §14.2.

f. "The Board shall employ on behalf of the Retirement System an executive director and any other employees for which the Board establishes positions. * * * The executive director, unless such power is retained by the Board, shall determine the compensation of all employees of the Retirement System (except the executive director, whose compensation shall be determined by the Board and the chief investment officer, whose compensation shall be determined by the Investment Committee.)" Component I §14.3.

g. "The Investment Committee shall have the exclusive power to select, retain and terminate the services of a chief investment officer for the Retirement System. The Investment Committee shall determine any and all compensation and other terms of employment of any chief investment officer hired by it." Component I §16.4.

(Dkt. No. 8045-1, Exhibit I.A.254.a)

ANSWER: The Investment Committee admits that (i) it "may retain actuarial, legal counsel, audit or other professional or support personnel to provide advice to the Investment Committee as it deems reasonably necessary to perform its functions, and such parties or persons may be reasonably compensated from the assets of the Retirement System. Such engagements shall not be subject to approval of the Board," (ii) "[t]he Investment Committee shall have the exclusive power to select, retain and terminate the services of a chief investment officer for the Retirement System. The Investment Committee shall determine any and all compensation and other terms of employment of any chief investment officer hired by it," and (iii) that plaintiff has purported to quote portions of the Combined Plan, which speaks for itself. By way of further response, MCL 38.1133(5) states, in relevant part, that "an investment fiduciary may use a portion of the system's income to defray the costs of investing, managing, and protecting the assets of the

system; may retain investment and all other goods and services necessary for the conduct of the affairs of the system, including investment advisors, consultants, custodians, accountants, auditors, attorneys, actuaries, investment personnel, administrators, and physicians; and may enter into contracts for and pay reasonable compensation for those services" (emphasis added).

41. Accordingly, the IC is vested with the authority to hire and set the compensation for only the CIO. The Board retained full authority to hire and approve the compensation (as determined by the Executive Director) of all other employees of PFRS, including the DCIO.

ANSWER: The Investment Committee admits that it is vested with the authority to hire and set the compensation for the CIO. As to the remainder of the allegations in paragraph 41 of plaintiff's complaint, the Investment Committee denies them as untrue.

42. The terms of the State Contribution Agreement also apply to GRS, and GRS has also adopted a Combined Plan and established an investment committee with the same authority outlined above.

ANSWER: Upon information and belief, the Investment Committee admits that the State Contribution Agreement applies to the GRS and that the GRS has established an investment committee with the same authority as outlined

above and as supplemented by the Investment Committee's responses to plaintiff's complaint.

43. GRS and PRS share many administrative services. For example, David Cetlinski serves as the Executive Director of both Retirement Systems. Similarly, CIO Bigelow serves as the CIO for both Retirement Systems and answers to the PFRS IC and the GRS IC, and DCIO Kenneally served as the DCIO for both Retirement Systems prior to his resignation as part of the IC's scheme.

ANSWER: Upon information and belief, the Investment Committee admits that David Cetlinski serves in his respective positions for both Retirement Systems. As to the remainder of the allegations contained in paragraph 43 of plaintiff's complaint, the Investment Committee denies them as stated. The Investment Committee denies any alleged "scheme."

44. Employees working for the Retirement Systems are paid though [sic] the City's payroll. The City has established salary guidelines for City employees known as the "White Book" which is subject to City Council approval. The Retirement Systems reimburses the City for these employee costs.

ANSWER: The Investment Committee neither admits nor denies the allegations in paragraph 44 of plaintiff's complaint because it lacks sufficient information to determine whether they are true.

45. Bigelow has been employed by the Retirement Systems since June,

2011 and was named as the CIO of both GRS and PFRS in the State Contribution Agreement.

ANSWER: The Investment Committee admits that Mr. Bigelow was an employee of the PFRS and GRS from 2011 through 2014. By way of further response, after 2014, Mr. Bigelow was named CIO in the State Contribution Agreement (subject to approval of the State) and serves as the CIO at the direction of the Investment Committee and the GRS investment committee.

46. In 2018, Bigelow's salary as CIO for both Retirement Systems was $241,654.

ANSWER: The Investment Committee admits that Mr. Bigelow was the CIO at the direction of the Investment Committee and the GRS investment committee throughout 2018, and his total salary for that year was $241,654.

47. Kenneally was hired as the Retirement Systems' DCIO on February 6, 2018 at a salary of $166,855.

ANSWER: The Investment Committee denies the allegations in paragraph 47 of plaintiff's complaint as stated. By way of further response, Mr. Kenneally's salary was $162,786. Mr. Kenneally was hired as the DCIO at the direction of the Investment Committee and the GRS investment committee.

48. Beginning in or about August, 2018, and over the objections of the

Board, the IC began a campaign, led by Chairperson Smith and CIO Bigelow, to grant unnecessary, unwarranted and excessive raises to the CIO and DCIO.

ANSWER: The Investment Committee denies the allegations in paragraph 48 of plaintiff's complaint as untrue.

49. In December 2018, in an effort to justify an increase in compensation for the CIO, the IC commissioned a report from McLagen regarding the "competitive range of salary and total cash compensation" for the CIO and DCIO positions. McLagen suggested a salary range of $225,000 to $300,000 for the CIO position, and $170,000 to $210,000 for the DCIO position.

ANSWER: The Investment Committee admits that it commissioned the December 4, 2018 Investment Staff Competitive Pay Analysis prepared by McLagen. By way of further response, the McLagen report was not commissioned in an effort to justify an increase in compensation and the Investment Committee affirmatively states that the McLagen report speaks for itself.

50. At the IC meeting on December 17, 2018, the IC approved a $22,000 pay raise for the CIO, increasing his compensation to $264,000, purportedly based on the McLagen study. **Exhibit C** - December 17, 2018 IC Meeting Minutes (excerpt).

ANSWER: The December 17, 2018 committee meeting minutes speak for

themselves.

51. Three month [sic] later, at its March 11, 2019 meeting, the IC voted to raise the compensation of DCIO Kenneally by almost $60,000, to $224,000, purportedly based on the McLagen study. The IC then approved a motion to make this pay increase *retroactive* to January 1, 2019. **Exhibit D -** March 11, 2019 IC Meeting Minutes (excerpt).

ANSWER: The March 11, 2019 committee meeting minutes speak for themselves.

52. Remarkably, at the March 11, 2019 meeting, the IC also approved to a move to provide CIO Bigelow another $50,000 raise, increasing his compensation to $315,000, also retroactive to January 1, 2019, purportedly to stay consistent with the treatment of DCIO Kenneally. This was the second substantial pay increase for CIO Bigelow in less than 90 days.

ANSWER: The March 11, 2019 committee meeting minutes speak for themselves.

53. The IC took its action with respect to the DCIO compensation in disregard of the exclusive authority conferred on the Board and/or Executive Director with respect to management and compensation of employees of the Retirement Systems, other than the CIO.

ANSWER: The Investment Committee denies the allegations in paragraph 53

of plaintiff's complaint as untrue.

54. These amounts exceed the salaries allowed by the City's White Book and also exceed the range suggested by McLagen.

ANSWER: The City's "White Book" and the McLagen report speak for themselves. By way of further response, the City's payroll limits are irrelevant and the CIO's and DCIO's compensation is within the median range of "salary plus bonus" for Small Public Funds as referenced on pages 4 and 5 of McLagen report.

55. IC members Jeffrey Pegg and Gregory Trozak voted "no" on the motion because the action improperly invaded the Board's authority and the increases were unreasonable and unwarranted.

ANSWER: The Investment Committee's meeting minutes and its members' votes are public record and speak for themselves. By way of further response, the motive of the members' votes is not known to the Investment Committee and the Investment Committee denies that it "improperly invaded" the Board's authority and the suggestion that the increases were unreasonable and unwarranted.

56. Executive Director Cetlinski specifically opposed the salary increase of the DCIO, writing to the IC on March 11, 2019: "At this time I cannot endorse or concur with this increase. Mr. Kenneally has worked for the retirement system

for one year and a raise of this magnitude is out of the normal scope and range. Mr. Kenneally is in a class code of EX 2 within the system compensation schedules. The salary range for that position that he was hired into and that his title was put in is $139,591 to $200,937. The increase that is proposed is well beyond the maximum rate in his class code and beyond the recommended range in the requested McLagan study. I am not against giving a raise but I believe that one of this size cannot be justified. A more appropriate increase would be to stay in the salary table of his class code and increase it over time to the desired amount. My recommendation would be to take him to step 8 at $187,305." **Exhibit E -** March 11, 2019 Memo from D. Cetlinski.

ANSWER: The Investment Committee admits that Exhibit E to plaintiff's complaint is a memo dated March 11, 2019 purportedly from Mr. Cetlinski and affirmatively states that the memo speaks for itself.

57. At its March 21, 2019 meeting, the Board voted to disapprove the action taken by the IC on March 11, 2019 regarding the salary increases for the CIO and DCIO and directed its General Counsel, Ron King, to notify the IC accordingly. In addition, the Board directed Executive Director Cetlinski to work with the City's Human Resources Department to implement a study regarding compensation rates for the CIO and DCIO classifications and update the "White Book" if allowed. **Exhibit F** - March 21, 2019 Board Meeting Minutes (excerpt).

ANSWER: The Investment Committee admits that Exhibit F to plaintiff's complaint is an excerpt of the Board's March 21, 2019 meeting minutes and affirmatively states that the Board's March 21, 2019 meeting minutes speak for themselves.

58. On April 4, 2019, then Board Chairperson Pegg wrote to the IC opposing the salary increases and set forth, in detail, the reason for the Board's disapproval. Among other reasons, the letter stated:

- The McLagan study was flawed and did not properly compare the compensation for the CIO/DCIO positions with other like-situated and comparable retirement systems.
- The compensation decisions do not comport with the City's guidelines.
- Under the Combined Plan, the compensation and employment terms of the DCIO fall under the authority of the Retirement System, not the IC.
- The IC took action without the participation of the GRS, leaving the PFRS trust to pay all associated costs.

See **Exhibit G** - April 4, 2019 letter from J. Pegg.

ANSWER: The Investment Committee admits that Exhibit G to plaintiff's complaint is an April 4, 2019 letter purportedly by Mr. Pegg and affirmatively

states that the April 4, 2019 letter speaks for itself. By way of further response, the Investment Committee denies any suggestion that its conduct was wrongful and/or beyond its authority.

59. On May 13, 2019, upon the recommendation of General Counsel and at the request of the Board, the IC held a conference with members of the Board following its regularly scheduled meeting to discuss the proposed salary increases and to explore a compromise if possible. The Board members conceded that the IC had the authority to approve and implement a salary increase for the CIO, but not for the DCIO, who is an employee of the Retirement Systems and whose compensation is subject to the approval of the Executive Director under the Plan of Adjustment and related documents cited above. The Board members continued to oppose the amount of the salary increases as excessive and not prudent or appropriate for a retirement system in a city emerging from bankruptcy.

ANSWER: The Investment Committee admits that it held a conference with members of the Board on March 13, 2019 and that the Board conceded that the Investment Committee has the authority to approve and implement a salary increase for the CIO. The Investment Committee denies the allegation that it does not have the authority to approve and implement a salary increase for the DCIO. As to the remaining allegations in paragraph 59 of plaintiff's complaint, the Investment Committee neither admits nor denies them because

it lacks sufficient information to determine whether they are true.

60. Moreover, the Board was never presented with any details of the DCIO duties and responsibilities and never presented with any other meaningful economic or non-economic justification for the compensation increase.

ANSWER: The Investment Committee denies the allegations in paragraph 60 of plaintiff's complaint as untrue.

61. Nevertheless, on May 13, 2019, the IC escalated the dispute by again voting to increase the CIO's salary to $315,000, effective retroactively to January 1, 2019. Furthermore, the IC motion at that time improperly provides that: if the increase is not approved by the GRS IC, the full amount of the increase would be covered by PFRS assets; and if the increase exceeded the salary range approved in the City's "White Book", the difference would be covered by PFRS assets. *See* **Exhibit H** - May 13, 2019 IC Meeting Minutes (excerpt).

ANSWER: The May 13, 2019 committee meeting minutes speak for themselves. By way of further response, the Investment Committee denies that it "escalated" any dispute or took improper action.

62. In fact, the GRS IC declined to adopt the salary increase and the increase clearly exceeded the City's "White Book" salary range. Moreover, the Human Resources Department at the City expressly indicated that it would not honor the salary increases for the CIO and DCIO because the increases were

significantly outside the range of what it was willing to approve.

ANSWER: The Investment Committee neither admits nor denies the allegations in paragraph 62 of plaintiff's complaint because it lacks sufficient information to determine whether they are true.

63. As a result, while Bigelow is the CIO of both PFRS and GRS, the full amount of the salary increase implemented by the IC is unfairly being funded by assets of PFRS only, which results in PFRS's assets being illegally used for the benefit of persons other than its participants and beneficiaries.

ANSWER: The Investment Committee denies the allegations in paragraph 63 of plaintiff's complaint as untrue.

64. By separate motion on May 13, 2019, the IC again voted to increase DCIO Kenneally's compensation to $224,000 "as an *employee/hybrid employee* depending on the administrative feasibility of doing so." (Emphasis added). As with the increase in the CIO's salary, the IC directed that this increase was to be effective retroactively as of January 1, 2019, and any amounts above what may be approved by GRS, the GRS IC or the White Book was to be borne solely by PFRS. *See* **Exhibit H** - May 13, 2019 IC Meeting Minutes (excerpt).

ANSWER: The May 13, 2019 committee meeting minutes speak for themselves.

65. By letter dated May 14, 2019, Chairperson Smith brazenly advised the Board regarding the IC's "final decision" on the matter of compensation and improperly directed the Board to process "true-up" payments to CIO Bigelow and DCIO Kenneally for the salary difference since January 1, 2019, and to increase the salary payments going forward. *See* **Exhibit I** - May 14, 2019 letter from IC Chairperson Smith.

ANSWER: The Investment Committee admits that Exhibit I to plaintiff's complaint is a letter dated May 14, 2019 by Mr. Smith addressed to Mr. Pegg and a letter also dated May 14, 2019 by Mr. Bigelow that is approved and authorized by Mr. Smith and affirmatively states that the May 14, 2019 letters speak for themselves. The Investment Committee denies that its actions were improper or that the letter's context was "brazen."

66. On May 16, 2019, the Board voted to decline the IC's improper directive with respect to the salary increase for DCIO Kenneally. *See* **Exhibit J** - May 16, 2019 Board Meeting Minutes (excerpt).

ANSWER: The Investment Committee denies that its directive was improper. By way of further response, the May 16, 2019 Board meeting minutes speak for themselves.

67. At its July 22, 2019 meeting, the IC discussed whether it could retain DCIO Kenneally as an *independent contractor* in order to circumvent the Board

and avoid the need to obtain Board approval of the proposed salary increase and the limitations of the City's White Book (i.e., an improper end-run). PFRS General Counsel King warned the IC that it was not advisable to retain DCIO Kenneally as an independent contractor because such an arrangement was not likely to satisfy legal tests differentiating an employee from an independent contractor.

ANSWER: The Investment Committee admits that it discussed possible approaches to resolving the dispute regarding Mr. Kenneally's compensation on July 22, 2019. By way of further response, the July 22, 2019 meeting records speak for themselves.

68. Apparently dissatisfied with that advice, Chairperson Smith and the independent members of the IC, on July 22, 2019, voted to engage Special Counsel "with respect to creating a compensation package for the Deputy Chief Investment Officer that is in accordance with the motion made and passed at the Committee's May 13, 2019 meeting and, further, bring forth alternatives for the best way to implement the compensation package." *See* **Exhibit K** - July 22, 2019 IC Meeting Minutes (excerpt).

ANSWER: The Investment Committee admits that it approved the engagement of special counsel. By way of further response, the July 22, 2019 meeting records speak for themselves. As to the remainder of the allegations in paragraph 68 of plaintiff's complaint, the Investment Committee denies as

untrue.

69. On July 24, IC Chairperson Smith and CIO Bigelow retained the Gallagher Law Firm as Special Counsel to the IC.

ANSWER: The date in paragraph 69 of plaintiff's complaint is missing the year, but the Investment Committee admits that Mr. Gallagher was retained by the Investment Committee on or around July 24, 2019. Mr. Gallagher was not retained by any individuals.

70. On July 26, 2019, IC Member Joe Bogdahn wrote to other members of the committee, warning: "As I noted in our call in May, making this an independent position would be overly expensive due to the cost to replicate and administer the benefits. Further complicating this is the 'independent contractor' standard of the IRS, and we will not meet the standard." *See* **Exhibit L** - Bogdahn email dated July 26, 2019.

ANSWER: The Investment Committee admits that Exhibit L to plaintiff's complaint is an email dated July 26, 2019 purportedly from Mr. Bogdahn and affirmatively states that the July 26, 2019 email speaks for itself.

71. On August 15, 2019, attorney Sean Gallagher appeared at the Board meeting on behalf of the IC and outlined three alternatives to implement the decision of the IC regarding the DCIO's salary increase: (a) DCIO Kenneally would remain a City employee with any excess salary paid by PFRS; (b) the IC

would hire DCIO Kenneally as an employee of the IC; or (c) the IC would retain DCIO Kenneally as an independent contractor. *See* **Exhibit M** - August 15, 2019 Board Meeting Minutes (excerpt).

ANSWER: The Investment Committee admits that Exhibit M to plaintiff's complaint is an excerpt of the Board's August 15, 2019 meeting minutes and affirmatively states that the August 15, 2019 meeting minutes and records speak for themselves.

72. On August 19, 2019, Board Chairperson and IC Member Gnatek wrote to IC Chairperson Smith, stating that he was surprised that attorney Gallagher had appeared at the Board meeting on August 15th on behalf of the IC, as he was not aware that attorney Gallagher had been retained or that he had been asked to appear at the meeting on behalf of the IC. Gnatek further wrote: "Sean was asked directly whether there was a legal opinion as to whether Kevin could be hired as an independent contractor. He would not or could not give us his legal opinion. If such an opinion has been given, I would hope that it is shared with all IC members. We have been advised by our general counsel and outside legal counsel that any such arrangement with Kevin will violate state and federal employment law and the POA does not give the IC the authority to do that. As one IC member I cannot agree to a breach of my fiduciary duty and do not agree to entering into any such arrangement. We do not have authority to enter into illegal

contracts. Certainly not with my support and without any discussion or action by the committee as whole. I am not really sure where this leaves us but I am very concerned that a fraction of the IC appears to be driving an agenda without involving or consulting all members of the investment committee. I hope we can resolve this issue without further distraction or protracted litigation." **Exhibit N** - Matt Gnatek email dated August 19, 2019.

ANSWER: The Investment Committee admits that Exhibit N to plaintiff's complaint is an email dated August 19, 2019 purportedly from Mr. Gnatek and affirmatively states that the August 19, 2019 email speaks for itself.

73. Despite the objections and warnings clearly articulated by Board Chairperson and IC Member Gnatek, IC and Board Member Pegg, IC Member Bogdan and PFRS General Counsel King, the independent members of the IC, led by Chairperson Smith and CIO Bigelow, continued to take steps to circumvent the Board regarding DCIO Kenneally's compensation.

ANSWER: The Investment Committee denies the allegations in paragraph 73 of plaintiff's complaint as untrue.

74. In a September 10, 2019 email, CIO Bigelow directed the Chief Accounting Officer of the Retirement Systems to process the salary increase for DCIO Kenneally approved by the IC by making a "true-up" payment of $39,734 for January 1 through September 13, 2019, and adjusting his paychecks going

forward to represent annual compensation of $224,000 beginning on September 16, 2019. CIO Bigelow did this notwithstanding his knowledge that the Board had rejected the raise. *See* **Exhibit O** - Ryan Bigelow email dated September 10, 2019.

ANSWER: The Investment Committee admits that plaintiff has attempted to paraphrase a portion of an email dated September 10, 2019 purportedly from Mr. Bigelow and affirmatively states that the September 10, 2019 email speaks for itself. By way of further response, the Investment Committee denies any suggestion that Mr. Bigelow's conduct was improper.

75. Executive Director Cetlinski, with support of the Board, properly declined to authorize the Chief Accounting Officer to process these excessive and unauthorized payments.

ANSWER: The Investment Committee admits that Mr. Cetlinski, "with the support of the Board, declined to authorize the Chief Accounting Officer to process" Mr. Kenneally's payments for compensation. The Investment Committee denies that the declination was proper, and answers further that, as a result, the Board breached their fiduciary duties.

76. Prior to the Board's October 3, 2019 meeting, the IC's Special Counsel Gallagher contacted PFRS General Counsel King and *suggested* for the first time that if the Board did not comply with the demands of the IC regarding the DCIO compensation increase, the IC might not make certain compliance

certifications required under the State Contribution Agreement and Combined Plan. (One of the Plan requirements is that the IC certify to the Foundation for Detroit's Future ("FDF") that the Retirement System is in compliance with the various governing documents. This certification is part of FDF's determination to remit an $18.3 million annual contribution to PFRS as part of the "Grand Bargain.")

ANSWER: The Investment Committee admits that it is required to regularly certify compliance, and by way of further answer, states that the Plan of Adjustment, including the State Contribution Agreement and Combined Plan, speak for themselves. As to the remainder of the allegations in paragraph 76 of plaintiff's complaint, the Investment Committee lacks sufficient information to determine whether they are true.

77. PFRS General Counsel King was initially dismissive of the suggestion that a dispute over employee compensation could ever result in any type of breach (material or otherwise) of any of the operative documents or that the IC, acting as a fiduciary, would somehow jeopardize funding (no matter how unlikely) to the PFRS over this issue. However, the IC continued to use this tactic to pressure the Board to go along with its scheme regarding Kenneally.

ANSWER: The Investment Committee denies that it "continued to use this tactic to pressure the Board to go along with" any "scheme" regarding Mr.

Kenneally. As to the remainder of the allegations in paragraph 77 of plaintiff's complaint, the Investment Committee neither admits nor denies because it lacks sufficient information to determine whether they are true.

78. IC Chairman Smith contacted John Naglick, a Board Trustee and Chief Deputy CFO/Finance Director for the City, and stated that unless Naglick and the Board found a way to support what the IC wanted to do regarding Kenneally, Smith would not be in a position to certify compliance to the FDF.

ANSWER: The Investment Committee denies the statements in paragraph 78 of plaintiff's complaint as to how they are characterized and what is implied as to a timeline. By way of further response, the Investment Committee admits that Mr. Smith had a conversation with Mr. Naglick in which they discussed concerns with respect to certification. Mr. Naglick said the independent contractor route would not cause a problem.

79. This matter was reported in detail to the Board at its October 3, 2019 meeting.

ANSWER: The October 3, 2019 Board meeting minutes and records speak for themselves.

80. Incredibly, during discussion of the FDF certification at the IC meeting on November 18, 2019, IC Chairperson Smith stated that if the Board did not comply with the IC's decision regarding Kenneally, he would be forced to

"report that the System is not in a good place." This was clearly a not so veiled **threat** to the Board that he would not certify compliance with the Plan of Adjustment, thereby endangering the $18.3 million required contribution to PFRS by FDF, if the Board did not acquiesce to the independent contractor scheme.

ANSWER: The November 18, 2019 meeting minutes and records speak for themselves. The Investment Committee denies the remaining allegations in paragraph 80 of plaintiff's complaint as untrue.

81. On December 2, 2019, the IC entered into the Contractor Agreement with KJK, a Michigan limited liability company formed by DCIO Kenneally on November 22, 2019 for this purpose. *See* **Exhibit B** - Contractor Agreement.

ANSWER: The Investment Committee admits that it entered into an Independent Contractor Agreement dated December 2, 2019 with KJK Associates, LLC and affirmatively states that it speaks for itself. As to why KJK was formed, the Investment Committee lacks sufficient information to determine the reason(s).

82. Chairperson Smith executed the Contractor Agreement on behalf of the IC. Notably, the Contractor Agreement was executed without prior review or input from the full IC, the Board, the Executive Director or PFRS General Counsel King.

ANSWER: The Investment Committee admits that Mr. Smith executed the

Contractor Agreement dated December 2, 2019 with KJK Associates, LLC. By way of further response, the Investment Committee responds that the Contractor Agreement was reviewed by the PFRS General Counsel before it was signed. As to the remainder of the allegations in paragraph 82 of plaintiff's complaint, the Investment Committee neither admits nor denies because it lacks sufficient information to determine whether they are true.

83. DCIO Kenneally was still an employee of the Retirement Systems when the Contractor Agreement was executed.

ANSWER: The Investment Committee admits that Mr. Kenneally was an employee under the direction of the Investment Committee and the GRS investment committee until December 27, 2019. By way of further response, the Contractor Agreement was amended to an effective start date of January 6, 2020.

84. While DCIO Kenneally was still an employee of the Retirement System, there was little to anything for the Executive Director and/or the Board to do with respect to the KJK contract. Clearly and among other things, DCIO Kenneally could not perform and be paid under the Contractor Agreement while an employee of the Retirement Systems.

ANSWER: The Investment Committee denies the allegations in paragraph 84 of plaintiff's complaint as stated. The Executive Director advised the CIO

that the DCIO should not resign until payment was approved. Therefore, the effective date of the Contractor Agreement was amended to January 6, 2020.

85. At the time the Contractor Agreement was executed, IC Chairperson Smith and the members of the IC knew that the arrangement was unlikely to pass muster as an independent contractor relationship under applicable IRS and other legal standards. IC Chairperson Smith and the independent members of the IC disregarded those concerns and knowingly executed, approved and ratified the Contractor Agreement, notwithstanding the illegalities and risks to PFRS and the Board.

ANSWER: The Investment Committee denies the allegations in paragraph 85 of plaintiff's complaint as untrue.

86. Execution of the Contractor Agreement recklessly and imprudently exposes the Board and PFRS to possible liability under a host of potential legal claims.

ANSWER: The Investment Committee denies the allegations in paragraph 86 of plaintiff's complaint as untrue.

87. The "fee arrangement" for Kenneally is set forth on Exhibit A to the Contractor Agreement and provides KJK/Kenneally shall receive a one-time "incentive payment" of $60,000, and a monthly fee of $23,750.00 (or **$285,000 annually**). This amount is well above the $224,000 previously proposed by the IC;

the increase is apparently intended to cover Kenneally's lost benefits. *See* **Exhibit B.**

ANSWER: The Contractor Agreement speaks for itself and the Investment Committee denies plaintiff's characterization of the Contractor Agreement.

88. The "incentive payment" is intended to be a form of retroactive pay for work performed by Kenneally since January 2019 as an employee of the Retirement Systems.

ANSWER: The Contractor Agreement and the various meeting minutes and records approving Mr. Kenneally's compensation speak for themselves.

89. The IC does not attempt in any way to characterize the "incentive payment" as anything other than retroactive compensation. In fact, IC Chairman Smith confirmed as much to the Detroit News on December 9, 2019. *See* **Exhibit P** - Ferretti, Christine, "Detroit pension investment official to get 75% raise, signing bonus as contractor", *Detroit News*, December 9, 2019, www.detroitnews.com/story/news/local/detr0city/2019/10/09/detroit-investment-official-kenneally-raise-signing-bonus-contractor/2633097001/.

ANSWER: The Contractor Agreement and newspaper article speak for themselves.

90. Such retroactive pay to a contractor clearly violates Article XI, §3 of Michigan's 1963 Constitution which provides that "[n]either the legislature or any

political subdivision of this state shall grant or authorize extra compensation to any public officer, agent or contractor after the service has been rendered or the contract entered into."

ANSWER: The allegations in paragraph 90 of plaintiff's complaint state a legal conclusion to which no response is required.

91. The Contractor Agreement provides, at Exhibit B, that KJK shall provide services as directed by the CIO, including but not limited to: (i) identifying, reviewing and evaluating prospective investment strategies; (ii) assisting in the development of portfolio asset allocation; (iii) providing support as needed with the investment manager search and selection process; (iv) conducting on-site investments, operational and/or confirmatory due diligence with prospective managers; (v) coordinating and conducting ongoing maintenance due diligence with existing investment managers; (vi) preparing and presenting portfolio reviews; (vii) creating risk analytic and compliance reports; (viii) providing financial market commentary; (ix) assisting as needed with the review and workout of problem investments. *See* **Exhibit B.**

ANSWER: The Contractor Agreement speaks for itself.

92. The duties described in Exhibit B of the Contractor Agreement are a nearly verbatim recitation of the written job description for the DCIO position and the exact duties Kenneally performed as a direct employee of the Retirement

Systems.

ANSWER: The Contractor Agreement speaks for itself.

93. The Contractor Agreement also provides that: KJK shall be an independent contractor and not an employee; the IC will provide a Form 1099, not a Form W-2; and KJK is solely responsible for all taxes and is not entitled to unemployment compensation, worker's compensation, or other benefits. Contractor Agreement ¶4. *See* **Exhibit B**.

ANSWER: The Contractor Agreement speaks for itself.

94. In reality, **Kenneally is not an independent contractor** and would remain an employee under the Michigan "economic realities test" and applicable federal law. Accordingly, the above provisions violate state and federal law and subject PFRS to substantial liability.

ANSWER: The allegations in paragraph 94 of plaintiff's complaint state a legal conclusion to which no response is required. To the extent a response is required, the Investment Committee denies the allegations in paragraph 94 of plaintiff's complaint as untrue.

95. The IC effectively admits the illegality of Kenneally's independent contractor status and foolish risk of liability by including, at Section 14 of the Contractor Agreement, an indemnification provision that unfairly shifts the risk of liability on this very issue to KJK/Kenneally.

ANSWER: The Investment Committee denies the allegations in paragraph 95 of plaintiff's complaint as untrue. Further, this allegation is inconsistent with the allegations in paragraph 13 of plaintiff's complaint.

96. This provision is almost certainly unenforceable under federal and state law.

ANSWER: The allegations in paragraph 96 of plaintiff's complaint state a legal conclusion to which no response is required. To the extent a response is required, the Investment Committee denies the allegations in paragraph 96 of plaintiff's complaint as untrue.

97. Finally, the compensation under the Contractor Agreement is clearly excessive and amounts to a 70% increase over Kenneally's previous salary as DCIO for both GRS and PFRS of $166,855.

ANSWER: The Investment Committee denies the allegations in paragraph 97 of plaintiff's complaint as untrue.

98. The GRS investment committee prudently declined to participate in this arrangement. As a result, under the IC's scheme, Kenneally would perform work only on behalf of the PFRS, not the GRS; i.e., earning nearly twice as much money for half the work.

ANSWER: The Investment Committee denies any alleged "scheme" and

further denies that Mr. Kenneally is earning nearly twice as much money for half the work. By way of further response, the intent of the arrangement with Mr. Kenneally remains for him to continue to work under the direction of the Investment Committee and the GRS investment committee.

99. At the December 17, 2019 special IC meeting, the executed Contractor Agreement was presented to the full IC for the first time.

ANSWER: The December 17, 2019 Investment Committee meeting minutes and records speak for themselves.

100. At the December 17, 2019 meeting of the IC, Board Chairperson and IC Member Gnatek told the other IC members that the Board would not approve payments to Kenneally under the Contractor Agreement due to concerns that the arrangement did not create a legitimate independent contractor relationship.

ANSWER: The December 17, 2019 meeting minutes and records speaks for themselves.

101. At the December 17, 2019 meeting of the IC, PFRS General Counsel King reiterated his opinion that the Contractor Agreement did not comport with legal guidelines regarding independent contractors because the IC was merely retaining Kenneally to do the same work that he performed as an employee of the Retirement Systems.

ANSWER: The December 17, 2019 meeting minutes and records speaks for

themselves.

102. At the December 17, 2019 meeting of the IC, Board Chairperson and IC Member Gnatek suggested that the IC go to the Bankruptcy Court to resolve the independent contractor issue and the authority to set the DCIO's compensation before Kenneally resigned and placed himself at risk. IC Chairperson Smith responded that if the Board went to court he could not in good faith sign the critical certification to the FDF. Accordingly, the IC forged ahead with its ill-advised scheme.

ANSWER: The Investment Committee denies that it "forged ahead" with any "ill-advised scheme." As to the remainder of the allegations in paragraph 102 of plaintiff's complaint, the December 17, 2019 meeting minutes and records speak for themselves.

103. Kenneally resigned his employment on December 27, 2019.

ANSWER: The Investment Committee admits that Mr. Kenneally resigned his employment on December 27, 2019.

104. KJK/Kenneally has purportedly performed work under the Contractor Agreement and submitted the following invoices to the Board for payment: (i) Invoice dated December 30, 2019 for a "Contractual Fee" of $60,000; and (ii) Invoice dated January 1, 2019 for "Contractor Fee 1/6/20 - 1/15/20" for $11,875.

ANSWER: The Investment Committee admits the allegations in paragraph 104 of plaintiff's complaint.

105. Under the Contractor Agreement, CIO Bigelow has exclusive oversight (with no meaningful checks and balances) over all services performed by KJK/Kenneally.

ANSWER: The Contractor Agreement speaks for itself and the Investment Committee denies plaintiff's characterization of the Contractor Agreement.

106. The Board has declined to pay the invoices for the reasons stated above.

ANSWER: The Investment Committee admits that the Board has declined to pay the invoices. As to why the Board has declined to do so, the Investment Committee lacks sufficient information to determine the reason(s).

COUNT I - BREACH OF FIDUCIARY DUTY

107. The Board re-alleges the preceding paragraphs as if set forth fully herein.

ANSWER: The Investment Committee restates its answers to plaintiff's previous allegations as if fully restated herein.

108. The Plan of Adjustment, including Section 1.21 of the Combined Plan and the IC Governance Terms at p. 6, clearly provides that the IC has a fiduciary duty to act in the best interests of the PFRS, for the protection of its assets and for

the benefit of its participants - the current and former police officers and firefighters of the City of Detroit and their beneficiaries.

ANSWER: The Plan of Adjustment speaks for itself.

109. The IC has breached its fiduciary duty to the PFRS and its participants by:

a. Violating the Plan of Adjustment, doing an end-run around the clear authority of the Board and entering into the illegal Contractor Agreement which subjects the Board and PFRS to substantial legal liability, as set forth above;

b. Demanding that PFRS use its limited assets to grant excessive raises to the CIO and DCIO which are unjustified by any objective measure;

c. Granting excessive raises to the CIO and DCIO without the participation of GRS, and agreeing to fund the entire increase out of the assets of the PFRS trust, so that PFRS is paying a disproportionate share for work performed for both Retirement Systems; and

d. Threatening to withhold its certification to FDF which would deprive the PFRS participants and beneficiaries of millions of dollars needed to pay benefits, simply because the Board would

not acquiesce to the IC's *ultra vires* acts.

ANSWER: The Investment Committee denies the allegations in paragraph 109 of plaintiff's complaint as untrue. By way of further response, paragraph 59 of plaintiff's complaint concedes that the Investment Committee has the authority to approve and implement a salary increase for the CIO, thus contradicting the statements regarding the CIO in this paragraph.

COUNT II - DECLARATORY JUDGMENT

110. The Board re-alleges the preceding paragraphs as if set forth fully herein.

ANSWER: The Investment Committee restates its answers to plaintiff's previous allegations as if fully restated herein.

111. The Federal Declaratory Judgment Act provides courts with the authority to "declare the rights and other legal relations of any interested party seeking such declaration" in any actual controversy within its jurisdiction. *See* 28 U.S.C. §2201.

ANSWER: The allegations in paragraph 111 of plaintiff's complaint state a legal conclusion to which no response is required.

112. Here, there is an actual controversy between the parties relating to their respective rights and authority under the Plan of Adjustment, State

Contribution Agreement and Combined Plan.

ANSWER: The Investment Committee admits the allegations in paragraph 112 of plaintiff's complaint, and further notes that the dispute concerns respective rights and authority granted by State law.

113. The IC knowingly violated the Plan of Adjustment, State Contribution Agreement and Combined Plan with respect to its actions concerning DCIO Kenneally as set forth above.

ANSWER: The Investment Committee denies the allegations in paragraph 113 of plaintiff's complaint as untrue.

114. The IC has intentionally violated its fiduciary duty to the PFRS and its participants by violating the Plan of Adjustment, doing an end-run around the Board and entering into the illegal Contractor Agreement that subjects the Board and PFRS to substantial legal liability, as set forth above.

ANSWER: The Investment Committee denies the allegations in paragraph 114 of plaintiff's complaint as untrue.

COUNT III - INJUNCTIVE RELIEF

115. The Board re-alleges the preceding paragraphs as if set forth fully herein.

ANSWER: The Investment Committee restates its answers to plaintiff's previous allegations as if fully restated herein.

116. The IC's breach of the Plan of Adjustment and its fiduciary duty by, among other things, entering into the illegal Contractor Agreement subjects the PFRS to substantial legal liability and economic loss, as alleged above.

ANSWER: The Investment Committee denies the allegations in paragraph 116 of plaintiff's complaint as untrue.

117. PFRS will violate tax and employment law, and may well incur actual legal liability and economic loss, if the Contractor Agreement is permitted to take effect and be enforced.

ANSWER: The Investment Committee denies the allegations in paragraph 117 of plaintiff's complaint as untrue.

118. The PFRS, its assets and good standing, must be protected at all times.

ANSWER: The Investment Committee neither admits nor denies the allegations in paragraph 118 of plaintiff's complaint because it lacks sufficient information to determine whether they are true.

119. As set forth above, the Plan of Adjustment provides that the Board has "the right to seek to preliminarily enjoin [the offending] action without the need to show irreparable harm."

ANSWER: The Investment Committee denies the allegations in paragraph 119 of plaintiff's complaint as untrue as stated.

120. Nevertheless, the PFRS will suffer irreparable immediate harm if an injunction is not granted precluding the implementation and enforcement of the Contractor Agreement because the PFRS's good standing is essential to its funding and operations.

ANSWER: The Investment Committee denies the allegations in paragraph 120 of plaintiff's complaint as untrue.

121. There is a strong likelihood the Board will prevail on the merits.

ANSWER: The Investment Committee denies the allegations in paragraph 121 of plaintiff's complaint as untrue.

122. The irreparable harm that the PFRS will suffer if injunctive relief is not granted far outweighs the minimal inconvenience to the IC and Kenneally/KJK (which they caused; Kenneally could have remained employed as the DCIO) in the event it is not granted.

ANSWER: The Investment Committee denies the allegations in paragraph 122 of plaintiff's complaint as untrue.

123. The public, third parties, and most importantly the PFRS's participants will benefit from, and not be harmed by, the issuance of injunctive relief protecting the assets and good standing of the PFRS.

ANSWER: The Investment Committee denies the allegations in paragraph

123 of plaintiff's complaint as untrue.

WHEREFORE, the Investment Committee respectfully requests that the Court enter a no cause of action as to plaintiff's complaint against it and award such other relief as the Court deems appropriate, including an award of costs and attorney fees.

AFFIRMATIVE DEFENSES

The Investment Committee relies upon the following affirmative defenses to plaintiff's complaint:

1. Plaintiff's complaint fails to state a claim upon which relief can be granted.

2. Plaintiff has failed to mitigate the alleged damages.

3. Plaintiff's claims may be barred, in whole or in part, by the applicable statute of limitations and/or laches.

4. Plaintiff's claims may be barred, in whole or in part, by the unclean hands doctrine.

5. Plaintiff's claims are barred, in whole or in part, under the terms of the State Contribution Agreement, Plan of Adjustment, Combined Plan, and/or internal policies and governance documents, and State law.

6. Plaintiff's claims are barred, in whole or in part, by governmental immunity.

7. Plaintiff's claims are barred, in whole or in part, because the requested injunction lies beyond the power of this Court, in that it does not have the power to alter the governance of a governmental entity in contravention of State law.

WHEREFORE, the Investment Committee respectfully requests that the Court enter a no cause of action as to plaintiff's complaint against it and award such other relief as the Court deems appropriate, including an award of costs and attorney fees.

Dated: February 25, 2020

BODMAN PLC

By:/s/ Ralph E. McDowell
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COUNTERCLAIM OF THE INVESTMENT COMMITTEE OF THE POLICE AND FIRE RETIREMENT SYSTEM OF THE CITY OF DETROIT

The Investment Committee of the Police and Fire Retirement System of the City of Detroit (the "Investment Committee") states as follows in support of its counterclaim against plaintiff / counter-defendant Police and Fire Retirement System the City of Detroit ("PFRS").

JURISDICTION AND PARTIES

1. This counterclaim is brought under Rule 7001, 7012, and 7013 of the Federal Rules of Bankruptcy Procedure and Section 105 of the United States Bankruptcy Code.

2. The Court has jurisdiction over this matter under 28 U.S.C. § 157(b)(2)(A) and 1334(b), Fed.R.Bankr.P. 7001(7) and (9), 7012, and 7013.

3. This is a core proceeding under 28 U.S.C. §157(b)(2)(O) and venue properly lies in this District under 28 U.S.C § 1409.

4. PFRS is a pension plan and trust established by the City of Detroit Charter and Municipal Code with its office in Detroit.

5. The Investment Committee was created pursuant to State statute (see MCL §38.1132, *et seq*.) and is a critical piece of the City of Detroit's Plan of Adjustment providing independent, expert oversight of the PFRS's actions.

6. The PFRS continues to violate the express and unambiguous language

of the laws of Michigan, the State Contribution Agreement, Plan of Adjustment, and the Combined Plan, and the Investment Committee seeks injunctive and declaratory relief to remedy the ongoing violations.

GENERAL ALLEGATIONS

7. Michigan law requires the establishment of the Investment Committee. MCL §38.1133(g)(1).

8. Creation of the Investment Committee was also a requirement of the State Contribution Agreement, Doc No. 8045-1, Ex. 1.A.332, Oct. 22, 2014 ("SCA"). The PFRS was required to establish an investment committee "for the purpose of making recommendations to, and approving certain actions by, the [PFRS's] board of trustees and/or making determinations and taking action under and with respect to Investment Management, as set forth in the terms and conditions enumerated" therein. SCA, Doc No. 8045-1, Ex. 1.A.332, p. 2.

9. The authority granted to the Investment Committee as an investment fiduciary under State law is broad:

> "(5) Subject to section 13g, an investment fiduciary may use a portion of the system's income to defray the costs of investing, managing, and protecting the assets of the system; may retain investment and all other goods and services necessary for the conduct of the affairs of the system, including investment advisors, consultants, custodians, accountants, auditors, attorneys, actuaries, investment personnel, administrators, and physicians; and may enter into contracts for and pay reasonable compensation for those services * * *."

MCL 38.1133(5); emphasis added.

10. The Investment Committee's broad responsibilities and powers with respect to "Investment Management" are also described in the SCA, which similarly ensures the Investment Committee the resources and tools necessary to carry out its responsibilities. See SCA, Doc No. 8045-1, Ex. 1.A.332, Ex. B.

11. Specifically, under the SCA, the Investment Committee was given the explicit power to retain professional support as follows:

> The IC shall evaluate and select the CIO [i.e., Chief Investment Officer], set and approve any and all compensation for, and terms of employment of, the CIO. With respect to plan assets, the CIO shall report directly to the IC and the Executive Director of the Board. The CIO shall be responsible for assisting the IC and the Board in overseeing the PFRS's investment portfolio.
>
> * * *
>
> The IC may retain actuarial, legal counsel, audit or other professional or support personnel to provide advice to the IC as it deems reasonably necessary to perform its functions and such parties or persons may be reasonably compensated from the assets of the Plan; such engagements shall not be subject to the approval of the Board.

Doc No. 8045-1, Ex. 1.A.332. – Ex. B. Investment Committee Governance at pp. 3 and 7 (emphasis added).

12. The Investment Committee Governance terms also state: "The IC shall have all the powers as a fiduciary under the first sentence of MCL

§ 38.1133(5) * * *." SCA, Ex. B, Investment Committee Governance, p. 4.

13. Under the SCA, Ryan Bigelow was appointed as the Investment Committee's CIO for both the PFRS and the General Retirement System and continues to serve in that role.

14. In addition to Mr. Bigelow, under the SCA and Michigan law, the Investment Committee may retain other professional or support personnel to provide advice to the Investment Committee as it deems reasonably necessary to perform its functions, such parties or persons retained may be reasonably compensated from the assets of the Plan, and such engagements are not subject to Board approval.

15. As such, the Investment Committee retained Kevin Kenneally directly and later through KJK Associates, LLC ("KJK") as a Deputy Chief Investment Officer ("DCIO") to provide advice to the Investment Committee to perform its functions.

16. The PFRS has historically spent less than similar systems on monitoring and overseeing its assets, and much more on litigation and external investment monitoring and oversight. Stated another way, the PFRS has historically had too few investment staff to perform needed due diligence, resulting in lower investment returns and high legal costs.

17. To fix these costly issues, the Investment Committee has focused on

increased "in-sourcing" of investment monitoring and oversight to normalize the level of those matters.

18. Both the CIO and the former Deputy CIO explored opportunities to work elsewhere with higher pay within the first two years of joining PFRS. The CIO was retained by an increase in pay; the former Deputy CIO left after only two years, accepting a higher offer.

19. To aid in its endeavor to in-source the monitoring, oversight, and due diligence, keep talent, and thus increase return and decrease litigation costs, the Investment Committee commissioned an analysis by McLagen as to the proper compensation for its investment staff in 2018. **Exhibit 1 – McLagen study, December 4, 2018.**

20. The McLagen study showed that the compensation being paid to the CIO and DCIO at that time was in the bottom quartile of the comparative analysis.

21. It is critical that the Investment Committee compensate investment professionals to (at least) the median pay range to retain talented professionals, especially when similar, even more desirable positions are available to those professionals and the prior DCIO left early in his tenure with PFRS to take a higher paying position elsewhere.

22. As such, the Investment Committee approved compensation for Mr. Bigelow and Mr. Kenneally (through KJK) based upon the median range of

"salary plus bonus" for Small Public Funds as referenced on pages 4 and 5 of McLagen report. **Exhibit 1.**

23. The PFRS refused to accept the Investment Committee's decision to increase Mr. Kenneally's compensation, and challenges in its complaint the Investment Committee's decision to increase Mr. Bigelow's compensation, both decisions that the PFRS has no authority to second guess.

24. At a May 13, 2019 conference, the PFRS conceded that the Investment Committee had the authority to approve and implement a compensation increase for Mr. Bigelow as the CIO, but refused to acknowledge the same for Mr. Kenneally as the DCIO.

25. The PFRS continues to wrongfully interfere with the Investment Committee's decision and authority to retain Mr. Kenneally and reasonably compensate him.

26. To this end, Executive Director Cetlinski, with support of the Board, directed the chief accounting officer of the General Retirement System to withhold payments due and owing to Mr. Kenneally.

27. Instead of allowing the Investment Committee to carry out its intended function, the PFRS filed an adversary proceeding ("Adversary Proceeding") against the Investment Committee seeking various and vague relief.

28. During debate over the investment professionals' compensation,

members of the PFRS Board improperly disclosed, in a public forum, information from closed sessions, attorney-client correspondence and information, and private and confidential information and correspondence.

29. Commencement of the Adversary Proceeding is consistent with the PFRS Board's history of spending too much of the System's assets on lawyers instead of putting those resources toward monitoring, oversight, and due diligence that would increase investment returns.

COUNT I
BREACH OF FIDUCIARY DUTY

30. The Investment Committee re-alleges each of the preceding paragraphs.

31. The PFRS has a fiduciary duty to act in the best interests of its assets, its participants, and beneficiaries under, and among other documents and laws, the SCA, Combined Plan, Plan of Adjustment, and the Public Employee Retirement System Investment Act, as amended, MCL 38.1132 *et seq*.

32. The PFRS has breached its fiduciary duty and continues to breach its fiduciary duty by:

a. Disclosing and disseminating nonpublic information from closed sessions in violation of Michigan's Open Meetings Act, MCL § 15.267;

b. Disclosing and disseminating private, confidential, and attorney-client information and correspondence;

c. Violating the Board's governance policies and procedures, including the Ethics and Code of Conduct Policies;

d. Refusing to accept the Investment Committee's affirmative decision and authority to retain Mr. Kenneally and reasonably compensate him for work performed;

e. Directing the chief accounting officer to withhold payments due and owing to Mr. Kenneally; and

f. Violating the laws of Michigan, the Plan of Adjustment, Combined Plan, and State Contribution Agreement.

WHEREFORE, the Investment Committee respectfully requests that this Court find that the PFRS breached its fiduciary duties, order immediate payment of amounts due to Mr. Kenneally (through KJK), and award such other relief as the Court deems appropriate.

COUNT II
DECLARATORY JUDGMENT

33. The Investment Committee re-alleges each of the preceding paragraphs.

34. An actual and ongoing controversy exists where a declaratory

judgment or decree is necessary to guide the PFRS's future conduct.

35. The Investment Committee has the express authority to select its chief investment officer, set and approve any and all compensation for, and terms of employment of, the chief investment officer.

36. The Investment Committee also has the express authority to retain professional support, to reasonably compensate such professional support from the assets of the Plan, and to engage such professionals without Board approval.

37. Consistent with its authority and broad responsibilities, the Investment Committee approved the retention of Ryan Bigelow as CIO and KJK as DCIO and has agreed to reasonable compensation for their services.

38. It is unclear if the PFRS has truly "conceded" that the Investment Committee has the authority to select, retain, and compensate its CIO as the PFRS's adversary complaint is vague and riddled with inconsistencies in this regard.

39. It is clear however that the PFRS continues to ignore the express and unambiguous language of the laws of Michigan, the SCA, Plan of Adjustment, State law and Combined Plan by refusing to accept the Investment Committee's retention of KJK.

40. As such, the Investment Committee requests a declaratory judgment providing that it has the authority to select, retain, and compensate the CIO, DCIO,

additional deputy chief investment officers, and any other professional or support personnel that it deems reasonably necessary to perform its functions, and that such engagements are not subject to Board approval.

WHEREFORE, the Investment Committee respectfully requests that this Court enter an order stating that the Investment Committee has the authority to select, retain, and compensate its Chief Investment Officer, Deputy Chief Investment Officer, additional deputy chief investment officers, and any other professional or support personnel that it deems reasonably necessary to perform its functions, as employees or as independent contractors, and that such engagements are not subject to Board approval. The Investment Committee further requests that this Court enter an order stating that the PFRS members who also sit on the Investment Committee be excluded from the Investment Committee's attorney-client work product and communication, and that PFRS members who also sit on the Investment Committee be disqualified from voting on Investment Committee decisions with respect to the Adversary Proceeding, and award such other relief as the Court deems appropriate.

Dated: February 25, 2020

BODMAN PLC

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EXHIBIT 1

RSCD
Retirement System City of Detroit



The Retirement System City of Detroit

Investment Staff Competitive Pay Analysis

December 4, 2018

Overview

- The Retirement System City of Detroit ("RSCD") asked McLagan to review the competitiveness of RSCD's salaries for two investment positions:

  Chief Investment Officer Assistant Chief Investment Officer

- Consistent with the approach in 2016, to complete this analysis, McLagan assembled data from multiple pay comparator groups:
  - Small US Public Pension Funds (i.e., AUM less than $20B).
  - All US Public Pension Funds.
  - Private Sector Investment Management Firms (e.g., investment management firms, corporate pensions, endowments, foundations, insurance companies, banks, etc.).
- This report contains information about the competitive range of salary and total cash compensation (e.g., salary + bonus) for these positions.

Executive Summary & Recommendations

- RSCD's compensation for investment positions is positioned in the bottom quartile of all comparator groups. To be more competitive, RSCD should consider adjusting its salary ranges and/or implementing a performance-based incentive plan:

Position	Current Salary	Alternative Range
Chief Investment Officer	$242,301 (cap)	$225,000 to $300,000
Deputy CIO	$139,591 to $200,937	$170,000 to $210,000

- As detailed further in this report, RSCD competes with a broad range of investment management organizations in the public and private sector for qualified talent. Other public funds represent only a small fraction of the total labor market.
- Importantly, while RSCD is generally smaller than the peer funds included in this report, RSCD is also more complex than most funds – having two separate and distinct funds as well as unique bankruptcy challenges. Moreover, RSCD is located in a relatively high cost of living area versus smaller public funds (which are often located in relatively rural, low cost areas). For these reasons, we have focused our alternative salary recommendations on:
  - The 25th percentile to median of total cash for small public funds.
  - The 25th percentile of total cash for all public funds.
  - The 25th percentile of salary only for private sector firms.

Chief Investment Officer

Comparator Group	Survey Position	RSCD	Competitive Market ($000s) Salary 25th	Salary Median	Salary 75th	Salary + Bonus 25th	Salary + Bonus Median	Salary + Bonus 75th	Q'tile Positioning 2017 T. Cash	2018 Salary
Chief Investment Officer										
Small Public Funds	Chief Investment Officer	$242	$264	$282	$318	$264	$315	$408	4	4
All Public Funds	Chief Investment Officer		269	327	401	269	366	547	4	4
All Private Sector	Head of External Investments		260	303	390	528	733	1,085	4	4

- RSCD'S current and maximum CIO salary of $242K falls below the 25th percentile versus all comparator groups.
- Alternative salary range: **$225K - $300K**

This position has ongoing responsibility for the Fund's overall investment results. Working with the Board and/or with external consultants, this position is responsible for developing and implementing the Fund's overall investment policy and program. Depending on the Fund's investment approach, investment activities may be conducted through external managers and/or through internal staff (e.g., Heads of Investment Area/Asset Class Heads, Senior Portfolio Managers).

Incumbent is a seasoned administrator, money manager, and investment strategist.

Typically has more than 10 years of investment-related experience.

Deputy Chief Investment Officer

Comparator Group	Survey Position	RSCD	Competitive Market ($000s)						Q'tile Positioning	
			Salary			Salary + Bonus			2017	2018
			25th	Median	75th	25th	Median	75th	T. Cash	Salary
Team Leader - External Investments										
Small Public Funds	Team Leader - Ext Investments	$167	$153	$189	$220	$189	$224	$245	4	4
All Public Funds	Team Leader - Ext Investments		191	222	259	204	265	359	4	4
All Private Sector	Portfolio Mgr - Ext Inv		175	210	250	245	335	463	4	4

- RSCD'S Deputy CIO current salary of $167K falls below the 25th percentile versus all comparator groups.
- Alternative salary range: **$170K - $210K**

Oversees a team responsible for managing external investment managers. Responsible for: creating risk and asset class guidelines for external managers; and training and directing the team's staff. Depending on the organization, may be fully responsible for a major asset class (e.g., equities or fixed-income) or for supporting CIO across a broad range of asset classes. Incumbents generally report directly to the CIO.

Typically has more than 7 years of investment-related experience.

Appendix

Appendix

Small Public Funds Comparator Group

Fund	Location	AUM ($B) 12/31/2017
Teachers' Retirement System of Louisiana	Baton Rouge, LA	$19.8
Kansas Public Employees' Retirement System	Topeka, KS	19.4
West Virginia Investment Management Board	Charleston, WV	19.3
State Universities Retirement System of Illinois	Champaign, IL	19.2
Montana Board of Investments	Helena, MT	18.6
Public Employee Retirement System of Idaho	Boise, ID	17.5
Hawaii Employees' Retirement System	Honolulu, HI	16.5
School Employees' Retirement System of Ohio	Columbus, OH	14.4
Maine Public Employees' Retirement System	Portland, ME	14.2
New Mexico Educational Retirement Board	Santa Fe, NM	12.9
South Dakota Investment Council	Sioux Falls, SD	12.1
Municipal Employees' Retirement System of Michigan	Lansing, MI	10.7
Missouri State Employees' Retirement System	Jefferson City, MO	8.5
Wyoming Retirement System	Cheyenne, WY	8.5
MO Local Gov't Employees' Retirement Sys	Jefferson City, MO	7.0
Fire and Police Pension Association of Colorado	Greenwood Village, CO	5.4
Employees' Retirement Fund of the City of Dallas	Dallas, TX	3.7
Idaho Endowment Fund Investment Board	Boise, ID	3.1
Municipal Fire & Police Retirement System of Iowa	West Des Moines, IA	2.6
City of Phoenix Employees' Retirement System	Phoenix, AZ	2.5
Fort Worth Employees' Retirement Fund	Fort Worth, TX	2.3
MoDOT & Patrol Employees' Retirement System	Jefferson City, MO	2.3
	High Quartile	$17.2
	Median	**11.4**
	Low Quartile	4.1
City of Detroit Fire & Police	**Detroit, MI**	**$3.1**

RSCD is on the smaller side of the Small Public Fund peer group but RSCD's structure is more complex than most smaller funds.

Appendix

All Public Funds Comparator Group

Fund	AUM ($B) 12/31/17
California Public Employees' Retirement System	$350.0
California State Teachers' Retirement System	225.3
New York State Common Retirement Fund	209.1
State Board of Administration of Florida	205.2
Teacher Retirement System of Texas	151.3
State of Wisconsin Investment Board	117.4
New York State Teachers' Retirement System	113.3
Ohio Public Employees' Retirement System	99.6
Washington State Investment Board	99.5
Virginia Retirement System	78.5
State Teachers Retirement System of Ohio	78.3
State of New Jersey Pension Fund	77.6
Oregon Public Employees' Retirement Fund	77.3
State of Michigan Retirement System	69.9
Minnesota State Board of Investment	68.4
Alaska Permanent Fund Corporation	64.5
Massachusetts PRIM	62.7
Los Angeles County Employees' Retirement Association	55.6
Maryland State Retirement and Pension System	51.9
Tennessee Consolidated Retirement System	49.8
Colorado Public Employees' Retirement Association	48.4
Public School & Education Employee Retirement Systems of Missouri	43.5
Alaska Retirement Management Board / State of Alaska	42.2
Public Employees' Retirement System of Nevada	41.2
Arizona State Retirement System	39.6
Iowa Public Employees' Retirement System	32.3
South Carolina Retirement System	31.8
Texas County & District Retirement System	29.9

Fund	AUM ($B) 12/31/17
Pennsylvania State Employees' Retirement System	29.1
Employees' Retirement System of Texas	28.6
Texas Municipal Retirement System	28.4
Indiana Public Retirement System	28.3
Mississippi Public Employees' Retirement System	28.1
Nebraska Investment Council	27.0
Teachers' Retirement System of Louisiana	19.8
Kansas Public Employees' Retirement System	19.4
West Virginia Investment Management Board	19.3
State Universities Retirement System of Illinois	19.2
Montana Board of Investments	18.6
Public Employee Retirement System of Idaho	17.5
Hawaii Employees' Retirement System	16.5
School Employees' Retirement System of Ohio	14.4
Maine Public Employees' Retirement System	14.2
New Mexico Educational Retirement Board	12.9
South Dakota Investment Council	12.1
Municipal Employees' Retirement System of Michigan	10.7
Missouri State Employees' Retirement System	8.5
Wyoming Retirement System	8.5
MO Local Gov't Employees' Retirement Sys	7.0
Fire and Police Pension Association of Colorado	5.4
Employees' Retirement Fund of the City of Dallas	3.7
Idaho Endowment Fund Investment Board	3.1
Municipal Fire & Police Retirement System of Iowa	2.6
City of Phoenix Employees' Retirement System	2.5
Fort Worth Employees' Retirement Fund	2.3
MoDOT & Patrol Employees' Retirement System	2.3

	HighQ	$68.8
	Median	**29.5**
	LowQ	14.3
City of Detroit Fire & Police		**$3.1**

RSCD is on the smaller side of survey participants when looking at "all participating funds." However, this data represents the broadest public employee labor market for qualified staff in similar positions.

Appendix

All Private Sector Comparator Group

Private Sector Pay Comparators (All)				
		AUM (bbs)		
	# Firms	Low Quartile	Median	High Quartile
Investment Management Firms	142	$28.4	$67.9	$257.4
Banks (Investment Management Depts)	29	21.3	67.0	392.6
Insurance Companies (Investment Management Depts)	57	27.7	70.0	139.9
Corporate Plan Sponsors, Endowments & Foundations	89	2.3	5.2	13.3
Total	**317**	**$10.3**	**$36.4**	**$139.9**