CAUSE NO. DC-17-11306

DALLAS POLICE & FIRE PENSION SYSTEM,	§	**IN THE DISTRICT COURT**
	§	
Plaintiff,	§	
	§	
v.	§	
	§	**OF DALLAS COUNTY, TEXAS**
TOWNSEND HOLDINGS, LLC d/b/a THE TOWNSEND GROUP, RICHARD BROWN, MARTIN ROSENBERG and GARY B. LAWSON,	§	
	§	
	§	**298th JUDICIAL DISTRICT**
Defendants.		

SCHEDULING ORDER AND
DISCOVERY CONTROL PLAN (LEVEL 3)

Pursuant to Rule 190.4 of the Texas Rules of Civil Procedure, the Court enters the following Scheduling Order and Discovery Control Plan (Level 3):

1. Jury trial is set for August 26, 2019.

2. Amended pleadings asserting new causes of action shall be filed on or before June 8, 2018.

3. The deadline for joinder of additional parties will be October 31, 2018.

4. The deadline to move for leave to designate responsible third parties will be November 30, 2018.

5. Amended pleadings asserting new defenses shall be filed on or before September 7, 2018.

6. Fact discovery shall be completed on or before January 18, 2019.

7. On or before February 15, 2019, all parties seeking affirmative relief shall file with the Court and deliver to all parties of record their written Designation of Expert Witnesses, complying with Rule 194.2(1) for all experts who are expected to testify at the trial of this cause with respect to any issue upon which that party bears the burden of proof and seeks affirmative relief.

8. On or before March 19, 2019, all parties shall file with the Court and deliver to all parties of record their written Designation of Expert Witnesses on defensive issues, complying with Rule 194.2(f) for such experts who are expected to testify at the trial of this cause.

9. On or before April 18, 2019, all parties shall file with the Court and deliver to all parties of record their written Designation of Rebuttal Expert Witnesses, complying with Rule 194.2(f) for such experts who are expected to testify at the trial of this cause.

10. Expert discovery shall be completed on or before May 22, 2019.

11. Motions for Summary Judgment shall be filed no later than June 14, 2019.

12. *Robinson* motions, if any, shall be filed no later than June 14, 2019.

13. On or before July 23, 2019, the parties will exchange their (i) lists of fact and expert trial witnesses, (ii) lists of trial exhibits (other than those that may be introduced solely for the purpose of rebuttal or impeachment) and (iii) page and line designations for oral and videotaped depositions to be used at trial. Exhibits shall be made available for inspection by the other parties.

14. On or before July 30, 2019, the parties will designate responsive page and line designations for those oral and videotaped depositions to be used at trial.

15. On or before August 6, 2019, the parties will exchange their objections to the other parties' (i) lists of fact and expert trial witnesses, (ii) lists of trial exhibits and (iii) page and line designations for oral and videotaped depositions to be used at trial.

16. On or before August 9, 2019, the parties shall file any motions *in limine*.

17. On or before August 14, 2019, the parties shall confer in good faith in an attempt to resolve all objections to deposition designations, witnesses, and exhibits. The parties shall also exchange by facsimile or hand delivery a proposed jury charge.

18. On or before August 16, 2019, the parties shall file oppositions to any motions *in limine*.

19. Witness lists, exhibit lists, and requested jury questions and instructions to be used in trial are to be filed by August 20, 2019.

20. The Court shall hear motions *in limine* on August 23, 2019.

21. Regarding oral depositions, unless there is a showing of good cause requiring more, depositions will be limited to the parties (corporate designee(s), in the case of entity parties), experts, and 25 additional depositions for each of (a) the plaintiff, (b) the Townsend-related defendants, and (c) Lawson.

The above deadlines and other matters contained herein, with the exception of the trial date, may be altered or amended by written agreement of the parties or for good cause shown.

Signed this 9 day of August 2018.

JUDGE PRESIDING

CONSENTED TO:

DIAMOND MCCARTHY LLP

By _____

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ATTORNEYS FOR DEFENDANTS TOWNSEND HOLDINGS, LLC d/b/a THE TOWNSEND GROUP, RICHARD BROWN and MARTIN ROSENBERG

FILED
DALLAS COUNTY
11/30/2018 2:10 PM
FELICIA PITRE
DISTRICT CLERK

Nikita Mosley

CAUSE NO. DC-17-11306

DALLAS POLICE & FIRE PENSION SYSTEM,	§	**IN THE DISTRICT COURT**
	§	
	§	
Plaintiff	§	
	§	
	§	
v.	§	
	§	**OF DALLAS COUNTY, TEXAS**
TOWNSEND HOLDINGS, LLC d/b/a THE TOWNSEND GROUP, RICHARD BROWN, MARTIN ROSENBERG and GARY B. LAWSON,	§	
	§	
	§	
	§	
Defendants.	§	**298th JUDICIAL DISTRICT**

AGREED MOTION FOR ENTRY OF
AMENDED SCHEDULING ORDER

Defendants The Townsend Group, Richard Brown, and Martin Rosenberg (collectively, the "Townsend Defendants"), Defendant Gary B. Lawson ("Lawson"), and Plaintiff Dallas Police & Fire Pension System ("Plaintiff") file this agreed motion for the entry of an amended scheduling order and show the following:

1. Plaintiff filed this lawsuit on August 31, 2017. On August 9, 2018, the Court entered an agreed Scheduling Order and Discovery Control Plan (Level 3) pursuant to Rule 190.4 of the Texas Rules of Civil Procedure.

2. Despite good faith and diligent efforts, all parties need substantial additional discovery concerning Plaintiff's claims, the Townsend Defendants' defenses, and defendant Gary B. Lawson's defenses, including written discovery and dozens of fact witness depositions. The current fact discovery deadline of January 18, 2019, is no longer workable, and all parties have conferred and agreed that it is necessary to vacate the current trial date of August 26, 2019, and reschedule the trial, and all corresponding discovery and pre-trial dates, for a later time.

Accordingly, consistent with Rules 190.1, 190.4(a), and 190.5 of the Texas Rules of Civil Procedure, the parties respectfully request entry of a revised scheduling order, including an order vacating the current trial date and resetting the trial for a date on or after April 27, 2020. A proposed order is attached hereto as Exhibit A.

3. All parties have agreed to the proposed relief.

WHEREFORE, the parties respectfully request that the Court grant this motion and enter the proposed revised scheduling order attached as Exhibit A.

Dated: November 30, 2018

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ATTORNEYS FOR PLAINTIFF DALLAS POLICE & FIRE PENSION SYSTEM

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ATTORNEYS FOR DEFENDANTS TOWNSEND HOLDINGS, LLC d/b/a THE TOWNSEND GROUP, RICHARD BROWN and MARTIN ROSENBERG

CERTIFICATE OF CONFERENCE

I hereby certify that on November 6, 2018, counsel for Plaintiff Dallas Police and Fire Pension System expressed his agreement with the relief requested by this motion, and on November 26, 2018, counsel for Defendant Gary B. Lawson expressed her agreement with the relief requested by this motion.

/s/ Elizabeth L. Yingling

Elizabeth L. Yingling

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document was served on the following via e-service on this 30th day of November, 2018:

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/s/ Elizabeth L. Yingling

Elizabeth L. Yingling

CMW

COBB MARTINEZ WOODWARD

William D. Cobb, Jr.
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February 13, 2019

Via Electronic Filing and Hand Delivery

298th Judicial District Court
c/o Felicia Pitre, Dallas County District Clerk
George L. Allen, Sr. Courts Building
600 Commerce Street, Box 540
Dallas, TX 75202

Re: DC-17-11306; *Dallas Police & Fire Pension System v. Townsend Holdings, LLC d/b/a The Townsend Group, Richard Brown, Martin Rosenberg and Gary B. Lawson*

Dear Ms. Pitre:

Attached please find a proposed Revised Scheduling Order executed by the parties in the above-referenced matter. We would appreciate you presenting this Order to the judge for approval and signature, with the attached letter, and providing us with a conformed copy.

By copy of this letter, I am furnishing all counsel of record with a copy of same.

Thank you for your assistance in this matter.

Sincerely,

Bill Cobb

William D. Cobb, Jr.

WDCjr/klh
Attachment

cc: *All Counsel of Record* (w/encl.) (via e-filing and e-service)

CAUSE NO. DC-17-11306

DALLAS POLICE & FIRE PENSION SYSTEM,	§	**IN THE DISTRICT COURT**
	§	
	§	
Plaintiff	§	
	§	
	§	
v.	§	
	§	**OF DALLAS COUNTY, TEXAS**
TOWNSEND HOLDINGS, LLC d/b/a THE TOWNSEND GROUP, RICHARD BROWN, MARTIN ROSENBERG and GARY B. LAWSON,	§	
	§	
	§	
	§	
	§	
Defendants.		**298th JUDICIAL DISTRICT**

REVISED SCHEDULING ORDER

Pursuant to Rule 190.4 of the Texas Rules of Civil Procedure, the Court enters the following Revised Scheduling Order:

1. Jury trial is set for April 27, 2020.

2. The deadline for joinder of additional parties will be May 2, 2019.

3. The deadline to move for leave to designate responsible third parties will be May 30, 2019.

4. Fact discovery shall be completed on or before December 23, 2019.

5. On or before November 6, 2019, all parties seeking affirmative relief shall file with the Court and deliver to all parties of record their written Designation of Expert Witnesses, complying with Rule 194.2(1) for all experts who are expected to testify at the trial of this cause with respect to any issue upon which that party bears the burden of proof and seeks affirmative relief.

6. On or before December 6, 2019, all parties shall file with the Court and deliver to

all parties of record their written Designation of Expert Witnesses on defensive issues, complying with Rule 194.2(f) for such experts who are expected to testify at the trial of this cause.

7. On or before December 23, 2019, all parties shall file with the Court and deliver to all parties of record their written Designation of Rebuttal Expert Witnesses, complying with Rule 194.2(f) for such experts who are expected to testify at the trial of this cause.

8. Expert discovery shall be completed on or before January 22, 2020.

9. Motions for Summary Judgment shall be filed no later than February 21, 2020.

10. *Robinson* motions, if any, shall be filed no later than February 21, 2020.

11. On or before March 24, 2020, the parties will exchange their (i) lists of fact and expert trial witnesses, (ii) lists of trial exhibits (other than those that may be introduced solely for the purpose of rebuttal or impeachment) and (iii) page and line designations for oral and videotaped depositions to be used at trial. Exhibits shall be made available for inspection by the other parties.

12. On or before March 31, 2020, the parties will designate responsive page and line designations for those oral and videotaped depositions to be used at trial.

13. On or before April 7, 2020, the parties will exchange their objections to the other parties' (i) lists of fact and expert trial witnesses, (ii) lists of trial exhibits and (iii) page and line designations for oral and videotaped depositions to be used at trial.

14. On or before April 10, 2020, the parties shall file any motions *in limine*.

15. On or before April 15, 2020, the parties shall confer in good faith in an attempt to resolve all objections to deposition designations, witnesses, and exhibits. The parties shall also exchange by facsimile or hand delivery a proposed jury charge.

16. On or before April 17, 2020, the parties shall file oppositions to any motions *in limine*.

17. Witness lists, exhibit lists, and requested jury questions and instructions to be used in trial are to be filed by April 21, 2020.

18. The Court shall hear motions *in limine* on April 24, 2020.

19. The above deadlines and other matters contained herein, with the exception of the trial date, may be altered or amended by written agreement of the parties or for good cause shown.

Signed this ___ day of February 2019.

_____
JUDGE PRESIDING

CONSENTED TO:

DIAMOND MCCARTHY LLP

By */s/ Mark K. Sales*

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ATTORNEYS FOR DEFENDANTS TOWNSEND HOLDINGS, LLC d/b/a THE TOWNSEND GROUP, RICHARD BROWN and MARTIN ROSENBERG

FILED
DALLAS COUNTY
6/25/2019 3:41 PM
FELICIA PITRE
DISTRICT CLERK

Treva Parker-Ayodele

CAUSE NO. DC-17-11306

DALLAS POLICE & FIRE PENSION SYSTEM,	§	**IN THE DISTRICT COURT OF**
	§	
Plaintiff,	§	
v.	§	**DALLAS COUNTY, TEXAS**
	§	
TOWNSEND HOLDINGS, LLC d/b/a THE TOWNSEND GROUP, RICHARD BROWN, MARTIN ROSENBERG and GARY B. LAWSON,	§	
	§	
Defendants.	§	**298th JUDICIAL DISTRICT**

NOTICE OF HEARING

PLEASE TAKE NOTICE that the Court will hold a hearing on the **AGREED MOTION FOR ENTRY OF REVISED SCHEDULING ORDER**, on Tuesday, August 6, 2019 at 8:30 AM, in the courtroom of the Honorable Emily G. Tobolowsky, George L. Allen, Sr. Courts Building, 600 Commerce, 8th Floor New Tower, Dallas, Texas 75202.

Dated: June 25, 2019

Respectfully submitted,

By: */s/ Mark K. Sales*

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Counsel for Plaintiff
Dallas Police & Fire Pension System

CERTIFICATE OF SERVICE

I hereby certify that on June 25, 2019, a true and correct copy of the foregoing instrument was served on the following counsel via the Efile Service as follows:

Elizabeth Yingling
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William D. Cobb, Jr.

Cobb Martinez Woodward PLLC
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Dallas, Texas 75201

/s/ Mark K. Sales
Mark K. Sales

FILED
DALLAS COUNTY
6/20/2019 4:23 PM
FELICIA PITRE
DISTRICT CLERK
Treva Parker-Ayodele

CAUSE NO. DC-17-11306

DALLAS POLICE & FIRE PENSION SYSTEM,	§	**IN THE DISTRICT COURT**
Plaintiff,	§	
v.	§	
	§	**OF DALLAS COUNTY, TEXAS**
TOWNSEND HOLDINGS, LLC d/b/a THE TOWNSEND GROUP, RICHARD BROWN, MARTIN ROSENBERG and GARY B. LAWSON,	§	
	§	**298th JUDICIAL DISTRICT**
Defendants.		

AGREED MOTION FOR ENTRY OF REVISED SCHEDULING ORDER

Plaintiff Dallas Police & Fire Pension System ("Plaintiff") and Defendants The Townsend Group, Richard Brown, and Martin Rosenberg (collectively, the "Townsend Defendants") and Defendant Gary B. Lawson ("Lawson"), file this agreed motion for the entry of a revised scheduling order and show the following:

1. Plaintiff filed this lawsuit on August 31, 2017. On August 9, 2018, the Court entered an agreed Scheduling Order and Discovery Control Plan (Level 3) pursuant to Rule 190.4 of the Texas Rules of Civil Procedure. On November 30, 2018, the parties filed an Agreed Motion for Entry of Amended Scheduling Order requesting that the Court reset the trial date and extend the current deadlines in this case.

2. Despite good faith and diligent efforts, all parties need substantial additional discovery concerning Plaintiff's claims, the Townsend Defendants' defenses, and Lawson's defenses, including written discovery and dozens of fact witness depositions. Neither the original discovery deadline nor the previously-proposed discovery deadline of August 30, 2019, remains

workable, and all parties have conferred and agreed that it is necessary to vacate the trial date that was initially set for August 26, 2019, and reschedule the trial, and all corresponding discovery and pre-trial dates, for a later time. Accordingly, consistent with Rules 190.1, 190.4(a), and 190.5 of the Texas Rules of Civil Procedure, the parties respectfully request entry of a revised scheduling order, including an order vacating the current trial date and resetting the trial for a date on or after November 2, 2020. A proposed order is attached hereto as Exhibit A.

3. All parties have agreed to the proposed relief.

WHEREFORE, the parties respectfully request that the Court grant this motion and enter the proposed revised scheduling order attached as Exhibit A.

DATED: June 20, 2019.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF DALLAS POLICE & FIRE PENSION SYSTEM

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ATTORNEYS FOR DEFENDANTS TOWNSEND HOLDINGS, LLC d/b/a THE TOWNSEND GROUP, RICHARD BROWN and MARTIN ROSENBERG

CERTIFICATE OF CONFERENCE

I hereby certify that on June 20, 2019, counsel for Defendant Gary B. Lawson expressed his agreement with the relief requested by this motion. I further certify that on June 20, 2019, counsel for Defendants Townsend Holdings, LLC d/b/a The Townsend Group, Richard Brown and Martin Rosenberg expressed their agreement with the relief requested by this motion. The parties request a hearing on the status of the case, despite their stated agreement to the requested relief.

/s/ Rebecca A. Muff
Rebecca A. Muff

CERTIFICATE OF SERVICE

I hereby certify that on June 20, 2019, a true and correct copy of the foregoing instrument was served on the following counsel via the Efile Service as follows:

Elizabeth Yingling
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Dallas, TX 75201

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Dallas, Texas 75201

/s/ Rebecca A. Muff
Rebecca A. Muff

CAUSE NO. DC-17-11306

DALLAS POLICE & FIRE PENSION SYSTEM,	§	**IN THE DISTRICT COURT**
	§	
Plaintiff,	§	
	§	
v.	§	
	§	**OF DALLAS COUNTY, TEXAS**
TOWNSEND HOLDINGS, LLC d/b/a THE TOWNSEND GROUP, RICHARD BROWN, MARTIN ROSENBERG and GARY B. LAWSON,	§	
	§	**298th JUDICIAL DISTRICT**
Defendants.		

REVISED SCHEDULING ORDER

Pursuant to Rule 190.4 of the Texas Rules of Civil Procedure, the Court enters the following Revised Scheduling Order:

1. Jury trial is reset for November 2, 2020.

2. The deadline for joinder of additional parties will be August 14, 2019.

3. The deadline to move for leave to designate responsible third parties will be November 1, 2019

4. Fact discovery shall be completed on or before June 30, 2020.

5. On or before May 8, 2020, all parties seeking affirmative relief shall file with the Court and deliver to all parties of record their written Designation of Expert Witnesses, complying with Rule 194.2(1) for all experts who are expected to testify at the trial of this cause with respect to any issue upon which that party bears the burden of proof and seeks affirmative relief.

6. On or before June 5, 2020, all parties shall file with the Court and deliver to all parties of record their written Designation of Expert Witnesses on defensive issues, complying with Rule 194.2(f) for such experts who are expected to testify at the trial of this cause.

7. On or before July 14, 2020, all parties shall file with the Court and deliver to all parties of record their written Designation of Rebuttal Expert Witnesses, complying with Rule 194.2(f) for such experts who are expected to testify at the trial of this cause.

8. Expert discovery shall be completed on or before August 14, 2020.

9. Motions for Summary Judgment shall be filed no later than September 1, 2020.

10. *Robinson* motions, if any, shall be filed no later than September 1, 2020.

11. On or before September 29, 2020, the parties will exchange their (i) lists of fact and expert trial witnesses, (ii) lists of trial exhibits (other than those that may be introduced solely for the purpose of rebuttal or impeachment) and (iii) page and line designations for oral and videotaped depositions to be used at trial. Exhibits shall be made available for inspection by the other parties.

12. On or before October 6, 2020, the parties will designate responsive page and line designations for those oral and videotaped depositions to be used at trial.

13. On or before October 13, 2020, the parties will exchange their objections to the other parties' (i) lists of fact and expert trial witnesses, (ii) lists of trial exhibits and (iii) page and line designations for oral and videotaped depositions to be used at trial.

14. On or before October 16, 2020, the parties shall file any motions *in limine*.

15. On or before October 21, 2020, the parties shall confer in good faith in an attempt to resolve all objections to deposition designations, witnesses, and exhibits. The parties shall also exchange by facsimile or hand delivery a proposed jury charge.

16. On or before October 23, 2020, the parties shall file oppositions to any motions *in limine*.

17. Witness lists, exhibit lists, and requested jury questions and instructions to be used in trial are to be filed by October 27, 2020.

18. The Court shall hear motions *in limine* on October 30, 2020.

19. The above deadlines and other matters contained herein, with the exception of the trial date, may be altered or amended by written agreement of the parties or for good cause shown.

Signed this ____ day of _____, 2019.

/s/_____
JUDGE PRESIDING

CONSENTED TO:

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FELICIA PITRE
DALLAS COUNTY DISTRICT CLERK

NINA MOUNTIQUE
CHIEF DEPUTY

CAUSE NO. DC-17-11306

DALLAS POLICE & FIRE PENSION SYSTEM

vs.

TOWNSEND HOLDINGS, LLC D/B/A THE TOWNSEND GROUP, et al

298th District Court

ENTER DEMAND FOR JURY

JURY FEE PAID BY: PLAINTIFF

FEE PAID: 40.00

600 COMMERCE STREET DALLAS, TEXAS 75202 (214) 653-7261
FAX (214)653-7781 E-mail: Felicia.Pitre@dallascounty.org
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FILED
DALLAS COUNTY
12/10/2018 12:03 PM
FELICIA PITRE
DISTRICT CLERK

Terri Kilgore

CAUSE NO. DC-17-11306

DALLAS POLICE & FIRE PENSION SYSTEM,	§	IN THE DISTRICT COURT OF
Plaintiff,	§	
v.	§	DALLAS COUNTY, TEXAS
TOWNSEND HOLDINGS, LLC d/b/a THE TOWNSEND GROUP, RICHARD BROWN, MARTIN ROSENBERG and GARY B. LAWSON,	§	
Defendants.	§	298th JUDICIAL DISTRICT

TOWNSEND'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS

IN RESPONSE TO FIRST SET OF REQUESTS FOR PRODUCTION

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TOWNSEND'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS IN RESPONSE TO FIRST SET OF REQUESTS FOR PRODUCTION

Defendants Townsend Holdings, LLC d/b/a The Townsend Group, Richard Brown, and Martin Rosenberg (collectively, "Townsend") file this Motion to Compel Documents in Response to First Set of Requests for Production against Plaintiff Dallas Police & Fire Pension System ("Plaintiff" or "DPFPS") on the grounds set forth below.

I. INTRODUCTION

1. Plaintiff is run by a Board of Trustees and dedicated staff members who act as fiduciaries to the men and women of the Dallas police and fire departments. In the early 2000s, those trustees and staff developed a high-risk, high-return investment strategy designed to leverage the size of the pension's existing funds and take into account both the number and life expectancy of its beneficiaries and DPFPS's considered views of the future of the financial markets. For years, that strategy was hugely successful. The trustees and staff were the toast of the town, and they regularly enjoyed fully paid boondoggles to glamorous locations like Honolulu, Las Vegas, and Napa.

2. But markets are cyclical, and Plaintiff's strategy encountered major obstacles in the wake of the recent Great Recession. In the years following the downturn, the *Dallas Morning News* and other media openly questioned and criticized DPFPS's real estate investment strategy. The press repeatedly interviewed and exchanged correspondence with Plaintiff's trustees and staff members. The City of Dallas commissioned an independent audit of Plaintiff's investment portfolio in 2013, voicing particular concern over Plaintiff's valuation of certain real estate investments. The Federal Bureau of Investigation ("FBI") and the Texas Rangers reportedly are investigating Plaintiff and its dealings with a now-defunct real estate investment manager named CDK Realty Advisors ("CDK").

3. Invoking the old adage, "the best defense is a good offense," Plaintiff launched a flurry of lawsuits and a public relations campaign blaming others for DPFPS's decision-making and financial challenges. To date, Plaintiff has sued a former investment manager, a former actuary, and a former outside lawyer, in addition to Townsend.[1] Plaintiff has threatened to sue others. Everyone is at fault, according to Plaintiff, except the trustees and staff who made the investment decisions themselves.

4. In 2017, Plaintiff sued Townsend, a former investment consultant, claiming that Townsend's acts and omissions led to astronomical losses of over $500 million. Townsend has served Requests for Production seeking documents concerning Plaintiff's investment strategies and decision-making, investment performance, internal and external audits, and, of course, the FBI's ongoing investigation into Plaintiff's real estate investment program.

5. Plaintiff is obstructing Townsend's access to this evidence in an effort to skew the proof in this case. While Plaintiff has agreed to provide Townsend certain documents—largely documents that Townsend provided to Plaintiff in the first instance during their 15-year relationship—Plaintiff refuses to make available case-critical documents that are undeniably relevant and unquestionably responsive.

6. Plaintiff's purported bases for refusing to produce documents are groundless:

[1] Ex. 1 (Defendant and Counter-Plaintiff's Original Counterclaim, *CDK Realty Advisors, LP v. Dallas Police & Fire Pension Sys.*, No. DC-16-01566 (192nd Dist. Ct., Dallas County, Tex. Apr. 5, 2016)) (counterclaims against CDK, Plaintiff's primary investment manager, alleging that CDK mismanaged real estate investments and seeking over $320 million in damages); Ex. 2 (Original Petition & Demand for Jury Trial, *Dallas Police & Fire Pension Sys. v. Buck Global LLC*, No. DC-18-16385 (95th Dist. Ct., Dallas County, Tex. Oct. 30, 2018)) (lawsuit against Buck Consultants, Plaintiff's actuary and advisor for over 25 years, alleging that Buck "failed to communicate important risk information" and assured Plaintiff "that the Fund was actuarially sound, when in fact it was not" and seeking unspecified damages); First Amended Petition ("FAP") ¶¶ 119–125 (asserting claims against Gary Lawson, Plaintiff's former attorney, for breach of fiduciary duty and negligence).

a. Documents Provided to the FBI: Plaintiff admits that there is an "ongoing investigation" by the FBI concerning its real estate investment program, and also admits that it has made documents available for the FBI to review. Plaintiff, however, refuses to make the same documents available to Townsend or even to identify or describe what documents Plaintiff gave to the FBI. There is no legal basis to deny Townsend this important evidence. Documents provided to federal law enforcement investigating wrongdoing in connection with Plaintiff's real estate program are, by definition, centrally relevant to the issues in this case. There is minimal (if any) burden to making the documents available to Townsend since they were already provided to the FBI, and Texas law makes clear that any privilege that may otherwise have existed over these documents has been waived through Plaintiff's provision of the material to the FBI.

b. Plaintiff's Real Estate Investments: Townsend sought documents from Plaintiff about each of the real estate investments Plaintiff made during the operative time period. Plaintiff, however, refuses to produce documents concerning investments that are not "specifically pled" in its First Amended Petition. Plaintiff's contention that only investments "specifically pled" are relevant to this case is contrary to the relevance standard and irreconcilable with Plaintiff's own argument to this Court when it sought (and obtained) documents from Townsend that concern non-pled investments. These documents—especially about investments that Plaintiff chose not to plead—will prove what everyone knows:

Plaintiff, its trustees, and its staff made each of these investment decisions, remained intimately involved in each, and Plaintiff is merely cherry-picking certain investments in this case in an effort to find a scapegoat to blame.

c. Dallas Audit: Plaintiff is withholding documents concerning a 2013 audit commissioned by the City of Dallas. As press reports confirm, this audit involved Plaintiff's valuation of the same investments at issue in this case; audit-related documents are relevant, and the universe of responsive documents is very limited.

d. Trustees: Plaintiff refuses to produce indisputably relevant documents on the ground that documents in the physical possession of current and former trustees are outside Plaintiff's "possession, custody, or control." In other words, Plaintiff says it has no ability to ask its own fiduciary trustees to turn over documents they have. This position is refuted by Texas law, which makes clear documents held by trustees must be produced, as Plaintiff has the right to request and obtain responsive documents from them.

e. Investment Managers: Plaintiff's refusal to produce documents in the physical possession of its former investment managers is likewise improper; as a practical and legal matter, Plaintiff has the right to request and obtain responsive documents held by its former representatives.

f. General Objections: Plaintiff's responses include boilerplate general objections, which are incorporated by reference into 113 of its 114

responses (99.1%). Plaintiff refuses to sign a Rule 11 agreement confirming, without qualification, that it is not withholding documents based on these general objections. That refusal is completely inconsistent with the discovery rules—not to mention the position Plaintiff itself took in demanding and obtaining such a Rule 11 agreement from Townsend earlier this year.

7. Townsend is entitled to this evidence to defend itself against the baseless claims leveled by Plaintiff. Plaintiff has no legal basis to conceal it. Townsend respectfully requests an order directing Plaintiff to produce the documents requested herein.

II. BACKGROUND

A. Factual History

8. In the early 2000s, Plaintiff—with former Administrator Richard Tettamant at the helm—developed an investment strategy that was tailored to the size and expectations of the Dallas police and fire departments.

9. Plaintiff hired Townsend in 2001 to act as an investment consultant for the real estate portion of the fund's vast investment portfolio. Townsend was paid roughly $175,000 per year for its services, which included providing detailed quarterly reports summarizing the performance of Plaintiff's various real estate investments.

10. Plaintiff also hired numerous investment managers to identify potential real estate investments and manage those investments once made. In 2002, Plaintiff hired CDK, the entity ultimately responsible for many of Plaintiff's worst-performing investments. On average, DPFPS paid CDK over $2 million annually for its services. *See* Ex. 1 (Defendant and Counter-Plaintiff's Original Counterclaim, *CDK Realty Advisors, LP*. (No. DC-16-01566)) at ¶ 3. Plaintiff also took the "unusual step" of managing certain investments by itself, without an

outside investment manager. *See* Ex. 3 (June 8, 2017 *Dallas Morning News* article) (noting that Plaintiff's leadership "took the unusual step of managing [certain real estate investments] themselves for years"); Ex. 4 (profile of Richard Tettamant noting that Tettamant had "saved the Pension System millions of dollars in management fees" by "personally overseeing investment properties").

11. Initially, in the first half of the decade, Plaintiff's strategy appeared successful, the investments performed well, and Plaintiff's trustees and staff enjoyed acclaim. Plaintiff's staff and trustees, including Tettamant, frequently enjoyed lavish all-expenses-paid trips to California, Hawaii, and other locations. *See* Ex. 5 (Jan. 29, 2013 *Dallas Morning News* article); Ex. 6 (Feb. 17, 2013 *Dallas Morning News* articles).

12. Beginning in 2007, Dallas, the United States, and the world suffered from what is now known as the Great Recession. Plaintiff did not escape its impact.

13. As the Great Recession wore on—and even as real estate started to rebound—Plaintiff's investment portfolio was not the overachiever it formerly had been. As detailed in the First Amended Petition, Plaintiff was forced to write down the value of many of its real estate investments and sell others at a loss. Notably, Plaintiff's underperformance was not limited to real estate; according to Plaintiff's newly-hired general consultant, Meketa, Plaintiff's time-weighted returns for private equity investments are worse than its returns for real estate investments over virtually every time period. Ex. 7 (Meketa 2Q18 Review) at 23.

14. In the years following the downturn, as details of Plaintiff's investment performance came to light, Plaintiff's beneficiaries and observers, including the City of Dallas itself, openly questioned Plaintiff's investment strategy, particularly with respect to real estate. The *Dallas Morning News*, for example, asked why DPFPS had invested so heavily in real estate,

especially in undeveloped land, and questioned whether those investments might cause problems for the fund and its beneficiaries down the road. Tettamant scoffed at the criticism, saying: "Some people call us contrarian; I like to call ourselves innovative . . . We try to look at things differently than the rest of the market. If you follow the herd, you're going to get market returns." Ex. 6 (Feb. 17, 2013 *Dallas Morning News* article).

15. In 2013, with Mayor Rawlings voicing particular concern over Plaintiff's real estate investments, the City of Dallas commissioned an independent audit of Plaintiff's investment portfolio. Ex. 8 (Jan. 26, 2014 *Dallas Morning News* article).

16. In 2015, Plaintiff fired CDK, the manager responsible for the bulk of Plaintiff's real estate investments—not to mention many of the "site visits" enjoyed by trustees and staff members. In 2016, the FBI raided CDK's offices, housed in the same building as Plaintiff, as part of an investigation of CDK and of Plaintiff's real estate investments. Reports indicate that the Texas Rangers are investigating Plaintiff's real estate investment program as well.

17. That same year, DPFPS sued CDK. *See* Ex. 1 (Defendant and Counter-Plaintiff's Original Counterclaim, *CDK Realty Advisors, LP*. (No. DC-16-01566)). Plaintiff has also sued its former actuary, Buck Consultants. *See* Ex. 2 (Original Petition & Demand for Jury Trial, *Dallas Police & Fire Pension Sys.* (No. DC-18-16385)). And, as part of this action, Plaintiff has sued its former outside lawyer, Gary Lawson. Plaintiff has threatened to sue (and, in some cases, has extracted settlements from) others, including investment managers and developers M3, Hearthstone, and WWJ Project Holdings. Ex. 9 (Plaintiff's Responses to Townsend's Requests for Disclosure).

18. This case is just another effort to find a scapegoat for Plaintiff's reckless decision-making. Here, Plaintiff points the finger at Townsend, which served as its real estate investment

consultant between 2001 and 2016, for certain failed investments and claims losses of over $500 million. As the evidence will show, Townsend is not to blame for the losses to Plaintiff's real estate investment portfolio. To the contrary, it was Plaintiff that developed an aggressive, high-risk strategy to invest heavily in alternative investments such as raw, undeveloped land; invested in risky real estate projects without seeking Townsend's advice; disregarded Townsend's advice, including clear warnings that Plaintiff was exceeding real estate allocation guidelines and should diversify its real estate portfolio by investment type, geographic location, and investment manager; and ignored widespread public criticism of its investment strategy—even launching a public relations campaign to defend its decisions.

B. Procedural History

19. Townsend served its First Set of Requests for Production ("Requests") on August 24, 2018. Ex. 10.

20. Plaintiff served Objections and Responses to the Requests ("Responses") on September 24, 2018, which contain boilerplate objections and refusals to produce key categories of documents that are plainly relevant—indeed, pivotal—to Plaintiff's claims and Townsend's defenses. Ex. 11.

21. Despite numerous meet-and-confer exchanges, several disputes remain. What follows are the issues on which the parties could not reach agreement.

22. The foregoing discovery is necessary for Townsend to adequately defend this case—a case in which Plaintiff seeks more than $500 million in damages. Townsend therefore respectfully requests that the Court grant this Motion and compel Plaintiff to produce documents to which Townsend is clearly entitled.

III. TOWNSEND'S MOTION SHOULD BE GRANTED

A. Townsend Is Entitled To Review The Same Documents Plaintiff Provided To The FBI During Its Investigation Of Plaintiff's Real Estate Investment Program.

23. Request 95 seeks "[a]ll documents produced to or seized by any state or federal government agency," including the FBI, "concerning Plaintiff's real estate investment program, including the losses alleged in this Lawsuit." Ex. 10 (Requests) at 24. These documents are directly relevant—and critically important—to this case.

24. According to multiple media reports, the FBI has undertaken an investigation concerning Plaintiff's real estate investments and losses—including those at the heart of this lawsuit. *See, e.g.*, Ex. 12 (May 11, 2018 *Dallas Morning News* article); Ex. 13 (Jan. 20, 2017 *Dallas Morning News* article); Ex. 14 (Dec. 30, 2016 *Wall Street Journal* article). For example, the FBI is reportedly investigating Plaintiff's relationship with CDK, the investment firm that recommended and managed the vast majority of real estate investments identified in the First Amended Petition. *See, e.g.*, Ex. 13 (Jan. 20, 2017 *Dallas Morning News* article); FAP ¶ 27 (CDK "manag[ed] the largest percentage of DPFP's nearly $1 billion Real Estate Portfolio"); *see also* FAP ¶¶ 28–29, 30-34, 38–43, 56–57 (detailing CDK-managed investments). Dallas Mayor Mike Rawlings has called for the Texas Rangers to launch a separate state investigation into Plaintiff's real estate investment program. *See, e.g.*, Ex. 12 (May 11, 2018 *Dallas Morning News* article); Ex. 14 (Dec. 30, 2016 *Wall Street Journal* article).

25. Plaintiff admits that there is an "ongoing investigation" by the FBI concerning its real estate investment program, and that it has made "millions" of documents available for the FBI to review. Ex. 15 (Oct. 29, 2018 Letter) at 4–5; Ex. 16 at (Nov. 9, 2018 Letter) 7–8.[2] But

[2] After initially denying that it was aware of any investigation by the Texas Rangers, Plaintiff has now backtracked, and claims to be "investigating" whether any state or federal government

Plaintiff refuses to identify which documents it made available to the FBI or make those same documents available to Townsend for review. *Id.* Plaintiff's position is meritless.

26. First, documents provided to the FBI "concerning Plaintiff's real estate investment program" and "the losses alleged in this Lawsuit" are, by definition, relevant. Notably, Plaintiff failed to assert any relevance objection in its response to Request 95, meaning that any such objection has now been waived. Ex. 11 (Responses) at 30; Tex. R. Civ. P. 193.2(e) ("An objection that is not made within the time required . . . is waived unless the court excuses the waiver for good cause shown.").

27. In meet-and-confer correspondence, however, Plaintiff asserted an untimely—and misplaced—relevance objection, arguing that documents provided to the FBI were "for [the FBI's] own, undisclosed purposes" and "nothing about the fact of [the FBI's] review makes such documents relevant." Ex. 17 (Oct. 19, 2018 Letter) at 4–5. Wrong. Plaintiff's entire lawsuit hinges on the (false) premise that Townsend is responsible for Plaintiff's failed real estate investments. According to media reports, the FBI's investigation involves the same investments and the possible reasons for their failure—including the role played by Plaintiff's former administrator (Richard Tettamant), primary investment manager (CDK), and others. *See supra* at ¶ 24; Ex. 12 (May 11, 2018 *Dallas Morning News* article) (reporting that Tettamant's attorney asserted his innocence and claimed that "all of the investment decisions were made by [Plaintiff's] trustees"). Documents that Plaintiff turned over to the FBI in connection with this

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agency other than the FBI is conducting an investigation concerning its real estate investment program. *Compare* Ex. 18 (Nov. 5, 2018 Letter) at 6 *with* Ex. 16 (Nov. 9, 2018 Letter) at 8. For the avoidance of doubt, to the extent that any documents are produced to or seized by the Texas Rangers—or any other government agency—concerning Plaintiff's real estate investment program, those documents are also responsive to Request 95 and must be produced.

investigation could directly refute Plaintiff's claims and support Townsend's defenses—and are clearly relevant.[3]

28. Second, there is little-to-no burden on Plaintiff to make these same documents available for inspection and copying by Townsend. Plaintiff acknowledges that it "made millions of non-privileged documents available to the FBI . . . to inspect and copy as it saw fit." Ex. 17 (Oct. 19, 2018 Letter) at 4. Plaintiff claims, implausibly, that it does not know—and has no way to determine—which specific documents were actually reviewed or copied by the FBI. Ex. 11 (Responses) at 30; Ex. 16 (Nov. 9, 2018 Letter) at 7. Even if that were true, there is no reason not to provide Townsend access to the same universe of documents that Plaintiff made available to the FBI. Because the same documents have already been collected, there should be no additional burden or expense for Plaintiff to make them available to Townsend. Moreover, Townsend is willing to inspect these documents at Plaintiff's offices or assume the cost of having them copied.

29. Third, there is no basis for Plaintiff to withhold documents provided to the FBI on privilege grounds. Plaintiff has studiously avoided Townsend's questions as to whether it is in fact withholding documents on privilege grounds, but it asserted during meet-and-confer exchanges—without support or explanation—that "privilege has not been waived" over

[3] Not surprisingly, courts have regularly ordered the production of documents relating to government investigations concerning the same subject matter as the litigation. *See, e.g.*, *Munoz v. PHH Corp.*, 2013 WL 684388, at *1, *4 (E.D. Cal. Feb. 22, 2013) (ordering defendant to produce documents provided to Consumer Financial Protection Bureau and concluding "[t]here can be no serious dispute that documents related to the CFPB's investigation of Defendant[] . . . are relevant to Plaintiffs' suit based on identical allegations"); *Republic Envtl. Sys., Inc. v. Reichhold Chems., Inc*, 157 F.R.D. 351, 352-53 (E.D. Pa. 1994) (ordering plaintiff to produce documents relating to "any environmentally-related investigation, inspection or inquiry by any governmental agency or authority" concerning waste treatment facility at issue in lawsuit). The same result is warranted here.

documents provided to the FBI. Ex. 11 (Responses) at 30; Ex. 16 (Nov. 9, 2018 Letter) at 8. Texas law is clear, however, that any privilege that may otherwise have existed over these documents was waived when Plaintiff provided them to the FBI.

30. An "overwhelming" majority of state and federal courts recognize that the disclosure of privileged documents to a government agency waives privilege over those documents, and reject a "selective waiver" approach which would preserve privilege in such instances of compelled disclosure. *S.E.C. v. Brady*, 238 F.R.D. 429, 440 (N.D. Tex. 2006).[4] As the Texas Court of Appeals has explained, given the inherently "adversarial nature of the relationship between the government and the regulated party . . . [,] it is illogical to argue that any privileged materials disclosed retain their privileged status." *In re Fisher & Paykel Appliances, Inc.*, 420 S.W.3d 842, 851–52 (Tex. App.—Dallas 2014, no pet.); *see also Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 1425 (3d Cir. 1991) ("selective waiver does not serve the purpose of encouraging full disclosure to one's attorney in order to obtain informed legal assistance; it merely encourages voluntary disclosure to government agencies, thereby extending the privilege beyond its intended purpose").

31. Texas courts have followed the majority rule. *See Brady*, 238 F.R.D. at 440–41 (holding that defendant waived privilege over materials provided to SEC based on "the great weight of authority which has declined to adopt the selective waiver doctrine"); *In re Fisher &*

[4] *See U.S. v. Mass. Inst. of Tech.*, 129 F.3d 681, 686–87 (1st Cir. 1997); *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 236 (2d Cir. 1993); *Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 1425 (3d Cir. 1991); *In re Martin Marietta Corp.*, 856 F.2d 619, 623-24 (4th Cir. 1988); *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 302 (6th Cir. 2002); *Burden–Meeks v. Welch*, 319 F.3d 897, 899 (7th Cir. 2003); *In re Pacific Pictures Corp.*, 679 F.3d 1121, 1127-29 (9th Cir. 2012); *In re Qwest Commc'ns Int'l*, 450 F.3d 1179, 1196–97 (10th Cir. 2006); *Permian Corp. v. U.S.*, 665 F.2d 1214, 1221-22 (D.C. Cir. 1981); *Genentech, Inc. v. U.S. Int'l Trade Comm'n*, 122 F.3d 1409, 1417 (Fed. Cir. 1997).

Paykel, 420 S.W.3d at 851 (holding that defendant's disclosure of reports to government agency constituted waiver); *cf. In re BP Prods. N. Am. Inc.*, 263 S.W.3d 106, 116–17 (Tex. App.—Houston 2006, no pet.) (recognizing that "disclosure can operate as a waiver," but finding no waiver as to documents that were not actually disclosed to SEC). *Fisher & Paykel* is the most recent Texas state case to address the issue of selective waiver. In that case, a products liability action, defendant asserted that reports it filed with the U.S. Consumer Product Safety Commission pursuant to a mandatory reporting obligation constituted privileged attorney work product. 420 S.W.3d at 849. The court concluded that any privilege that may have existed was waived when defendant disclosed the reports to the Commission, emphasizing that "the weight of authority does not favor recognition in Texas of a doctrine of selective waiver of privilege." *Id.* at 850–51.

32. Likewise here, Plaintiff's broad disclosure of documents to the FBI constitutes waiver of any privilege that may have existed over those documents. As a result, there is no basis for Plaintiff to withhold documents responsive to Request 95 on privilege grounds.

33. For the reasons set forth above, Plaintiff should be ordered to produce or make available for inspection all documents responsive to Request 95.

B. Plaintiff Should Produce Documents Relating To Certain "Non-Pled" Investments.

34. Requests 19, 48, and 108 seek documents concerning Plaintiff's real estate investments during the relevant time period (October 1, 2004 through August 31, 2017), some of which were not specifically identified in the First Amended Petition. Request 19 seeks documents relating to Plaintiff's "real estate investment allocation, strategy, goals, policies, or guidelines." Request 48 seeks documents concerning "audits, appraisals, valuations, and other analyses of Plaintiff's real estate investment portfolio as a whole." And Request 108 seeks documents and communications relating to Plaintiff's retention of Mike Snyder, a public relations consultant who was apparently retained to counteract widespread public criticism of Plaintiff's real estate investments. Ex. 10 (Requests) at 9, 15, 26; *see also* Ex. 19 (July 28, 2013 *Dallas Morning News* article) (describing Snyder's work as "part of a more than $1 million legal and public relations campaign waged by the Dallas Police and Fire Pension System," including his response to online commentary "accus[ing] [pension officials] of mismanaging the more than $3 billion fund and placing taxpayers at risk").

35. In response to these Requests, Plaintiff agreed to produce documents relating to the real estate investments that were named in the First Amended Petition, but refused to produce documents concerning "non-pled" investments. Ex. 16 (Nov. 9, 2018 Letter) at 6–8. According to Plaintiff, such documents are irrelevant and unduly burdensome to produce. *Id.* Plaintiff's objections are baseless. As set forth below, these documents are relevant—as Plaintiff itself acknowledged in demanding (and obtaining) discovery concerning non-pled investments from Townsend—and the Requests are narrowly tailored to avoid any undue burden or expense.

36. Although non-pled investments may not be the basis for Plaintiff's liability and damages claims, they are nonetheless relevant to those claims and Townsend's defenses. The

question of whether Townsend, Plaintiff, or someone else is to blame for the failed real estate investments identified in the First Amended Petition requires consideration of, *inter alia*, investments that Plaintiff does not challenge, Plaintiff's overall real estate investment program and strategy, and the fifteen-year relationship between Plaintiff and Townsend.

37. To take just a few examples, discovery concerning non-pled investments could establish:

a. Losses to Plaintiff's real estate portfolio are attributable not to Townsend, but to Plaintiff's own mismanagement and investments that are not mentioned in the First Amended Petition—including Museum Tower, an ill-fated condominium project in Dallas that has generated widespread criticism and controversy. *See, e.g.*, Ex. 20 (Mar. 15, 2013 *Dallas Morning News* article) (former trustee "'lost faith' in the system's leadership" and expressed "concern[] about the fund's diminishing overall health"); Ex. 21 (July 1, 2015 *Dallas Morning News* article) ("Tettamant[] resigned under pressure last year as it became clear that bad investment decisions, unrealistic financial assumptions and overly generous benefits had jeopardized the fund's health"); Ex. 22 (July 5, 2012 *Dallas Morning News* article) (Plaintiff "faces major challenges with some of its real estate holdings . . . only about 15 percent of the 110 luxury condos in the $200 million Museum Tower have been sold").

b. Under Tettamant's leadership, Plaintiff developed and pursued a high-risk, high-return strategy with respect to its entire real estate portfolio—and did so with full knowledge that its strategy was unusually aggressive and risky

for a pension fund. *See, e.g.*, Ex. 22 (July 5, 2012 *Dallas Morning News* article) ("The system has drawn heavy criticism from some for focusing so much on so-called 'alternative' investments . . . . However, system trustees and staff say, such a large real estate commitment, along with other nontraditional investments, have . . . increased returns and lowered overall risk."); Ex. 23 (Nov. 4, 2012 *Dallas Morning News* article) ("They've been the investor cowboys of local pensions, betting heavily on alternative investments . . . . They've eagerly defended the strategy, saying it's the best way to generate high returns required for retirees."); Ex. 6 (Feb. 17, 2013 *Dallas Morning News* article) ("'Some people call us contrarian; I like to call ourselves innovative,' [Tettamant] says. 'We try to look at things differently than the rest of the market.'").

c. Plaintiff was well-aware of public criticism concerning its aggressive real estate strategy, and launched a "public relations" campaign to counteract it. *See, e.g.*, *supra* at ¶ 34; Ex. 22 (July 5, 2012 *Dallas Morning News* article) ("'It's time to fight back and set the record straight,' Tomasovic, a battalion chief in the fire department and a certified public accountant, said in a video posted on the fund's website . . . . Anyone who doesn't agree with [Plaintiff's] alternative asset investment strategy, Tomasovic said, 'is trapped in the mindset of the past.'").

d. Plaintiff routinely disregarded Townsend's advice, including clear warnings that Plaintiff was exceeding real estate allocation guidelines and specific recommendations that Plaintiff diversify its real estate portfolio.

See, e.g., TTG0064065[5] (2006 investment guidelines drafted by Townsend setting forth allocation ranges for various investment types and emphasizing the importance of diversification); DPFP_TOWNSEND_0006407 (Townsend presentation recommending sales of land investments); DPFP_TOWNSEND_0007505 (Townsend presentation recommending DPFPS to encourage investment managers to strategically sell properties).

Such documents are critical to Townsend's ability to defend this case.

38. Plaintiff's relevance objection is also belied by its own position in seeking discovery from Townsend. Plaintiff's requests for production sought documents and communications relating to "Investments," defined broadly as "any and all investments made by or relating to [Plaintiff] for which Townsend . . . had any oversight, reporting, management, fiduciary, or similar responsibilities"—including Museum Tower and numerous other investments that were not named in the First Amended Petition. Ex. 24 (Plaintiff's First Request for Production) ("Plaintiff's Requests") at 4. In its initial objections, Townsend agreed to produce documents relating to investments that were specifically identified in the Petition. Plaintiff, however, asserted that "[w]hether or not the request references investments or investment managers or matters not mentioned in Plaintiff's Petition, discovery regarding such items would be appropriate." Ex. 25 (May 18, 2018 Letter) at 7. At Plaintiff's insistence, Townsend has produced tens of thousands of documents, many of which relate to "non-pled" investments such as Museum Tower. *See* Ex. 26 (Rule 11 agreement) ¶ 9. Plaintiff cannot now take the exact opposite position.

[5] Documents referenced herein by bates number will be made available for the Court's in-camera review at the hearing, or at any other time the Court requests.

39. The relevance of these documents outweighs the burden of producing them. Requests 19, 48, and 108 do not "implicate each and every document in Plaintiff's possession," as Plaintiff contends. Ex. 17 (Oct. 19, 2018 Letter) at 3. Rather, these Requests target discrete categories of documents relating to (i) strategies, guidelines, and other high-level documents concerning Plaintiff's real estate investment program; (ii) analyses of Plaintiff's real estate portfolio "as a whole" (in other words, documents that relate to both pled and non-pled investments); and (iii) communications with Mr. Snyder, who appears to have been retained in or around 2013 for the limited purpose of counteracting public criticism of Plaintiff's real estate investments. *See supra* at ¶ 34.

40. Plaintiff should be ordered to produce all non-privileged documents responsive to Requests 19, 48, and 108.

C. There Is No Basis For Plaintiff To Withhold Documents Concerning The City Of Dallas' 2013 Audit.

41. Request 110 seeks documents relating to a 2013 audit of Plaintiff conducted by the City of Dallas through the consulting firm Foster & Foster. According to press reports, the purpose of this audit was to "double-check how [Plaintiff] value[d]" certain real estate investments, and Plaintiff was not cooperative—refusing to turn over documents concerning its valuations of certain real estate investments, including investments in Hawaii and Napa County that are expressly referenced in the First Amended Petition. *See, e.g.*, Ex. 8 (Jan. 26, 2014 *Dallas Morning News* article); FAP ¶¶ 35, 46–51.

42. Plaintiff agreed to produce a copy of the final audit report, but has refused to produce any other documents sought by Request 110—including external and internal communications about the audit—on relevance grounds. *See* Ex. 17 at 6 (Oct. 19, 2018 Letter).

43. Request 110 easily satisfies the relevance standard of Texas Rule of Civil Procedure 192.3. Tex. R. Civ. P. 192.3(a) ("a party may obtain discovery regarding any matter that is not privileged and is relevant to the subject matter of the pending action" or "reasonably calculated to lead to the discovery of admissible evidence"). Communications concerning the 2013 audit could show, for example, that Plaintiff was aware of problems with its real estate investments and valuations in or before 2013—*i.e.*, outside the statutory limitations period.[6] Such communications could also show that Plaintiff's approach to valuation of its real estate investments—for example, its decision not to have certain investments appraised or marked-to-market on a regular basis—was based on advice from certain investment managers (not Townsend) and Plaintiff's own desire to avoid publicly reporting significant losses. Given the limited scope of Request 110, which concerns one external audit, any burden associated with this discovery is far outweighed by its relevance.

44. Plaintiff should be ordered to produce documents responsive to the full scope of Request 110.

D. As Texas Law Makes Clear, Plaintiff Must Produce Documents Held By Current And Former Trustees And Investment Managers.

45. Plaintiff has withheld documents that are indisputably relevant to this case on the ground that certain documents in the physical possession of its current and former trustees and investment managers are outside Plaintiff's "possession, custody, or control." This objection is meritless.

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[6] The statutes of limitations applicable to Plaintiff's claims are between two and four years. *See* Tex. Civ. Prac. & Rem. Code §§ 16.003(a), 16.004 (claims for negligence and breach of fiduciary duty subject to two- and four-year statutes, respectively); *Via Net v. TIG Ins. Co.,* 211 S.W.3d 310, 312 (Tex. 2006) (*per curiam*) (breach of contract claim subject to four-year statute). The parties signed a tolling agreement effective as of June 13, 2017. Ex. 27 (Master Standstill and Tolling Agreement). As a result, Townsend contends that any claims that accrued prior to June 13, 2013, are time-barred as a matter of law.

46. Texas law requires a party responding to discovery to produce responsive documents within its "possession, custody, or control," irrespective of whether such documents are held by third parties. Tex. R. Civ. P. 192.3(b). "Possession, custody, or control" includes "not only actual physical possession, but constructive possession, and the right to obtain possession from a third party such as an agent or representative." *In re Summersett*, 438 S.W.3d 74, 81 (Tex. App.—Corpus Christi-Edinburg 2013, no pet.) (citing *GTE Commc'ns Sys. Corp. v. Tanner*, 856 S.W.2d 725, 729 (Tex. 1993)); *see also* Tex. R. Civ. P. 192.7 ("Possession, custody, or control of an item means that the person either has physical possession of the item or has a right to possession of the item that is equal or superior to the person who has physical possession of the item.").

47. As both a practical and legal matter, Plaintiff has the right to request and obtain possession of responsive documents from its current and former trustees and investment managers. Texas law is clear that Plaintiff cannot withhold these documents simply because they are not in its actual physical possession—any other rule would lead to absurd and dangerous policy results.

(1) <u>Documents Held By Plaintiff's Current And Former Trustees</u>

48. By statute, Plaintiff is administered by a Board of Trustees, which is charged with a fiduciary duty to "hold and administer the assets of the fund for the exclusive benefit of members and their beneficiaries . . . in a manner that ensures the sustainability of the pension system." Tex. Rev. Civ. Stat. Ann. art 6243a-1 (West 2018). In its First Amended Petition, Plaintiff repeatedly refers to the Board as Townsend's "client," alleging, *inter alia*, that Townsend breached its contractual, fiduciary, and professional obligations by failing to provide certain advice and information directly to the Board. *See, e.g.*, FAP ¶¶ 3–5, 22, 24, 29, 36, 40, 45, 53, 54–61, 64–66.

49. Plaintiff thus cannot dispute that its current and former trustees, along with the staff members who support them, are the key witnesses and document custodians in this case. Nor can Plaintiff dispute that trustees regularly used personal email accounts, rather than "dpfp.org" email accounts (presumably maintained by Plaintiff), to conduct business on Plaintiff's behalf.

50. To take one example, former trustee Steve Umlor regularly used his personal email account to communicate with Plaintiff, Townsend, and Plaintiff's investment managers. In 2009, for example, Mr. Umlor used his personal account—without copying any "dpfp.org" email address—to communicate with investment advisor L&B Realty Advisors, LLP ("L&B") regarding a visit to one of Plaintiff's real estate investments. *See* TTG0148322. In addition, calendar invites for trustees have been sent to trustees' personal email accounts and Dallas City Council email accounts rather than their "dpfp.org" accounts. *See, e.g.*, TTG0180382; TTG0070722; TTG0090868.

51. Plaintiff, however, refuses to search current or former trustees' personal email accounts for responsive documents or request that the trustees themselves conduct such searches, asserting that it lacks the "requisite control." Ex. 16 (Nov. 9, 2018 Letter) at 5. That statement is inaccurate.

52. Plaintiff clearly has the ability and right to obtain documents relating to administration of the Fund from its current and former trustees. Indeed, courts have routinely required entities to instruct officers, directors, board members, and other representatives to preserve and produce responsive documents. *See, e.g.*, *In re Triton Energy Ltd. Sec. Litig.*, 2002 WL 32114464, at *6 (E.D. Tex. March 7, 2002) (applying analogous rules, holding that defendant should have "instruct[ed] its officers and directors to preserve and produce any

documents in their possession, custody, and control," and ordering defendant to produce "documents from present and former outside directors"); *Grace Bros., Ltd. v. Siena Holdings, Inc.*, 2009 WL 1547821, at *1–2 (Del. Ch. Ct. June 2, 2009) (applying analogous rules, ordering defendant to produce emails between board members, and noting that defendant should have "ask[ed] that the directors look for any relevant emails in their accounts"). If there were any other rule, companies could effectively shield themselves from liability by instructing representatives to use personal email accounts to conduct or communicate about any wrongdoing while keeping their company-issued email accounts clean.

(2) Documents Held By Plaintiff's Former Investment Managers

53. Requests 78 and 79 seek documents relating to communications with the investment managers responsible for the investments named in Plaintiff's First Amended Petition: CDK, M3, Knudson, Criswell Radovan, and Land Baron. Plaintiff does not dispute the relevance of these requests, but refuses to request responsive documents from a single one of these managers, contending that Plaintiff "no longer has any legal relationship" with them and thus "does not have control" over their documents. *See* Ex. 17 (Oct. 19, 2018 Letter) at 4.

54. Plaintiff, however, has the ability and right to request the return of its files from investment managers who were retained to perform services on its behalf—regardless of whether their professional relationship has ended. *See, e.g.*, *Moreno v. Autozone, Inc.*, 2008 WL 906510, at *1 (N.D. Cal. Apr. 1, 2008) (applying analogous federal rules and holding "Plaintiff should have the legal right to obtain [] documents from former counsel on demand"); *Spano v. Satz*, 2010 WL 11515691, at *7 (S.D. Fla. May 12, 2010) (plaintiff has duty to request responsive documents from current and former agents, "including her former counsel and . . . all medical providers, and she has a legal right to receive the documents from these individuals").

55. Indeed, this right is expressly referenced in Plaintiff and several of its investment managers, including CDK, Land Baron, and Knudson. Under those agreements, the investment managers were required to maintain accurate books and records of their activities and to make those records available for inspection and copy at Plaintiff's request and discretion. DPFP_TOWNSEND_0045874 at 45880, 45886 (CDK); DPFP_TOWNSEND_0048239 at 48242 (Land Baron); DPFP_TOWNSEND_0033025 at 33050 (Knudson).

56. For the reasons set forth above, Plaintiff should be ordered to request and produce any responsive documents held by current and former trustees and former investment managers.

E. Plaintiff Should Make The Same Rule 11 Attestation It Demanded From Townsend: That It Is Not Withholding Documents Based On Its Boilerplate Objections.

57. Plaintiff's Responses contain boilerplate general objections—misleadingly titled "Specific Objections Applicable to Certain Requests as Incorporated"—which are incorporated by reference into 113 of 114 responses (99.1%). These general objections relate to (i) Townsend's instruction that the name of any person or entity "include all past or present employees, officers, directors, partners, agents, representatives, and attorneys" as well as predecessors and successors, (ii) Townsend's definition of "DPFPS Staff," (iii) Townsend's instruction that Plaintiff provide certain information regarding documents that have been lost or destroyed, and (iv) the time for production specified in the Requests. Plaintiff has refused to sign a Rule 11 agreement confirming, without qualification, that it is not withholding documents based on these general objections. That refusal is improper, and completely inconsistent with the position Plaintiff took in demanding and obtaining such a Rule 11 agreement from Townsend.

58. Earlier this year, Plaintiff filed a motion to compel challenging general objections asserted by Townsend. Plaintiff contended that "[t]hese types of general objections are an improper prophylactic and hypothetical means of objection to specific requests under the Texas

Rules of Civil Procedure," and requested that the Court order Townsend to withdraw its general objections or deem them waived. Plaintiff's June 20, 2018 Mot. to Compel at 9–18. At the hearing on Plaintiff's motion, the Court's questioning suggested that the appropriate course was for Plaintiff to request a "withholding statement" from Townsend. Ex. 28 (Hearing Tr. July 31, 2018) at 9:7-10:12. As a result, following the hearing, Plaintiff insisted that Townsend sign a Rule 11 agreement confirming that it would not withhold documents based on its general objections, and Townsend agreed. *See* Ex. 29 (Aug. 22, 2018 Letter). The parties executed a Rule 11 agreement on September 10, 2018 providing:

> The Townsend Defendants represent that they have not withheld in the past, and agree not to withhold in the future, any documents from production in response to any particular request in the First Request on any basis not set forth in the objections specific to that request. In other words, unless one of the General Objections . . . is specifically set forth in the response to a request (rather than merely being incorporated by reference), the Townsend Defendants are not withholding any documents from production on the basis of such General Objection.

Ex. 26 (Rule 11 agreement) ¶ 2.

59. Remarkably, Plaintiff now refuses to sign a Rule 11 agreement containing the exact same language. After receiving the boilerplate objections accompanying Plaintiff's Responses, Townsend asked Plaintiff to confirm that it would not withhold documents based on those objections and provided a draft Rule 11 agreement with the same language to which Townsend had previously agreed. Ex. 30 (Oct. 9, 2018 Letter) at 1–2. Plaintiff refused to sign the agreement, and instead proposed revised language that contained numerous qualifiers and provided that Plaintiff "maintains" its general objections. Ex. 15 (Oct. 29, 2018 Letter) at 2.

60. There is no justification for treating Plaintiff's general objections differently from Townsend's. Plaintiff attempts to distinguish its boilerplate objections on the ground that they were "incorporated by reference into certain responses." Ex. 15 (Oct. 29, 2018 Letter) at 2. As

noted above, however, Plaintiff "incorporated by reference" the same general objections into all but one of its 114 responses. Moreover, the Texas Rules of Civil Procedure require that Plaintiff "state specifically the legal or factual basis for [its] objection[s] and the extent to which [it] is refusing to comply with the request." Tex. R. Civ. P. 193.2(a) (emphasis added). Townsend is entitled to a plain and unequivocal statement making clear that Plaintiff is not withholding documents based on its general objections, just as Townsend provided to Plaintiff—or in the alternative, a statement clarifying whether and to what extent Plaintiff is withholding documents.

IV. CONCLUSION

61. For all of the foregoing reasons, Townsend respectfully requests that the Court grant its Motion to Compel in its entirety, order Plaintiff to produce documents as set forth herein within 30 days after entry of the Order, and order such other and further relief to which Townsend may show itself justly entitled.

DATED: December 10, 2018

Respectfully submitted,

BAKER & McKENZIE, LLP

By */s/Elizabeth L. Yingling*

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ATTORNEYS FOR DEFENDANTS TOWNSEND HOLDINGS, LLC d/b/a THE TOWNSEND GROUP, RICHARD BROWN and MARTIN ROSENBERG

CERTIFICATE OF SERVICE

I hereby certify that via correspondence exchanged between the undersigned and counsel for Plaintiff on October 9, October 19, October 24, October 29, November 5, November 9, November 15, and November 16, 2018, and a telephonic conference on October 24, 2018, the parties conferred regarding the subject matter of this motion but were unable to reach agreement. Accordingly, the motion is submitted to the Court for determination.

/s/Melissa Sedrish Rabbani
Melissa Sedrish Rabbani

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document was served on the following via e-service on this 10th day of December, 2018:

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2/13/2019 5:49 PM
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February 13, 2019

Via Electronic Filing and Hand Delivery
298th Judicial District Court
c/o Felicia Pitre, Dallas County District Clerk
George L. Allen, Sr. Courts Building
600 Commerce Street, Box 540
Dallas, TX 75202

Re: DC-17-11306; *Dallas Police & Fire Pension System v. Townsend Holdings, LLC d/b/a The Townsend Group, Richard Brown, Martin Rosenberg and Gary B. Lawson*

Dear Ms. Pitre:

Attached please find a proposed Revised Scheduling Order executed by the parties in the above-referenced matter. We would appreciate you presenting this Order to the judge for approval and signature, with the attached letter, and providing us with a conformed copy.

By copy of this letter, I am furnishing all counsel of record with a copy of same.

Thank you for your assistance in this matter.

Sincerely,

Bill Cobb

William D. Cobb, Jr.

WDCjr/klh
Attachment

cc: *All Counsel of Record* (w/encl.) (via e-filing and e-service)

CAUSE NO. DC-17-11306

DALLAS POLICE & FIRE PENSION SYSTEM,	§	**IN THE DISTRICT COURT**
	§	
	§	
Plaintiff	§	
	§	
	§	
v.	§	
	§	**OF DALLAS COUNTY, TEXAS**
TOWNSEND HOLDINGS, LLC d/b/a THE TOWNSEND GROUP, RICHARD BROWN, MARTIN ROSENBERG and GARY B. LAWSON,	§	
	§	
	§	
	§	
	§	
Defendants.		**298th JUDICIAL DISTRICT**

REVISED SCHEDULING ORDER

Pursuant to Rule 190.4 of the Texas Rules of Civil Procedure, the Court enters the following Revised Scheduling Order:

1. Jury trial is set for April 27, 2020.

2. The deadline for joinder of additional parties will be May 2, 2019.

3. The deadline to move for leave to designate responsible third parties will be May 30, 2019.

4. Fact discovery shall be completed on or before December 23, 2019.

5. On or before November 6, 2019, all parties seeking affirmative relief shall file with the Court and deliver to all parties of record their written Designation of Expert Witnesses, complying with Rule 194.2(1) for all experts who are expected to testify at the trial of this cause with respect to any issue upon which that party bears the burden of proof and seeks affirmative relief.

6. On or before December 6, 2019, all parties shall file with the Court and deliver to

all parties of record their written Designation of Expert Witnesses on defensive issues, complying with Rule 194.2(f) for such experts who are expected to testify at the trial of this cause.

7. On or before December 23, 2019, all parties shall file with the Court and deliver to all parties of record their written Designation of Rebuttal Expert Witnesses, complying with Rule 194.2(f) for such experts who are expected to testify at the trial of this cause.

8. Expert discovery shall be completed on or before January 22, 2020.

9. Motions for Summary Judgment shall be filed no later than February 21, 2020.

10. *Robinson* motions, if any, shall be filed no later than February 21, 2020.

11. On or before March 24, 2020, the parties will exchange their (i) lists of fact and expert trial witnesses, (ii) lists of trial exhibits (other than those that may be introduced solely for the purpose of rebuttal or impeachment) and (iii) page and line designations for oral and videotaped depositions to be used at trial. Exhibits shall be made available for inspection by the other parties.

12. On or before March 31, 2020, the parties will designate responsive page and line designations for those oral and videotaped depositions to be used at trial.

13. On or before April 7, 2020, the parties will exchange their objections to the other parties' (i) lists of fact and expert trial witnesses, (ii) lists of trial exhibits and (iii) page and line designations for oral and videotaped depositions to be used at trial.

14. On or before April 10, 2020, the parties shall file any motions *in limine*.

15. On or before April 15, 2020, the parties shall confer in good faith in an attempt to resolve all objections to deposition designations, witnesses, and exhibits. The parties shall also exchange by facsimile or hand delivery a proposed jury charge.

16. On or before April 17, 2020, the parties shall file oppositions to any motions *in limine*.

17. Witness lists, exhibit lists, and requested jury questions and instructions to be used in trial are to be filed by April 21, 2020.

18. The Court shall hear motions *in limine* on April 24, 2020.

19. The above deadlines and other matters contained herein, with the exception of the trial date, may be altered or amended by written agreement of the parties or for good cause shown.

Signed this ___ day of February 2019.

_____
JUDGE PRESIDING

CONSENTED TO:

DIAMOND MCCARTHY LLP

By */s/ Mark K. Sales*

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