



**JACKSONVILLE POLICE & FIRE PENSION
FUND BOARD OF TRUSTEES' RESPONSE**

**TO FORENSIC INVESTIGATION REPORT
TO JACKSONVILLE CITY COUNCIL
BY BENCHMARK FINANCIAL SERVICES**



Executive Summary

This document has been prepared by the Jacksonville Police and Fire Pension Fund Board of Trustees in response to the “*Forensic Investigation of the Jacksonville Police and Fire Pension Fund, Report to Jacksonville City Council by Benchmark Financial Services, Inc., October 28, 2015.*” The purpose of this document is to correct significant errors, omissions and inaccuracies of the Benchmark report, which caused the Fund, its employees and operations to be portrayed in a false light. Specifically, this response provides an evidentiary basis for the following assertions:

- Benchmark Financial Services, Inc. possesses no level of expertise in any discipline related to pension administration, and relies on Benchmark’s principal, Edward Siedle, as the source for that information;
- The Benchmark report provides a flawed analysis of the Board’s fiduciary responsibilities;
- The Benchmark report’s assertions that the previous investment consultant caused the Fund to lose 30% of its value is nothing more than reckless and unsubstantiated speculation based on a clearly flawed analysis;
- The Benchmark report’s assertions regarding excessive fees and imprudent investments are erroneous and not factually supported;
- The Benchmark report’s assertions regarding Fund counsel’s “conflicts of interest” ring hollow due to Benchmark’s principal, Edward Siedle’s, failure to reveal his own negative personal history and conflicts with the Fund’s counsel;
- The Benchmark report’s reliance on newspaper accounts and decade-old magazine entries and reports lend no support to its speculative assertions;
- The Benchmark report’s assertions regarding failures to provide documents were not factually accurate;
- The Benchmark report’s comments regarding Fund personnel travel held no evidentiary basis;
- The Benchmark report’s comments regarding commission recapture also held no evidentiary basis and were directly contrary to a detailed City Council auditor review;
- For the above-cited reasons, the Benchmark report’s calls for investigations of the Fund were unsupported hyperbole.

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I. BACKGROUND AND TENOR OF THE REPORT

On April 28, 2015, the Jacksonville City Council approved Ordinance 2015-0200, which appropriated \$85,000 from the General Fund for a “Forensic Investigation of the Jacksonville Police and Fire Pension Fund.” The bill’s summary prepared by the chief of research of the City Council Research Division described the bill as appropriating funds to cover the cost of a “forensic audit of the Police and Fire Pension Fund.” The “audit” was to be performed by the firm Benchmark Financial Services, Inc. of Ocean View, Florida. The bill summary relied on the representations of the owner of Benchmark Financial Services, Edward Siedle, as to the firm’s qualifications to perform such an “audit.” There are no public documents that memorialize any efforts to verify the representations of Mr. Siedle as to his qualifications or expertise, other than the engagement document, which is a two-page letter that repeats material found on the Benchmark Financial Services, Inc. website. The bill did not provide for Benchmark Financial Services to review the General Employees’ Pension Fund, which is curious since many of the resources in administering the funds are shared between them.

As a threshold matter, it is important to point out that the Jacksonville Police and Fire Pension Fund (“Fund”), has a yearly audit performed by an independent certified public accounting firm. The audit is conducted pursuant to the auditing standards generally accepted in the United States and the standards applicable to financial audits contained in Government Auditing Standards issued by the Comptroller General of the United States. On January 16, 2015, KBLD, LLC, certified public accountants, issued an audit for the year ending September 30, 2014, using the recently adopted standard, GASB Statement No. 67, Financial Reporting for Pension Plans. The introductory page of the audit explained:

An audit involves performing procedures to obtain audit evidence about the amounts and disclosures in the financial statements. The procedures selected depend on the auditor's judgment, including the assessment of the risks of material misstatement of the financial statements, whether due to fraud or error. In making those risk assessments, the auditor considers internal control relevant to the entity's preparation and fair presentation of the financial statements in order to design audit procedures that are appropriate in the circumstances, but not for the purpose of expressing an opinion on the effectiveness of the entity's internal control. Accordingly, we express no such opinion. An audit also includes evaluating the appropriateness of accounting policies used and the reasonableness of significant accounting estimates made by management, as well as evaluating the overall presentation of the financial statements.

The auditing firm did not identify any deficiencies in internal control that it considered material weaknesses. Further, the auditor stated,

As part of obtaining reasonable assurance about whether the Fund's financial statements are free from material misstatement, we performed tests of its compliance with certain provisions of laws, regulations, contracts, and grant agreements, noncompliance with which could have a direct and material effect on the determination of financial statement amounts. However, providing an opinion on compliance with those provisions was not an objective of our audit, and accordingly, we do not express such an opinion. The results of our tests disclosed no instances of noncompliance or other matters that are required to be reported under Government Auditing Standards.

Clearly, an entity whose credentials are apparent and verifiable found that the Fund's financial records are in compliance with nationwide standards generally accepted by the federal government. The auditor used primary sources in its analysis, i.e., financial documents issued by the Fund and City of Jacksonville, as well as records obtained from Fund vendors, consultants and capital custodians. Benchmark, as described in detail below, used no accepted auditing standards.

On October 28, 2015, Benchmark Financial Services, Inc. issued a document entitled "Forensic Investigation of the Jacksonville Police and Fire Pension Fund" ("Benchmark

Report”). The Benchmark Report purported to be “an expert forensic review of the Fund,”¹ however, the document did not follow commonly accepted methods of expert reporting found in reports issued in litigation. The Federal Rules of Civil Procedure and the Federal Rules of Evidence provide a standardized means of procuring testimony from those who purport themselves to be “experts” at any given discipline. Although the Fund does not assert a Jacksonville City Council inquiry should employ the federal rules to evaluate the efficiency and effectiveness of Fund operations, the rules do provide a standard, accepted by the American judiciary, by which the Council can evaluate the Benchmark Report.

Federal Rule of Evidence 702 describes the requirements for rendering an opinion that meets the demands of being described as “expert.” The rule states:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

The rule presupposes that the witness has established his or her expertise in the field in which he or she is giving an opinion and that the opinion is based on primary sources of data applied to commonly accepted methods of analysis. Rule 26(2)(b) of the Federal Rules of Civil Procedure describes the procedure on how an expert delivers his or her opinions on any matter. The rule requires a report containing:

- (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
- (ii) the facts or data considered by the witness in forming them;

¹ Benchmark Report, p.3. According to Black’s Law Dictionary, forensic audits are performed by professionals with skillsets in criminology and accounting. There is no evidence that Benchmark Financial Services possesses either skillset.

- (iii) any exhibits that will be used to summarize or support them;
- (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
- (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
- (vi) a statement of the compensation to be paid for the study and testimony in the case.

The Benchmark Report is deficient in all of the requirements of Rule 26. As the notes accompanying Rule 702 state, an intelligent evaluation of facts is often difficult without the application of some scientific, technical, or other specialized knowledge. For that reason, a firm representing itself as an “expert” in the field of pension fund administration should be held to the same standards required by our courts.

The Benchmark Report starts by recognizing its shortcomings, but blames the target entity instead of its own technique.² As will be covered in more detail below, the Report is riddled with unsupported speculation, uses secondary and tertiary sources³ as “evidence,” and neither cites nor follows any commonly accepted standards in formulating its opinions. On the final page, the Benchmark Report describes Benchmark Financial Services, Inc., which appears to be nothing more than a single person, Edward Siedle, and vaguely references past investigations and articles that have appeared about him in various media outlets. This two paragraph entry falls short of the standards required by subsections (iv) and (v) of Rule 26.

This Response to the Benchmark Report will be divided into three sections, 1) fiduciary responsibilities and legal issues, 2) investment performance and 3) board staff issues.

² Benchmark Report, p.4

³ The author often cites himself as a source.

II. THE BOARD'S ROLE AS A FIDUCIARY

a. *Fiduciary Responsibility Generally*

The term “fiduciary” is a legal concept that carries very specific meaning when applied to a trustee’s responsibilities to the assets under his or her control.⁴ A fiduciary is a person who exercises discretionary authority over a retirement plan, in addition to its assets, and fiduciary responsibility extends to both investment management and benefit administration.

The modern concept of the trustee as fiduciary traces its origins to a 1928 opinion given by the famed jurist Benjamin Cardozo, while serving as Chief Justice to the New York State Court of Appeals⁵ (New York Supreme Court). In that case, Messrs. Meinhard and Salmon were partners in a real estate joint venture, with Meinhard supplying the upfront capital and Salmon running operations. At the end of a lease that had proved to be lucrative for the venture, Salmon negotiated a side deal with a third party to take over the property and eliminate Meinhard’s interest. Meinhard sued and the trial court held that Salmon had a fiduciary relationship to the venture and was thus liable to Meinhard. On appeal, Justice Cardozo explained, “A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.” Furthermore, he described a fiduciary’s role as one of “undivided loyalty,” applied with “uncompromising

⁴ Under Florida law, a “fiduciary” is defined as an executor, administrator, trustee, guardian (except any guardian holding funds received from or currently in receipt of funds from the United States Department of Veterans Affairs, to the extent of those funds alone), or other person, whether individual or corporate, who by reason of a written agreement, will, court order, or other instrument has the responsibility for the acquisition, investment, reinvestment, exchange, retention, sale, or management of money or property of another. § 518.10, Fla. Stat. Ann.

⁵ *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928)

rigidity.” The United States Supreme Court examined the issue in further detail in 1981, when it was presented with *N.L.R.B. v. Amax Coal Co, a division of Amax, Inc.*⁶

Amax Coal Co. involved a collective bargaining dispute between the United Mine Workers of America and the Amax Coal Company concerning the appointment of trustees to a pension fund board. Under the pre-ERISA law of the time, a pension fund created on behalf of industrial workers had three trustees; one picked by the employees, one by the employer, and a third chosen by the first two. The central issue in the dispute was whether Amax Coal Company could create a pension fund for its own employees, or whether it was obligated to join the pension fund that existed between the national mineworkers union and the multiemployer bargaining unit representing coal-mining companies nationwide. If Amax set up a pension fund for its own employees it would assign one of its management team to the board, whereas if it took part in the national pension fund, the representative would be chosen by the multiemployer bargaining unit. The union complained that the Amax fund would have portability issues, but Amax took the position that any management-appointed trustee was a collective-bargaining “representative” of the employer and that the union's insistence that it participate in the national trust fund constituted illegal coercion under the National Labor Relations Act.

On appeal the United States Supreme Court held,

a trustee bears an unwavering duty of complete loyalty to the beneficiary of the trust, to the exclusion of the interests of all other parties. To deter the trustee from all temptation and to prevent any possible injury to the beneficiary, the rule against a trustee dividing his loyalties must be enforced with “uncompromising rigidity.”⁷ A fiduciary cannot contend “that, although he had conflicting interests,

⁶ *N.L.R.B. v. Amax Coal Co., a Div. of Amax*, 453 U.S. 322, 327, 101 S. Ct. 2789, 2793, 69 L. Ed. 2d 672 (1981)

⁷ quoting *Meinhard*, 249 N.Y. at 464.

he served his masters equally well or that his primary loyalty was not weakened by the pull of his secondary one.”⁸

The Court explained that nowhere under the law, should an appointed trustee “administer a trust fund in the interest of the party that appointed him, or that an employer may direct or supervise the decisions of a trustee he has appointed.” The Court was clear that a trustee, notwithstanding his status as appointed by one party or the other, was beholden to the beneficiaries of the trust.

The Court discussed ERISA⁹ in its opinion, articulating that ERISA “essentially codified the strict fiduciary standards that [an employee pension fund] trustee must meet.”¹⁰ ERISA, the Court explained:

[1] requires a trustee to “discharge his duties... solely in the interest of the participants and beneficiaries....; [2] declares that a trustee may not act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries; [and, 3] prohibits any transaction between the trust and a party in interest, including an employer.¹¹

In sum, the Court concluded, “ERISA vests the ‘exclusive authority and discretion to manage and control the assets of the plan in the trustees alone.”¹²

b. Unsupported Fiduciary Concerns Cited by the Benchmark Report

The Benchmark Report cited three main concerns related to fiduciary standards and oversight. These concerns include general violation of ERISA fiduciary standards adopted for board, staff and service providers, the failure to provide fiduciary oversight by delegation of

⁸ *Amax Coal Co.*, 453 U.S. at 330 (citations omitted).

⁹ The Employee Retirement Income Security Act had been promulgated by Congress in the interim between the events giving rise to this litigation and its arrival at the Supreme Court.

¹⁰ *Amax Coal Co.*, at 332.

¹¹ *Id.* at 332-333.

¹² *Id.*

broad responsibility to the administrator and outside general counsel and the lack of errors and omissions fidelity bond coverage. As articulated below, the Benchmark Report misunderstands fiduciary responsibility¹³ as the law applies it to the Jacksonville Police and Fire Pension Fund Board of Trustees (“PF Board”). The Benchmark Report criticizes the PF Board for violating fiduciary standards, yet relies on an incorrect standard. Moreover, the Report alleges conflicts of interest by vendors, but relies on innuendo or clear misinformation based upon personal biases of the author to articulate conflicts that are in fact not recognized conflicts in the industry.

The Benchmark Report starts its discussion related to fiduciary standards with reference to the Fund’s Statement of Investment Policy,¹⁴ which declares in its introduction,

Although the Board of Trustees acknowledges that the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), does not apply to the Fund as a governmental retirement plan, it hereby adopts the fiduciary provisions of ERISA. The Board, the Fund's staff and the Fund's service providers shall discharge their responsibilities in the same manner as if the Fund were governed by the fiduciary responsibility provisions of ERISA.¹⁵

The Benchmark Report then cites to other provisions in the Investment Policy that describe the PF Board and Investment professionals as held to ERISA’s fiduciary standards.¹⁶ The Report then proceeds over the next several pages to discuss ERISA provisions and its applicability to pension funds generally.¹⁷

¹³ The Benchmark Report discussion of this issue is found in sections VII (p.52) through IX (p.56).

¹⁴ Benchmark Report, p.52.

¹⁵ This statement is also in the General Employees’ Statement of Investment Policy.

¹⁶ *Id.* pp. 53-54.

¹⁷ *Id.* pp. 54-57. This section of the Report is a clear example of the report’s lack of compliance with the standards applied to expert documents or even professional Reports. The Benchmark Report’s discussion of ERISA relies almost entirely on secondary sources, such as an FAQ webpage of the Department of Labor website and a generalized website discussion of a Washington DC law firm (www.groom.com). The section pays scant attention to primary sources of the law, citing only one case (which is a case arising in the 2nd Circuit, instead of citing to the

As a threshold matter, Congress created ERISA to regulate the funding of private employer pension liabilities. ERISA does not apply to state or federal government pension plans.¹⁸ The Fund’s Statement of Investment Policy references ERISA because Section 112.661(4), Florida Statutes, which regulates government plans in Florida, states that boards will “comply with the fiduciary standards set forth in [ERISA].” The fiduciary duty of government pension boards in Florida is governed by Chapters 518, 112, 175 and 185 of the Florida Statutes.

The fiduciary duty adopted by ERISA requires a fiduciary to discharge his or her duties “with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.”¹⁹ The ERISA standard is based on the common law “prudent investor rule,” which is codified in Chapter 518, Florida Statutes, Investment of Fiduciary Funds. Under Florida law, the prudent investor rule requires,

the exercise of reasonable care and caution and is to be applied to investments not in isolation, but in the context of the investment portfolio as a whole and as a part of an overall investment strategy that should incorporate risk and return objectives reasonably suitable to the trust, guardianship, or probate estate.²⁰

Furthermore, under Florida law, any counsel, accountant or actuary of a public employee retirement system are arguably included as fiduciaries.²¹ In addition to the statutory regime

¹¹ Circuit where the Fund is located—or at least to the United States Supreme Court) and makes no reference to a federal or state statute.

¹⁸ 29 U.S.C.A. § 1003(b)(1)

¹⁹ 29 U.S.C.A. § 1104(a)(1)(B)

²⁰ § 518.11, Fla. Stat.

²¹ § 112.656, Fla. Stat. Each retirement system or plan shall have one or more named fiduciaries with authority to control and manage the administration and operation of the retirement system or plan. However, the plan administrator, and any officer, trustee, and custodian, and any counsel, accountant, and actuary of the retirement system or plan who is employed on a full-time basis, shall be included as fiduciaries of such system or plan.

regulating trusts, police and firefighter pension funds in Florida are governed by Chapters 175²² and 185,²³ Florida Statutes. These statutes regulate the State of Florida’s program for rebating to municipalities and special fire control districts a portion of the tax levied on fire and casualty insurance premiums. In the case of Jacksonville, the premium tax amounts to approximately \$10 million per year.²⁴ In order for a Florida municipality to qualify for the rebate, the local government must comply with the terms of Chapters 175 and 185. One of the terms of the statutory scheme requires police and fire boards of trustees to follow the higher “prudent investor rule” as the fiduciary standard by which trustees’ duties are judged by the law.²⁵

Clearly, the Fund’s fiduciary duty under Florida law and the fiduciary standard set forth for private industry under ERISA are the same standard, yet the Benchmark Report is replete with references to a “heightened ERISA fiduciary standard.”²⁶ The Benchmark Report’s confusion on the issue is but one example of Benchmark’s repeated failure to address the applicable law as well as the underlying facts concerning Fund administration. The Benchmark Report opines that it found “scant evidence of compliance with ERISA fiduciary standards,”²⁷ which would be presumed since the PF Board is held to Florida law rather than ERISA. The Benchmark Report cites as fiduciary compliance problems, a “failure to scrutinize investment

²² This chapter regulates firefighter pensions.

²³ This chapter regulates police officer pensions.

²⁴ Ch. § 175.061; § 185.03, Fla. Stat. (subjecting trustees to the fiduciary standards of §§ 112.656, 112.661 and 518.11, Fla. Stat.)

²⁵ See § 175.071, Fla. Stat.; § 185.06, Fla. Stat. (same)

²⁶ See Benchmark Report pp. 50, 55-56.

²⁷ Benchmark Report, p.56

management fees,” which is refuted in section three below and conflicts of interest with the PF Board’s legal counsel, which is refuted in section four below.

The Report also argues that the PF Board is deficient in its fiduciary duties because it does not include language in its investment management agreements referencing ERISA or fiduciary standards. Of the voluminous documents provided to Benchmark, the Report selects in particular, the Acadian Emerging Markets Equity II Fund, LLC.²⁸ The Benchmark Report describes certain terms of the Acadian subscription agreement, arguing that the terms do not comply with the provisions of the ERISA. The Report argues that the PF Board allows Acadian to engage in ERISA prohibited transactions,²⁹ which, again, is inapplicable to government plans, and indemnifies Acadian for breaches of ERISA fiduciary duties.³⁰

Had the PF Board entered into an agreement with Acadian based solely on the Subscription Agreement, the Benchmark Report would have been correct, but the PF Board executed an addendum to the Acadian Subscription Agreement that declares Acadian to be a fiduciary to the Fund and its assets.³¹ Moreover, the addendum, at paragraph eight, specifically removes the indemnification provisions of the subscription agreement. On August 13, 2015, the Executive Director-Administrator of the Fund, John Keane, sent copies of contracts between the Fund and investment consultants with a memorandum cover letter articulating which agreements and contracts were under cover to Kirk Sherman, Council Auditor. The Acadian Asset Management agreement was within the 456-page collection of documents enclosed. Although

²⁸ *Id.* at p.57

²⁹ *Id.* at p.58

³⁰ *Id.* at p.59

³¹ See exhibit 1, attached.

the addendum to the agreement was not specifically mentioned, the Fund staff had a custom and practice of enclosing investment contract addendums and other appended documents when delivering them in response to the “forensic investigation.”

c. Florida Law Allows Delegation of Fiduciary Responsibility

Notwithstanding that the documents the Benchmark Report refers to actually do not “indicate” or articulate the PF Board has waived its fiduciary duties, Florida law holds that a fiduciary may delegate its investment functions. Under Florida law such delegation is allowed, assuming the fiduciary uses “reasonable care, judgment, and caution in selecting the investment agent, in establishing the scope and specific terms of any delegation, and in reviewing periodically the agent's actions in order to monitor overall performance and compliance with the scope and specific terms of the delegation.”³² If an agent is delegated investment functions, the agent assumes jurisdiction of Florida courts and is subject to the same standards as the fiduciary under the law.³³ This means that under Florida law, even if the contracts in question did not hold the investment managers to the “prudent investor” fiduciary standard, which they did, Florida law would nevertheless require it.

The Benchmark Report’s analysis of the delegation of duties to the Fund’s Executive Director-Administrator is similarly flawed, claiming that the delegation is “exceptionally broad, encompassing various portfolio investment matters.”³⁴ The entirety of the Report’s support for this contention is reliance on newspaper clippings from the Florida Times-Union, the local

³² § 518.112(1), Fla. Stat.

³³ § 518.112(5) & (6), Fla. Stat.

³⁴ Benchmark Report, p.62.

Jacksonville daily.³⁵ The Report entirely ignored primary sources, like the Fund’s Statement of Investment Policy³⁶, the Summary Plan Description³⁷ or Florida law³⁸. Under the Investment Policy, the PF Board “has the sole authority and responsibility for the investment of Police and Fire Assets.”³⁹ The policy articulates with black letter clarity, that the roles of the PF Board and the Administrator are akin to a policy setting body and a manager delegated with the duty of carrying out the policy. The Investment Policy states:

[T]he Board shall develop and approve a Statement of Investment Policy and provide overall direction in the implementation and execution of such Policy Statement. The Board delegates responsibilities to the Administrator for the implementation of the Statement of Investment Policy and in the provision of administrative oversight of the Investment Managers to ensure that the Board’s policies are being properly implemented.

In addition to these duties and responsibilities, the Board retains the authority to establish general administrative rules and procedures for the effective and efficient administration of all aspects of the Fund’s operations that are not inconsistent with the powers and directives of other governing and administrative bodies who retain jurisdiction over such matters.⁴⁰

As evidenced in the Investment Policy, the PF Board governs the development of the Investment Policy and the overall direction of such policy, whereas the Administrator is

³⁵ The primary sources listed in the footnotes below are promulgated pursuant to Florida statute, are reviewed by the state government for completeness and are relied upon in government operations as primary sources of reliance under administrative law. The summary plan description is required by § 112.66(1), Fla. Stat. and the Statement of Investment Policy is required by § 112.661, Fla. Stat. In contrast, the Benchmark Report relies upon a series of articles culled from the Florida Times-Union regarding the Fund, its Board members and Executive Director-Administrator.

³⁶ <http://www.coj.net/departments/police---fire-pension-fund/statement-of-investment-policy/december-20-2012.aspx>

³⁷ <http://www.coj.net/departments/police-fire-pension-fund/summary-plan/summary-plan-book-2014-2016.aspx>

³⁸ § 112.66(3), Fla. Stat.

³⁹ Statement of Investment Policy, p.36.

⁴⁰ Id.

delegated with the responsibility of working with investment professionals to carry out the PF Board's policy. The Investment Policy describes the Administrator's role further:⁴¹

The Administrator is assigned the responsibility of ensuring that the Statement of Investment Policy, along with all other broad policy guidance and directives promulgated by the Board, are being properly implemented.

The Administrator of the Fund is also charged with the responsibility for managing and directing all administrative, personnel, budgeting, and support functions, including recommending the strategic and tactical allocation of investment assets in consultation with the Investment Consultant. The Administrator is charged with developing specified Asset Class investment portfolio objectives and policy guidelines, and providing the Board with monthly and quarterly Reports of investment activities provided by the Investment Consultant.⁴²

The Administrator has the responsibility for recommending policies for maintaining diversified portfolios and maximizing returns with respect to the broad diversified market standards of individual Asset Classes, consistent with appropriate risk constraints. The Administrator is responsible for recommending changes respecting the appropriateness of the goals and objectives in this Plan in light of actuarial studies and recommending timely changes to the Board when appropriate. The Administrator is also responsible for ensuring that an appropriate system of internal controls is developed to safeguard the assets of the Fund.

Throughout the Investment Policy, the Administrator's role is managing people and working with the Investment Consultant to recommend strategies for successful implementation of the Investment Policy.

To be clear, the Board's investment policies are governed by Florida Statutes 112, 175 and 185, and Article 22 of the City Charter. To fulfill its duty under these laws, the Board obtains an investment consultant to assist it in determining investment policy, based on the long term funding goals of the Fund, and directing proper allocations, based on prevailing market

⁴¹ Id. at p.37.

⁴² These Reports are found at <http://www.coj.net/departments/police-fire-pension-fund/annual-Report> under "Capital Market Snapshot—Performance.

forces. In choosing its investment consultant after terminating the previous consultant, the Board interviewed several candidates and hired Summit Strategies Group, of St. Louis, Missouri.⁴³

Summit Strategies' role is to study market forces, conduct risk analysis, research managers and make manager recommendations to the Board based upon the Fund's need in specific asset classes. Once those recommendations are made, the Board weighs its options and then decides where the trust will invest its assets and specifically with which managers. Once those investment decisions are made, the Board instructs the consultant to contact the Fund custodian, who will execute those trades. There is no authorization under the Investment Policy, or in practice, for the Administrator to formulate or implement any investment strategy of his own accord. The rule contemplates the Administrator's role as working with the Investment Consultant to accomplish financial tasks, in contrast with the Benchmark Report's assertions and innuendo that the Administrator can operate independently from the PF Board. Had Benchmark interviewed or submitted written interrogatories to the PF Board, it would have learned the PF Board has never allowed the Administrator to take the actions the Benchmark Report erroneously claims. There is no evidence that substantiates the Benchmark Report's claims in this regard.

d. Florida Law Authorizes the PF Board to Determine Whether Fiduciary Liability Coverage is Necessary

The Benchmark Report commented on the PF Board's decision to forego fiduciary liability coverage, stating, "As ERISA fiduciaries, the Board should obtain errors and omissions coverage to protect the Fund against loss resulting from errors or omissions by the Board or staff,

⁴³ Information on Summit Strategies Group can be found at <https://www.ssgstl.com/>

in our opinion.”⁴⁴ In accord with other areas of the Report, it provided no analysis of the issue, only unsupported opinions for a subject that is rather complex. The issue involves the cost of fiduciary liability policies versus efficacy of coverage, plan design and the invocation of sovereign immunity. Although Florida law requires that certain parties be fiduciaries to a retirement system, it does not require the purchase of insurance.⁴⁵

The purpose of fiduciary liability coverage is two-fold. First, coverage is provided for loss arising from a wrongful act of an insured. Second, it is provided for damages resulting from a claim for a wrongful act committed by an insured, or another for whom the insured is legally responsible. As a governmental entity in Florida, the Fund is protected by sovereign immunity; therefore, damages covered in the second instance would be limited to \$200,000 per person and \$300,000 for an entire claim. Claims for punitive damages and interest are prohibited by statute.⁴⁶ At the January 29, 2016 PF Board meeting, a local vendor presented a proposal for fiduciary liability coverage insurance of \$32,000, for 1 million in coverage. The high cost of coverage versus the slight benefit in relation to the Fund’s limited exposure is part of the analysis of whether there is value in purchasing such a policy.

As a practical matter, the first type of coverage would reimburse the Fund for theft of its assets by the PF Board, administrative staff or vendors. However, the Fund designates a third party custodian to hold all assets, and as part of the yearly audit, an analysis of financial controls is performed. The Fund has been in existence since 1937, and in those 79 years, a Fund audit has

⁴⁴ Benchmark Report, p.52.

⁴⁵ § 112.656(3), Fla. Stat. In fact, the General Employees’ Pension Plan does not carry errors and omissions insurance coverage either.

⁴⁶ § 768.28(5), Fla. Stat.

never yielded a negative opinion. The City auditors make a similar examination each year, also with the same results. Before the custodian transfers assets, it requires written orders signed by more than one board member, and only transfers assets to previously designated entities. It is understood that no system is foolproof, but as prudent investors, the PF Board must assess the value of the high cost of fiduciary liability insurance against the efficacy of its internal controls. The Report also ignores that sovereign immunity protects the PF Board and limits tort damages.⁴⁷

In contemplation of all of these factors, the PF Board has traditionally chosen to forego fiduciary liability insurance.⁴⁸ Florida fiduciary standards and statutes do not require the PF Board purchase the insurance but the prudent investor rule requires the PF Board weigh the issue, which the PF Board has done. Accordingly, the Benchmark Report's unsupported allegations and lack of analysis entirely ignores the PF Board's status as a governmental plan under Florida law.

III. INVESTMENT PERFORMANCE

The Benchmark Report's discussion of investment performance included a wide range of criticisms alleging excessive investment fees, poor investment performance, custodial issues and investment consultant conflicts. The discussion of the Benchmark Report's criticism of investment performance must therefore start with an overview of the standard industry practice in public pension fund governance of investments, pointing out where Benchmark is uninformed as to standard practice.

⁴⁷ Sec. 768.28, Fla. Stat.

⁴⁸ As has the Jacksonville General Employees' Pension Fund.

a. *There is No Evidence of Erroneous Performance Result Calculations*

All pension fund investment operations originate with the third party custodial bank. Services provided by a bank custodian are typically the settlement, safekeeping, and reporting of customers' marketable securities and cash.⁴⁹ A custody relationship is contractual, and services performed for a customer may vary.⁵⁰ A custodian providing core domestic custody services typically settles trades, invests cash balances as directed, collects income, processes corporate actions, prices securities positions, and provides recordkeeping and Reporting services.⁵¹ A bank may offer securities lending to its custody customers, which would allow a customer to make additional income on its custody assets by loaning its securities to approved borrowers on a short-term basis. In addition, a custodian may contract to provide its customers with other value-added services such as performance measurement, risk measurement and compliance monitoring.⁵²

The Statement of Investment Policy articulates in detail the responsibilities of the custodial bank, which reproduces, in longer form, the core duties described by the Department of the Treasury handbook above.⁵³ The Benchmark Report asserts that the PF Board failed in its

⁴⁹ U.S. Department of the Treasury, Office of the Comptroller of the Currency, *Custody Services Comptroller's Handbook*, p.1. Accessed at <http://www.occ.treas.gov/publications/publications-by-type/comptrollers-handbook/custodyservice.pdf>

⁵⁰ *Id.*

⁵¹ *Id.* at 2.

⁵² *Id.*

⁵³ Statement of Investment Policy, p.33.

A. Custodian Bank. The Board shall retain a bank or trust company to act as Custodian Bank for the Fund's assets. Such Custodian shall be responsible for the safekeeping of all the Fund's assets put under its custody, as well as the regular valuation of Fund assets and settlement of Investment Manager's trades on behalf of the Fund. In order to maximize the Fund's return, no money should be allowed to remain idle and uninvested. Dividends, interest,

fiduciary duty by not including in the custodial agreement with Northern Trust Company, an acknowledgment by Northern Trust that it is a fiduciary with respect to the assets it holds for the Fund, and that the PF Board allows practices inconsistent with ERISA fiduciary standards.⁵⁴ The lack of such a statement does not vitiate the custodian's duty, as Section 112.656(2), Florida

proceeds from sales, new contributions and all other monies are to be invested promptly upon receipt. Consistent with these requirements, the Custodian Bank shall be responsible for the following functions:

1. Accept daily instructions from the Investment Managers;
2. Advise Investment Managers daily of changes in cash equivalent balances;
3. Immediately advise Investment Managers of contributions and withdrawals from their account;
4. Notify Investment Managers of tenders, rights, fractional shares or other dispositions of holdings;
5. Resolve any custodial account problems that Investment Managers may have relating to the custodial account;
6. Safekeeping of securities;
7. Collection of all interest and dividends;
8. Daily cash sweep of idle cash balances;
9. Process all Investment Managers security transactions;
10. Collect proceeds from maturing securities and sale transactions;
11. Make cash disbursements as directed;
12. Provide monthly statements based on cost and fair market value for each security in each Investment Manager account and a consolidated statement of all assets under custody to the Trustees and Investment Consultant;
13. Provide a dedicated account representative and back-up to assist Pension Office staff in all needs relating to the custody and accountability of the Fund's assets;
14. Managing and/or assisting the securities lending program as directed by the Pension Trustees.
15. Provide a schedule of commissions paid and brokers used by each Investment Manager;
16. Provide other Reports mutually agreed upon by the Custodian Bank and the Board;
17. Provide any other tasks necessary for the effective safekeeping, valuation or administration of Fund assets; and
18. Distribute proxies to all Investment Managers

⁵⁴ Benchmark Report p.109-110.

Statutes, dictates that the custodian is included as a fiduciary to the Fund. Further, Section E of the agreement between the PF Board and Northern Trust spells out that the custodian is subject to Florida law.

The Benchmark Report also asserts the Fund's performance calculations are flawed because:

- a. The custodian, as holder of the Fund's assets, is always in the best position to verify values and performances of the respective investment managers;
- b. The consultant and the managers are subject to a conflict of interest in calculating performance; and
- c. Here, as discussed extensively below, the integrity of the former consultant to the Fund—the party calculating performance over a two-decade period—was challenged by regulators.⁵⁵

The Report is wrong on each claim. First, the custodian is the holder of the Fund's assets; it has a duty to record the value of the assets on the first and last days of each month (audited accounting statements), and should provide those raw numbers to the consultant for calculation of performance.⁵⁶ In that manner, the growth or decline in the value of the assets are verified, independently, from the holder of the assets. This process is standard industry practice and provides a check and balance to the performance calculations, ensuring that the fiduciary responsibilities of each party are performed. Afterward, pursuant to state statute, the certified public accounting firm that audits the Fund each year provides a third level of verification of accurate performance review through sampling. Each party serves as an independent check and

⁵⁵ *Id.* at p.104

⁵⁶ Incidentally, these would be the same reports Benchmark is proposing the custodian uses to calculate performance.

balance on the work of the other parties, based entirely on the raw data provided by the custodian.

Second, the Investment Consultant and separate investment managers are not subject to prohibited conflicts of interest, as the Benchmark Report asserts. Under Florida law, a police and fire pension board may hire a “professionally qualified investment consultant,” but can only do so on a flat-fee basis.⁵⁷ The consultant cannot be associated with any money manager and is required to make “calculations according to the American Banking Institute method of calculating time-weighted rates of return. All calculations must be made net of fees.”⁵⁸ The law generally recognizes conflicts of interest when a fiduciary engages in self-dealing or where the fiduciary’s ability to act in the best interest of the beneficiary is compromised or impaired.⁵⁹ An argument can hardly be made that any investment consultant has an inherent conflict of interest, where the law requires they calculate the fund’s rate of return and be paid on a flat-fee basis for their work. Further, the consultant’s performance calculations are easily verified by accessing the raw data and any false reports of fund performance would be identified by the audit performed yearly. A true “forensic investigation” would have entailed obtaining raw data from the custodian and calculating the performance numbers, to compare whether actual performance differs from stated performance. Benchmark clearly did not conduct such an investigation, and merely asserted a conflict existed without actually explaining the nature of the conflict.

⁵⁷ § 175.071(6), Fla. Stat.; § 185.06(5), Fla. Stat.

⁵⁸ *Id.*

⁵⁹ See U.S. Department of the Treasury, Office of the Comptroller of the Currency, *Asset Management Comptroller’s Handbook, Conflicts of Interests*, p.1, found at <http://www.occ.treas.gov/publications/publications-by-type/comptrollers-handbook/conflictinterest.pdf>

The Benchmark Report's third allegation regarding performance calculations, that the calculations are suspect because the former consultant's integrity is at issue, is also meritless. In its communications with Benchmark, the investment consultant, Summit Strategy Group, explained that the PF Board retained Summit in December 2007. Summit received only composite performance information from the former consultant, Merrill Lynch, so the PF Board instructed the firm to use the prior consultant's performance calculations. Moreover, the SEC enforcement actions against Merrill Lynch did not take place until 2009, two years after the PF Board hired Summit as the investment consultant.

To be clear, the Benchmark Report asserts that due to the former consultant's misconduct the calculation of fund performance itself is suspect. That is a different matter from asserting that the Fund's performance could have been better, had the investment consultant not engaged in misconduct. The matter of misconduct must be examined to properly evaluate the most outrageous of the Benchmark assertions, that the misconduct cost the Fund between \$300-\$500 million dollars in asset value—a full 30% of the Fund's value.

b. The Merrill Lynch Litigation

From at least 2000 through 2005, Merrill Lynch, through its Consulting Services program, provided advisory services to high net worth and institutional clients, including public pension funds.⁶⁰ During this time, the Jacksonville Police and Fire Pension Fund and the General Employees Plan were clients of Merrill Lynch.⁶¹ As an integral part of these services, it assisted clients in developing appropriate investment policies and in identifying asset allocations

⁶⁰ See Securities and Exchange Commission Administrative Proceeding, No.: 3-13356, *In the Matter of Michael Callaway*, Order Instituting Administrative Cease and Desist Proceedings, found at <https://www.sec.gov/litigation/admin/2009/ia-2833-o.pdf>

⁶¹ Merrill Lynch also served the Jacksonville General Employees' Pension Fund at the time.

to meet their individual needs. Merrill Lynch Consulting Services also helped clients to monitor performance of their investment portfolios by providing periodic reports and helped clients to identify and evaluate new money managers so that the clients could select one or more such managers for the discretionary management of their accounts. Michael Callaway, who headed a team of ten advisors and researchers (“the Callaway team”), was based in Jacksonville, Florida and acted as investment consultant to approximately 100 public pension clients in Florida. The headquarters for Merrill Lynch Consulting Services was located in Jersey City, New Jersey, and provided support to local investment adviser representatives, like the Callaway team, throughout the country who provided advisory services.

Although the PF Board employed the services of Merrill Lynch, it did not exclusively rely on Merrill Lynch as the sole “gatekeeper.” When the PF Board saw a need for an investment manager in a particular class of investments, the PF Board would advertise in national pension investment periodicals for that type of manager. The responses it received were weighed against each other and the PF Board employed Merrill Lynch solely for the purpose of performing due diligence on the representations of the money managers.⁶² Merrill Lynch did not propose managers to the PF Board and thus, the PF Board was not subject to the conflicts and damages claimed by Merrill Lynch’s other Florida pension fund clients.

According to the SEC filings, the Callaway team misrepresented the process used to identify new money managers for clients, in breach of its fiduciary duty to those clients.⁶³ The Callaway team, in written communications, emphasized the extensive in-house resources and research that was available through Merrill Lynch to match each individual client with

⁶² Many of these searches were conducted jointly with the Jacksonville General Employees’ Pension Fund.

⁶³ *Id.* at ¶ 9

appropriate money managers for that client's needs. The company explained the manager search process to clients in terms of Merrill Lynch's vast resources, and in a manner suggesting that the centralized nature of the process protected against conflicts of interest.

However, contrary to written representations to clients, the Callaway team recommended money managers who were not identified, vetted or approved by Merrill Lynch Consulting Services in New Jersey.⁶⁴ Rather, the team conducted the manager search process themselves using a short list of managers consisting of approximately sixty money managers, giving rise to a limited universe of recommendations. In addition to the above, the Callaway team also directed clients to use its "transition services" for changing money managers.⁶⁵ In exchange for being a part of this small universe of managers, the managers would direct "production credits"⁶⁶ to the Callaway team or "directed brokerage."⁶⁷

⁶⁴ Id. at ¶ 11

⁶⁵ Without the services of a transition manager, the money manager being terminated would sell any shares held by the client that the new money manager did not want to keep and transfer the proceeds from those sales to the client's account. The new money manager would then use these proceeds to purchase securities for its portfolio on behalf of the client. Consequently, the process of terminating and hiring a new money manager results in the generation of commissions. Merrill Lynch's transition management desk represented that it could manage a transition more efficiently and cost-effectively by offering cross trades and reduced commission costs. The conflict here was inherent in that the Callaway team received a portion of the commission generated during the transition. The client was unable to evaluate whether the recommendation to use Merrill Lynch's transition services was in the best interest of the client or whether Merrill Lynch's recommendation was disinterested. The Callaway team misled clients when they were asked about income they received from recommending Merrill Lynch's transition services.

⁶⁶ Production credits entitled the Callaway team to share in generated commissions.

⁶⁷ Directed brokerage is an arrangement whereby the clients directed money managers to execute trades through Merrill Lynch's institutional trading desk. Merrill Lynch had a financial incentive to recommend the client enter into such an arrangement because the firm would generate income far above the flat investment consultant fee with the trade commissions. This arrangement would provide the client with a credit towards their flat fee consultancy arrangement, but would generate income far beyond the yearly flat fee. The clients were generally not made aware of the extent of the extra income.

Because of their misconduct, in 2009, the SEC brought an administrative action against Merrill Lynch and Michael Callaway, resulting in a civil penalty of \$20,000 against Callaway and \$1 million against Merrill Lynch. In 2010, the Board of Trustees of the City of Lake Worth Police, Fire and General Employees Retirement System sued Merrill Lynch on behalf of all of Merrill Lynch's public employee pension fund clients and ended up settling the case for \$8.5 million.⁶⁸ The Jacksonville Police and Fire Pension Fund was not a named plaintiff in the action, just a member of the class, but still received over \$273,000—a full ten times more than the amount recovered by the SEC against its advisor, and without taking any risk or expense. The Jacksonville General Employees' Pension Plan received over \$700,000 from the settlement.

The Benchmark Report's description of the Merrill Lynch litigation is also misleading. The Report paints a picture that the PF Board either was aware of Merrill Lynch's activities and did not care, or was purposefully blind to it based upon the representations of other vendors. Had Benchmark actually sat down with Fund personnel and discussed the Fund's processes at the time, it would have learned that most of the problems associated with Merrill Lynch and its client base did not transpire with the Fund. The PF Board never gave Merrill Lynch the opportunity to engage in the mischief impacting the class members. This point cannot be emphasized enough—the very basis for the Benchmark Report's claim that the PF Board allowed the Fund to lose a third of its value is completely erroneous. However, this error is not the only instance where the Benchmark Report is fundamentally flawed, as the Report began with a conclusion and selectively used information to justify it.

⁶⁸ *Board of Trustees of the City of Lake Worth Employees' Retirement System, et al. vs. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, Doc. 103-1, Case No.: 10-cv-00845-TJC-MCR (M.D. Fla. 04-24-2012)

The Report claims that because the Fund uses a consultant, as Florida statute requires, and not a committee of professionals, the Fund is at a theoretical disadvantage.⁶⁹ In support of this contention however, the Benchmark Report does not provide actual analysis of the Fund's performance based on raw data from the custodian compared to returns of other funds in the same period. The Benchmark Report skirts the issue by simply discussing possible evils that could transpire with public pension funds at the hands of corrupt investment consultants.⁷⁰

The Benchmark Report's contention that the performance numbers are suspect based on Merrill Lynch's misconduct is erroneous. There were no accusations, much less evidence, to suspect that Merrill Lynch misstated investment earnings or engaged in nefarious bookkeeping practices. The SEC enforcement actions and *City of Lake Worth* lawsuit were based on Merrill Lynch's policy of inappropriate financial arrangements with certain investment managers. The actual performance of those managers, good or bad, was never in question. Furthermore, as articulated above, Benchmark made no effort to investigate the practical relationship between Merrill Lynch and the PF Board. The PF Board did not use Merrill Lynch as the sole gatekeeper to choose investment managers; they simply relied on Merrill Lynch's research abilities to vet stated performance history, staffing and investment philosophy.

The report attempts to bolster the author, Edward Siedle, by discussing a presentation he made to the Florida Police and Firefighters Pension Trustee Educational Seminar 14 years earlier,⁷¹ and how at the time, Mr. Siedle met with PF Board's Administrator and general counsel

⁶⁹ Benchmark Report, p.30.

⁷⁰ *Id.*

⁷¹ The Florida Division of Retirement provides this seminar to Florida police and fire trustees twice each year, and recruits many of the same pension industry professionals to provide instruction in their respective fields. There is no evidence that Mr. Siedle presented more than once.

to discuss issues related to Merrill Lynch.⁷² The Benchmark Report then asserts its extreme and unsupported claim that based in part on a GAO analysis; the Fund has lost 30% of its value because of the Merrill Lynch episode.

c. The GAO Analysis

In 2007, the Chairman of the House Committee on Education and Labor, Rep. George Miller, asked the Government Accounting Office (“GAO”) to examine the issue of conflicts of interest on the part of service providers and plan fiduciaries to single employer, private sector defined benefit pension plans.⁷³ The issue concerned the committee because in the years prior to the issuance of the GAO analysis, several large private corporations had gone bankrupt, causing the Pension Benefit Guaranty Corporation (“PBGC”) to indemnify their pension plans.⁷⁴ Due to large bankruptcies between 2000 and 2006, the PBGC went from a surplus of \$9.7 billion to a deficit of more than \$18 billion.⁷⁵ The GAO focused its investigation on the extent of conflicts, whether the conflicts caused losses to private pension plans and if so, whether the losses were recoverable. Additionally, the GAO investigated whether procedures existed to identify conflicts prior to problems arising.

In identifying the extent of conflicts, the GAO relied upon a 2005 SEC study of pension consultants registered as investment advisers.⁷⁶ The study found that 13 of the 24 consultants the

⁷² See Section IV(b) below for a complete discussion of the conflict between Edward Siedle and the Fund’s general counsel.

⁷³ United States Gov’t Accountability Office, *GAO-07-703, Defined Benefit Pensions: Conflicts of Interest Involving High Risk or Terminated Plans Pose Enforcement Challenges* 1 (2007)

⁷⁴ *Id.* The Report mentions United Airlines and Bethlehem Steel as examples.

⁷⁵ *Id.*

⁷⁶ The Fund’s current investment consultant, Summit Strategies Group, was part of the universe of pension consultants reviewed for the SEC study. The SEC found that Summit was one of four pension consultants having no

SEC examined had failed to disclose conflicts of interest to their pension fund clients.⁷⁷ The GAO analyzed the 13 consultants identified by the SEC as having conflicts, and found that combined, these consultants had \$4.5 trillion in U.S. assets under advisement, including defined benefit, defined contribution and other types of assets.⁷⁸ The GAO also analyzed a sample of the defined benefit plans associated with the 13 consultants and found that those plans, as of 2004, had annual returns “generally 1.3 percent lower than those that did not.”⁷⁹ The GAO report immediately qualified that statement with the following admonition:

Because many factors can affect returns, and data and modeling limitations limit the ability to generalize and interpret the results, this finding, while suggestive, should not be considered as proof of causality between consultants and lower rates of return.⁸⁰

Moreover, the GAO study articulated its methodology and explained:

While, the results suggest a negative association between returns and plans that are associated exclusively with pension consultants that did not properly disclose significant conflicts of interest, the results should not be viewed necessarily as evidence of a causal relationship in light of modeling and data limitations. Although the analysis controlled for plan size, funding level, performance of asset markets, differences in plan fiscal years and other key variables, other unknown, omitted factors could have influenced the results of our analysis. While this result gives an indication of the potential harm conflicts of interest may cause in the aggregate, these results cannot be generalized to the population of pension consultants since the consultants examined by the SEC were not selected randomly. In addition, while these findings are consistent with the views of the experts we interviewed concerning the adverse effect that complex service

issues related to conflicts and provided Summit with a “no further action” letter. The Benchmark Report failed to mention this fact.

⁷⁷ *Id.* at p.3.

⁷⁸ *Id.*

⁷⁹ *Id.* The GAO report did not specifically indicate whether the defined benefit plans examined were public or private, but the focus of the report was on private sector defined benefit pension plans, so a fair assumption would be that the sampling was of private plans regulated by ERISA.

⁸⁰ *Id.*

provider related conflicts of interest can have on pension plans, we cannot rule out the possibility that some other differences between the plans could explain the differences in estimated returns.

Although statistical analysis is useful, a detailed audit would be needed to uncover a conflict of interest in any one plan. Independent experts and officials stated that though a typical first step to identify harm related to a conflict of interest is to examine a plan's investment returns, determining whether any financial harm is caused to an individual pension plan by a conflict of interest requires a detailed forensic audit. A rate of return for any single plan is not necessarily a good litmus test for deciding whether to pursue an investigation.⁸¹

This section of the GAO report concluded with an examination of the United Airlines bankruptcy and whether consultant conflicts caused any harm. The report concluded:

[A] detailed, forensic audit would be necessary to identify any accrued harm from a conflict of interest. Even then, the magnitude of the harm could be difficult to determine. Experts told us that determining harm often involves a resource-intensive audit of a plan's service provider's records and the investment performance of the plan's assets. To perform such an audit effectively, experts told us that they would need, at a minimum, 5 years' worth of service provider specific documents, including contracts with the plan sponsor, fees charged, payments and other financial transactions between service providers and those involving plan fiduciaries. In addition, experts told us that it would be important to review the investigative files and complaint records of agencies like the SEC to determine if there is a history of problems at plans and service providers.⁸²

In complete disregard of the GAO's explanation of the limits of the methodology used in the report, and its admonitions to avoid extrapolating their statistical findings to pension plans generally, the Benchmark Report stated:

Most significantly, conflicts of interest at investment consulting firms were found to result in substantial financial harm to plans by the U.S. Government Accountability Office ("GAO") in a 2007 Report, i.e., plans using consultants with undisclosed conflicts of interest had annual returns generally **1.3 percent lower**.

⁸¹ *Id.* at p.16.

⁸² *Id.* at p.17.

For almost twenty years, from 1988 through December 31, 2007, Merrill Lynch, a broker-affiliated investment consultant, served as the investment consultant to the Board. If, as the GAO study found, pension consultant conflicts cost plans 1.3 percent, then over a 20-year period, with compounding, such conflicts may have cost the Fund **almost 30 percent** of its value—perhaps **\$300-\$500 million**.⁸³

As a threshold matter, the GAO report explained that the subset of consultants was not a random sample, but specifically chosen by the SEC, which prohibits extrapolation at the outset. The limits of the GAO’s analysis is explained above, but specifically, the GAO explained that the extensive requirements of performing a forensic audit include, “at a minimum, 5 years’ worth of service provider specific documents, including contracts with the plan sponsor, fees charged, payments and other financial transactions between service providers and those involving plan fiduciaries.”⁸⁴ As described throughout this response, the Benchmark Report relied almost exclusively on newspaper clippings and secondary sources, and failed to request raw data from either the current consultant, the previous consultant or the custodian.

Furthermore, the SEC and GAO reports analyzed consultant conflicts in private pension plans, but Benchmark superimposed SEC and GAO findings on a public pension plan. The difficulties with the comparison lie in structural differences between public and private defined benefit plans. Private sector defined benefit plans are required to participate in the PBGC insurance program and make insurance premium payments to the PBGC. As a result, corporate defined benefit plans have higher costs, since well-managed plans are required to pay insurance premiums based on the liability of other less well-managed plans. Second, governmental defined benefit plans are permitted a degree of actuarial flexibility, which is not available in private sector plans. For example, governmental plans are not forced to periodically change their

⁸³ Benchmark Report, p.31 (emphasis in original).

⁸⁴ GAO-07-703, at p.17.

liabilities based on interest rate levels, which results in greater contribution volatility for private sector plans. Third, most governmental plans require their members to pay employee contributions into the plan, which is generally not the case with corporate DB plans.

In its simplest mathematical terms, funding a defined benefit pension is fundamentally based on the following equation: Contributions + Investment returns = Benefits and Expenses. Private plans, as compared to public plans, remove employee contributions from the equation and raise expenses due to insurance payments and interest rate sensitivity. Thus, extrapolation of plan performance is further muddled and subject to error. In sum, the Benchmark Report fails to provide quantifiable evidence that the Jacksonville Police and Fire Pension Fund had diminished earnings over the last thirty years as a result of using Merrill Lynch as its investment consultant.

d. Investment Strategies

The Benchmark Report argues that the Fund's performance has been affected by various strategies taken by the PF Board and its investment consultant, Summit Strategies Group.⁸⁵ The Benchmark Report's main issues are fees, active versus passive investment management, calculation and monitoring of investment performance⁸⁶, investment in energy master limited partnerships, and investment losses. These issues are considered in succession.

1. Fees and Active vs. Passive Investment Management

The Benchmark Report asserts the PF Board's "lack of scrutiny of investment management fees" cost the Fund \$6 million annually.⁸⁷ However, the analysis provided by the

⁸⁵ Summit is also the investment consultant for the General Employees' Pension Plan.

⁸⁶ The calculation and monitoring of investment performance is addressed in section II(a) above, therefore it will not be addressed again here.

⁸⁷ Benchmark Report, p.23. This is a curious figure as the Fund only pays approximately six million in management fees yearly.

Report in support of this proposition focuses entirely on the presentation given by Jonathan Trichter of Maeva Municipal Solutions, Inc. to the Jacksonville Reform Task Force Committee Meeting in October 2013.⁸⁸ Mr. Trichter’s presentation focused mainly on pension obligation bonds, but ended with comments on investment fees and how the Fund pays approximately twice the fees, as a percentage, paid by the Florida Retirement System (“FRS”).⁸⁹ The Benchmark Report cited Trichter’s comparison of FRS, the California Public Retirement System (“CALPERS”) and the Jacksonville Police and Fire Pension Fund’s use of active and passive managers and how those strategies reflected fees.

The Benchmark Report notes that the Fund’s large cap domestic equity portfolio is weighted two-thirds active management and one-third passive management, stating it has almost the exact opposite allocation of passive versus active management as CALPERS. Any comparison to CALPERS or FRS regarding passive investment is not a valid comparison because of the significant difference in their asset size with the Jacksonville Police and Fire Pension Fund. FRS has both defined benefit and defined contribution components, with the

⁸⁸ Id. at p.100. To be clear, the Benchmark Report does not state that Benchmark spoke with Mr. Trichter, it just reproduced the comments Mr. Trichter made to the committee.

⁸⁹ Mr. Trichter’s remarks can be found at [http://www.coj.net/retirement-reform/docs/oct-29/jt-jacksonville-testimony---oct-29-2013-\(amended\).aspx](http://www.coj.net/retirement-reform/docs/oct-29/jt-jacksonville-testimony---oct-29-2013-(amended).aspx). An internet search for information on Mr. Trichter and Maeva yielded little information. Maeva Municipal Solutions, LLC is a Delaware Corporation, located for business in White Plains, NY, formed in 2012 and employs two employees. The firm does not have a website, and information on Mr. Trichter is difficult to come by. The only reasonably reliable background information that could be found about Mr. Trichter is his *Linked In* site, which is authored by Mr. Trichter. The site describes Mr. Trichter as having worked in political campaigns and having worked for an unknown period as an “investment banker at JP Morgan in public finance.” The *Linked In* entry touts Trichter as having played “a lead role at Maeva on two of the most meaningful public pension restructurings in the country – in Kentucky and Jacksonville, Florida, where he worked hand-in-hand with the City and its public safety unions.” The comment seems curious, in that other than the brief comments he made to the committee referenced above, there is no evidence he played any other role in Jacksonville pension reform. The comments can be found at <https://www.linkedin.com/in/jonathan-trichter-25023819>

defined benefit component alone valued at approximately \$136.8 billion.⁹⁰ CALPERS is larger with an approximate value of \$280 billion.⁹¹ The Jacksonville Police and Fire Pension Fund, however, is much smaller, with a market value of approximately \$1.3 billion. As noted below, fund size materially affects fee structure, as larger funds get fee breaks due to size of their investments in individual mandates.

According to Summit Strategies Group, due to their size, many of the large public pension plans are forced to invest more heavily in passive strategies. While there is some possible performance advantages of using passive management over active management, the Benchmark Report does not explain that investable passive indices are not available for every asset class. Moreover, certain asset classes such as small cap equities, international equities and MLPs have a higher probability of success in obtaining better returns if actively managed. Additionally, the outperformance of actively managed funds over passively managed funds, and vice-versa, runs in cycles.

The Benchmark Report incorrectly states that no fee analyses have been prepared for the Board by Summit or any third party for the Fund.⁹² The Benchmark Report further quotes the investment consultant, “The net fees paid are buried in the investment performance reports.” The Benchmark Report took the investment consultant’s statement out of context, as the Report fails to point out that Summit explained to Benchmark that no dedicated fee-only report had been prepared because the PF Board did not request one, nor is Summit required to draft such a report

⁹⁰ <https://www.myfrs.com/PlanInformation.htm> The Investment Plan (the FRS defined contribution component) is valued at approximately \$8.3 billion.

⁹¹ <https://www.calpers.ca.gov/page/investments/asset-classes/asset-allocation-performance/investment-fund-values>

⁹² Benchmark Report, p.95.

under its contract. The PF Board reviews performance each month on both a net and gross of fees basis with substantial discussion on net of fees performance.⁹³ Each manager search conducted by Summit contains full fee disclosure with discussion of fee negotiation, including performance-based fees.

Furthermore, Summit has won fee concessions for the PF Board on a number of occasions. In fact, in 2014 Summit arranged fee discounts for the Fund and the City of Jacksonville Retirement System whereby managers common to both funds aggregated assets in determining fees paid, resulting in both paying reduced fees. The Report claims that Summit did not prepare a fee-analysis even though the Fund Administrator asked Summit to do so. However, Summit explained to Benchmark that since there was no single document summarizing fees, gathering all the fee information contained in various documents in response to Benchmark's request was a time and labor intensive project. Therefore, the Fund Administrator requested Summit prepare an expedited summary of investment manager fees to provide Benchmark a more timely response.

The Benchmark Report takes issue with the fee analysis provided by Summit, which compared the Fund's current manager fees to the eVestment Alliance universe of manager fees, after adjusting for style, size of account and type of investment vehicle.⁹⁴ The Report's criticism centers on eVestment Alliance's use of manager-stated fees schedules instead of comparing the Fund's fees to a universe of actual management fees paid. The Benchmark Report relies on the 2004 Investment Management Fee Survey by Callan Associates to argue public pension funds

⁹³ See <http://www.coj.net/departments/police-fire-pension-fund/annual-Report> for all of the Reports available to the PF Board and members regarding investments.

⁹⁴ Benchmark Report, p.101.

pay the lowest fees regardless of account size. Therefore, the Benchmark Report continues, the comparators in Summit’s fee review were “almost certainly materially higher than those paid by public pensions, such as the Fund.”⁹⁵

The Benchmark Report’s use of the 2004 Callan Report is misleading, as Callan published a more recent Report; the 2014 Callan Investment Management Fee Survey. The 2014 Callan Report explains that investment management fees represent, on average, 46 basis points of all fund sponsors’ total assets, which have increased over the last 5 years, compared to 48 basis points for the Jacksonville Police and Fire Pension Fund. The average total investment management fee for public pension plans was 34 basis points. While this is 14 basis points lower than that of the Fund, the universe of funds Callan surveyed favors larger funds. The average asset size of funds in the Callan survey is \$12 billion, with 56% of the respondents having assets greater than \$2 billion and 19% having assets greater than \$15 billion.

The fee survey shows that fund size materially impacts the total investment management fees paid. The largest funds enjoy a price break for investing more money in individual mandates. Regarding the issue of comparing Fund investment management fees to actual fees paid rather than published fees, the following table prepared from the fee survey shows the Jacksonville Police and Fire Pension Fund pays fees in line with, or better than, the median actual fees produced in the fee survey.

⁹⁵ Id. Regarding actual fees paid according to style peer group, the Callan fee survey only provides style peer group information based on published fees instead of actual fees – the same as the eVestment universe.

	Callan Survey Published Fees	Callan Survey "Actual" Fees	Jacksonville P&F Actual Fees	Callan "Actual" Observations
Passive US Large Cap	4 bps	3 bps	4 bps	9
Active US Large Cap	53 bps	50 bps	48 bps	15
Active US Small Cap	81 bps	71 bps	80 bps	14
Passive International Developed	11 bps	7 bps	10 bps	1
Active International Developed	66 bps	64 bps	61 bps	5
Active Emerging Markets	90 bps	88 bps	60 bps	3
Passive Core Fixed Income	5 bps	N/A	4 bps	N/A
Bank Loans	50 bps	50 bps	50 bps	6
Active Core Fixed Income	24 bps	19 bps	18 bps	11
TIPS	13 bps	N/A	6 bps	N/A
Core Real Estate	88 bps	N/A*	95 bps	N/A

The Benchmark Report opines that not all fees were disclosed by Summit,⁹⁶ but this is not accurate. First, Summit's fees are flat-fee based, separate from investment managers and disclosed on regular intervals. Second, manager fees are clearly documented, as evidenced above, and the PF Board has never found any indication that fees have been withheld or hidden by Summit. The Benchmark Report expresses an opinion that investment management fees are understated by \$2 million annually and that "virtually all the US Equity investment managers are 50 percent higher than they should be." However, the Benchmark Report provides no empirical proof or calculations in support of these assertions.

⁹⁶ Id., p.101.

2. Investment in Energy Master Limited Partnerships, Investment Losses and Global Economic Performance

The Benchmark Report is critical of the Fund's investments in Master Limited Partnerships ("MLP"), labeling the strategy as "gambling" without explaining the nature of the investment.⁹⁷ MLPs are publicly traded companies that take a limited partnership form rather than a C corporation form. Their shares are publicly traded on the New York Stock Exchange, NASDAQ, and AMEX as closed-end funds that can trade at a premium or discount to their net asset value.⁹⁸ They are transparent and provide diversification through low correlation to traditional stocks and bonds.

Without explaining the Fund's costs versus returns in these investments, the Benchmark Report argues that MLPs are generally costlier investments with higher risks, again without any supporting documentation. The Benchmark Report continues this misinformation by precisely selecting Fund MLP returns over the past year's downturn in the energy markets, without discussing the strategy's returns since investment inception. In contrast with the Benchmark Report's assertions, the two MLP managers hired by the Fund three years ago have delivered 8.91% and 7.58% on a net of fees basis since they were retained.⁹⁹ Their returns represent net of fee performance above their benchmarks of 7.58% and 5.61%, respectively. Additionally, the Fund's Investment Policy calls for measuring managers over a full market cycle compared to manager style peers and a benchmark reflecting the manager's opportunity set. In other words,

⁹⁷ Benchmark Report, p.108. In fact, the General Employees' Pension Plan also invests with the same MLPs.

⁹⁸ MLPs can be purchased individually or in mutual funds and exchange traded funds as well.

⁹⁹ The Police and Fire Pension Fund and the General Employees' Pension Fund receive reduced management fees because of the combined investment.

MLPs are to be compared against MLP index benchmarks, as is the industry practice, not against other investment indexes.¹⁰⁰

3. The Factual Basis for the Current Unfunded Actuarial Liability

A troubling aspect of the Benchmark Report is its failure to discuss the global economic climate for the last fifteen years and its effect on the Fund's investment returns. To understand the dynamics of how global economics over the last decade affected the Fund, an understanding of the methods a public pension plan uses to calculate its future liabilities and the funding it will need to pay for its liabilities is required.

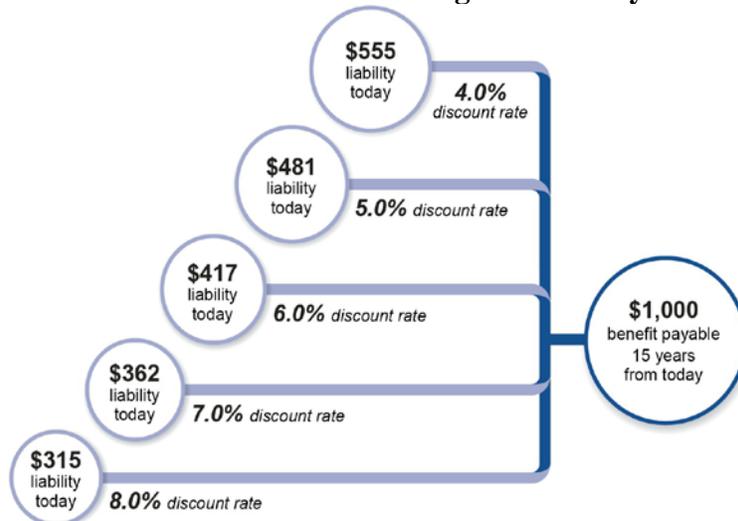
The basis for determining how much funding a defined benefit pension plan will need over the course of time to pay future pension liabilities is the discount rate. Pension liabilities include (1) the present value of all projected future benefits for current retirees and former employees not yet retired, but who have a vested right to a pension; and (2) the present value of a portion of the projected future benefits for current employees, based on their service to date.¹⁰¹ Public pension plans use the "assumed return approach" in determining the discount rate, which is the long-term assumed average rate of return on the pensions plan's assets. Pursuant to this method, the discount rate relies on the allocation of plan assets, with higher risk assets increasing the discount rate and lowering plan liabilities. Since a shortfall in a public pension fund's

¹⁰⁰ It is fair to say that comparing the results of one strategy of investment (bonds, for example), against the index of another strategy (equities, for example) is so misleading and inappropriate that no professional entity in the financial industry conducts business in that fashion. Investment strategy of a perpetual trust is concerned with proper allocation and sound diversification, so that even though certain mandates perform better than others do over any given period, the goal is reasonably consistent returns. That entails investment strategies that do not perform as well as others in lieu of risk. The Benchmark Report's idiosyncratic comparison of investment results of one category against benchmarks in another category, in support of an argument that returns could have been better, is not industry practice.

¹⁰¹ United States Government Accountability Office, *GAO-14-264 Pension Plan Valuation, Views on Using Multiple Measures to Offer a More Complete Financial Picture*, 13 (2014)

investment earnings will require higher contributions or reduced benefits, investment returns matter. The below chart, taken from the GAO analysis, is illustrative of this concept.

Effect of Different Discount Rates on Measuring the Liability for a Future Payment



Source: GAO analysis. | GAO-14-284

Notes: The figure above illustrates the effect of different discount rates on measuring the liability for a future payment independent of an actuarial cost method. Corresponding liabilities for a \$1,000 benefit payable 7 years from today are \$760 at a 4 percent discount rate and \$583 at an 8 percent discount rate. For a benefit payable 7 years from today, the liability measured at 4 percent is therefore 30 percent higher than the liability measured at 8 percent. In contrast, for the benefit payable 15 years from today, the liability measured at a 4 percent discount rate is 76 percent higher than the liability measured at an 8 percent discount rate.¹⁰²

To establish a reasonably accurate discount rate, actuarial assumptions regarding demographics of the plan membership, economic returns and wage growth are required. Actuarial assumptions of the plan's future economic returns are calculated using the plan's asset allocation, current and projected interest rates and rates of inflation, historic and projected returns of individual classes and historic returns of the fund itself.¹⁰³ Assumptions that are set

¹⁰² *Id.*

¹⁰³ *Id.* at 3.

too low will cause current taxpayers to be overcharged for liabilities and future taxpayers to be undercharged. Assumptions that are set too high will have the opposite effect. Erroneous assumptions in either direction will cause the misallocation of resources and unfairly distribute costs across generations.¹⁰⁴ For this reason, actuarial assumptions regarding investment returns are estimated over the long-term, typically 30 to 50 years, so that stability and predictability of costs are promoted. Since 1984, public pension plans have accrued approximately \$5.9 trillion in revenue, of which \$3.7 trillion (62%) has been generated by investment earnings. The remainder is split between employer contributions, which account for \$1.5 trillion (26%) and employee contributions, which account for \$730 billion (12%).¹⁰⁵

Simply put, diligent efforts made by the PF Board to calculate a reasonable discount/assumption rate will not impede increases in unfunded liabilities when investments do not perform as they are expected. In 1992, the assumption rate was set at 8.75% and stayed there until 1998, when it was lowered to 8.4%. In 1999, the PF Board raised the assumption rate to 8.5% and it stayed at that level until 2011, when it was lowered to 7.75%, and then lowered again in 2013 to 7%. The Fund's average rate of return, net of fees, between 1990 and 1999 was 13.26%. The Fund's average rate of return, net of fees, between 2000 and 2009 was 3.38%.¹⁰⁶ This corresponds with macroeconomic conditions, which saw real gross domestic product growth of 1.9% between 2000 and 2009, whereas average growth for the six decades before

¹⁰⁴ National Association of State Retirement Administrators Issue Brief, Public Pension Plan Investment Return Assumptions 1 (2015)

¹⁰⁵ *Id.* at 2.

¹⁰⁶ Pension Board Consultants, Inc., *Jacksonville Police & Fire Pension Plan Experience Study* 7 (2015)

2000 was 3.9% per year.¹⁰⁷ Employment growth was similarly arrested, with non-farm employment growing at a rate of 27% per decade between 1940 and 1999, whereas the 2000s saw employment growth fall by 0.8%.¹⁰⁸ In the same period, the S&P 500 Index returned an average of 18.2% per year between 1990 and 1999, whereas it posted a -0.9% annual return between 2000 and 2009.¹⁰⁹

These figures describing macroeconomic challenges during the 2000 decade correspond with the Fund's growth in unfunded liabilities. On September 30, 2001, the actual market value of the Fund's assets was approximately \$814.9 million. Eleven years later, on September 30, 2012, the Fund's actual market value of its securities was approximately \$885.7 million, representing growth of \$70.8 million over that decade. During that time, the assumed rate of return for the Fund's assets was 8.5%, which produced a deficit of \$735.4 million between anticipated growth based on the assumption rate and actual growth.¹¹⁰

In addition to the macroeconomic challenges of the last decade, several actuarial changes increased the unfunded liabilities as well. These included mortality table changes in 2008 and 2011; salary scale decreases in 2011 and 2012; and decreases in the investment return assumption rate in 2011 and 2012. These changes caused an overall increase in the unfunded liability of \$560 million. These actuarial changes (which strengthened the actuarial assumptions), combined with the \$735 million in investment underperformance and another

¹⁰⁷ The Economist (on-line edition), *Back to the Crash*, 02-25-2010, found at <http://www.economist.com/node/15579916>

¹⁰⁸ *Id.*

¹⁰⁹ <http://www.marketwatch.com/story/8-lessons-from-80-years-of-market-history-2014-11-19>

¹¹⁰ Pension Board Consultants, Inc., Letter to Board (December 5, 2012)

\$150 million in shortfall of payment on the unfunded liability interest, caused the Fund's Unfunded Actuarial Accrued Liability to be \$1.6 billion in 2012.¹¹¹

The Benchmark Report ignored all of this information and strategically chose two dates to discuss unfunded liability; the year 2000, when the Fund was 87% funded, and 2013, when the Fund was 39% funded.¹¹² In 2000, the Fund's funded ratio was very high because in April 2000 the PF Board and the City of Jacksonville entered into the Restated Agreement, which governed the dissemination of Chapter dollars. According to Pension Board Consultants, Inc., the Agreement was renegotiated from 50% sharing of gains and losses between City and members to 100% City burden. Additionally, the Fund's valuation method changed from a five year smoothing method to market value. These two events combined to cause a spike in the year 2000 valuation to a funded ratio of 86% in 2000 from 76% in 1999. The next year reflected the absorption of these changes in actuarial methodologies, as the funded ratio dropped to 75% by the 2001 valuation. As discussed above, the 2011 actuarial changes caused a three point drop in the funded ratio from 42% to 39% in 2012, but it recovered in 2013 to 42% again and is steadily climbing with a 46% funded ratio in 2014. Moreover, the Fund is more conservatively valued today with more appropriate (and costly) actuarial values, than was the case in the year 2000. None of this material was discussed in the Benchmark Report.

¹¹¹ Id.

¹¹² Benchmark Report, p.40. Although the Benchmark Report states the Fund was funded at 39% in FY2013, it was actually at that rate in 2012. In plan year ending 2013, the Fund's funding ratio was 42%. (See Fund Audited Financial Statements, Actuarial Reports and City Comprehensive Annual Financial Reports for support of this assertion.)

IV. BOARD STAFF AND VENDORS

a. The Fund Executive Director-Administrator

The Benchmark Report seeks to analyze controversies surrounding John Keane, the Fund's Executive Director-Administrator, but does little more than malign Mr. Keane's integrity while parroting fragments of Florida Times-Union articles.¹¹³ The drafter of the Report never asked to interview any current or former member of the PF Board on the subject of the Administrator, his salary, education or travel.

The Benchmark Report also reviews the issues surrounding the Senior Staff Pension Plan, repeating inflammatory accusations made by the Florida Times-Union, while providing no analysis of whether the PF Board had the right under Florida law to establish the plan for its employees.¹¹⁴ The Report describes the positions of the City Council Auditor, the City General Counsel, the City Ethics Office Director and the PF Board's Counsel, again with no analysis of any party's position. The Benchmark Report then, quite curiously, takes the position that "the Fund adopted the heightened fiduciary standard of ERISA,"¹¹⁵ so the PF Board is required to refrain from self-dealing.

The issue has been documented so thoroughly that another treatment in this Response is unnecessary. The PF Board was well within its rights under Florida law to provide its employees a defined benefit pension plan.¹¹⁶ The PF Board considered, drafted, adopted and funded the plan in open meetings. The City finance officers were well aware of the senior staff plan for

¹¹³ Benchmark Report, p.61.

¹¹⁴ *Id.* at p.76.

¹¹⁵ See discussion above regarding the erroneous use of the phrase "heightened Fiduciary standard of ERISA."

¹¹⁶ The opinions and the law the PF Board relied upon are attached to this document as a composite exhibit.

years. Contrary to the Benchmark Report's descriptions of the senior staff plan, the City itself in contested legal filings refers to the plan as "unauthorized" but not "illegal." The Benchmark Report's language is misleading and inflammatory in this regard.

b. The Fund Legal Counsel

The Benchmark report takes efforts to malign the Board's counsel, Robert Klausner, without describing the prior relationship between Mr. Klausner and Benchmark report's principle, Ted Siedle. The report accuses Klausner of conflicts in his representation and compensation, and falsely claims that information was requested from Klausner that was not provided.¹¹⁷ The Benchmark report complains of inappropriate fee splitting and goes so far as to assert that Klausner violated Florida Bar rules in his transactions with securities litigation firms. The truth is that Benchmark's principal, Ted Siedle, has a negative personal history with Klausner that he did not reveal in the report.

According to Klausner, he was initially introduced to Siedle by Douglas McKeige of Bernstein Litowitz Berger & Grossman ("BLBG"), a securities litigation firm that performed securities fraud monitoring work for the Fund. This introduction occurred in the same general period that the Merrill Lynch matters were coming to fruition, which was the subject of the meeting. Siedle proposed to Klausner that they cooperate in a lawsuit against Merrill Lynch based upon the above-described violations regarding its recommendation of asset managers. Siedle's intent was to assist in the lawsuit and split fees with the Klausner's firm and any other firms involved in the case. However, Siedle was not an active member of any state bar at the time so Klausner could not split fees with him without violating the rules of professional responsibility. Siedle stated he was not interested in compensation for expert witness work, so

¹¹⁷ Benchmark report, p.14,

Klausner advised Siedle that if he activated a membership in a state bar he could serve in a counsel capacity. Furthermore, Klausner advised Siedle that the Jacksonville Fund did not employ Merrill Lynch to recommend managers, as the Fund and the Jacksonville General Employees' Pension Fund both advertised for managers through an RFP process. Eventually, the City of Lake Worth Police, Fire and General Employees Retirement System, to which Klausner, Kaufman, Jensen & Levinson ("KKJL") serves as counsel, filed suit against Merrill Lynch as lead plaintiff without using Siedle's services.

Siedle met again with McKiege, Klausner and John Keane at a police and fire pension seminar in California, where Siedle made the same business proposal. Keane reiterated to Siedle that Jacksonville would not qualify as a plaintiff nor could it reasonably be determined what managers would have been selected by looking retrospectively. Siedle again approached Klausner and KKJL partner Stuart Kaufman a third time, together with a Ft. Lauderdale attorney, Dale Ledbetter, in an effort to peddle his services for securities litigation. Once again, KKJL declined to engage Siedle.

Shortly thereafter, in 2004, the above-referenced story appeared in Forbes Magazine, a publication Siedle writes for, accusing BLBG and KKJL of undisclosed litigation and fees. The PF Board investigated the accusations and, consistent with the Benchmark report itself, found no substance or basis to the allegations.

Notwithstanding the previous history between Siedle and Klausner, KKJL offered through the City treasurer and the Fund Administrator to meet with Siedle concerning any needed documents during Benchmark's investigation. Siedle did not answer the invitation, nor did he directly request any documents. Considering the fact that Siedle hid personal resentments borne of failed business endeavors, any comments regarding securities litigation should be read

discriminately. The Fund's long history of involvement in securities matters and KKJL's work with those cases is well documented in records provided to the City and through records of the Fund. Additionally, the City Council performed its own study and concluded full disclosure had been made, which the PF Board Chairman confirmed in a letter.¹¹⁸

c. Transparency

One of the "key findings" of the Benchmark Report was the Fund's "lack of transparency," which the Benchmark Report claimed amounted to "profound red flags."¹¹⁹ The Report based this opinion on, again, local newspaper reports about the litigation between self-proclaimed "citizen activists" and the Fund. The specific litigation referenced in the Report entailed a lawsuit against the Fund wherein eight claims were made, but the Court found the Fund to have violated the public records law on only two of the claims. On those violations, the Court found that the Fund construed Florida law erroneously, even though Fund followed an Attorney General opinion on the subject. The Florida Supreme Court inevitably agreed that the issue was one of first impression, as it did not award attorney fees on the appellate litigation.¹²⁰

The issues involved on those matters have been documented thoroughly so that an exposition on them is not required here. However, the Benchmark Report attempts to use the public records litigation as a means to bolster its contention that it was denied records, but as documented herein, this is inaccurate. Benchmark's request for records amounted to a request for almost every document in the Fund's massive inventory of documents. The Fund provided to Benchmark approximately 1500 pages of material before the end of September 2015, and

¹¹⁸ Attached as exhibit.

¹¹⁹ Benchmark Report, pp. 6, 46.

¹²⁰ Orders attached as exhibits.

expended dozens of hours on research.¹²¹ A trail of emails, which are open to public access, between the Fund Administrator and Siedle, document that the Fund cooperated to the best of its abilities in providing Benchmark the materials it requested. This activity was all performed while Fund employees continued their mission to efficiently deliver retirement benefits to Fund members.

d. Travel

The Benchmark Report takes issue with the travel of PF Board members to educational seminars, although trustees are required by law to fulfill educational requirements.¹²² This section of the Report starts by again relying on newspaper articles, this time from California and Colorado that were written thirteen years earlier, to support its opinion that trustee travel is not necessary. After setting an ominous tone, the Benchmark Report states, “the Fund Administrator and General Counsel are regular participants at these conferences and have long defended them.”¹²³ The Report cites an article that ran in Plan Sponsor magazine to support its contentions, but in fact misstates the points made in the article. The article actually cited the Fund Administrator and General Counsel with approval in their description of the process used to vet educational conferences before attending them.¹²⁴ It stated:

Most public funds do have educational policies, and most must approve conferences that trustees attend. Funds do this in different ways, Klausner says. Some funds review and approve every conference prior to a trustee attending,

¹²¹ As a result of questions raised by the Benchmark Report’s erroneous claims, the Fund provided to City Council subcommittees an additional 1500 pages of material and expended many more hours of Fund personnel work on research.

¹²² See, § 112.661(14), Fla. Stat.

¹²³ Benchmark Report, p.85. It’s worth noting here that Ted Seidel markets himself as a speaker at these conferences as well.

¹²⁴ <http://www.plansponsor.com/MagazineArticle.aspx?Id=4294991614>

while others publish lists of acceptable and unacceptable conferences. Others have restrictions on how many conferences trustees can attend, or limits on what can be spent. Other funds limit international travel.

For example, the Jacksonville fund has a list of conferences that meet the fund's business objectives, says Keane. Conferences are approved a long time in advance, sometimes six to seven months. "We monitor course content for its value to our ongoing program," says Keane. The fund has 5,000 members and retirees.

This section of the Report closes with a discussion of two investigations of travel by Fund personnel, conducted by the Jacksonville Ethics, Compliance and Oversight Office.¹²⁵ Neither investigation led to any discovery of wrongdoing by any person affiliated with the Fund. Furthermore, one of the investigations prompted a referral by the Jacksonville Ethics Officer to the State of Florida Commission on Ethics.¹²⁶ Again, the State Ethics Commission's investigation revealed no wrongdoing of any person affiliated with the Fund.

e. Commission Recapture

The Benchmark Report's discussion of the Fund's commission recapture program begins on page 110. The Report describes generalized corruption associated with unrelated commission recapture programs in the most ominous terms possible, and spends four pages referring to historical examples. The Report then proceeds to provide opinions on the PF Board's commission recapture program, making the valid point that the PF Board might be better served by attempting to reduce brokerage fees instead of recapturing them. The Report goes off-track again, however, by describing how Benchmark requested annual statements on commission recapture since 1987. When Fund personnel supplied Benchmark with statements since 2005

¹²⁵ Both of these investigations were initiated by complaints generated by the same Curtis Lee discussed above. The Benchmark Report also fails to mention this fact.

¹²⁶ State of Florida Commission on Ethics, Case No.: 14-060.

and not 1987, Benchmark speculated on the amount of recaptured dollars the Fund should have, arguing that commission recapture dollars are unaccounted for. Although this specious argument caused controversy, it was proven wrong by the City Council’s subcommittee investigating this matter.

The Council Auditor was tasked by the City Council subcommittee with gaining an understanding of the Fund’s commission recapture program. The Council Auditor issued a memorandum to the subcommittee, explaining in part that it conducted a “detailed review of the transactions with one of the brokers in which the Fund has a recapture agreement.”¹²⁷ The memorandum also described how all contracts between the Fund and its commission recapture agents were produced to the Auditor for agreements since 1997. The Auditor concluded from its survey, “Based on work performed, it appears that the monies credited/paid to the Police and Fire Pension Fund as indicated by Convergenx for the period 10/1/12 through 9/30/15 were deposited into the Fund’s bank account and were subsequently reported in the Fund’s audited financial statements.” The subcommittee concluded its investigation into that matter and had no further recommendations.¹²⁸

¹²⁷ City of Jacksonville, Office of the Council Auditor, *Police and Fire Pension Fund—Commission Recaptures* (February 26, 2016). The Council Auditor’s memorandum is clear that the investigation it performed was not an audit conducted pursuant to Government Auditing Standards.

¹²⁸ City of Jacksonville, Office of the City Council, *Final Report of the Subcommittee on Subpoenas Related to Police and Fire Pension Fund* (March 11, 2016)

Conclusion

In conclusion, this Board, its employees and vendors provide a valuable service to active and retired police and fire personnel of this City, their beneficiaries, widows and orphans. The Board is always ready to work with City leaders to improve its services, as it has on multiple occasions, but the Board will also correct the record when erroneous allegations are made. It is imperative to do so, because it is vital that the members have faith in those that are tasked with the solemn fiduciary duty of caring for their retirement benefits. The sponsor of the legislation paying for this flawed investigation publically stated at its release, “to those who say there are inaccuracies, my answer to you is, ‘Prove it.’”

The Board hopes that the reader of this report will agree that the Benchmark report’s inaccuracies have been cited, displayed and proven.