IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW

BARRY J. FENCHAK, Plaintiff, vs. THE PENNSYLVANIA STATE UNIVERSITY BOARD OF TRUSTEES AND MATTHEW SCHUYLER IN HIS OFFICIAL CAPACITY AS CHAIRMAN, Defendants.	Docket No. 2024-CV-1843-CI Type of Case: Civil Action - Equity Type of Pleading: Preliminary Objections Filed on behalf of Defendants Counsel of Record for Defendants: **MARSHALL DENNEHEY, P.C.** Christopher J. Conrad, Esquire PA ID No. 202348 Gary H. Dadamo, Esquire PA ID No. 93292 200 Corporate Center Dr. Ste 300 Camp Hill, PA 17011 Ph. 717-651-3531 Fax: 717-651-3707 cjconrad@mdwcg.com ghdadamo@mdwcg.com

BARRY J. FENCHAK, Plaintiff, v. THE PENNSYLVANIA STATE UNIVERSITY BOARD OF TRUSTEES, and MATTHEW SCHUYLER IN HIS OFFICIAL CAPACITY AS CHAIRMAN, Defendants.	: : : : : : : : : :	COURT OF COMMON PLEAS CENTRE COUNTY, PENNSYLVANIA CIVIL ACTION – LAW NO. 2024-cv-1843-CI

ORDER

AND NOW, this _____ day of _____, 2024, upon consideration of Defendants' Preliminary Objections to the Complaint, and Plaintiff's response thereto, if any, it is hereby ORDERED and DECREED that said Objections are SUSTAINED and this action is dismissed with prejudice.

BY THE COURT:

_____
J.

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DEFENDANTS' PRELIMINARY OBJECTIONS

AND NOW, come Defendants, The Pennsylvania State University Board of Trustees, and Matthew Schuyler, in his official capacity as Chair of the Board, by and through their attorneys, Marshall Dennehey, P.C., and hereby file these Preliminary Objections in response to the Complaint filed against them by Plaintiff, Barry J. Fenchak, and in support thereof aver as follows:

1. On July 18, 2024, Plaintiff initiated this action with the filing of a Civil Complaint.
2. The Complaint names The Pennsylvania University Board of Trustees ("Board") and Matthew Schuyler in his official capacity as Chair of the Board as Defendants.
3. Plaintiff, a current Trustee of the Board, claims Defendants violated certain provisions of the Pennsylvania Nonprofit Corporation Law (including the section entitled "Information rights of a director") when he did not receive certain financial information regarding administrative fees paid related to the management of the endowment for The Pennsylvania State University ("Penn State" or the "University") in the form and manner he has requested.

BACKGROUND

4. Penn State is a nonprofit corporation subject to the Pennsylvania Nonprofit Corporation Law of 1988, 15 Pa.C.S. § 5512. (Complaint, ¶ 4).
5. The Board is the corporate body established by the University's Charter with overall responsibility for the governance and welfare of the University and all the interests pertaining thereto.
6. Plaintiff was elected to the Board in 2022. (Complaint, ¶ 7).

7. In his role as Trustee, Plaintiff has requested information regarding administrative fees paid related to the management of the endowment that he alleges is necessary to fulfill his fiduciary duties to as a Board member. (Complaint, ¶¶ 8-9, 31).

STATEMENT OF ALLEGED FACTS IN PLAINTIFF'S COMPLAINT

8. The Board has delegated University related investment responsibilities to the Penn State Investment Council (PSIC) and to the University's Office of Investment Management (OIM) through its Spending Policy and the Investment Policies for Long Term Investment Pool (LTIP) and Non-Endowed Funds ("BOT Resolution").[1]
9. Penn State's OIM is responsible for administering the day-to-day operation of the University's endowment. (Complaint, ¶2).
10. PSIC is authorized by the Board to administer the spending and LTIP investment policies.[2]
11. PSIC has primary responsibility for directing and overseeing the OIM in investment and management of LTIP.[3]

[1] The Court may take judicial notice of the roles and responsibilities of the Penn State Investment Council (PSIC) and the University's Office of Investment Management (OIM), and the Board Resolution, which respectively appear on the University's official website at: https://oim.psu.edu/sites/oim/files/2024-08/ltip-ips_0.pdf) and https://oim.psu.edu/sites/oim/files/2023-02/WEB%202023%20BOT%20Resolution.pdf. *See Figueroa v. Pa. Bd. of Prob. & Parole*, 900 A.2d 949, 950 n.1 (Pa. Cmwlth. 2006) (taking judicial notice of information found on a party's official website).

[2] *Id.*

[3] *Id.*

12. PSIC acts as a fiduciary for LTIP.[4]

13. Plaintiff reviewed the University's endowment IRS 990 filings from 2008 to 2023 and noticed an increase in the endowment's administrative fees paid to the during 2016 through 2023. (Complaint, ¶ 22).

14. Upon joining the Board in June 2022, Plaintiff requested underlying data for the figures reflected in the IRS 990 filings. For example, Plaintiff sought an itemization of the "Administrative Expenses" for the Endowment for five years prior to him joining the Board. Plaintiff also requested specific information on "[w]hich specific money investment funds/managers" were used, the "[v]alue of assets with each fund/manager," and "[a]dministrative/management/advisory profit share fees paid to each fund/manager each year." (Complaint, ¶ 23, Exhibit A-2).

15. Plaintiff requested such information from Trustees Robert Fenza (then-Vice Chair of the Committee of Finance, Business, and Capital Planning) and David Kleppinger (Vice Chair of the Board). (*Id.*).

16. Plaintiff has made additional, similar requests since 2022, and he claims his requests were either denied or that he was provided with information similar to that set forth in the Form 990. (Complaint, ¶ 24).

[4] *Id.*

17. On June 23, 2023, Shannon Harvey, Director of the Office of the Board and Board Secretary, provided information in response to Plaintiff's request for endowment management fees information, as well as an explanation for what he descried as a "jump in administrative fees paid during the 2016-2023 timeframe." Ms. Harvey stated, "[i]n regards to the increase [in administrative expenses] in 2019, disclosure in prior years had been focused on internal PSU administrative fees, but after discussions with a few peers regarding their similar reporting, the decision was made to include external investment manager fees going forward." (Complaint, ¶¶ 22, 25, Exhibit B-1).

18. Trustee Mary Lee Schneider – then Chair of the Finance and Business Committee of the Board of Trustees – told Plaintiff that she would "be happy to talk to [him] about this" matter; however, the Board was not in a position to provide the requested information in the manner Plaintiff sought. (Complaint, ¶¶ 24-27, Exhibit B-13, *see generally* Exhibit B-21).

19. On May 7, 2024, Board Chair Matt Schuyler and Vice Chair David Kleppinger sent a letter to Plaintiff relating to his request for these materials. (Complaint, ¶ 30, Exhibit B-21).

20. The letter stated, in relevant part, that "[w]hile we welcome all trustees' efforts to prepare for and meaningfully participate in Board proceedings

and fulfill their oversight obligations to the University, your requests go well beyond that. They are unreasonable, beyond that which is objectively necessary for you to discharge your duties as a trustee, seek information that is not maintained/provided in the ordinary course by the University, and therefore overly burdensome to the University and its representatives." (*Id.*).

21. Chair Schuyler's and Vice Chair Kleppinger's May 7, 2024 letter further stated that, "[w]ith respect for University endowment information, you already have been provided with aggregate reporting information from the University's Office of Investment Management (OIM). Many of the investments OIM makes on behalf of the University are in private investment funds offered to the University as a Qualified Institutional Buyer. Consistent with industry practice, these funds request that the University maintain confidentiality (aside from those exercising a fiduciary oversight role) of the funds' investments, operations, and processes, which is why the University has provided to you and others with aggregate portfolio-level information. The Pennsylvania State Investment Council (PSIC), of which you are not a member, is charged with acting as the University's fiduciary for these purposes, providing oversight of the University's portfolio." (*Id.*).

PLAINTIFF'S CLAIMS IN THE COMPLAINT

22. Count I of the Complaint seeks declaratory relief that Defendants have violated certain provisions of the Pennsylvania Nonprofit Corporation Law, specifically 15 Pa. C.S. 5512(a) and (b). (Complaint, ¶ 35).

23. Count II of the Complaint seeks permanent injunctive relief to enjoin Defendants from removing him from the Board and ordering Defendants to refrain from withholding the information Plaintiff has requested as more fully identified in the Prayer of Relief at Paragraph 2. (Complaint, ¶¶ 36-37).

I. PRELIMINARY OBJECTION IN THE NATURE OF A DEMURRER PURSUANT TO RULE 1028(A)(4), PENNSYLVANIA RULES OF CIVIL PROCEDURE, AS TO COUNT I OF THE COMPLAINT

24. Defendants hereby incorporate by reference the averments of Paragraphs 1 through 23 hereinabove as though fully set forth herein.

25. In ruling on preliminary objections in the nature of a demurrer, the trial court is required to accept as true all well-pleaded allegations of material fact and all reasonable inferences deducible from those facts and resolve all doubt in favor of the non-moving party. *Taylor v. Pennsylvania State Corr. Officers Ass'n*, 291 A.3d 1204, 1208 (Pa. Super. 2023).

26. The question presented is whether, on the facts averred, the law says with certainty that no recovery is possible. *Id.*

27. However, "a court need not accept as true conclusions of law, unwarranted inferences, or expressions of opinion." *Bayada Nurses, Inc. v. Comm., Dept. of Labor and Industry*, 8 A.3d 866, 884 (Pa. 2010).

28. The purpose of the Declaratory Judgments Act (the "Act") is to "settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and is to be liberally construed and administered." *Bowen v. Mt. Joy Twp.,* 644 A. 2d 818, 821 (Pa. Cmwlth. 1994) (citations omitted).

29. Yet, an action under the Act "must allege an interest by the party seeking relief ***which is direct, substantial and present*** … and ***must demonstrate the existence of an actual controversy related to the invasion or threatened invasion of one's legal rights***." *Id.* at 108 (emphasis added) (citation omitted).

30. "[T]o have standing to petition for declaratory relief, [a party] must plead facts which establish a ***direct, immediate and substantial injury***." (*Id.*) (emphasis added) (citations omitted).

31. Count I of the Complaint fails to set forth a viable claim for declaratory relief because the alleged harm suffered by Plaintiff, *i.e.* the purported inability to satisfy his fiduciary duties as an individual Board member of Penn State University (not PSIC, the body to which the Board has

delegated fiduciary oversight of the endowment), is not so "direct, immediate, and substantial" to warrant the relief requested in Plaintiff's Complaint.

32. Plaintiff alleges that he has been deprived of the information requested since 2022, yet he fails to identify any **substantial or potentially substantial** harm suffered by the Board and/or University during that time as a result of his inability to the review the requested management fee information in the manner and form he seeks.

33. The information sought by Plaintiff, *i.e.* administrative fees paid related to the management of the endowment, do not materially impact the overall financial health of the endowment.

34. Plaintiff's claim that the administrative fees paid since 2018-2019 are 1-2 basis points higher than prior years does not constitute **substantial harm** to the Board and/or University, especially in light of the fact that the Board Secretary explained to Plaintiff in a June 23, 2023 email that the increase in administrative expenses beginning in 2018-19 was due to "the decision . . . to include external investment manager fees going forward." (Complaint, ¶ 22, Exhibit A-1, Exhibit B-1).

35. Plaintiff does not specifically allege that he has been unable to perform his fiduciary duties to the Board in any capacity based upon his inability to review the requested information in the manner and form he seeks.

36. Plaintiff is a single Board member on a Board comprised of thirty-eight (38) individuals and, even if successful, any impact on the operation of the Board and/or University based upon his individual review of the limited information sought will be minimal at best and unequivocally not substantial, especially in light of the fact that the Board has delegated to PSIC fiduciary oversight of the University's investment portfolio.

37. Count I of the Complaint should therefore be dismissed with prejudice because there has been no substantial harm to Plaintiff in performing his fiduciary duty nor to the Board itself as a result.

II. PRELIMINARY OBJECTION IN THE NATURE OF A DEMURRER PURSUANT TO RULE 1028(A)(4), PENNSYLVANIA RULES OF CIVIL PROCEDURE, AS TO COUNT II OF THE COMPLAINT

38. Defendants hereby incorporate by reference the averments of Paragraphs 1 through 37 hereinabove as though fully set forth herein.

39. An injunction is "an extraordinary remedy that should be issued with caution and only where the rights and equity of the petitioner are clear and free from doubt, and where the harm to be remedied is ***great and irreparable***." *Eagleview Corp. Ctr. Ass'n v. Citadel Fed. Credit Union,*

243 A. 3d 764, 773 (Pa. Cmwlth. 2020) (emphasis added) (citations omitted).

40. In order to obtain permanent injunctive relief, a party must establish the following elements: (1) a clear right to relief, (2) an urgent necessity to avoid an injury that cannot be compensated by damages, and (3) a finding that greater injury will result from refusing, rather than granting, the injunction. (*Id.*) (citations omitted). *See also Mazin v. Bureau of Professional and Occupational Affairs*, 950 A. 2d 382, 389 (Pa. Cmwlth. 2008).

41. Furthermore, "[e]ven where the essential prerequisites of an injunction are satisfied, the court must narrowly tailor its remedy to abate the injury. An injunction that commands the performance of an affirmative act, a mandatory injunction, is the rarest form of injunctive relief and is often described as an extreme remedy. The case for a mandatory injunction must be made by a very strong showing, one stronger than that required for a restraining-type injunction." *Eagleview Corp. Ctr. Ass'n*, 243 A. 3d at 773 (citations omitted).

42. Count II of the Complaint fails to set forth a viable claim for the extreme remedy of permanent injunctive relief – here, in the form of a mandatory injunction requiring the Board to perform an affirmative act by producing

the requested information in the form Plaintiff seeks - because the alleged harm suffered by Plaintiff, *i.e.* the purported inability to satisfy his fiduciary duties as an individual Board member, is not so "great and irreparable" to warrant the relief requested in Count II of Plaintiff's Complaint.

43. The Complaint does not allege what harm or injury, if any, would be suffered by the Board to which the fiduciary duty is owed by Plaintiff.

44. Any potential impact on the operation of the Board and/or University based upon Plaintiff's review of the limited information sought is purely speculative.

45. The information sought by Plaintiff, i.e. administrative fees paid related to the management of the endowment, do not materially impact the overall financial health of the endowment. Moreover, the Board Secretary explained to Plaintiff in a June 23, 2023 email that the increase in administrative expenses beginning in 2018-19 was due to "the decision . . . to include external investment manager fees going forward." (Exhibit B-1).

46. Plaintiff does not specifically allege that he has been unable to perform his fiduciary duties to the Board in any capacity based upon his inability to review the requested information in the manner and form he seeks.

47. Plaintiff is a single Board member on a Board comprised of thirty-eight (38) individuals and, even if successful, any impact on the operation of the Board and/or University based upon his individual review of the limited information sought will be minimal at best and unequivocally not substantial, especially in light of the fact that the Board has delegated to PSIC fiduciary oversight of the University's investment portfolio.

48. Moreover, Plaintiff's claim requesting that Defendants be permanently enjoined from "committing further retaliatory acts" must also be dismissed. (Complaint, ¶ 37).

49. With respect to available relief for a violation of the Pennsylvania Nonprofit Corporation Law of 1988, Section 5512(b) provides, in pertinent part:

> The court shall summarily order the corporation to permit the requested inspection or to obtain the information unless the corporation establishes that information other than the bylaws to be obtained by the exercise of the right is not reasonably related to the performance of the duties of the director or that the director or the attorney or agent of the director is likely to use that information in a manner that would violate the duty of the director to the corporation.

15 Pa. C.S. § 5512(b).

50. Furthermore, "[t]he order of the court may contain provisions protecting the corporation from undue burden or expense and prohibiting the director

from using the information in a manner that would violate the duty of the director to the corporation." §5512(b) (emphasis supplied).

51. Plaintiff's request for relief seeking to enjoin Defendants from committing unknown acts in the future that Plaintiff believes are retaliatory is not relief that can be recovered under the Pennsylvania Nonprofit Corporation Law.

52. Count II of the Complaint should therefore be dismissed with prejudice because any injury suffered by Plaintiff is not sufficiently severe to warrant the extraordinary relief sought, and Defendants cannot be enjoined from committing any acts deemed retaliatory by Plaintiff as a matter of law.

III. PRELIMINARY OBJECTION FOR FAILURE OF THE COMPLAINT TO CONFORM TO LAW OR RULE OF COURT PURSUANT TO RULE 1028(A)(2), PENNSYLVANIA RULES OF CIVIL PROCEDURE

53. Defendants hereby incorporate by reference the averments of Paragraphs 1 through 52 hereinabove as though fully set forth herein.

54. Rule 1028(a)(2) permits a preliminary objection for "failure of a pleading to conform to law or rule of court or inclusion of scandalous or impertinent matter[.]" Pa.R.C.P. 1028(a)(2).

55. "In order to be scandalous or impertinent, 'the allegation must be immaterial and inappropriate to the proof of the cause of action.' " *Breslin v. Mountain View Nursing Home, Inc.*, 171 A.3d 818, 822 (Pa. Super.

2017) (*quoting Common Cause/Pennsylvania v. Commonwealth of Pennsylvania*, 710 A.2d 108 (Pa. Cmwlth. 1998)).

56. The Complaint alleges that "The Penn State Board of Trustees is currently being sued in Centre County Court by Spotlight PA for multiple violations of the Pennsylvania Sunshine Act…" ("Spotlight PA Lawsuit"). (Complaint, ¶ 11)

57. This allegation is immaterial and inappropriate to the claims in the Complaint because there is no violation of the Pennsylvania Sunshine Act alleged by Plaintiff and, therefore, the claims and allegations in the Spotlight PA Lawsuit are not relevant and serve no purpose other than to disparage Defendants.

58. Paragraph 11 of the Complaint must therefore be stricken because it includes scandalous and impertinent matter.

59. The Complaint requests that Defendants be permanently enjoined from "committing further retaliatory acts." (Complaint, ¶ 37).

60. This allegation/request for relief is also scandalous and impertinent because it implies that Defendants have already committed retaliatory acts; however, there is no judicial determination to support that claim, and it is not related to Plaintiff's claim that Defendants violated the Pennsylvania Nonprofit Corporation Law.

61. Paragraph 37 of the Complaint must therefore be stricken because it includes scandalous and impertinent matter.

WHEREFORE, for the reasons set forth herein, and for those reasons set forth in its forthcoming Brief in Support, Defendants, The Pennsylvania State University Board of Trustees and Matthew Schuyler, respectfully request that the Court sustain their Objections and dismiss this action with prejudice as any amendment would be futile.

Respectfully Submitted,

MARSHALL DENNEHEY, P.C.

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DATE: August 7, 2024

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provision of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by: Defendant Board of Trustees of the Pennsylvania State University, and Matthew Schuyler

Signature: */s/ Christopher J. Conrad*
Name: Christopher J. Conrad, Esquire

Attorney No. (if applicable): 202348

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document has been served upon the following known counsel and parties of record this 7th day of August, 2024, **via email and regular mail**, as follows:

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