FILED FOR RECORD BY EMAIL
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IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY

BARRY J. FENCHAK *Plaintiff*, v. THE PENNSYLVANIA STATE UNIVERSITY BOARD OF TRUSTEES, and MATTHEW SCHUYLER IN HIS OFFICIAL CAPACITY AS CHARIMAN *Defendants*.	:	NO. 2024-CV-1843-CI

PLAINTIFF'S REPLY BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISSOLVE THE PRELIMINARY INJUNCTION

Plaintiff, Barry J. Fenchak, Trustee of The Pennsylvania State University Board of Trustees, by and through his undersigned counsel, hereby files this Brief in Opposition to Defendants' Motion to Dissolve the Preliminary Objections, and in support thereof, avers as follows:

I. PROCEDURAL HISTORY OF THE CASE

Plaintiff, Barry F. Fenchak ("Plaintiff") commenced the action on July 16, 2024 with the filing of a civil complaint (the "Original Complaint"). The Original Complaint sought declaratory relief finding that Defendants have failed to provide information necessary for Plaintiff to exercise his role as Trustee pursuant to 15 Pa. C.S. §5512(a). In the Original Complaint, Plaintiff also asked this Court to compel Defendants to provide the requested information, and to permanently enjoin Defendants from committing further violations of 15 Pa. C.S. §5512(a) and from "committing further retaliatory acts against Plaintiff, including but not limited to removal from the Board." On August 7, 2024, the Defendants filed preliminary objections to the Original Complaint. In turn, Plaintiff filed an amended complaint (the "Amended Complaint") on or about August 27, 2024. On September 16, 2024, Defendants filed preliminary objections to the Amended Complaint, however, Defendants later withdrew their objections and on or about February 21, 2025, and filed their Answer with New Matter to the Amended Complaint. During the pendency of these proceedings the parties filed various motions, including but not limited to Plaintiff's Emergency Motion for Preliminary Injunction, which was granted by this Honorable Court on or about October 9, 2024. Defendants' filed the instant Motion to Dissolve Preliminary Injunction on or about February 27, 2024.

II. COUNTER STATEMENT OF FACTS

Plaintiff, Barry J. Fenchak, is an elected member of the Board of Trustees of The Pennsylvania State University serving in that capacity since his election by the alumni in June of 2022. *See* Amended Complaint, ¶15. He is one of 36 voting members of the Board of Trustees. The Board of Trustees is a nonprofit corporate body that serves as the governing body of Penn State, and Matthew Schuyler served as the Chairman of the Board at the time of the filing of this suit. The University's Board of Trustees is the corporate body established by the University's Charter and is responsible for overseeing, managing, and maximizing benefits of this endowment. *See* Amended Complaint, ¶ 13 The Board delegates day-to-day management of the University President with certain reserved powers set forth in the Bylaws. *See* Amended Complaint, ¶14. According to the Defendants, the Board of Trustees has delegated various responsibilities and day-to-day operations concerning the University's investments but it is ultimately the Board of Trustees that "maintains ultimate oversight of the University's investment assets."[1]

The Board of Trustees is responsible for the governance and welfare of PSU and all the interests pertaining thereto. In the exercise of its responsibilities, the Board of Trustees delegates day-to-day management and control of PSU to the university

[1] https://oim.psu.edu/sites/oim/files/2024-08/ltip-ips_0.pdf

President, with certain reserved powers as set forth in the PSU's bylaws.[2] Beginning in June of 2022, Plaintiff in his capacity as a Trustee, began requesting certain financial information from the Defendants concerning the administrative fees *and* related information concerning the net return of the endowment (the "initial request"). *See* Amended Complaint, ¶ 57. The reported value of the endowment in 2023 was approximately $4.57 Billion. *See* Amended Complaint, ¶ 10. The endowment provides funding for numerous university core missions, including scholarship, faculty retention, and financing of physical assets, and directly impacts those missions. *See* Amended Complaint, ¶ 39.

For over two (2) years Plaintiff has continued to follow up on his initial request. *See* Amended Complaint, ¶ 61. In turn, the Defendants have repeatedly refused to provide Plaintiff with the information sought in his initial request. *See* Amended Complaint, ¶¶ 60-79. Plaintiff subsequently made a second series of requests for information to Defendants (the "second request"). Plaintiff's second request concerned information relating to a massive ticketing deal that the University purportedly entered into with Elevate, a ticketing sales agency. *See* Amended Complaint, ¶¶ 84 – 102. According to reports, the contract (the "Elevate contract"), has the potential to generate up to $1 billion in revenue over

[2] https://trustees.psu.edu/purpose

the course of the ten (10) year deal. *See* Amended Complaint, ¶ 86. Moreover, the Elevate contract has been promoted by the University as a vehicle to fund, in part, a $700 million renovation of Beaver Stadium, and more generally as a means to ensure the economic stability of the University's athletics department. *See* Amended Complaint, ¶¶ 87-88. Despite initially being told he would be provided with this information, Plaintiff was later informed by the Defendants that they would not be providing Plaintiff with the Elevate contract and related information. *See* Amended Complaint, ¶¶ 96-103.

In February of this year the Defendants produced the endowment information that Plaintiff had been requesting for over two (2) years). The Defendants also produced the Elevate contract in conjunction with the endowment disclosures.

Despite producing this information to Plaintiff, the Defendants have maintained that they were not required to do so Plaintiff, and accordingly, they have opposed *an award for reasonable attorney's fees*. Furthermore, they have continued to oppose any injunctive relief enjoining them from taking any further retaliatory action against him.

III. COUNTER STATEMENT OF QUESTIONS INVOLVED

A. Should this Court's preliminary injunction be dissolved prior to the resolution of the underlying litigation in this matter?

Suggested Answer: No. This Court's preliminary injunction should not be dissolved prior to the resolution of all issues raised and relief sought in this matter that involves an active and sitting Trustee of the Pennsylvania State University

IV. ARGUMENT

Defendants' motion to dissolve this injunction are misplaced for the reasons outlined below. A trustee's right to access information is "*absolutely beyond dispute*." *Wilson v. Bd. of Directors of City Trusts*, 188 A. 588, 594 (Pa. 1936) (emphasis added). What the Defendants' with the Court to read is that a Trustee with less than two months left on his term is not entitled to information he needs to perform his fiduciary duty. The claim because they offered him "some" information that that should suffice, make the case moot and entitle them to a dissolution of the injunction.

a. Legal Standard

To dissolve an injunction, Defendant must show a change in the circumstances and file a motion to vacate, dissolve or modify the injunction or otherwise get rid of the injunction. *Nether Providence Twp. v. Coletta*, 133 A.3d 86, 91 (Pa. Commw. Ct. 2016); *see also Tamagno v. Waiters & Waitresses Union, Loc. No. 301*, 96 A.2d 145, 146 (Pa. 1953) ("An injunction may be modified or dissolved upon a showing of changed circumstances that have occurred since the issuance of the injunction.").

Defendant cannot do that here as explained below. Defendant's argument contains a myriad of mistaken legal application in this case. The seminal anchor that disabuses their legal position of accuracy is that Mr. Fenchak is a current – and sitting – Trustee with all the powers vested in a Trustee. They wish this Court to prematurely dissolve this injunction because Trustee Fenchak's term is winding down. As a sitting Trustee, he has not only the opportunity to – but the legal obligation – to fulfill his fiduciary duty. That duty does not expire until his term does. They try to convince this Court that because, after strenuous litigation, they provided him with "some" information that the injunction should be dissolved, and the case is moot.

Defendants' remind the Court that the Preliminary Injunction was based, in part, on the conclusion that Fenchak "raises important claims in his underlying lawsuit that may be foreclosed once he is removed from the Board." Order at 8. And go on to (mis)state that "[T]hat concern has now been mooted because Mr. Fenchak has the documents to which he claimed a right of access. Therefore, the preliminary injunction should be dissolved."

The Defendant's wish for this Court to look in the rear-view mirror and hold that Trustee Fenchak received documents to which he had a right of access, failing to complete the picture: he has a right to access documents he believes are necessary to fulfill his fiduciary duty. These concerns are not resolved nor are they moot. Trustee Fenchak deserves and is legally entitled to have all of his issues legally

revolved. Moreover, even in the May 9, 2025 Board meeting, Mr. Fenchak has had questions and has sought information about this day's presentation necessary for the fulfillment of his fiduciary duty. As the Board's own Bylaws establish:

Section 2.03(c) of the Amended Bylaws provides:

> Meetings and Other Responsibilities. Trustees must prepare diligently, attend required meetings of the Board (as set forth in Section 2.04), and assigned committees, and **participate constructively** in all Board of Trustees meetings and related activities by reading the agenda and supporting materials.

Here, Defendant's wish for Mr. Fenchak to go quietly into the night – and is asking this Court to ignore the Board's own Amended Bylaws for "**participate constructively.**" To dissolve this injunction without a full resolution also precludes Mr. Fenchak from receiving information that may be necessary to complete his duties and would require him to seek additional legal relief if he were denied. The Board fails to accept the Supreme Court's decision holding that a Trustee as a right to access that is beyond dispute. A trustee's right to access information about trust property is "*absolutely beyond dispute*." *Wilson v. Bd. of Directors of City Trusts*, 188 A. 588, 594 (Pa. 1936) (emphasis added). The Court reasoned that "to withhold the means of knowledge concerning that property is to withhold the power to exercise the duty of preservation." *Id.* at 594 (citing *Brown v. Brancato*, 184 A. 89, 91 (Pa. 1936)). Further, the Commonwealth Court has held that a public board

member "has the right to study, investigate, discuss, and argue problems and issues prior to the public meeting at which the [board member] may vote." *Palm v. Center Twp.*, 415 A.2d 990, 992 (Pa. Commw. Ct. 1980).

Defendants' further argue that the basis for granting the preliminary injunction has been mooted because they have given him access to the documents that he sought in Count I of the Amended Complaint. *See* Defendants' Motion to Dissolve Preliminary Injunction, ¶¶ 64-66.

Defendant's real meaning in their legal presentation, here, again *supra*, is that they wish for the Court to dilute the power of a Trustees' position merely because he or she has 60 days left of term. A Trustee is entitled to information throughout his term and the mootness argument is a thinly veiled attempt to perform a magic trick to say, "Trustee Fenchak is out the door soon so let's ignore his requests."

While it is true that the Defendants did provide the endowment and Elevate documents to Plaintiff – after litigation - the Defendants are mistaken in their belief that these disclosures render the Court's bases for the injunction moot. In this action Plaintiff has sought additional legal and equitable relief that has not been granted by the Defendants' disclosures of the endowment and Elevate information.

First, Plaintiff has sought an award of attorney's fees as a result of dilatory, obdurate and vexatious conduct of the Defendants. *See* Amended Complaint, ¶¶ 130-133. Moreover, Plaintiff seeks injunctive relief requiring the Defendants not

only to provide the requested information to him and other trustees, but also enjoining them from taking further retaliatory action against him. *Id.*, ¶¶ 134-169.

This Honorable Court has acknowledged that granting the injunction would "serve to shield Plaintiff from the immediate and irreparable harm that would be caused by his removal from the Board, and will allow the parties more time to fully litigate the issues involved in this matter." See Opinion and Order of this Court entered on October 9, 2024, P. 7. "If it is not granted, he will be removed from his position on the Board and will be unable to effectively defend his claims related to July 19, 2024 and prosecute the underlying lawsuit in this case." *Id.*

As stated above, Plaintiff seeks attorney's fees as a result of the Defendants' repeated delays in producing the information to Plaintiff. There is precedent for such an award for the Defendants' wrongful evasion of the mandates of 15 Pa. C.S. § 5512. In re Nonprofit Corporation Trustees to Compel Inspection of Corporate Information, 157 A.3d 995 (Pa. Cmwlth. 2017).

Defendant's argue that refusing to dissolve the injunction (i) deprives the Board of its rights to manage its own affairs; and (ii) presumes that the Board will act in bad faith, in violation of the business judgment rule, *New Founds.*, 182 A.3d at 1067. A conclusory statement that the Board cannot manage its own affairs does not meet the evidentiary requirement necessary to dissolve this. Moreover, as to (ii) regarding a presumption of bad faith in violation of the business judgment rule, the

record is replete with examples of the Board's disdain for Mr. Fenchak. This motion is yet another pre-text to cut Mr. Fenchak's term shorter than the Board wishes to deal with him, which is not permissible under law or bylaw, or even a standard of fair play.

The Defendant's disclosure of the information well after Plaintiff's request for such information, and after commencement of this lawsuit, does not absolve them of years of obfuscation and delays. Nor does their late disclosure of this information render his request for attorney's fees or request for injunctive relief moot. Plaintiff must be afforded an opportunity to fully litigate these issues and his removal from the Board will hinder his ability to do so."

V. CONCLUSION

For all the reasons set forth herein, Plaintiff, Barry J. Fenchak, respectfully requests that this Honorable Court deny Defendants' Request to Dissolve the Preliminary Injunction.

Respectfully submitted,

OBERMAYER REBMANN MAXWELL & HIPPEL LLP

By: */s/ Terry L. Mutchler*
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Date: May 9, 2025

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions 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.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Terry Mutchler, hereby certify that on this date a true and correct copy of the foregoing document was served upon the following counsel for the Defendants, via email:

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