

IN THE COURT OF COMMON PLEAS OF
 CENTRE COUNTY, PENNSYLVANIA

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

NOTICE TO DEFEND

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiffs. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER.

IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE:

Centre County Bar Association
 192 Match Factory Pl.
 Bellefonte, PA 16823
 814-548-0052

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AMENDED COMPLAINT

NOW COMES Plaintiff, Barry J. Fenchak, by and through his undersigned Transparency counsel, Obermayer Rebmann Maxwell & Hippel LLP, and hereby files this Amended Complaint against the above-captioned defendants, and in support thereof avers as follows:

INTRODUCTION

When an individual has the privilege of joining The Pennsylvania State University's Board of Trustees to oversee a nearly \$5 Billion endowment, that Board member is handed a copy of the bylaws, not a blindfold. Yet, here, the University asks that Trustee Plaintiff to take a "trust me" approach and refuses to provide critical information to consider and weigh. In essence, the University asks the Board members to vote on the welfare of this endowment wearing a blindfold. In this First Amended Complaint, Plaintiff rejects this approach and seeks relief as follows.

PARTIES

1. Plaintiff, Barry J. Fenchak (“Plaintiff”) is an adult individual residing at 596 Devonshire Drive, State College, PA 16803.

2. Defendant, Pennsylvania State University Board of Trustees (the “Board of Trustees” or collectively, “Defendants”) is a nonprofit corporate entity with a principal place of business located at 201 Old Main, University Park, PA 16802.

3. Defendant, Matthew Schuyler (“Chairman Schuyler” or collectively, “Defendants”), is sued solely in his official capacity as Chairman of the Board of Trustees.

JURISDICTION AND VENUE

4. This Honorable Court has subject matter jurisdiction in this matter pursuant to 42 Pa. C.S. § 931(a), and personal jurisdiction over the defendants pursuant to 42 Pa. C.S. § 5301(a).

5. Venue is proper in this Court pursuant to Pa. R. Civ. P 1006 and Pa. R. Civ. P. 2103.

STATEMENT OF FACTS

6. The Pennsylvania State University (“Penn State” or the “University”), is a public state-related land grant research university founded in 1855 with 24 campuses across the Commonwealth.

7. The University was originally chartered by an Act of the Pennsylvania Legislature on February 22, 1855 as the “Farmer’s High School of Pennsylvania.”

8. In 1862, Congress passed the Morrill Act, known as the Land Grant Act, and it was adopted by the Pennsylvania General Assembly a year later.

9. In 1863, Penn State was designated as a land grant institution obtaining all the benefits of the Morrill Act.

10. In 2023, the University's endowment was valued at \$4.57 Billion.
11. The student population is 87, 903 students in that same year.
12. The University is governed by a Board of Trustees.
13. 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 explained in detail below.
14. The Board delegates day-to-day management of the University President with certain reserved powers set forth in the Bylaws.
15. 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 2022.
16. Plaintiff is currently serving a three-year term, which is set to expire on June 30, 2025.
17. Plaintiff is one of nine (9) voting members of the Board elected by the alumni serving on the thirty-six (36) member Board.
18. Plaintiff's position on the Board is uncompensated.
19. Plaintiff regularly attends Board meetings and is active in discussions, and speaks openly, freely, and candidly in accordance with the "expectations of membership" imposed by the Board's Standing Order VIII.¹
20. Defendant Board of Trustees is a nonprofit corporate body that serves as the governing body of Penn State.
21. According to the Board of Trustees, it's origin and purpose is summarized as

¹ <https://bpb-us-e1.wpmucdn.com/sites.psu.edu/dist/7/64540/files/2019/03/Standing-Orders-2020-September.pdf>

follows:

“The Pennsylvania State University was originally chartered by an Act of the Legislature of the Commonwealth of Pennsylvania on February 22, 1855 as the “Farmers’ High School of Pennsylvania”. The Morrill Act (also known as the Land Grant Act), passed by Congress in 1862, was accepted by the Pennsylvania Legislature in 1863 and Penn State was designated as the institution in Pennsylvania to receive the benefits of the Morrill Act. Today, the University, as the Commonwealth’s land grant university, exists as a multi-campus public research university that educates students from Pennsylvania, the nation and the world, and improves the well-being and health of individuals and communities through integrated programs of teaching, research, and service.

*The Board of Trustees of the University 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. In the exercise of its responsibilities, the Board of Trustees delegates day-to-day management and control of the University to the President, with certain reserved powers as set forth in the University’s **Bylaws**. ”²*

22. Moreover, the Board of Trustees claims to govern with a “holistic approach”

and seeks to advance the institution while “acting in the best interests” of the University:

*“As Penn State’s governing body, the Board of Trustees takes a holistic approach to guiding goals, policies, and procedures as well as reviewing and approving University budgets. In partnership with the president, the board seeks to advance the institution while acting in the best interests of the University community. In the exercise of its responsibilities, the board delegates day-to-day management and control of the University to the president, with certain reserved powers as set forth in the University’s **bylaws**.*

The board comprises thirty-six voting members and two ex-officio non-voting members—the President of the University and the Governor of the Commonwealth of Pennsylvania. Members represent various entities including, but not limited to, Pennsylvania county agricultural societies, business and industry, students, and faculty.”³

23. In this Commonwealth both the legislature and the courts have long favored liberal and open access of corporate records to directors.

24. In 1912, the Supreme Court of Pennsylvania recognized this by ruling that a board member had “absolute” and unfettered access to corporate records as discussed in detail below. Moreover, the Court held that that assessment of records is solely held by the individual Trustee – not the Board as a whole. *Machen v. Machen & Mayer Electrical Mfg. Co.*, 85 A.

² <https://trustees.psu.edu/purpose/>

³ <https://trustees.psu.edu/>

100 (Pa. 1912).

Scope of Powers

25. Decades ago, the legislature enacted legislation delineating the permissible scope of powers, duties, and safeguards for every nonprofit corporation in the Commonwealth of Pennsylvania. 15 Pa. C.S. § 5501 *et seq.*

26. The Defendants are unquestionably subject to the mandates of this law. *See In re Nonprofit Corporation Trustees to Compel Inspection of Corporate Information*, 157 A.3d 995 (Pa. Cmwlth. 2017).

27. Subsection 5512(a) of the statute grants Plaintiff, as Trustee, an explicit right to inspect the University's books, records and documents, and to receive information regarding the assets, liabilities and operations of the University:

“(a) General rule.--To the extent reasonably related to the performance of the duties of the director, including those arising from service as a member of a committee of the board of directors, a director of a nonprofit corporation is entitled:

*(1) in person or by any attorney or other agent, at any reasonable time, to inspect and copy corporate books, records and documents and, in addition, to inspect, and receive information regarding, the **assets, liabilities and operations** of the corporation and any subsidiaries of the corporation incorporated or otherwise organized or created under the laws of this Commonwealth that are controlled directly or indirectly by the corporation; and*

(2) to demand that the corporation exercise whatever rights it may have to obtain information regarding any other subsidiaries of the corporation.” 15 Pa. C.S. § 5512(a) (Emphasis added).

28. The courts of this Commonwealth have routinely viewed the disclosure requirements set forth in Section 5512 in a broad and expansive light. *See In re Nonprofit Corporation Trustees to Compel Inspection of Corporate Information*, *supra* (Holding that trustees were entitled to recover attorney's fees in enforcement action where trial court found that investigative and litigation materials fell within the scope of “assets, liabilities and

operations” of the University).

Supreme Court ruling Granting Unqualified Access of Corporate Records

29. For well over a century the courts of this Commonwealth have held that a board of directors cannot deprive an individual director of the right to inspect its books and documents. *Machen v. Machen & Mayer Electrical Mfg. Co.*, 85 A. 100 (Pa. 1912).

30. The Supreme Court’s rationale for this rule is as follows: “the duty to manage the corporation rests alike upon *each and every one of the directors*, and therefore *it is the right of each director* to inspect its books and documents.” *Id.*, at 102 (Emphasis added).

31. Moreover, the Court recognized that a director’s right to inspect the books is unqualified since “the duties of a director require him to be familiar with the affairs of the company in order that he may have sufficient information to enable him to join intelligently in the management of the concern. The protection of the interests of the company, therefore, require that *his right to an inspection of the books be absolute*.” *Id.*, at 104 (Emphasis added).

32. The Pennsylvania Supreme Court has similarly held that 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).

33. As the Court has reasoned: “to withhold the means of knowledge concerning that property is to withhold the power to exercise the duty of preservation.” *Id.* at 594 (citing its prior holding in *Brown v. Brancato*, 184 A. 89, 91).

34. Similarly, 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).

35. Since Plaintiff's election to the Board of Trustees he has requested certain information that he believes is necessary to: familiarize himself with important affairs of the University; intelligently render decisions necessary to manage the University; and otherwise faithfully discharge his duty as trustee to protect the interests of the University.

36. In plain language, Plaintiff needs this information to vote in accordance with this fiduciary duties in his role as Trustee of the \$5 billion endowment. He is entitled to all of it per *Machen* as well as bylaws and corporate code.

37. Plaintiff has made these requests for information in good faith and in accordance with his legal duty to act in the best interest of the University.

38. As discussed in further detail below, the information requested by Plaintiff concerns matters relating directly to the endowment, investment and spending policies, and other operations affecting critical interests of the University.

39. The endowment of the Pennsylvania State University is the largest asset the university owns and controls. It is valued at approximately \$5 billion dollars. The endowment provides funding for numerous university core missions, including scholarship, faculty retention, and financing of physical assets, and directly impacts those missions.

40. Accordingly, the requested information is of critical importance to a Trustee such as Plaintiff.

41. While the Board of Trustees has delegated various responsibilities and day-to-day operations concerning the University's investments, it is ultimately the Board of Trustees that "maintains ultimate oversight of the University's investment assets."⁴

42. "Day-to-day operations" does not mean ceding control or oversight of \$5 Billion to staff.

⁴ https://oim.psu.edu/sites/oim/files/2024-08/ltip-ips_0.pdf

43. The Board is responsible for oversight of the endowment and for setting the investment and spending policies of the endowment and other long-term investments of the University. Overseeing the efficacy and efficient operation of the endowment is the responsibility – and duty - of the Board.

44. The day-to-day operations of the endowment are administered by the Office of Investment management ("OIM").

45. The OIM is governed by the Board and submits policies and practices for achieving investment and spending objectives to the Penn State Investment Council ("PSIC") and to the Board for their approval.

46. The PSIC consists of fourteen (14) members, and they approve the investment managers who are paid administrative fees to invest the endowment funds.

47. The PSIC must meet at least once a year and report to the full Board of Trustees.

48. Their annual report is a broad-brush overview with little detail or contextual information. It provides headlines but not the full story.

49. Per official policy of the PSIC – and unlike the Board of Trustees – meetings of the PSIC are not subject to the state’s Sunshine Act, 65 Pa.C.S. §§ 701-716, but rather “are only open to PSIC members and invited guests.”⁵

50. Thus, the discussions, decisions and underlying financial information at these meetings is not generally available, nor it is provided to the Trustees in detail.

Requests for Information

51. Shortly after his election to the Board of Trustees in the summer of 2022, Plaintiff reviewed Penn State endowment IRS 990 filings from 2008 to 2023 to fully

⁵ https://oim.psu.edu/sites/oim/files/2024-08/ltip-ips_0.pdf

understand the scope of the endowment he was responsible for as a newly elected Trustee.

52. What he found was extremely concerning to him given his fiduciary duty as a Trustee.

53. Until recently, the PSIC website included a policy stating that endowment administrative expenses should be limited to no more than 75 basis points per year, which means 0.75% of the amount being invested.

54. Within the investment industry, 75 basis points would generally be considered within a reasonable limit. However, the steep tripling of the administrative expenses was cause for alarm and the need for further probing.

55. Prior to 2016, Penn State's administrative expenses averaged 0.73% (73 basis points) per year, or just under the guideline maximum.

56. However, Plaintiff's jaw dropped when he saw the jump in administrative fees paid during the 2016-2023 timeframe, as those expenses (as reported on Penn State's IRS Form 990) began to rise dramatically in 2017, more than tripling the rate within three years.

57. In light of such a significant jump in said expenses, in June of 2022 Plaintiff, through prescribed channels, requested: access to the specific data and items that totaled to the aggregated figures listed on the IRS Form 990s administrative fees paid reported by Penn State, and other related information concerning the net return (the "initial request").

58. Upon information and belief, the data and information requested by Plaintiff has been shared by the PSIC with other Trustees on the board.

59. Plaintiff's initial request was communicated to Trustees, Robert Fenza, vice chair of the Finance Business and Capital Planning Committee, and David Kleppinger, Vice-Chair of the Board.

60. Mr. Fenza verbally denied Plaintiff's initial request during the Board of Trustees

orientation session in June of 2022, stating that: “You don’t need it. You need to mind your business and trust others.”

61. Over the next two years, Plaintiff has repeatedly made renewed requests for the information sought in his initial request for without this information he is hamstrung from performing his duties as a Trustee

62. Plaintiff’s requests were also communicated during numerous email exchanges by and between Plaintiff and fellow Trustees of the Board, including Shannon Harvey, Sara Thorndike, Robert Fenza, Chairman Schuyler, and Mary Lee Schneider.

Board Responses to Requests for Information

63. On or about February 16, 2024, during an in-person meeting at the Hintz Family Alumni Center, Trustee Mary Lee Schneider, then serving as the Vice Chair of the FBCP Committed, issued a verbal denial to Plaintiff’s repeated requests for the information, stating that: “*you will never be given that information. That is my decision and I will make sure you will never get it.*”

64. Plaintiff responded to Ms. Schneider’s verbal denial by indicating that he wished to confirm their conversation by sending an email to her.

65. Ms. Schneider responded to Plaintiff by admitting that she “*won’t get it. I’ve blocked your emails.*”

66. Ms. Schneider’s admission that she, as the decision maker for the Board, had blocked all emails from Plaintiff, demonstrates the Defendants’ blatant disregard for their own bylaws, and more importantly, their lawful duties under 15 Pa. C.S. § 5512(a).

67. In response to Ms. Schneider’s verbal denial, Plaintiff sent an email to Ms. Schneider, with copies to the entire Board, including Chairman Schuyler, memorializing the details of their conversation.

68. On or about March 5, 2024, Plaintiff submitted in writing, another follow-up request to the Board for the information.

69. On March 7, 2024, the Board's secretary, Shannon Harvey, acknowledged receipt of Plaintiff's written request for information and proposed a response to same by March 12, 2024.

70. Pursuant to 15 Pa. C.S. § 5512 required the Board to disclose the information to Plaintiff within two (2) days of his request.

71. The Board of Trustees, consistent with its prior pattern of delay and obfuscation, failed to disclose the information to Plaintiff by March 12th.

72. On March 18, 2024, having received no response from Defendants, Plaintiff sent another follow up email to Trustee Schuyler and President of the University.

73. Later in the day Trustee Fenchak received an email reply from Board Secretary Shannon Harvey which, once again, contained no substantive details but rather aggregated and therefore meaningless information.

74. Once again, the Board failed to provide requested information; Plaintiff did not request aggregated information.

75. Failure by the Board to comply with its statutory duties under 15 Pa. C.S. § 5512 prevents him from performing an assessment of any of the concerning issues relating to the endowment; asset selection; investment advisor performance; and/or investment advisor fees.

76. On or about April 29, 2024, Plaintiff sent follow up to Defendants in writing, reiterating his initial request for information and proposing a reasonable and simple format in which it could be provided to him.

77. Plaintiff's goal has been to receive information; not litigate. But the Board's action in repeatedly rebuffing and thwarting him left him no option.

78. On or about May 7, 2024, Plaintiff received correspondence from Defendants in

which they again denied his request for information.

79. In their response, Defendants throw a mixed bag of excuses at Plaintiff, including that the request is: “unreasonable”; “beyond that which objectively necessary”; “confidential”; and generally that other parties are responsible for oversight of the endowment.

"While we welcome all trustee's efforts to prepare for and meaningfully participate in Board proceedings and fulfil 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.

With respect to your request for University endowment information, you have already been provided with aggregated 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 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. In addition to PSIC's oversight role, the University's investment reporting is audited by an external auditor and each of the commingled fund investments held by the University are audited by an external auditor hired by the firms offering the funds. In light of the foregoing, it is our considered judgment that the further information you request is beyond that which is necessary to discharge your responsibilities as a trustee."

80. This response is direct contradiction not only to 15 Pa. C.S. § 5512 but to the Supreme Court of Pennsylvania decision in *Machen* that a Trustees right “to an inspection of the books be absolute.” *Machen v. Machen & Mayer Electrical Mfg. Co.*, 85 A. 100 (Pa. 1912).

81. *Machen* serves to eviscerate the Board’s position that it gets to spoon-feed pureed baby food to the 36-Member Board while hiding the meat of the financial and other workings from those same Members.

82. Moreover, common sense dictates that a Trustee of a \$5 billion endowment responsible for the education and welfare of 87,903 students as of 2023 be given **all** information

he or she believes necessary to perform their duties.

83. Subsequent to the Defendants' March 7th final denial to date of the initial request for information, Defendants denied yet another request for information made by Plaintiff (the "Elevate request").

Elevate Contract: Second Request for Information

84. The second request for information concerned the University's award of a massive contract to Elevate, a ticketing sales agency, relating ticketing sales for Penn State football games, and other university sports.⁶

85. The Plaintiff cannot provide specific and further details to this Court on the contract with Elevate (the "Elevate contract") because the Plaintiff, in his role as Trustee, does not have a copy of the Elevate contract, his requests to review the Elevate contract have been denied, and to date the Board has not voted on the Elevate contract.

86. According to reports, the Elevate contract, has the potential to generate up to \$1 billion in revenue over the course of the ten (10) year deal.⁷

87. The Elevate contract has been promoted by the University as a vehicle to fund, in part, a \$700 million renovation of Beaver Stadium.⁸

88. This revenue stream has also been trumpeted by University officials as a means to ensure the future economic stability of the athletics department.

89. Plaintiff's second request for information was first communicated to Defendants during a Board meeting on April 24, 2024.

⁶ <https://venuesnow.com/elevate-signs-massive-penn-state-ticketing-deal/#:~:text=Penn%20State%20University%20has%20signed,sources%20familiar%20with%20the%20project.>

⁷ *Id.*

⁸ <https://www.si.com/college/pennstate/football/penn-state-s-new-ticketing-contract-could-be-massive-report-says-01j4sc6tsy8t>

90. During discussions concerning the University's renovations of Beaver Stadium, Vice President of Athletics, Pat Kraft, and fellow board Trustee, Sara Thorndike, disclosed that an agreement was "pending" with Elevate for the ticketing arrangement.

91. Despite being a Trustee of the Board, Plaintiff was unaware of any negotiations and/or pending agreements with Elevate prior to this April 24th disclosure during the Board meeting.

92. In light of the enormity of this potential agreement with Elevate, Plaintiff requested information outlining the proposed terms of the Elevate agreement.

93. In response to Plaintiff's request for this information, Pat Kraft promised that Plaintiff would be provided with the information, stating: "you bet."

94. That same day, Plaintiff memorialized his request for the Elevate information by transmitting an email to Mr. Pat Kraft and Board Trustee, and Chair of the FBCP Committee, Robert Fenza.

95. On or about May 6, 2024, having received no response from Pat Kraft or Trustee Robert Fenza, Plaintiff sent another follow up email requesting "the contract parameters" of the Elevate deal.

96. On or about May 7, 2024, Plaintiff received correspondence from Chairman Schuyler and Trustee David Kleppinger, indicating that Plaintiff's request for the Elevate contract "is not objectively or reasonably related to your duties as a trustee. Additional information regarding Elevate will be provided to all trustees in the ordinary course."

97. On or about May 28, 2024, having received no update from Defendants on the Elevate contract, Plaintiff sent an email to Chairman Schuyler and Trustee Kleppinger inquiring when such information would be shared with the rest of the board.

98. On or about July 15, 2024, more than two (2) months since the Defendants'

promise to disclose the terms of the Elevate contract in the “ordinary course,” Plaintiff again wrote to Defendants and requested an update on the Elevate deal and a copy of any executed contract(s).

99. That same day, Trustee Mary Lee Schneider (now serving as Chair of the Finance Committee) acknowledged that the Elevate contract was executed, however, Plaintiff would not be receiving a copy of the contract as:

“The contract itself contains a confidentiality provision so that both Penn State and Elevate can safeguard the competitive terms and conditions contained therein. Given this, we will not be sharing copies of the executed contract. In addition, this level of detail is not reasonably or objectively necessary to your role as a trustee.”

100. The Board of Trustees acts as a whole. Therefore, one Trustee does not have authority or more weight than another in voting.

101. By refusing to share the details of a \$1 Billion contract, a few select Trustees have taken a “just trust us” approach and are, in essence, asking Trustees to vote blindly in direct contravention of their fiduciary duty.

102. On or about August 16, 2024, Plaintiff sent one last email to Defendants, renewing his request for the Elevate contract, which at this point in time was fully executed and binding on both parties.

103. On or about August 20, 2024, Chairman Schuyler and Trustee David Kleppinger sent written denial of Plaintiff’s Elevate request, stating:

“We write in response to your August 6, 2024 request for the University’s agreement with Elevate.

On multiple occasions, including April 18, 2024 and May 2, 2024, all trustees were provided with detailed information about the confidential financial guarantees and revenue share provision in the proposed arrangement with Elevate. Questions were posed by trustees and answered by University administrators regarding this information, as well as related to the reference checks conducted to confirm Elevate bona fides. As you know, the Board has received and will continue to receive regular updates on the Beaver Stadium renovation project including information on ticket/seat sales.

While we welcome trustees' efforts to prepare for an meaningfully participate in Board proceedings and fulfill their oversight obligations to the University, your request for this document is unreasonable, beyond that which is objectively necessary for you to discharge your duties as a trustee, and seeks information the University is not able to share due to legal obligations it has to Elevate. Furthermore, your repeated violations of your confidentiality obligations have created risk for the University that inform our decision not to provide the contract to you.

Under the terms of the University's agreement with Elevate, disclosure of the Agreement within the University is contractually restricted to those individuals who have a need to know such information in connection with the University's duties and obligations under the Agreement. In other words, disclosure of the Agreement within the University is limited to those persons tasked with carrying out the obligations in the Agreement including Penn State Finance operations that support those obligations.

Additionally, and despite your mischaracterization that such claims of confidentiality are "specious," the Elevate Agreement, and the framework of the Agreement itself, contains commercially sensitive information that Elevate has sought to protect. Your prior confidentiality breach related to Elevate – your disclosure of the existence of a confidential letter of intent between the University and Elevate in a public meeting of the Board in May 2024 – was raised by Elevate as a significant concern. Further sharing of confidential information by you could damage the University's relationship with Elevate.

We are available to discuss further should you wish to do so.

104. Chairman Schuyler's response is both split-tongued telling, and troublesome.

105. Telling, that on one hand Chairman Schuyler acknowledges Plaintiff's duties as Trustee to "meaningfully participate in Board meetings" and fulfill his "oversight obligations to the University," and yet on the other hand demonstrates his belief that Defendants have the authority to pick and choose which information Plaintiff can receive in his role as a Trustee.

106. The Penn State Board of Trustees - or any Board of Trustees in this Commonwealth – should not operate as a buffet-style of information; with only select information being given to certain Board Members. *Machen v. Machen & Mayer Electrical Mfg. Co.*, 85 A. 100 (Pa. 1912). Each Trustee, as dictated by the Supreme Court, has a right to all information THE TRUSTEE feels he needs – not what the Board says he needs.

107. When joining the Board of Trustees of this University, Board Members are handed Bylaws, not blindfolds.

108. Given the enormous amount of revenue at stake in the Elevate contract, and its direct ties to another substantial asset of the University (i.e. renovation of Beaver Stadium) it is inescapable that Plaintiff's second request for information implicates the keystones of 15 Pa. C.S. § 5512: the "assets, liabilities, and operations" of Penn State.

Retaliation for Seeking Necessary Information

107. Moreover, Plaintiff asserts that in response to his efforts to obtain even the most basic information of the Board, the Board has taken action to stem his efforts, and those of anyone who has the temerity to inject sunshine into the darkened decision rooms.

108. The most outstanding example of this rests with revised language inserted into to the bylaws by the Defendants on July 30, 2024.

109. The new language added to the bylaws gives the Board Chair and committee chairs authority beyond what is permissible under 15 Pa.C.S. § 5512 to restrict information available to Trustees. Section 2.03(e) of the bylaws states:

The Board Chair and applicable committee chairs have authority to review the reasonableness of requests from individual Trustees for information or documents and may narrow or deny any request deemed to be beyond the reasonable scope of a Trustee's legitimate interest as a fiduciary of the university. The Chair of the Board serves as the final arbiter of disputes regarding Trustee requests for information or records.

110. Defendants' make a thinly veiled excuse by attempting to blanket their actions under the phrases – that requested information is outside scope or not necessary.

111. Through the gossamer blanket of their excuses remains the clearly visible black-letter language of the law - 15 Pa. C.S. § 5512 - and their own acknowledgment that the Board of Trustees "maintains ultimate oversight of the University's investment assets."⁹

⁹ https://oim.psu.edu/sites/oim/files/2024-08/ltip-ips_0.pdf

112. They run afoul of the clear mandates set forth by the legislature in 15 Pa. C.S. § 5512, and longstanding precedent of the Pennsylvania Supreme Court that holds that Plaintiff's right "*to an inspection of the books be absolute.*" *Machen v. Machen & Mayer Electrical Mfg. Co.*, 85 A. 100 (Pa. 1912).

113. Admittedly, many factors which might lead to sub-optimal performance of the Penn State endowment, including but not limited to: asset selection, investment advisor performance, and investment advisor fees. But hiding information sought by Plaintiff in his initial request, it is impossible for this Trustee to identify or make informed decisions concerns the specific factors that may be impeding endowment performance.

114. Defendants cannot duck the fact that this information is **directly related to one of the core focuses** of 15 Pa. C.S. § 5512(a), as the endowment is the largest "asset" of the University.

Plaintiff's Qualifications

115. Given the plain language of the statute, the Supreme Court cases and the Bylaws, Plaintiff is entitled to this information even if he were a layman. The law does not hinge obtaining information to the bootstrap of a degree or degrees.

116. However, when the University responds to Plaintiff by saying his requests "*are unreasonable, beyond that which is objectively necessary for you to discharge your duties as a trustee*" his qualifications do come into play as an asset.

117. Plaintiff, through his knowledge, training and experience is well versed in the intricacies of finance and investment and related operations.

118. Plaintiff holds the following Pennsylvania professional licenses:

- a. Series 7 (General Securities Representative Exam);
- b. Series 24 (Securities Principal Exam);

- c. Series 63 (Uniform Securities Agent State Law Exam);
- d. Series 65 (Uniform Investment Adviser Law Exam);
- e. Financial Industry Regulatory Authority (FINRA) Central Registration Depository (CRD) # 2431018; and
- f. NPN Registration # 2025569.

119. He is also an Investment Advisor Representative registered in the state of Pennsylvania, and has securities licensed in Pennsylvania, California, Florida, Georgia, Massachusetts, North Carolina, New Jersey, New York, South Carolina, Virginia, Vermont, and Wisconsin.

120. Finally, Plaintiff also obtained a Masters of Business Administration (MBA) from Penn State.

121. Again, qualifications are not at all necessary to obtain information pursuant to 5512(a), yet Plaintiff's qualifications should be given weight as they underpin his sincere belief that the requested information is necessary in order to properly assess the health and wellbeing of the University's assets, liabilities and operations.

122. The information requested by Plaintiff relates directly to the University's largest asset: the endowment, and therefore falls squarely within the "assets, liabilities, and operations" of the University, as contemplated by 15 Pa. C.S. § 5512(a).

COUNT I - STATUTORY CLAIM
ENFORCEMENT OF INSPECTION PURSUANT TO 15 Pa. C.S. § 5512(b)

123. Plaintiff incorporates by reference the preceding paragraphs as if fully set forth herein.

124. The Defendants are subject to mandates of 15 Pa. C.S. § 5512.

125. Pursuant to subsection (a) of the statute:

“To the extent reasonably related to the performance of the duties of the director, including those arising from service as a member of a committee of the board of directors, a director of a nonprofit corporation is entitled:

(1) in person or by any attorney or other agent, at any reasonable time, to inspect and copy corporate books, records and documents and, in addition, to inspect, and receive information regarding, the assets, liabilities and operations of the corporation and any subsidiaries of the corporation incorporated or otherwise organized or created under the laws of this Commonwealth that are controlled directly or indirectly by the corporation; and

(2) to demand that the corporation exercise whatever rights it may have to obtain information regarding any other subsidiaries of the corporation.” 15 Pa. C.S. § 5512(a).

126. Pursuant to the express terms of subsection (b) of the statute a director may commence an action to enforce inspection where:

“If the corporation, or an officer or agent thereof, refuses to permit an inspection or obtain or provide information sought by a director or attorney or other agent acting for the director pursuant to subsection (a) or does not reply to the request within two business days after the request has been made, the director may file an action in the court for an order to compel the inspection or the obtaining or providing of the information. 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. The 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.” 15 Pa. C.S. § 5512(b).

127. As stated above, Plaintiff has an *absolute* right to inspect, copy and obtain information relating to the assets, liabilities, and operations of the University.

128. By any reasonable interpretation, the information sought by Plaintiff here falls squarely within the “assets” or “operations” of the University.

129. Furthermore, the information is directly related to the endowment, for which Plaintiff has oversight duties as a Trustee on the Board.

130. The Defendants have no legal basis to continue withhold this information from Plaintiff.

131. Their continuing refusal to disclose this information to Plaintiff is a clear and unequivocal violation of 15 Pa. C.S. § 5512.

132. Moreover, the Defendants pattern of delay and obfuscation with regard to Plaintiff's lawful requests for information conduct is the very definition of dilatory, obdurate and vexatious conduct.

133. Accordingly, Plaintiff is entitled to all relief available under subsection (b) of the statute, in addition to an award of attorney's fees.

WHEREFORE, Plaintiff, Barry J. Fenchak, demands judgment in his favor and against, Defendants, and asks this Honorable Court to enter an Order compelling Defendants, Pennsylvania University Board of Trustees, and Matthew Schuyler, to permit Plaintiff to inspect or obtain the information he has requested and awarding reasonable Attorney's fees to Plaintiff.

COUNT II
REQUEST FOR PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF

134. Plaintiff incorporates by reference the preceding paragraphs as if fully set forth herein.

135. Preliminary injunctive relief is appropriate where:

- a. the relief sought by plaintiff is necessary to prevent immediate and irreparable harm that cannot be adequately compensated with damages;
- b. plaintiff has a clear right to the relief requested;
- c. greater injury will result by refusing the injunction rather than by granting it;
- d. the injunction will restore the parties to their status as if it existed immediately prior to the alleged wrongful conduct;

- e. the injunction is reasonably suited to abate the offending activity; and
- f. the injunction will not adversely affect the public interest.

See *Warehime v. Warehime*, 860 A.2d 41, 46 (Pa. 2004).

136. “[T]o sustain a preliminary injunction, the plaintiff’s right to relief must be clear, the need for relief must be immediate, and the injury must be irreparable if the injunction is not granted.” *Sovereign Bank v. Harper*, 674 A.2d 1085, 1091 (Pa. Super. 1996).

137. Only “reasonable grounds” need exist for a court to grant injunctive relief. *Id.* (citing *William v. Childrens’ Hosp. of Pittsburg*, 479 A.2d 452, 453 (Pa. 1984)).

138. Pennsylvania courts recognize harm to be irreparable when it cannot be adequately compensated in damages, either because of the nature of the right that is injured, or because there exist no certain pecuniary standards for measurements of damages. *SEIU Healthcare Pennsylvania v. Com.*, 104 A.3d 495, 508 (Pa. 2014).

139. Further, where the offending conduct sought to be restrained through a preliminary injunction violates a statutory mandate, irreparable injury will have been established. See *Commonwealth v. Coward*, 414 A.2d 91, 98-99 (Pa. 1980) (holding that where a statute prescribes certain activity, the court need only make a finding that the illegal activity occurred to conclude that there was irreparable injury for purposes of issuing a preliminary injunction); *Commonwealth ex rel. Corbett v. Snyder*, 977 A.2d 28 (Pa. Cmwlth. 2009) (affirming issuance of a preliminary injunction and finding that irreparable harm was presumed where there was a credible violation of the state consumer protection statute).

140. The First Amendment prohibits laws “abridging the freedom of speech.” One obvious implication of that rule is that the government usually may not impose prior restraints on speech. See *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 718–720 (1931). But other implications

follow too.

141. “As a general matter,” the First Amendment prohibits government officials from subjecting individuals to “retaliatory actions” after the fact for having engaged in protected speech. *Nieves v. Bartlett*, 587 U. S. ___, ___ (2019) (slip op., at 5) (*internal quotation marks omitted*); *see also Hartman v. Moore*, 547 U.S. 250, 256 (2006).

142. The United States Supreme Court has held that a plaintiff pursuing a First Amendment retaliation claim must show, among other things, that the government took an “adverse action” in response to his speech that “would not have been taken absent the retaliatory motive.” *Nieves*, 587 U. S., at ___ (slip op., at 5).

143. The courts put these actions into two main buckets: material adverse actions and immaterial adverse actions.

144. “[D]eprivations less harsh than dismissal” can sometimes qualify too. *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 75 (1990).

145. In the instant PSU case, the retaliation is material. The bylaw changes are specifically designed to suppress Plaintiff’s speech of any kind, and those of Board members who have the temerity to ask questions.

146. These bylaws impinge the First Amendment both as a matter of speech but also as a matter of retaliation.

147. Here, it is clear that the changes would affect Plaintiff’s rights immediately and also contain anticipatory retaliation in that if he speaks in the future about the Board’s handling of the \$5 Billion investment, he is forewarned that he will be removed.

148. The Court has discussed distinguishing material from immaterial adverse actions, and the lower courts holdings are diverse. Some courts have asked whether the government’s

challenged conduct would “chill a person of ordinary firmness” in the plaintiff’s position from engaging in “future First Amendment activity.” *Nieves*, 587 U. S., at ____ (slip op., at 4) (internal quotation marks omitted) – and that is what Plaintiff in the instant case characterize as anticipatory retaliation.

149. Other courts have inquired whether a retaliatory action “adversely affected the plaintiff’s . . . protected speech,” taking into account things like the relationship between speaker and retaliator and the nature of the government action in question. *Suarez Corp. Industries v. McGraw*, 202 F.3d 676, 686 (CA4 2000).

150. Under any analysis of a Board responsible for a \$5 Billion endowment, deny Plaintiff critical core information about investments and contracts is a material issue. Moreover, write bylaws that would preclude him speaking about that denial is equivalent to adding Gorilla glue (Trademark) to an already locked filing cabinet drawer.

151. Plaintiff as Trustee of a nonprofit University, is bound not only by the law, but also by the bylaws, and the standing orders of the Board, and has a legal duty to act in the best interests of the University and faithfully discharge his fiduciary duties and oversight of the assets, liabilities and operations of the University, including the endowment.

152. The Defendants refusal to provide Plaintiff with the requested information will result in immediate and irreparable harm, as it forces Plaintiff and other similarly situated Trustees to violate their fiduciary duties to the University, including their duties to act in the best interests of the University and provide oversight of the assets, liabilities and operations of the University, such as the endowment.

153. Without these documents, Plaintiff and other similarly situated cannot faithfully discharge these fiduciary duties to the University.

154. Furthermore, Plaintiff, like other similarly situated Board Members, may be exposed to liability for breach of his fiduciary duties if they on matters concerning financial matters such as the endowment and related investments, without having first conducted a thorough inspection of related records, and without educating himself on the context of those decisions. This constitutes immediate and irreparable harm.

155. This injunction will restore the parties to their status prior to the Board's wrongful conduct of refusing to provide Board members such as Plaintiff with the opportunity to inspect records.

156. This injunction will not adversely impact the public interest, in fact, it is in pursuit and in the protection of the public's best interest that this legal action is filed.

157. Without an injunction, the Board will continue to deny its membership of records necessary for them to make completely informed decisions.

158. Plaintiff is legally entitled to the information that he is requested, and immediate access must be granted to him before the Board votes on other significant financial decisions, such as the Elevate contract discussed above.

159. Plaintiff further seeks an injunction to enjoin the Board from committing retaliatory acts against the Plaintiff.

160. In response to Plaintiff's requests for information congruent with his fiduciary duties, Board Chair Schuyler has repeatedly imposed sanctions upon the Plaintiff.

161. Plaintiff has been censured by Board Chair Schuyler and the Plaintiff's Board social privileges have been revoked.

162. The Plaintiff is also prohibited from membership on Board committees, which severely limits his ability to discharge his fiduciary duties and serve the University.

163. Just days ago, the Board prohibited Plaintiff from attending any board meetings in person.

164. The Board has recently amended its bylaws in a clear attempt to give the Chair additional power to further restrict access to information by Trustees and to remove Plaintiff from the Board.

165. The amended bylaws give the Chair of the Board and the Vice Chair of the Board ultimate power over sanction and removal options.

166. Furthermore, the Board's amended bylaws amount to impermissible retaliation for Plaintiff's lawful exercise of his freedom of speech.

167. Plaintiff's removal from the Board will result in immediate and irreparable harm as it prevents Plaintiff from discharging his fiduciary duties to the University.

168. This injunction is in pursuit of the University's best interest and to protect an alumni elected member of the Board. It will not adversely impact the public interest.

169. Considering the amended bylaws, together with the existing sanctions imposed on Plaintiff, it is reasonable for this court to grant injunctive relief to prevent Plaintiff's removal from the Board.

WHEREFORE, Plaintiff requests that this Honorable Court grant relief ordering the Board of Trustees and Chairman Schuyler, and employees to immediately provide him with the information that he has requested; and that this Court permanently enjoin the Board of Trustees and Chairman Schuyler from withholding similar records from its membership; and that this Court enter a preliminary injunction prohibiting the Board from taking any further retaliatory action against Plaintiff, including but not limited to further censure, removal of board privileges and/or removal from the Board; and that this Court grant any further and additional relief that may be justified under

law and fact, and further relief that this Court deems necessary.

Respectfully submitted,

By: */s/ Justin J. Boehret*
/s/ Erika L. Silverbreit
/s/ Terry L. Mutchler
JUSTIN J. BOEHRET, ESQ.
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Transparency Law and Public Data Team
OBERMAYER REBMANN MAXWELL
& HIPPEL LLP


Dated: August 27, 2024

VERIFICATION

I, Barry J. Fenchak verify that I am the Plaintiff in the above-referenced action. I further verify that the statements set forth in this Amended Complaint are true and correct to the best of my knowledge, information and belief. I understand that the statements made herein are subject to the penalties of 18 Pa. C.S.A. § 4904, relating to unsworn falsification to authorities.

Date:

8/27/24



Barry J. Fenchak

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,

OBERMAYER REBMANN MAXWELL & HIPPEL LLP

/s/ Justin J. Boehret
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Attorney for Plaintiff

Dated: August 27, 2024

IN THE COURT OF COMMON PLEAS OF
CENTRE COUNTY, PENNSYLVANIA

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

CERTIFICATE OF SERVICE

I, Justin J. Boehret, 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 and regular mail:

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Dated: August 27, 2024