

DISTRICT COURT, CITY & COUNTY OF DENVER,
COLORADO
1437 Bannock Street
Denver, Colorado 80202

Plaintiff:

WALKER STAPLETON, IN HIS OFFICIAL
CAPACITIES AS COLORADO STATE TREASURER
AND AS A TRUSTEE OF THE PUBLIC EMPLOYEES
RETIREMENT ASSOCIATION

v.

Defendants:

PUBLIC EMPLOYEES RETIREMENT ASSOCIATION,
CAROLE WRIGHT, MARYANN MOTZA, JAMES
CASEBOLT, HOWARD M. CRANE, RICH DELK,
CAROLYN JONAS-MORRISON, ROCHELLE LOGAN,
SCOTT MURPHY, SUSAN G. MURPHY, AMY L.
NICHOLS, SCOTT NOLLER, TIMOTHY M. O'BRIEN,
MARCUS PENNELL, AND LYNN E. TURNER, EACH
IN THEIR OFFICIAL CAPACITY AS A TRUSTEE OF
THE PUBLIC EMPLOYEES RETIREMENT
ASSOCIATION

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▲ COURT USE ONLY ▲

Case No. 2011CV6530

Courtroom: 203

DEFENDANTS' ANSWER, AFFIRMATIVE DEFENSES AND COUNTERCLAIMS

All Defendants, through their undersigned counsel, hereby respond to the Complaint of Plaintiff Walker Stapleton, in his official capacities as Colorado State Treasurer and as a trustee of the Public Employees Retirement Association of Colorado (the “Treasurer” or “Plaintiff”), as follows:

ANSWER

1. Defendants admit the allegations in paragraph 1.
2. Defendants admit the allegations in paragraph 2.
3. Defendants admit the allegations in paragraph 3.
4. Defendants admit the allegations in paragraph 4.
5. Defendants admit the allegations in paragraph 5.
6. Defendants admit the allegations in paragraph 6.
7. Defendants admit the allegations in paragraph 7.
8. Defendants admit the allegations in paragraph 8.
9. Defendants admit the allegations in paragraph 9.
10. Defendants admit the allegations in paragraph 10.
11. Defendants admit the allegations in paragraph 11.
12. Defendants admit the allegations in paragraph 12.
13. Defendants admit the allegations in paragraph 13.
14. Defendants admit the allegations in paragraph 14.
15. Defendants admit the allegations in paragraph 15.
16. Defendants admit the allegations in paragraph 16.
17. Defendants admit the allegations in paragraph 17.
18. Defendants admit the allegations in paragraph 18.
19. Defendants admit the allegations in paragraph 19.

20. Defendants admit the allegations in paragraph 20.
21. Defendants admit the allegations in paragraph 21.
22. Defendants admit that Plaintiff has accurately quoted Colo. Rev. Stat. § 24-51-207(2)(a).
23. Defendants admit that Plaintiff has accurately quoted Tab 17, paragraph 14 of the Governance Manual and that PERA, through its Trustees, properly adopted the Governance Manual. Defendants deny all other allegations in this paragraph.
24. Defendants admit that on June 3, 2011, Plaintiff sent a letter to PERA's Executive Director. To the extent the allegations in paragraph 24 are consistent with this letter, they are admitted; to the extent they are inconsistent, they are denied.
25. Defendants admit that on June 17, 2011, the Trustees discussed the Treasurer's request. To the extent the remaining allegations in paragraph 25 are consistent with the transcript of the discussion, they are admitted; to the extent they are inconsistent, they are denied.
26. Defendants admit that on July 11, 2011, Plaintiff's counsel sent a letter to the PERA Board Chair and PERA's Executive Director. To the extent the remaining allegations in paragraph 26 are consistent with the letter, they are admitted; to the extent they are inconsistent, they are denied.
27. Defendants admit the allegations in paragraph 27.
28. Defendants admit that on August 11, 2011, Plaintiff's counsel sent a letter to the PERA Board Chair and PERA's Executive Director. To the extent the remaining allegations in paragraph 28 are consistent with the letter, they are admitted; to the extent they are inconsistent, they are denied.
29. Defendants admit that John Nixon issued an opinion dated August 25, 2011 and that Plaintiff has quoted with substantial accuracy one excerpt from the opinion.
30. Defendants admit the allegations in paragraph 30.
31. Defendants admit that Plaintiff sent a September 8, 2011 letter to the PERA Board Chair and PERA's Executive Director. To the extent the remaining allegations in paragraph 31 are consistent with the letter, they are admitted; to the extent they are inconsistent, they are denied.
32. To the extent the allegations in paragraph 32 are consistent with Plaintiff's September 8, 2011 letter, they are admitted; to the extent they are inconsistent, they are denied.

33. Defendants admit they did not provide the requested information or respond to the September 8, 2011 letter by the September 16, 2011 deadline imposed by the Treasurer and affirmatively state that John Nixon responded to Plaintiff's September 8, 2011 letter on September 20, 2011. Defendants deny any remaining allegations contained in paragraph 33.

34. Defendants restate their responses to paragraphs 1 - 33.

35. Defendants admit only that Plaintiff has quoted language from Colo. Rev. Stat. § 24-51-207(5), and deny all other allegations contained in paragraph 35.

36. Defendants deny the allegations in paragraph 36.

37. Defendants restate their responses to paragraphs 1 – 33.

38. Defendants admit only that Plaintiff has quoted language from Colo. Rev. Stat. § 24-51-207(5), and deny all other allegations contained in paragraph 38.

39. Defendants deny the allegations in paragraph 39.

40. Defendants deny the allegations in paragraph 40.

41. Defendants restate their responses to paragraphs 1 – 33.

42. Defendants admit only that Plaintiff has quoted language from Colo. Rev. Stat. § 24-51-207(5), and deny all other allegations contained in paragraph 42.

43. Defendants deny the allegations in paragraph 43.

44. Defendants deny the allegations in paragraph 44.

45. Defendants restate their responses to paragraphs 1 – 33.

46. Defendants admit only that Plaintiff has quoted language from Colo. Rev. Stat. § 24-51-207(5), and deny all other allegations contained in paragraph 46.

47. Defendants deny the allegations in paragraph 47.

48. Defendants deny the allegations in paragraph 48.

49. Defendants restate their responses to paragraphs 1 - 33.

50. Defendants admit only that Plaintiff has quoted language from Colo. Rev. Stat. § 24-51-207(5), and deny all other allegations contained in paragraph 50.

51. Defendants deny the allegations in paragraph 51.

Plaintiff's WHEREFORE clause and prayer for relief are not averments to which a responsive pleading is required. To the extent that any response is required, Defendants deny the allegations therein, and deny that Plaintiff is entitled to any of the relief requested.

AFFIRMATIVE DEFENSES

1. Plaintiff's Complaint fails to state a claim upon which relief can be granted.
2. Defendants deny each and every allegation in Plaintiff's Complaint that is not expressly admitted herein.
3. Defendants have acted consistently with their statutory duties and their fiduciary duties to PERA members and benefit recipients under Colo. Rev. Stat. § 24-51-207(2)(a).
4. Plaintiff lacks standing to assert the claims.
5. Plaintiff's claims are barred, in whole or in part, by the doctrines of unclean hands, waiver, laches and estoppel.
6. Defendants owe no fiduciary duty to Plaintiff in his capacity as Treasurer or as a Trustee.
7. Plaintiff, despite numerous requests by Defendants, failed to articulate a proper basis for his request for the information at issue.
8. Defendants properly adopted Tab 17, paragraph 14 of the Governance Manual.
9. Defendants properly applied Tab 17, paragraph 14 of the Governance Manual to Plaintiff's request.
10. The Colorado Governmental Immunity Act bars Plaintiff's claims.
11. Defendants reserve the right to add additional affirmative defenses as they become known through discovery or investigation of Plaintiff's claims.

WHEREFORE, Defendants request that Plaintiff's Complaint be dismissed and that judgment be entered in favor of Defendants for their costs expended in the defense hereof, including attorneys' fees, and for such other relief as the Court deems appropriate.

COUNTERCLAIMS

The Public Employees' Retirement Association of Colorado ("PERA"), by and through its counsel, asserts the following Counterclaim against Plaintiff Walker Stapleton, in his capacities as Colorado State Treasurer and Trustee of PERA (the "Treasurer" or "Plaintiff").

PARTIES

1. PERA is an instrumentality of the State of Colorado with its principal office in Denver, Colorado. PERA has approximately 475,000 members and benefit recipients, and manages approximately 40 billion dollars of assets.

2. PERA is governed by a board of trustees ("Board" or "PERA Board") comprised of 16 trustees (the "Trustees" or "PERA Trustees"), including 11 representatives elected by various sectors of Colorado's public workforce and retirees, three Trustees appointed by the Governor, one ex officio member appointed by the Denver Public Schools Board of Education, and the Treasurer. Colo. Rev. Stat. § 24-51-203(1).

3. Walker Stapleton is the Treasurer for the State of Colorado and is a PERA Trustee.

JURISDICTION AND VENUE

4. The District Court for the City and County of Denver, Colorado has jurisdiction over this action pursuant to Colo. Const. art. VI, § 9.

5. This Court has personal jurisdiction over the Treasurer because he is a Colorado state official acting in his official capacity.

6. Venue is proper in this Court pursuant to Colorado Rule of Civil Procedure 98(c)(1) because the Treasurer's official office is located in the City and County of Denver and because the action arises from conduct taken by the Treasurer in Denver, Colorado.

GENERAL ALLEGATIONS

7. This action provides an opportunity for PERA to obtain guidance regarding the circumstances under which it can lawfully disclose information regarding its members and benefit recipients to PERA Trustees.

8. This action also involves an effort by Plaintiff to obtain information regarding a subset of PERA's beneficiaries without articulating a proper fiduciary purpose for such information.

9. PERA Trustees “shall carry out their functions solely in the interest of the members and benefit recipients.” Colo. Rev. Stat. § 24-51-207(2)(a).

10. PERA Trustees “shall not engage in any activities which might result in a conflict of interest with their functions as fiduciaries” for PERA. Colo. Rev. Stat. § 24-51-207(3).

11. PERA and its Trustees must maintain the confidentiality of “all information” in PERA’s files regarding its members and benefit recipients. Colo. Rev. Stat. § 24-51-213(1) states:

All information contained in records of members, former members, inactive members, DPS members, DPS retirees, benefit recipients and their dependents, including those from the Denver Public Schools division, participants in the voluntary investment program established pursuant to part 14 of this article, participants in the defined contribution plan established pursuant to part 15 of this article, and participants in the deferred compensation plan established pursuant to part 16 of this article shall be kept confidential by the association.

12. All Trustees, including the Treasurer, “shall have the responsibilities, duties and authorities” set forth in the statutes governing PERA. Colo. Rev. Stat. § 24-51-202.

13. The Treasurer’s authority as a Trustee is no greater than that of other Trustees and his responsibility is no less.

14. Colorado law imposes substantial authority on PERA and the Trustees, including the Treasurer when he is acting as a Trustee, to administer the benefits program in accordance with the law and manage the assets for the exclusive benefit of PERA’s members and benefit recipients. Consistent with that grant of extensive authority, Colorado law imposes on the Trustees, including the Treasurer when he is acting as a Trustee, one of the highest, if not the highest, duties recognized under law—that of a fiduciary. Colo. Rev. Stat. § 24-51-207(1).

15. As fiduciaries, all Trustees, including the Treasurer, are required to “carry out their functions solely in the interest of the members and benefit recipients and for the exclusive purpose of providing benefits and defraying reasonable expenses incurred in performing such duties as required by law.” Colo. Rev. Stat. § 24-51-207(2)(a).

16. By letter dated June 3, 2011, the Treasurer requested that PERA provide him the following confidential member information (“Confidential Information”):

Individual records, not to include names or data relating to the specific identity of individual recipients, of the top 20% of PERA recipients based on annual pension benefits. Individual records provided, in the form of an electronic record, should include:

- Annual retirement benefit
- Year of Retirement
- Age of retirement
- Last five years of salary as a PERA contributor
- Zip code of Residence
- Employer Division (School, State, etc.)

The Treasurer attached this letter as Exhibit B to the Complaint.

17. The Treasurer did not provide a proper reason, as required by his fiduciary duties as a PERA Trustee, for his request.

18. The Treasurer did not agree to keep the requested information confidential.

19. On June 10, 2011, Carole Wright, PERA Board Chair, responded by letter to the Treasurer indicating the matter would be addressed by the entire PERA Board at the June 17, 2011 Board meeting. A copy of this letter is attached as Exhibit 1 to this Counterclaim.

20. At a June 17, 2011 board meeting, the Trustees discussed the Treasurer's request for Confidential Information.

21. During the meeting, the Trustees repeatedly asked the Treasurer to state how he intended to use the information to perform his fiduciary duties as a PERA Trustee.

22. The Treasurer refused to describe any proper use as is required by his fiduciary duties as a Trustee.

23. The Treasurer stated: "[A]s to what I plan to do with the data I really cannot tell you because I believe that is premature because I don't know what my conclusions will be until I have been able to see and distill and absorb the information."

24. Nor could the Treasurer describe his objectives in requesting the information, stating: "I can't really tell you about my objectives . . . until I have actually seen the data. I may have no objectives."

25. The Treasurer further stated: "And I would simply say that the use and application of the data have nothing to do with the request. The request is a request for me to have access to review the information only. And it should be viewed in that scope only and the use and application is not the scope of the request. It's not the scope of the letter, it wasn't the spirit of the letter and it's not the intent of the letter."

26. Although the Treasurer could not articulate a proper use for the Confidential Information in his capacity as a Trustee, he made clear that he was requesting and intended to use the information in his capacity as Treasurer.

27. The Treasurer stated at the June 17, 2011 board meeting that he was requesting the Confidential Information in part because of his “responsibilities to . . . [the] people that have put us on this board.” It is unclear who the Treasurer was referencing, but it clearly was not the members and benefit recipients of PERA.

28. The Treasurer’s expressed intent to use the Confidential Information for some other constituency violates numerous provisions of Colorado law, including the explicit statutory requirement that the Trustees, including the Treasurer, must act “solely” in the interest and for the “exclusive” benefit of PERA’s members and benefit recipients. Colo. Rev. Stat. 24-51-207(2)(a).

29. The Treasurer also stated he intended to share this information with his staff at the Treasurer’s office.

30. The Treasurer’s express intended course of conduct in this regard violates numerous provisions of Colorado law, including the provision requiring PERA and the Trustees to maintain the confidentiality of “all information” in PERA’s files regarding its members and benefit recipients. Colo. Rev. Stat. § 24-51-213(1).

31. During the discussion at the June 17, 2011 board meeting, PERA Executive Director Meredith Williams, in reference to the Treasurer’s request for five years of salary information, indicated the request would take 190 staff days for one person working full time to compile.

32. Immediately thereafter, the Treasurer stated, “In the interest of not creating an onerous or egregious burden on the staff, I would be happy to drop that portion of the request of the information.”

33. At the conclusion of the discussion, all Trustees present, except the Treasurer, voted in favor of the following motion:

I move that the board seek input from outside fiduciary counsel and for the treasurer to reframe his request to demonstrate the fiduciary need for this information.

34. By letter dated July 11, 2011, a copy of which is attached to the Complaint as Exhibit C, the Treasurer, through counsel, Maurice Knaizer, Esq., reinstated his request for the information that includes the five years of salary data.

35. In the letter, the Treasurer did not reframe his request to demonstrate the fiduciary need for this information, despite the motion of the Board.

36. After careful consideration, the Board selected John Nixon, Esq. of the law firm of Duane Morris, LLP to render an opinion on the Treasurer's request.

37. On August 25, 2011, Mr. Nixon issued his written opinion to the PERA Board, a copy of which is attached to the Complaint as Exhibit E.

38. Mr. Nixon concluded in part that the Treasurer's request for information was not consistent with an appropriate fiduciary function, and because of the nature of the request, the disclosure of such information could result in a violation of the confidentiality protections afforded under the PERA statutes and Colorado law.

39. On August 31, 2011, the PERA Board voted to deny the Treasurer's request for information. The Board did so after careful deliberation, including a review of the opinion received from fiduciary counsel, John Nixon.

40. By letter dated September 8, 2011, a copy of which is attached to the Complaint as Exhibit F, the Treasurer, through counsel, Maurice Knaizer, Esq., stated his disagreement with Mr. Nixon's opinion.

41. In the letter, the Treasurer requested the Board to reconsider its denial of his request for the Confidential Information.

42. In the letter, the Treasurer again did not state a fiduciary need or identify a fiduciary purpose for the information.

43. In the letter, the Treasurer did not indicate how the information requested would help him meet any of his fiduciary duties to the members and beneficiaries of PERA.

44. Mr. Nixon reviewed the Treasurer's response to the Board's action as set forth in the September 8, 2011 letter. Mr. Nixon replied to the Treasurer's response through a letter dated September 20, 2011, a copy of which is attached as Exhibit 2 to this counterclaim. This September 20, 2011 reply reaffirmed that the Treasurer's request was not consistent with an appropriate fiduciary function and could lead to a violation of the confidentiality provision of the PERA statutes and a violation of the Treasurer's duty of loyalty.

45. The Treasurer commenced this suit prior to the Board's formal reconsideration of the request.

46. PERA and the Trustees repeatedly asked the Treasurer to articulate a proper, fiduciary basis, consistent with Colorado law, for why he was requesting the Confidential Information. Plaintiff either refused or could not do so.

47. There is no reasonable nexus between the information requested by the Treasurer and any valid fiduciary purpose.

48. The information requested does not provide the Treasurer the ability to satisfy his fiduciary duties.

49. The information requested by the Treasurer does not exist in a readily available format.

50. There would be substantial costs associated with producing the information requested by the Treasurer.

51. Consistent with Colorado law, the PERA Trustees adopted a Governance Manual. Tab 17, paragraph 14 of the Governance Manual provides in part:

Trustees shall only make reasonable requests for information that are necessary for the purposes of fulfilling their duties as Trustees, and shall not request or use PERA information for their own personal or business use. Where the Executive Director believes that an information request would require a significant expenditure of staff time or the use of external resources, the Executive Director may place the request on the agenda for the next Executive Committee meeting, for discussion and consideration.

52. PERA's process for addressing the Treasurer's request was consistent with the process set forth in Tab 17, paragraph 14 of the Governance Manual.

53. Prior to this action being commenced by the Treasurer, he never mentioned or complained about the PERA Governance Manual.

FIRST CLAIM FOR RELIEF
(Declaratory Judgment)

54. PERA adopts and incorporates paragraphs 1 – 53 of its Counterclaim as if fully set forth herein.

55. An actual and substantial controversy exists between the parties regarding: (1) the circumstances under which it is lawful for PERA to provide member and benefit recipient information to a Trustee; (2) the validity of Tab 17, paragraph 14 of the Governance Manual; and (3) whether the Treasurer is entitled to the information he seeks. A declaration from this Court on these issues will resolve these controversies.

56. PERA is entitled to a declaration that: (1) it is lawful for PERA to provide member and benefit recipient information to a Trustee only when such Trustee has demonstrated

that (i) the Trustee seeks the information so he or she can perform a valid, identified fiduciary function; (ii) there is a reasonable nexus between the information requested and the valid, identified fiduciary function, including that the information will in fact assist the Trustee in performing such fiduciary function; (iii) the expenses associated with providing the requested information are reasonable under the circumstances then prevailing; and (iv) safeguards can be imposed on the production of the information to preserve the confidentiality of member and benefit recipient information, which may include conditions on the circumstances under which the Trustee may review the information; (2) Tab 17, paragraph 14 of the Governance Manual is a valid and enforceable policy of PERA; and (3) the Treasurer is not entitled to the information that he seeks because he has not satisfied the conditions set forth in declaration (1) above.

WHEREFORE, PERA respectfully requests that this Court enter judgment declaring the respective rights and obligations of the parties as follows:

- a. A judgment declaring (1) it is lawful for PERA to provide member and benefit recipient information to a Trustee only when such Trustee has demonstrated that (i) the Trustee seeks the information so he or she can perform a valid, identified fiduciary function; (ii) there is a reasonable nexus between the information requested and the valid, identified fiduciary function, including that the information will in fact assist the Trustee in performing such fiduciary function; (iii) the expenses associated with providing the requested information are reasonable under the circumstances then prevailing; and (iv) safeguards can be imposed on the production of the information to preserve the confidentiality of member and benefit recipient information, which may include conditions on the circumstances under which the Trustee may review the information; (2) Tab 17, paragraph 14 of the Governance Manual is a valid and enforceable policy of PERA; and (3) the Treasurer is not entitled to the information that he seeks because he has not satisfied the conditions set forth in declaration (1) above.
- b. For entry of judgment against the Treasurer on his claims against Defendants.
- c. For an award of costs and such other and further relief as this Court deems proper.

Dated October 13, 2011

BROWNSTEIN HYATT FARBER SCHRECK,
LLP

By: s/John V. McDermott
John V. McDermott, #11854
Amy L. Benson, #15894
Karl Schock, #38239

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of October, 2011, a true and correct copy of the foregoing **DEFENDANTS' ANSWER, AFFIRMATIVE DEFENSES AND COUNTERCLAIMS** was served electronically via LexisNexis File & Serve as follows:

John W. Suthers, Esq.
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