



AlaFile E-Notice

03-CV-2010-900013.00

To: BRYAN CHAD WESLEY
cwb@chlaw.com

NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

LISA NIX GREEN ET AL v. KAY IVEY ET AL
03-CV-2010-900013.00

The following answer was FILED on 7/23/2010 10:46:40 AM

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MELISSA RITTENOUR
CIRCUIT COURT CLERK
MONTGOMERY COUNTY, ALABAMA
251 S. LAWRENCE STREET
MONTGOMERY, AL 36102

334-832-4950



**IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA**

LISA NIX GREEN, individually and as)	
next friend of Brent A. Green and)	
Blake A. Green,)	
)	
Plaintiffs,)	
v.)	CASE NO.: CV-2010-900013
)	
KAY IVEY, et al.)	
)	
Defendants.)	

**AMENDED ANSWER TO COMPLAINT,
AFFIRMATIVE DEFENSES, AND COUNTERCLAIM¹**

COME NOW the Defendants, by and through counsel, and file this Amended Answer to Complaint, Affirmative Defenses, and Counterclaim:

ANSWER

1. The Defendants admit the allegations contained in paragraphs 1 – 8 to the extent they allege the purchase of separate Alabama Prepaid Affordable College Tuition Contracts (“PACT Contracts”). The Defendants deny the remaining allegations contained in paragraphs 1 – 8 as stated therein and demand strict proof thereof.

2. The Defendants deny the allegations contained in paragraphs 9 – 14 and, for further answer, aver that the current Defendants, who are sued in their official capacities as members of the Board of Directors of the Wallace-Folsom College Savings Investment Plan (“Board”) and/or as Trustees of the PACT Trust Fund (“Trustees”), have been substituted as follows: Kay Ivey, Dr. Freida Hill, Dr. Gregory Fitch, Tom Broughton, Bill Newton, General

¹ The Defendants intend to file a motion to dismiss the Amended Complaint of Eldridge M. Franklin, and this Answer is not intended to waive any right to file such motion to dismiss or such other pleadings as the situation may require.

Paul Hankins, Dr. William Meehan, Marc Green, Dr. Richard Huckaby, Rep. Craig Ford, James Stubbs, Sen. Roger Bedford, and Dowd Ritter.

3. The Defendants deny the allegations contained in paragraph 19 as stated therein and demand strict proof thereof.

4. The Defendants deny the allegations contained in paragraphs 20 – 26 as stated and demand strict proof thereof.

5. The Defendants admit that the allegations contained in paragraphs 27 – 30 accurately identify statutory enactments of the Legislature and accurately quote certain specific provisions thereof. The Defendants deny the remaining allegations in paragraphs 27 – 30 as stated therein and demand strict proof thereof. For further answer, the Defendants aver that the PACT statutes and statutory scheme were amended by the Alabama Legislature who passed Act No. 2010-725 (“Act”) during the 2010 legislative session.

6. The Defendants deny the allegation contained in paragraph 31 that the nature of the PACT Program was “completely changed” by Act No. 2001-427, but admit that Plaintiffs have accurately quoted certain specific provisions of that Act. The Defendants deny the remaining allegations in paragraph 31 as stated therein and demand strict proof thereof. The Defendants further aver the passage of the Act described in paragraph 5 above.

7. The Defendants deny the allegations contained in paragraph 32 as stated and demand strict proof thereof.

8. The Defendants deny the allegations contained in paragraph 33 as stated and demand strict proof thereof

9. The Defendants deny the allegations contained in paragraph 34 and demand strict proof thereof.

10. The Defendants deny that this Court has subject matter jurisdiction over Plaintiffs' claims, but agree that venue would otherwise be proper in Montgomery County, Alabama.

11. As to Plaintiffs' realleging allegations in paragraphs 1 – 35, the Defendants adopt and incorporate answers previously given to said preceding paragraphs as if fully set out herein.

12. The Defendants admit that the Treasurer's website contained information with regard to PACT Contracts substantially similar to the statements contained in paragraph 37.A. The Defendants deny each and every other allegation contained in paragraph 37.A. and demand strict proof thereof. Defendants further aver that upon passage of the Act, the Alabama Legislature found that the appropriation of the funds contained in said Act would render the PACT Program "one hundred percent fully funded." (Act, § 3(b)).

13. With respect to paragraph 37.B., the Defendants admit the correctness of the citation of statutory language with respect to certain of the Plaintiffs and the correctness of excerpts from the contracts of the various Plaintiffs. However, the Defendants deny each and every other allegation contained in paragraph 37.B. and demand strict proof thereof. The Defendants further aver that all of the PACT statutes have to be read in pari materia with the passage of Act 2010-725.

14. The Defendants admit the allegations contained in paragraph 37.C. that relate to statutory excerpts as they existed at certain times, but deny each and every other allegation contained in paragraph 37.C. and demand strict proof thereof. The Defendants further aver that all of the PACT statutes have to be read in pari materia with the passage of Act 2010-725.

15. With respect to paragraph 37.D., Defendants deny that the nature of the PACT Program "was completely changed" by Act 2001-427. The Defendants admit that the quotations

attributed to specific provisions of PACT statutes and amendments as stated in paragraph 37.D. are accurate. However, the Defendants deny each and every other allegation contained in paragraph 37.D. and demand strict proof thereof. The Defendants further aver that all of the PACT statutes have to be read in pari materia with the passage of Act 2010-725.

16. The Defendants deny the allegations contained in paragraph 37.E. as stated and demand strict proof thereof. For further answer, the Defendants submit that the Act has fully funded the PACT Program and that the PACT has not failed to meet any obligation with regard to the Plaintiffs.

17. The Defendants deny the allegations contained in paragraph 37.F. as stated and demand strict proof thereof. For further answer, the Defendants submit that the Act has fully funded the PACT Program and that the PACT has not failed to meet any obligation with regard to the Plaintiffs.

18. For answer to paragraph 38, the Defendants adopt and incorporate by reference the answers previously given to paragraphs 1 – 37 above as if fully set out herein.

19. The Defendants deny each and every allegation contained in paragraph 39 and demand strict proof thereof.

20. For answer to paragraph 40, the Defendants adopt and incorporate herein by reference all answers previously given to paragraphs 1 – 39 as if fully set out herein.

21. The Defendants deny the allegations contained in paragraphs 41 – 44 as stated. To the extent the allegations contained in these paragraphs are repetitious, the Defendants adopt and incorporate by reference answers previously given to those same allegations. The Defendants demand strict proof of the allegations contained in paragraphs 41 – 44.

22. For answer to paragraph 45, the Defendants adopt and incorporate herein by reference the answers previously given to paragraphs 1 – 44 of the Complaint as if fully set out herein.

23. The Defendants deny the allegations contained in paragraph 46 as stated and demand strict proof thereof.

24. The Defendants deny that Plaintiffs are entitled to any relief that is inconsistent with the prayer for relief requested by the Defendants in their Counterclaim. The Defendants otherwise deny that Plaintiffs are entitled to the relief requested and demand strict proof thereof, both as to the Plaintiffs who are alleged to be members of Class A and as to those Plaintiffs who are alleged to be members of Class B.

AFFIRMATIVE DEFENSES

1. The Defendants plead not guilty.
2. The Defendants plead the general issue.
3. The Defendants plead the doctrine of sovereign immunity.
4. The Defendants plead the doctrine of state agent immunity.
5. The Plaintiffs failed to join indispensable parties as defendants; including, but not limited to, the appropriate legal representatives of the public colleges and universities of the State of Alabama.
6. The Defendants plead that they have not violated any rights of the Plaintiffs guaranteed under the constitutions of Alabama or the United States.
7. Plaintiffs' Complaint fails to state a claim upon which relief can be granted.
8. Defendants plead the affirmative defense of qualified immunity as recognized by federal case law.

9. Defendants aver that one or more claims as pled in Plaintiffs' Complaint are not ripe, are moot, or otherwise do not present a justiciable controversy. Therefore, Defendants aver that the Court lacks subject matter jurisdiction over Plaintiffs' claims.

10. Defendants plead the affirmative defenses of res judicata and collateral estoppel.

11. Defendants plead the affirmative defenses of excuse, unforeseeability impossibility, and/or frustration of purpose.

12. The Defendants plead the affirmative defense that the Legislature has appropriated sufficient funds to cure any alleged "announced" deficiency in the PACT Program and has found the PACT Program to be one hundred percent fully funded, and otherwise plead the language contained in Act 2010-725.

COUNTERCLAIM

1. COME NOW Counter Plaintiffs Kay Ivey, as Chairman of the Board of Directors of the Wallace-Folsom College Savings Investment Plan (the "Board") and as Trustee of the PACT Trust Fund ("Trustee"); Dr. Gregory Fitch, as a member of the Board and Trustee; Tom Broughton, as a member of the Board and Trustee; Dr. Freida Hill, as a member of the Board and Trustee; Bill Newton, as a member of the Board and Trustee; General Paul Hankins, as a member of the Board and Trustee; Dr. William Meehan, as a member of the Board and Trustee; Marc Green, as a member of the Board and Trustee; Dr. Richard Huckaby, as a member of the Board and Trustee; Rep. Craig Ford, as a member of the Board and Trustee; James Stubbs, as a member of the Board and Trustee; Sen. Roger Bedford, as a member of the Board and Trustee; and Dowd Ritter, as a member of the Board and Trustee, by and through counsel, and file this Counterclaim for instructions if the Alabama Uniform Trust Code, § 19-3B-101, et seq. of the CODE OF ALABAMA 1975, as amended, against the Counter Defendants Lisa Nix Green, Brent A.

Green, Blake Green, Eldridge M. Franklin, Eason L. Franklin and Kimberly H. Franklin, individually and as next friend of John Stephen Franklin, Brian A. McVeigh, individually and as next friend of Sarah K. McVeigh, Allen R. Hudson, individually and as next friend of Emma L. Hathaway, Nina McGinnis, individually and as next friend of Stevie A. Graves. Counter Defendants are named in the aforementioned capacities and in their capacities as representatives of one or more putative class(es) of PACT Contract holders and/or beneficiaries.

2. Counter Plaintiffs allege that the Wallace-Folsom College Savings Investment Plan (the “Plan”) and its components, including the PACT Program, are a state agency and instrumentality and that the Counter Plaintiffs are each serving in an official capacity as an agent of the State of Alabama when performing any of their duties and functions as Board members and/or Trustees as provided in § 16-33C-1, et seq. of the CODE OF ALABAMA 1975, as amended. At all times pertinent to the allegations of the Complaint and Counterclaim, the Plan, the PACT Program, the Board, and the individual Board members/Trustees serving in their official capacities have performed a State function.

3. Over the years, the Board and Trustees have followed the statutory authority of hiring actuaries, financial consultants and fund managers (“Professionals”), and have otherwise prudently invested the PACT Trust Fund in accordance with law. With the passage of Act No. 2010-725 (“Act”), the Legislature has appropriated sufficient funds so as to make the PACT Program one hundred percent fully funded.

4. The Board closed the PACT Program to new applicants in 2009. However, based upon the ages of the beneficiaries and the ten-year span within which a student can enroll in undergraduate colleges and universities, the PACT Program is projected to have obligations until

the year 2029. The Act appropriated funds to fully fund the PACT Program through the year 2029. The Act also closed the PACT Program to new applicants.

5. The Board adopted amendments to its existing rules and regulations consistent with the Act. Such proposed amendments to its existing rules and regulations are marked Exhibit A, attached hereto and specifically incorporated herein by reference. The Act requires the prior approval of the Legislative Council on any changes to the rules that are made prior to July 1, 2011.

6. The new rules adopted by the Board were amendments and changes to the rule that were made to conform to the Act. 7. Counter Plaintiffs contend that they possess the inherent authority to enact and implement the proposed rules changes pursuant to ALA. CODE § 16-33C-5, as amended by Act No. 2010-725.

In addition to the powers granted by any other provision in this chapter, the Board shall have, as agents of the State of Alabama, ***the powers necessary or convenient to carry out the purposes and provisions of this chapter*** and the powers delegated by any other law of the State or any executive order thereof, including, but not limited to, the following express powers:

...
(Emphasis added). Further, § 16-33C-5(11) specifically authorizes the Board “to establish other policies, procedures, and criteria necessary to implement and administer the provisions of this chapter.”

8. Act No. 2010-725 provides, in relation to the rule-making authority of the Board, as follows:

Section 12. The Legislature hereby strongly encourages the PACT Board to make any financially beneficial changes to PACT rules, procedures, or policies, to the extent that the PACT Board is authorized or permitted to make such changes and to the extent that such changes would not violate the contractual relationship existing between a PACT contract holder and the PACT Board.

Any such changes made prior to July 1, 2011, require the prior approval of the Legislative Council.

9. Because the PACT Trust Fund is a statutory trust within the scope of the Alabama Uniform Trust Code, § 19-3B-101, 103 (“Trust Code”), the Court in this judicial proceeding may provide instructions, determine the existence or non-existence of any immunity, approve a non-judicial settlement, interpret or construe the terms of the trust, and otherwise exercise such powers as granted by the legislature under § 19-3B-201 of the Alabama Uniform Trust Code. Put simply, the Trust Code authorizes the Court to enter an order, whether there exists or does not exist a justiciable controversy, which would render instructions or make determinations regarding administration of the PACT Trust Fund, to interpret or to construe the terms of the PACT Trust Fund and its rules and regulations or otherwise instruct the Board on the rights of PACT contract holders/beneficiaries and the duties of the PACT Program and/or PACT Board members/Trustees.

10. Based on the foregoing, Counter Plaintiffs request this Court, pursuant to its powers under the Alabama Uniform Trust Code, to instruct or otherwise give guidance with respect to the following issues:

(1) As to whether the proposed rule changes referenced in Exhibit A, or any one of them, violate the statutory, constitutional or contractual rights of the members of any potential class of PACT Contract holders/beneficiaries;

(2) As to how the Board should make payments to colleges and universities on behalf of PACT Contract holders/beneficiaries consistent with actuarially sound principles:

a. With regard to institutions of higher education under the oversight of the Boards of Trustees established in § 264 and § 266 of the

Constitution of Alabama of 1901, now appearing as §§ 264 and 266 of Official Recompilation of the Constitution of Alabama of 1901, as amended; and

- b. With regard to all other institutions of higher education within the State of Alabama except those institutions referenced in subsection a. above; and
- c. With regard to such institutions of higher education that are not public institutions; and
- d. With regard to such public and private institutions that exist outside the State of Alabama.

(3) As to whether the Board has the authority to dissolve, close, terminate and/or liquidate the PACT Program and/or PACT Trust Fund and, if so, upon what basis can distribution of assets be made; and

(4) If the Board finds itself without sufficient funds to pay tuition and mandatory fees on behalf of contract holders, how should the PACT Trust Fund equitably administer the funds so as to protect the contract holders and comply with the wishes of the Alabama Legislature?

WHEREFORE, the Counter Plaintiffs respectfully pray that the Counter Defendants be made parties to these proceedings and be required to answer the above-stated Counterclaim, and that after a hearing on the factual and legal matters, the Court will give the Counter Plaintiffs the instructions and guidance requested above. Your Counter Plaintiffs respectfully request such other, further and different relief to which the Counter Plaintiffs are entitled in the premises.

Respectfully submitted this the 23rd day of July, 2010.

/s/George L. Beck, Jr.

GEORGE L. BECK, JR. (BEC011)

CHAD W. BRYAN (BRY032)

Attorneys for Defendants

OF COUNSEL:

CAPELL & HOWARD, P.C.

150 South Perry Street

Post Office Box 2069

Montgomery, Alabama 36102-2069

Telephone: (334) 241-8002

Facsimile: (334) 241-8202

Email: glb@chlaw.com

rha@chlaw.com

cwb@chlaw.com

/s/ J. Michael Manasco

J. MICHAEL MANASCO (MAN010)

Attorney for the Defendants

OF COUNSEL:

J. Michael Manasco

State of Alabama Treasury

P.O. Box 302510

Montgomery, AL 36130-2510

Telephone: (334) 353-0050

Facsimile: (334) 353-0056

Email: mike.manasco@treasury.alabama.gov

CERTIFICATE OF SERVICE

I hereby certify that on July 23, 2010, a copy of the foregoing pleading was served on all known counsel of record listed below either electronically or by placing same in the United States mail, first class postage prepaid and properly addressed:

J. Doyle Fuller
Law Office of J. Doyle Fuller P.C.
2851 Zelda Road
Montgomery, AL 36106

/s/George L. Beck, Jr.
OF COUNSEL