FILED IN DISTRICT COURT
OKLAHOMA COUNTY
JAN - 5 2024
RICK WARREN
COURT CLERK
41

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

(1) Don Keenan, Plaintiff, v. **(1) Todd Russ**, in his capacity as the Treasurer of the State of Oklahoma Defendant.	Case No. CV-2023-3021

Defendant's Motion to Dismiss and Brief in Support

Defendant Todd Russ, in his capacity as Treasurer of the State of Oklahoma ("Defendant"), moves to dismiss Plaintiff Don Keenan's ("Plaintiff") action. As demonstrated below, Plaintiff's claims for alleged violations of the Oklahoma Constitution are not actionable. Each allegation fails to state a claim upon which relief may be granted. *See* 12 Okla. Stat. § 2012(B)(6). Additionally, and perhaps most critical, is Plaintiff's lack of standing to commence the action or seek temporary or injunctive relief. *See Anderson v. Access Med. Ctrs.*, 2011 OK CIV APP 106, 263 P.3d 328. In support of this Motion to Dismiss, Defendant shows the following:

Introduction

In 2022, Oklahoma passed the Energy Discrimination Elimination Act, 74 Okla. Stat. §§ 12001–12006. The Act generally prohibits government retirement systems from investing in companies that boycott the energy industry. Verified Petition, ¶ 9. Under the Act, the State Treasurer creates and maintains a list of financial companies that boycott energy companies. *Id.* at ¶ 10. After the list is promulgated, state retirement systems may be required to divest from the listed companies unless it "determines that such requirement would be inconsistent with its fiduciary responsibility…or other duties imposed by law relating to the investment of" the system's assets. 74 Okla. Stat. § 12002(D)(3). Further, a retirement system may cease divesting if it shows it "has

suffered or will suffer a loss in the value of assets...as a result of having to divest from listed financial companies," and may do so "to the extent necessary to ensure that the [retirement system] does not suffer a loss in value." 74 Okla. Stat. § 12003(F). For other state entities, the Act applies only insofar as the entity determines "the requirements...are inconsistent with the governmental entity's constitutional or statutory duties related to the...management of debt obligation or the...investment of funds." 74 O.S. § 12005(B)(4). Further, if a "governmental body determines the supplies or services to be provided are not otherwise reasonably available from a company that is not a listed financial company," then it too is exempted from the requirements. *Id.*

Plaintiff is a beneficiary of OPERS (Oklahoma Public Employees Retirement System). Verified Petition, ¶ 8. As a long-time member of OPERS, Plaintiff is on a defined-benefits plan, meaning Plaintiff is provided "a fixed payment each month, and the payments do not fluctuate with the value of the plan or because of the plan fiduciaries' good or bad investment decisions." *Thole v. U. S. Bank N.A*, 140 S.Ct. 1615, 1618, 207 L.Ed.2d 85 (2020). As such, Plaintiff is guaranteed his monthly payment, regardless of the investment strategies or funds available within OPERS. *See id.*; 1996 OK Atty. Gen. Op. 21, 1996 WL 927933, *19–20 (opining that the State of Oklahoma has a "statutory, contractual, and constitutional duty to annually and ultimately fund the retirement benefits" in the public retirement systems that cannot be abrogated "unless doing so would cause the State of Oklahoma to become insolvent.").

Plaintiff first filed this action on November 20, 2023, with Oklahoma County District Judge Sheila Stinson presiding over the case. After Defendant properly removed the case, Plaintiff dismissed the State of Oklahoma as a Defendant without discussion. Plaintiff then filed a Motion to Remand. The morning after Defendant file an objection to the Motion to Remand, Plaintiff improperly attempted to dismiss his federal claims. After being advised by Defendant of the

impropriety of the partial dismissal, Plaintiff dismissed his entire action and refiled in state court with a nearly identical Petition, absent his federal law claims.[1]

Plaintiff's Verified Petition broadly claims an assortment of alleged constitutional violations. *First*, Plaintiff alleges that, under Article 2, section 22 of the Oklahoma Constitution, the Act is content-discriminatory, viewpoint-discriminatory, and compels speech. Verified Petition, ¶ 12. *Second*, under the Oklahoma Constitution, Plaintiff alleges the Act violates Article 23, section 12's "exclusive purpose" mandate; Article 2, section 7 (Due Process); Article 5, section 46's prohibition on special laws; and creates an impermissible barrier to the courts in violation of Article 2, section 6. Verified Petition, ¶¶ 13–19. Beyond the broadly asserted alleged violations, Plaintiff's Petition is devoid of any legal or factual basis sufficient to survive dismissal.

Standard of Decision

The purpose of a motion to dismiss under 12 Okla. Stat. § 2012(B) is to test the law that "governs the claim in litigation rather than to examine the underlying facts." *Richardson, Richardson and Boudreaux v. Morrissey*, 2012 OK 52, ¶ 4, 283 P.3d 308, 309. A party must include "[a] short and plain statement of the claim showing that the pleader is entitled to relief." 12 Okla. Stat. § 2008(A)(1). Merely asserting a conclusory statement that a party is entitled to relief is insufficient — the pleading must "state a claim upon which relief can be granted." *Id.* at § 2012(B)(6). Since 12 Okla. Stat. §§ 2008(A)(1) and 2012(B) are adopted from and nearly identical to their federal counterparts, Oklahoma Courts may use federal law to interpret Oklahoma procedural rules. *Rooks v. State*, 1992 OK CIV APP 155, ¶ 9, 842 P.2d 773.

A motion to dismiss for failure to state a claim may be granted if "it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim[s] which would entitle relief.

[1] Oklahoma County District Judge Aletia Timmons was assigned this case once refiled. Defendant has not identified evidence indicating Plaintiff complied with Local Rule 8.

Gens v. Casady Sch., 2008 OK, 5, ¶ 8, 177 P.3d 565, 569. Although the moving party bears the burden of demonstrating the insufficiency of the pled facts, the plaintiff must state a cognizable legal theory to support their claims and sufficient facts under that cognizable theory. *Id.*

Further, although detailed factual allegations are not required, there must be more than unadorned and conclusory facts to establish both subject-matter jurisdiction and each individual claim brought by the plaintiff. *Russell-Webster v. Raimondo*, No. CIV-22-1074-D, 2023 WL 8358562 (W.D. Okla. Dec. 1, 2023) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). The "possibility that *some* plaintiff could prove *some* set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for these claims." *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008) (quoting *Ridge at Red Hawk v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007)).

Motions to dismiss challenging **jurisdictional** grounds may rely on facts not appearing on the face of the petition; motions challenging **sufficiency** of claims may do so as well, but this converts the motion into a motion for summary judgment. *Farley v. City of Claremore*, 2020 OK 30, ¶ 12, 465 P.3d 1213, 1221. However, an external document relied upon and referenced in pleadings may be incorporated in a motion to dismiss without converting it into one for summary judgment. *Tucker v. Cochran Firm-Criminal Defense*, 2014 OK 112, ¶ 30, 341 P.3d 673, 684–85 (citing *Gaylord Entertainment Co. v. Thompson*, 1998 OK 30, ¶ 4, n. 10, 958 P.2d 128, 136).

Arguments and Authorities

The Court should dismiss this action pursuant to 12 Okla. Stat. § 2012(B). *First*, Plaintiff lacks standing to bring his claims. *Second*, Defendant is immune under the doctrine of sovereign immunity. *Third*, even if the Court finds it has jurisdiction over the claims, it should dismiss the action because Plaintiff fails to state a claim upon which relief can be granted.

I. Plaintiff Lacks Standing Because He Has Not Alleged an Injury-in-Fact.

For there to be a case or controversy capable of resolution, "the plaintiff must have a personal stake in the case — in other words, standing." *TransUnion LLC v. Ramirez*, 141 S.Ct. 2190, 2203, 210 L.Ed.2d 568 (2021). Although federal jurisprudence for standing does not necessarily define standing pursuant to Oklahoma's Constitution, "in that our standing standards are analogous to those pronounced by the United States Supreme Court its jurisprudence on the subject is instructive." *Toxic Waste Impact Grp., Inc. v. Leavitt*, 1994 OK 148, 890 P.2d 906, 910 (citing *Hendrick v. Walters*, 1993 OK 162, 865 P.2d 1232, 1236, fn. 14). There are three "threshold criteria of standing." *Fent v. Contingency Rev. Bd.*, 2007 OK 27, ¶ 7, 163 P.3d 512, 519-20. A plaintiff must show he has (1) suffered an injury-in-fact which is actual, concrete, and not conjectural in nature, (2) a causal nexus between the injury and the complained-of conduct, and (3) there is a likelihood — more than mere speculation — the injury is capable of being redressed by a favorable court decision. *Toxic Waste*, 1994 OK at ¶ 8. All three elements are "indispensable". *Id.*

Injury-in-fact is key — a plaintiff must show "he has suffered the invasion of a legally protected interest that is concrete and particularized, *i.e.*, which affects the plaintiff in a personal and individual way." *Gill v. Whitford*, 138 S.Ct. 1916, 1929, 201 L.Ed.2d 313 (2018) (quoting *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 560 112 S.Ct. 2130, 119 L.Ed.2d 351 and n.1) (cleaned up). As here, "when the plaintiff is not himself the object of the government action or inaction he challenges, standing is...substantially more difficult [for a plaintiff] to establish." *Lujan*, 504 U.S. at 562 (internal quotations removed). *see also Ali v. Hogan*, 26 F.4th 587, 596 (4th Cir. 2022) (holding plaintiff in anti-boycott of Israel case lacked standing where he could not prove any injury); *A & R Eng'g & Testing, Inc. v. Scott*, 72 F.4th 685 (5th Cir. 2023) (reversing and vacating an injunction against Texas Attorney General which prohibited enforcement of the anti-boycott of Israel statute, as the plaintiff was unable to show the alleged injury was fairly traceable to the Attorney General); *Jordahl v. Brnovich*, 789 F. App'x 589 (9th Cir. 2020) (vacating preliminary injunction enjoining

enforcement of anti-boycott of Israel statute because, post-amendment, the statute did not apply to the plaintiff).

As the party invoking the court's jurisdiction, the plaintiff must establish each element. *Leavitt*, 1994 OK 148, ¶ 8, 890 P.2d 906, 910. Standing is not "dispensed in gross" — it must be shown for every element against every defendant for every form of relief. *TransUnion LLC*, 141 S.Ct. at 2208. Further, plaintiff must establish "standing to sue as of the time he commenced the litigation." *Ali*, 26 F.4th at 596 (citing *Carney v. Adams*, 141 S. Ct. 493, 208 L. Ed. 2d 305 (2020)).

Plaintiff here "alleges he has incurred two types of injuries in connection with [the Act]'s divestment requirement: (1) a threat of future economic loss and (2) several constitutional violations." *Abdullah v. Paxton*, 65 F.4th 204, 208 (5th Cir. 2023); *see* Verified Petition, ¶¶ 12–18. Plaintiff has not suffered any injury to any protected interest; further, any alleged injury is not fairly traceable to the Treasurer and would not be redressed by a judicial determination. As such, he fails to meet the standing requirements.

A. Plaintiff lacks standing because he has not — and is not in danger of having — sustained an injury in fact.

Plaintiff has suffered no injury from the enactment or enforcement of the Act. Plaintiff must plead that "he has sustained or is immediately in danger of sustaining some direct injury." *Abdullah* 65 F.4th at 208 (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 101, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983)). "Importantly, it cannot be speculative, conjectural, or hypothetical" — the "injury needs to be concrete and particularized, as well as actual or imminent." *Id.* (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013) and *K.P. v. LeBlanc*, 627 F.3d 115, 122 (5th Cir. 2010)) (internal quotations removed).

Plaintiff's claims fail for several reasons: *First and foremost*, Plaintiff has not and will not suffer any injury — pecuniary or violative of his constitutional rights — under the Act, because the Act simply does not apply to him. *Second*, Plaintiff's defined-benefit plan is not subject to the

market performance of the OPERS portfolio and even if it was subject to market performance and the system believed divestiture would cause a loss in the value of plan assets, the plan may obtain an exemption for the Act. *Third*, retirement systems may invoke statutory exceptions to divestment that prioritize fiduciary duties over divestment. Further, Plaintiff has not alleged any divestment has occurred — or ever will occur — that will impact OPERS's ability to pay his benefits.

1. Plaintiff cannot be injured by the Act because he is not subject to its provisions.

Plaintiff's facts alleging the scope of the Act showcase his lack of standing. In sum, Plaintiff alleges the Act requires companies, including financial institutions, to affirm they do not boycott energy companies; otherwise, the State, and the governmental entities under it, will not sign a contract with those companies. Verified Petition, ¶ 9-10.

Here, Plaintiff is not a state agency. He is not a financial institution. He is not an energy company. He is not a political subdivision of the state. He is not affiliated with a state retirement system, outside of being a beneficiary of a defined benefit plan. He is not attempting to sign a contract with the state. He is not boycotting any energy company. In fact, outside of his claim that he is a "retiree under the OPERS system," Plaintiff has no connection to the Act. Verified Petition, ¶ 8. Plaintiff has failed to plead any single fact or argument that OPERS' compliance with the Act will *actually cause an injury* to him.

Plaintiff's claims that the Act is unconstitutionally vague and overbroad likewise fail to provide standing — "even if a statute or regulation is allegedly vague or overbroad, that status alone does not establish standing to sue...the fact that the claimant may assert facial vagueness and overbreadth challenges does not alter" the injury-in-fact requirement of standing. *See Ali*, 26 F.4th at 599 (finding challenger of anti-boycott of Israel statute lacked standing because he had not alleged any injury-in-fact).

2. Plaintiff's retirement benefits are unrelated to market performance.

Plaintiff contends he has been a long-time contributor to OPERS and is a retiree under that system. Verified Petition, ¶¶ 1–8. However, as to Plaintiff, Plaintiff's retiree status affords him benefits under the "defined-benefits plan." In a defined-benefit plan, participants' benefits are fixed and will not change — that is, the benefits are "not tied to the value of the plan." *Thole*, 140 S.Ct. at 1619. Although it discusses federal law, the Supreme Court's decision in *Thole* is instructive.

In *Thole*, two retirees sued the U.S. Bank under ERISA for mismanagement of their defined-benefit retirement plan. *Id.* at 1616. In affirming the appellate court, the Court found both plaintiffs lacked standing "[b]ecause the plaintiffs themselves have no concrete stake in the lawsuit." *Id.* at 1619. Much like Plaintiff here, if the *Thole* plaintiffs *lost*, "they would still receive the exact same monthly benefits that they are already slated to receive, not a penny less" — and if they *won* "they would still receive the exact same monthly benefits that they are already slated to receive, not a penny more." *Id.* Both *Thole* plaintiffs had "received all of their monthly pension benefits so far, and they will receive those same monthly payments for the rest of their lives." *Id.*

The Court further rejected the plaintiffs' alternative arguments that they "possess[] an equitable or property interest in the plan, meaning...injuries to the plan are by definition injuries to the plan participants" and that plaintiffs functioned as "representatives of the plan itself." *Id.* at 1619–20. In dispensing with the first argument, the Court found the benefits paid to the participants of a defined-benefit plan "are not tied to the value of the plan" and, relying on precedent, stated that "plan participants possess no equitable or property interest in the plan." *Id.* (citing *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439–441, 119 S.Ct. 755, 142 L.Ed.2d 881 (1999)). Plaintiffs' second argument was quickly shot-down as well — "in order to claim the interests of others, the litigants themselves still must have suffered an injury in fact, thus giving them a sufficiently concrete interest in the outcome of the issue in dispute." *Id.* at 1620 (quoting *Hollingsworth v. Perry*, 570 U.S. 693, 708, 133 S.Ct. 2652, 186 L.Ed.2d 768 (2013)) (internal quotation marks omitted).

Plaintiff's arguments here fail for the same reasons. He has not alleged any particularized, concrete injury he *has* suffered. Indeed, Plaintiff neither pled nor alluded to missing a single retirement payment or receiving a reduction in payments resulting from the Act. Plaintiff has not alleged any particularized, concrete injury he *will* suffer. Plaintiff has not alleged any concrete interest in the outcome of this dispute that would allow him to bring claims on behalf of the interests of others or his authority to do so. Plaintiff has not alleged any injury at all having *actually* occurred — even Plaintiff's quotations purportedly showing the "financial devastation that **would be** wreaked by" the Act fails, as both quoted entities opted to use one of the several exceptions provided by the Act to avoid divestment. Verified Petition, ¶ 12. Insofar as these might constitute damages at all, they are the definition of "speculative." *Speculative Damages*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Damages that are so uncertain to occur that they will not be awarded.").

3. Statutory exceptions prioritize fiduciary duties over divestment obligations. Further, no divestment has occurred — or ever will occur — that will impact OPERS's ability to pay Plaintiff's benefits.

The divestment statute at issue here provides that a retirement system "shall not be subject to any requirement of this act if the [retirement system] determines that such requirement would be inconsistent with its fiduciary responsibility with respect to the investment of entity assets or other duties imposed by law relating to the investment of entity assets." 74 Okla. Stat. § 12002(D)(3). Put plainly, if the retirement system determines divesting from a listed company undermines their ability to pay their retirees, then they are not required to divest. Further, retirement systems are permitted to cease divestment from a listed company if the system determines it "has suffered or will suffer a loss in the value of assets…as a result of having to divest from listed financial companies" or if "an individual portfolio that uses a benchmark-aware strategy would be subject to an aggregate expected deviation from its benchmark as a result of having to divest." *Id.*

at § 12003(F). Additionally, the retirement system "is not required to divest from any indirect holdings in actively or passively managed investment funds or private equity funds." *Id.* at (E).

These statutory exceptions have already been relied upon by the two entities Plaintiff alleged as evidence of injury. Verified Petition, ¶ 11. Further, the only way Plaintiff could be injured is if "the mismanagement of the plan was so egregious that it substantially increased the risk that the plan and the employer would fail and be unable to pay the participants' future pension benefits." *Thole*, 140 S.Ct. at 1621. But "a bare allegation of plan underfunding does not itself demonstrate a substantially increased risk that the plan and the employer would both fail." *Id.* at 1622. Any alleged mismanagement by the administrators of OPERS would have to create or enhance the risk of default by the entire plan. *Id.* Given the statutory protections in place, this risk is effectively non-existent. Additionally, the State is obligated "to use all resources and fiscal means available...to fund or stabilize an insolvent state retirement plan *before* a default can occur," unless doing so "would cause the State of Oklahoma to become insolvent." Okla. Atty. Gen. Opinion 96-21.

B. Any damages Plaintiff claims are neither fairly traceable to Defendant, nor redressable by any possible relief ordered against them.

Plaintiff has failed to allege he has or will suffer any injury at all. As such, there is no injury to be traced to Defendant's actions and no redress available to Plaintiff. Any potential injury-in-fact arising from a chilling effect on expression, must "arise from an objectively justified fear of real consequences, which can be satisfied by showing a credible threat of prosecution or other consequences following from the statute's enforcement." *Rio Grande Found. v. Oliver*, 57 F.4th 1147, 1160 (10th Cir. 2023). Plaintiff does not show any credible threat to his freedom of speech.

To meet standing's traceability and redressability requirements, Plaintiff must show there is an increased risk of a future loss of money "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560 (cleaned up). Further, "it must be likely, as opposed to merely speculative, that the

injury will be redressed by a favorable decision." *Id.* at 561 (internal quotation marks omitted). Assuming Plaintiff has adequately pleaded OPERS' failure to invest in one of six financial institutions will so endanger the retirement systems' survival that it will be unable to pay his defined benefits, he has not plausibly pleaded doing so is either traceable to or redressable by the named Defendant. In fact, any divestment that occurs will be performed by an independent decisionmaker — the state retirement system doing the divesting. The Treasurer's role is merely administrative; it begins and ends with creating and maintaining the list of financial companies. *Id.* at § 12003.

Under the Act, the Treasurer is tasked with one obligation: to create and maintain a list of financial companies. Outside of annually updating that list, the Treasurer's role simply fades away. He plays no role in the remaining implementation or enforcement of the Act — it is the state governmental entities themselves, namely the retirement systems, that determine whether to apply one of the statutory exceptions, *see* 74 O.S. § 12003, 12005, or to "sell, redeem, divest, or withdraw all publicly traded securities of the financial company." *Id.* at § 12003(C)(4). The Treasurer himself does not have the power to divest from the listed companies, or to force the retirement systems to do so. The statute ultimately tasks the retirement systems with divesting securities according to their own preexisting fiduciary and legal duties. Injunctive relief against the Treasurer would simply prevent the list from being updated.

Further, Plaintiff has not shown the Treasurer has done anything to injure him. The Treasurer has placed six companies on the latest version of the divestment list. Plaintiff's Motion for TRO at 4. As a result of this list, Plaintiff alleges OPERS would lose more than $10 million if the retirement system divests from those financial companies. *Id.* And OPERS **chose not to divest** and, instead, voted to take advantage of the fiduciary duty exception provided in the Act. Plaintiff has not shown any possible future financial injury is fairly traceable to the Treasurer.

Nor would injunctive relief directing the Treasurer to cease updating the divestment list redress any of Plaintiff's alleged future loss of money. OPERS and other retirement systems would still be required to either divest the securities currently included on the list or determine whether those securities fit into one of the several exceptions provided. It is entirely "speculative" and not "likely" that declaratory or injunctive relief against the Treasurer will have any effect on Keenan's retirement benefits at some unspecified point in the future. *Lujan*, 504 U.S. at 561.

For these reasons, Plaintiff fails to show he has standing to bring any of his claims — he has not and will not suffer any injury-in-fact, and any alleged injury is not fairly traceable to or redressable by Defendant. Plaintiff's claims should be dismissed.

II. This suit is barred under the Governmental Tort Claims Act.

Even if the Court determines Plaintiff has standing, Defendant is immune to Plaintiff's claims under the Governmental Tort Claims Act ("GTCA"). *See* 51 Okla. Stat. § 152.1(A). "The state . . . and all of their employees acting within the scope of their employment . . . shall be immune from liability for torts." *Id.* This immunity extends "even to so-called 'constitutional' torts." *Barrios v. Haskell Cnty. Pub. Facilities Auth.*, 2018 OK 90, ¶ 2, 432 P.3d 233, 235. Indeed, the GTCA specifically defines "torts" to include any "legal wrong . . . involving violation of a duty imposed by general law, statute, *the Constitution of Oklahoma*, or otherwise . . . ." 51 Okla. Stat. § 152(14) (emphasis added). The GTCA further states Defendant is not liable if the claim results from "performance of . . . any act or service *which is in the discretion* of the state or political subdivision or its employees." 51 Okla. Stat. § 155(5). In addition, "[n]o action for any cause arising under [the GTCA] . . . shall be maintained unless valid notice has been given and the action is commenced within one hundred eighty (180) days after denial of the claim as set forth in this section." 51 Okla. Stat. § 157(B).

Accordingly, "any alleged . . . state right must be adjudicated within the remedial framework of a legally cognizable action, and the Governmental Tort Claims Act does not provide a remedy or recognize a cause of action when that Act expressly prohibits a party using a state constitutional right . . . as a basis for any tort liability against the state when the cause of action is otherwise prohibited by that Act." *Barrios*, 2018 OK 90, ¶ 4. Plaintiff cannot drop his federal claims on a moment's notice then insist Defendant lacks sovereign immunity when refiling in state court.

In passing the Act, the Legislature specifically ensured that they were not waiving immunity from claims related to the Act. In short, the Act provides that "[a] person...shall not sue or pursue a private cause of action against the state...for any claim or cause of action, including...violation of any constitutional, statutory, or regulatory requirement in connection with" actions or inactions taken in connection with the Act. 12 Okla. Stat. § 12002(D)(1).

Plaintiff states Defendant violated multiple provisions of the Oklahoma Constitution resulting in losses ("retirement benefits being depleted" and constitutional rights, Verified Petition ¶¶ 8, 12-19). The GTCA does not waive liability for losses involving violations of Oklahoma's Constitution. *See Barrios,* 2018 OK 90, ¶ 2, 432 P.3d at 235. Moreover, neither party disputes the discretionary aspect of enforcing the Act. In fact, Keenan relies on the Act's discretionary provisions as a basis for his "unconstitutionally vague" claim. Plaintiff's Motion for TRO at 14. However, the GTCA specifically shields Defendant from liability for acts in his discretion. *See* 51 Okla. Stat. § 155(5). Notwithstanding the foregoing, Plaintiff also failed to provide notice of his suit as required by the GTCA, thus presenting another fatal flaw to Plaintiff's claims.

Lastly, under the doctrine of sovereign immunity, "the State cannot be sued without its consent." *Freeman v. State ex re. Dep't of Hum. Servs*., 2006 OK 71, ¶ 0, 145 P.3d 1078, 1078. As discussed, there has been no such waiver authorizing Plaintiff's suit against Defendant. *See* 12

Okla. Stat. § 12002(D)(1). Absent an express waiver of sovereign immunity, Defendant is immune from Plaintiff's claims.

III. Plaintiff fails to state a claim upon which relief can be granted for each of his claims.

Even if this Court determines it has jurisdiction to hear Keenan's claims, it should still dismiss the action pursuant to 12 Okla. Stat. § 2012(B)(6). A court must accept as true all the pleading party's factual allegations and the reasonable inferences drawn therefrom. *See Hayes v. Eateries, Inc.*, 1995 OK 108, ¶ 2, 905 P.2d 778, 780. When there are "no set of facts which would entitle [Plaintiff] to relief," a motion to dismiss for failure to state a claim should be granted. *Pellebon v. State ex rel. Bd. of Regents of Univ. of Oklahoma*, 2015 OK CIV APP 70, ¶ 12, 358 P.3d 288, 291. A petition "may be dismissed as a matter of law for two reasons: (1) lack of any cognizable legal theory, or (2) insufficient facts under a cognizable legal theory." *Pryor v. Findley*, 1997 OK CIV APP 74, ¶ 2, 949 P.2d 1218, 1219.

If the undisputed facts in the pleadings make it "appear that the claim does not exist rather than the claim has been defectively stated," the claim should be dismissed "without giving the plaintiff the opportunity to amend." *Pellebon*, 358 P.3d at 292 (quoting *Fanning v. Brown*, 2004 OK 7, ¶ 23, 85 P.3d 841.) In dismissing a nonexistent claim, the court should make clear that "no amendment of the petition could cure the defects in Plaintiff's petition." *Id.*

From the outset, Plaintiff makes bare, conclusory allegations that the Act violates a variety of constitutional provisions, with little to no factual support behind them. For example, Plaintiff's Article 2, section 22 claim begins and ends with the following paragraph:

> "Aside from the finanical devastation that would be wreaked by divesting from the current fund managers, such divestment also violates Art. 2, § 22 of the Oklahoma Constitution (Freedom of Speech). This is true because the Act compels speech, is viewpoint discriminatory, and content discriminatory." Verified Petition, ¶ 12.

Plaintiff provides no set of factual allegations in support of this claim. In fact, outside of a base recitation of what the Act **does**, Plaintiff provides no real factual allegations at all. Plaintiff

mentions Defendant in three substantive paragraphs of his Petition: once to group him with the actions of the now-dismissed State defendant; once to describe his obligations under the Act; and once to provide out-of-context quotations. As such, Plaintiff's claims fail as a matter of law, as there is no factual basis for relief to be granted.

A. Plaintiff's claim that the Act is unconstitutional fails as it lacks a cognizable legal theory.

A motion to dismiss is properly granted if "it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim[s] which would entitle relief." *Gens v. Casady Sch.*, 2008 OK, 5, ¶ 8, 177 P.3d 565, 569. Without any foundation, Plaintiff contends the Act violates Article 2, section 7 of the Oklahoma Constitution (Due Process) as it is "unconstitutionally vague." Verified Petition, ¶ 14. Plaintiff provides no law, Amendment, or statute to support his contention Defendant has violated or harmed his due process rights. Plaintiff further alleges several Oklahoma Constitution provisions the Act purportedly violates, including Article 23, section 12; Article 5, section 46; and Article 2, section 6. Outside of conclusory statements those provisions are violated, Plaintiff's claims are not "anything more than a generalized relationship between those provisions and the harm [he] claims in this case." *Taylor v. City of Bixby*, 2018 OK CIV APP 18, ¶ 20, 415 P.3d 537, 545 (affirming dismissal of Art. 2, § 6 claim where plaintiff had "not sufficiently stated claims for violation of his constitutional rights.").

There is no private right of action under the Oklahoma Constitution. *Earles v. Cleveland,* 418 F.Supp.3d 879, 890 (W.D. Okla. 2019), *aff'd, Earles v. Cleveland,* 825 Fed. Appx. 544 (10th Cir. 2020) ("There is no private right of action for violations of the Oklahoma Constitution."); *see Howard v. Grady Cnty. Crim. Just. Auth.*, 2017 OK CIV APP 7, ¶ 4, 394 P.3d 299, 301 ("[W]hile the Supreme Court of Oklahoma has authority to fashion private causes of action in the absence of legislative action, it has not created or previously recognized a private right of action for violations of due process.").

1. The funds within the retirement systems are being used for the exclusive purpose and benefit of its beneficiaries in accordance with Article 23, § 12.

Article 23, section 12 of the Oklahoma Constitution provides all funds in the public retirement systems shall be held "in trust for the exclusive purpose of providing for benefits, refunds, investment management, and administrative expenses of the individual public retirement system."

Nothing in the Act allows for any funds within the retirement systems to be used for something that is not for the "exclusive purpose" of the employees and beneficiaries of the systems. The limitation on investment options within the Act is similar to other provisions that control the investments the state retirement systems may make. *See, e.g.,* 74 O.S. § 935.9 ("In selecting investment options for participants in the plan, the Board shall give due consideration to offering investment options provided by business entities that provide guaranteed lifetime income in retirement"); 74 O.S. § 582 ("The state shall not adopt a procurement, investment or other policy that has the effect of inducing or requiring a person to boycott the government of Israel").

2. The Act is not a special law under Article 5, § 46, or an impermissible barrier to the courts under Article 2, § 6.

Under section 46, the court must answer one question: is the statute at issue a special or general law? *Reynolds v. Porter*, 1988 OK 88, ¶ 17, 760 P.2d 816, 823. Special laws relate to "particular persons or things of a class"; general laws "relat[e] to all persons or things of a class." *Id.* at ¶ 14. The statute "must operate uniformly upon all brought within the class by common circumstances." *Id.* (citing *Grable v. Childers*, 1936 OK 273, syllabus 1, 56 P.2d 357, 358). Section 6 provides "three distinct constitutional guarantees:" access to courts; a right to remedies for every injury; and a prohibition on the sale, denial, delay, or prejudice of justice. *John v. Saint Francis Hospital, Inc.,* 2017 OK 81, ¶ 16, 405 P.3d 681, 688.

Plaintiff arbitrarily carves apart the language in the Act. Section 12002(D)(2) allows the State to recover its costs and attorney fees for defending claims brought against it under the Act. The Act does not "make[] a carve-out for declaratory judgments" as Plaintiff alleges. Verified Petition,

¶ 17. The provision operates uniformly on "all persons or things of a class" — any person who files suit against the State under that section. *Id.* "It is well settled that a statute which applies to all persons or things of a designated class uniformly throughout the state, omitting no person or thing belonging under that classification, is a general law within the meaning of the constitution." *Grable v. Childers*, 1936 OK 273, 56 P.2d 357, 360.

Similarly, awarding attorney fees for prevailing parties is constitutional under Oklahoma law. *See, e.g., Tillery v. Tulsa Christian Care Ctr., Inc.,* 2005 OK CIV APP 54, ¶ 10, 118 P.3d 772, 776 ("[W]e find that the award of attorney fees to the successful plaintiff pursuant to 63 O.S. § 1-1918(F) does not violate either the 14th Amendment of the United States Constitution or § 6, Art. II of the Oklahoma Constitution."); *Alford v. Garzone*, 1998 OK CIV APP 105, 964 P.2d 944 (finding law authorizing attorney fees to a person when a protective order is entered constitutional under strict scrutiny review); *Thayer v. Phillips Petroleum Co.*, 1980 OK 95, ¶ 15, 613 P.2d 1041, 1045 (upholding Small Claims Act provision imposing attorney fees on the defendant if the plaintiff prevails as constitutional under strict scrutiny review).

IV. Plaintiff lacks capacity as a party to sue.

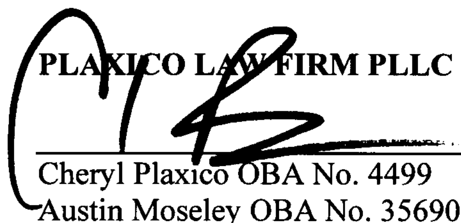
Persons generally have the capacity to sue or be sued in Oklahoma unless otherwise provided by law. 12 O.S. § 2017(B). Under the Act, "a member, retiree, or beneficiary of a retirement system to which the [Act] applies...**shall not sue or pursue a private cause of action** against the state...or any other officer of a state governmental entity...for any claim or cause of action, including...for violation of any constitutional, statutory, or regulatory requirement." 12 O.S. § 12002(D)(1); *see also Century Inv. Grp., Inc. v. Bake Rite Foods, Inc.*, 2000 OK CIV APP 48, ¶ 4, 7 P.3d 510, 512–13 (affirming that a statute removing the capacity to sue from corporations not in good standing "expresses the public policy of" Oklahoma and is "a decision by the Legislature" that warranted a directed verdict).

Plaintiff is a retiree and beneficiary of the OPERS system. Verified Petition, ¶ 8. The Legislature specifically removed from retirees and beneficiaries of applicable retirement systems the power to bring claims under the Act. As such, Plaintiff lacks capacity as a party to sue.

Conclusion

For the reasons discussed above, the Court should dismiss this suit. Plaintiff lacks standing to maintain all actions alleged. Defendant is immune to suits for statutory and constitutional violations. Plaintiff failed to state a claim upon which relief can be granted. Plaintiff has not supported any of his allegations with sufficient facts to support the court affording him relief. Plaintiff's request for declaratory relief fails. Plaintiff lacks capacity to sue. Further, the Legislature specifically exempted retirees and beneficiaries under state retirement systems from bringing suit for damages alleged under the Act. Accordingly, the Court should **GRANT** Defendant's Motion to Dismiss pursuant to the provisions under 12 Okla. Stat. § 2012(B).

Respectfully submitted,



PLAXICO LAW FIRM PLLC

Cheryl Plaxico OBA No. 4499
Austin Moseley OBA No. 35690

Mailing Address:
P.O. Box 298
Oklahoma City, Oklahoma 73101

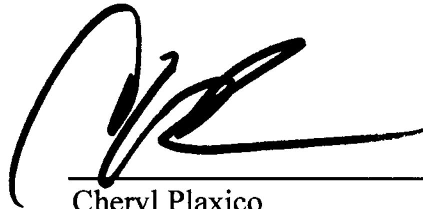
Midtown OKC Office:
923 N. Robinson Ave., 5th Floor
Oklahoma City, Oklahoma 73102
Telephone: (405) 209-7565
Email: cplaxico@plaxico.law
Email: amoseley@plaxico.law

ATTORNEYS FOR DEFENDANT

Certificate Of Service

I hereby certify that on the 5th day of January, 2024, a true and correct copy of the foregoing was sent via mail with postage prepaid and email thereon to:

Collin R. Walke, OBA #22328
Hall Estill
100 N. Broadway, Suite 2900
Oklahoma City, Oklahoma 73102
(405) 553-2322
(405) 553-2388
cwalke@hallestill.com
ATTORNEY FOR PLAINTIFF



Cheryl Plaxico