



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

**NATIONWIDE RETIREMENT SOLUTIONS, INC.,**  
**Plaintiff,**  
**vs.**  
**ALABAMA STATE PERSONNEL BOARD, PEBCO, INC., and ALABAMA STATE EMPLOYEES ASSOCIATION,**  
**Defendants**

**CIVIL ACTION NO.**  
**CV-2009-1088**

**ANSWER AND CROSSCLAIMS**

**I. ANSWER**

For its answer to the individually-numbered paragraphs of the Complaint for Interpleader filed by Nationwide Retirement Solutions, Inc. (“NRS”), the Alabama State Personnel Board (“SPB”) states the following:

1. The SPB admits that NRS provides retirement-plan services to governmental employers, and is a corporation registered in Delaware and headquartered in Ohio, with its offices and principal place of business in Ohio. The SPB is without knowledge or information sufficient to form a belief as to the truth of the remaining averments of paragraph 1 of the Complaint for Interpleader.

2. The SPB admits that it is the entity of the State of Alabama that supervises the State's personnel department and civil service and merit system and has the power, granted by statute, to adopt certain rules and regulations which have the force and effect of law.

3. This paragraph is not applicable to the SPB and requires neither an admission nor a denial.

4. This paragraph is not applicable to the SPB and requires neither an admission nor a denial.

5. The SPB admits that a substantial part of the events or omissions giving rise to this Complaint occurred in Montgomery County, Alabama.

6. The SPB admits that NRS alleges there is at least \$720,000 in dispute. The SPB can neither admit nor deny the actual sum in dispute because the SPB has not been provided access to the information upon which the amount is based.

7. The SPB admits that this Court has personal jurisdiction over all defendants for purposes of entertaining the Complaint for Interpleader. The SPB denies the remaining allegations of paragraph 7 of the Complaint for Interpleader.

8. The SPB admits that the State of Alabama makes a supplemental retirement plan available to state employees and that such plan is often referred to as the State of Alabama Public Employees Deferred Compensation Plan (“the Plan”). The SPB admits that the Plan is intended as an eligible deferred compensation plan within the meaning of Section 457(b) of the Internal Revenue Code, 26 U.S.C. § 457(b), and permits state employees to save for retirement on a tax-deferred basis by deferring portions of their compensation. The SPB admits that it is the Plan's sponsor and a fiduciary to the Plan. The SPB denies that it is the only fiduciary of this Plan. The SPB denies the remaining allegations of paragraph 8 of the Complaint for Interpleader.

9. The SPB admits that Alabama Code Section 36-26-14 states that the SPB “is hereby authorized and directed to adopt a plan or plans as recommended by the employees of the State of Alabama through the Alabama State Employees Association providing for tax-deferred annuity and deferred compensation programs for the salaried employees of the State of Alabama.” The SPB admits that Alabama Code Section 36-26-14 states that the SPB is “hereby authorized to adopt and arrange for consolidated billing and efficient administrative services through the Alabama State Employees Association or its designated agent in order that any such plans adopted shall operate without cost to or contribution from the State of Alabama except for the incidental expenses of administering the payroll salary-reductions and the remittance thereof to the trustee or custodian of the plan or plans.”

10. The SPB denies that “[i]n 2003, ASEA conducted a search for providers of administrative services and investment options through a competitive RFP process, pursuant to its responsibility to recommend the Plan terms to the Personnel Board.” The SPB is without knowledge or information sufficient to form a belief as to the truth of the averment that “NRS participated in that RFP process and was selected from among a number of other participants,” and therefore denies the same. The SPB admits that there was a course of dealing that assumed that NRS was selected to perform certain administrative services for the Plan and that NRS’s affiliate, Nationwide Life Insurance Company (“NL”), was selected to provide fixed and variable annuity contracts to the Plan that offer certain investment

options for the Plan's participants. The SPB is without knowledge or information sufficient to form a belief as to whether NRS or NL was selected.

11. The SPB admits that in March 2004, it approved the choice of NRS to provide certain administrative services, and NL to provide certain annuity contracts. The SPB admits that it approved a "Funding Agreement" in reliance upon certain representations made to it. The SPB denies that said Funding Agreement "sets forth the terms of the Plan." The SPB admits that said Funding Agreement includes some terms of the annuity contracts provided by NL, but denies that those terms constitute "the general terms of the annuity contracts."

12. The SPB admits NRS's statements that "NRS and PEBCO, Inc., entered into a March 1, 2004 Administrative Services Agreement between them" and that "NRS agreed to make certain payments to PEBCO and ASEA." The SPB denies that NRS agreed to make such payments to PEBCO and ASEA "in return for their performance of certain administrative, marketing, sponsorship, and other services for the Plan." The SPB admits that "[t]hose payments are made in quarterly installments each year."

13. The SPB is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 13 of the Complaint for Interpleader.

14. The SPB is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 13 of the Complaint for Interpleader.

15. The SPB admits that on April 29, 2009, it adopted an Amendment to the Plan (“Plan Amendment”) that alters retroactively and prospectively the terms of the Plan and the law regarding the Plan. The Plan Amendment speaks for itself. Nevertheless, SPB admits that the Plan Amendment prohibits the payments referred to in paragraphs 13 and 14 of the Complaint for Interpleader (“future payments”) since no one sought approval of such payments from the SPB.

16. The SPB admits it has a right to seek the restoration of Plan assets to the Plan, and, accordingly asserts an ownership interest on behalf of the Plan in the disputed future payments. The SPB admits that the State Personnel Director sent a letter to NRS, NL, ASEA, and PEBCO on or about June 26, 2009, directing them to stop transactions that do not comply with the Plan Amendment and clarifying that the directive applied to payments to the ASEA and PEBCO. The Plan Amendment speaks for itself. The SPB denies all other allegations contained in paragraph 16 of the Complaint for Interpleader.

17. The SPB is without knowledge or information sufficient to form a belief as to the truth of the averment that “[t]hree participants in the Plan have also claimed that the Plan and all of its participants have a legal right to future payments, including the July 15 payment and the Draw Down Account.” The SPB admits that in the Amendment the SPB clarified that it is the Plan sponsor. The SPB admits that the Amendment refers to the Board as the only person that can approve an interested person’s prohibited transactions. The SPB admits it has a

right to seek the restoration of Plan assets to the Plan, and, accordingly asserts an ownership interest on behalf of the Plan in the disputed future payments.

18. The SPB is without knowledge or information sufficient to form a belief as to the truth of the averment that “ASEA and PEBCO together claim right to the future payments under the Administrative Services Agreement.” The SPB admits that both ASEA and PEBCO have filed lawsuits in the Circuit Court of Montgomery County pending as Civil Action Nos. CV-2009-804 and CV 2009-812 “claiming that the Amendment unlawfully and unconstitutionally impairs the obligations of ASEA’s/PEBCO’s contracts and violates ASEA’s/PEBCO’s due process rights” and “seek[ing] a declaration that the Personnel Board’s Amendment is null and void.”

19. The SPB is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 19 of the Complaint for Interpleader.

20. Because paragraph 20 of the Complaint for Interpleader makes no allegation, it requires neither an admission nor a denial.

21. Because paragraph 21 of the Complaint for Interpleader makes no allegation, it requires neither an admission nor a denial.

The SPB denies that NRS is entitled to any costs and attorneys’ fees, and denies that the Court has jurisdiction to tax NRS’s costs against the SPB or to require the SPB to pay NRS’s attorneys’ fees.

Except as expressly admitted hereinabove, the SPB denies each and every material averment of the Complaint for Interpleader and demands strict proof thereof.

## **II. CROSSCLAIMS**

COMES NOW Defendant/Crossclaim-Plaintiff the Alabama State Personnel Board on behalf of The State of Alabama Public Employees Deferred Compensation Plan for Public Employees (“the Plan”), and states the following crossclaims against the Alabama State Employees Association, PEBCO, Inc., Edwin J. “Mac” McArthur, Steve Walkley, Glenn Parker, Ulysses Lavender, Diana McLain, Randy Hebson, and Robert Wagstaff.

### **PARTIES**

1. Defendant/Crossclaim-Plaintiff the Alabama State Personnel Board (“SPB”) is the agency of the State of Alabama that supervises the State's personnel department and civil service and merit system and has the power, granted by statute, to adopt certain rules and regulations which have the force and effect of law. In addition to the SPB's powers under Alabama Code § 36-26-14 and other law, the SPB also asserts these crossclaims as the Plan's representative.

2. Defendant/Crossclaim-Defendant the Alabama State Employees Association (“ASEA”) purports to be a tax-exempt labor organization described in Internal Revenue Code (26 U.S.C.) § 501(c)(5), with its principal office and place of business located in Montgomery, Alabama.

3. Defendant/Crossclaim-Defendant PEBCO, Inc. (“PEBCO”) is a corporation organized under the laws of the State of Alabama and has its principal place of business in Montgomery, Alabama. PEBCO is a wholly-owned subsidiary of ASEA.

4. Crossclaim-Defendant Edwin J. “Mac” McArthur (“McArthur”) is an individual citizen of the State of Alabama. McArthur is Executive Director of the ASEA. McArthur is President of and serves on the Board of Directors of PEBCO. McArthur is a proper party to this action because the claims asserted against him are based on the same transactions and occurrences as those asserted against the other Counterclaim-Defendants and Crossclaim-Defendants and questions of law or fact common to all Counterclaim-Defendants and Crossclaim-Defendants arise in this action.

5. Crossclaim-Defendant Steve Walkley (“Walkley”) is an individual citizen of the State of Alabama. Walkley is Treasurer of and a member of the Board of Directors of the ASEA. Walkley is a member of the Board of Directors of PEBCO. Walkley is a proper party to this action because the claims asserted against him are based on the same transactions and occurrences as those asserted against the other Counterclaim-Defendants and Crossclaim-Defendants and questions of law or fact common to all Counterclaim-Defendants and Crossclaim-Defendants arise in this action.

6. Crossclaim-Defendant Glenn Parker (“Parker”) is an individual citizen of the State of Alabama. Parker is an officer of and member of the Board of Directors of PEBCO. Parker is a proper party to this action because the claims asserted against him are based on the same transactions and occurrences as those asserted against the other Counterclaim-Defendants and Crossclaim-Defendants

and questions of law or fact common to all Counterclaim-Defendants and Crossclaim-Defendants arise in this action.

7. Crossclaim-Defendant Ulysses Lavender (“Lavender”) is an individual citizen of the State of Alabama. Lavender is a member of the Board of Directors of PEBCO. Lavender is a proper party to this action because the claims asserted against him are based on the same transactions and occurrences as those asserted against the other Counterclaim-Defendants and Crossclaim-Defendants and questions of law or fact common to all Counterclaim-Defendants and Crossclaim-Defendants arise in this action.

8. Crossclaim-Defendant Diana McLain (“McLain”) is an individual citizen of the State of Alabama. McLain is Secretary of and a member of the Board of Directors of the ASEA. McLain is a member of the Board of Directors of PEBCO. McLain is a proper party to this action because the claims asserted against her are based on the same transactions and occurrences as those asserted against the other Counterclaim-Defendants and Crossclaim-Defendants and questions of law or fact common to all Counterclaim-Defendants and Crossclaim-Defendants arise in this action.

9. Crossclaim-Defendant Randy Hebson (“Hebson”) is an individual citizen of the State of Alabama. Hebson is President of and a member of the Board of Directors of the ASEA. Hebson is an officer of and member of the Board of Directors of PEBCO. Hebson is a proper party to this action because the claims asserted against him are based on the same transactions and occurrences as those

asserted against the other Counterclaim-Defendants and Crossclaim-Defendants and questions of law or fact common to all Counterclaim-Defendants and Crossclaim-Defendants arise in this action.

10. Crossclaim-Defendant Robert Wagstaff (“Wagstaff”) is an individual citizen of the State of Alabama. Wagstaff is a member of the Board of Directors of the ASEA. Wagstaff is also Chairman of the ASEA Deferred Compensation Committee. Wagstaff is a proper party to this action because the claims asserted against him are based on the same transactions and occurrences as those asserted against the other Counterclaim-Defendants and Crossclaim-Defendants and questions of law or fact common to all Counterclaim-Defendants and Crossclaim-Defendants arise in this action.

### **JURISDICTION AND VENUE**

11. The Circuit Court of Montgomery County, Alabama, has jurisdiction over these crossclaims. Venue is proper in this court under Alabama Code Sections 6-3-2, 6-3-6, and 6-3-7, and otherwise.

### **FACTS AND CLAIMS**

12. This lawsuit concerns secret payments relating to a deferred compensation plan referred to as the Plan, which has been established and maintained by the State of Alabama for State employees pursuant to Alabama Code § 36-26-14 (1975) and intended as an eligible deferred compensation plan within the meaning of I.R.C. § 457(b) (26 U.S.C. § 457(b)).

13. Internal Revenue Code § 457 provides that such a plan “may be established and maintained” by an “eligible employer,” which means “a State, political subdivision of a State, [or] any agency or instrumentality of a State or political subdivision of a State.” I.R.C. § 457(b), (e)(1)(A). Only the State or a political subdivision thereof qualifies as an eligible employer with respect to the Plan under I.R.C. § 457.

14. Alabama Code § 36-26-14 (1975), enacted in 1971, states that the SPB “is hereby authorized and directed to adopt a plan or plans as recommended by the employees of the State of Alabama through the Alabama State Employees Association providing for tax-deferred annuity and deferred compensation programs for the salaried employees of the State of Alabama.”

15. The State of Alabama authorized the SPB to adopt the Plan at issue.

16. The SPB is the “eligible employer” for the Plan, as that term is defined in Internal Revenue Code § 457.

17. The SPB has the power and authority to assert legal and equitable claims on behalf of the Plan and to seek the restitution of assets to the Plan.

18. Since 1971, the SPB has periodically adopted or approved restatements of the Plan and Plan-related contracts recommended by the ASEA.

19. For more than thirty years, the ASEA has made Plan-related recommendations that included the provision of Plan-related services by Nationwide Life Insurance Company (“NL”), Nationwide Retirement Solutions, Inc.

("NRS"), Public Employee Benefit Services Corporation ("PEBSCO"), now known as NRS, and/or other companies affiliated with Nationwide.

20. The following contains a list of Funding Agreements, Administrative Service Agreements, Plan Documents, and Annuity Contracts that were presented to and approved or ostensibly approved by the SPB beginning in 1986 and continuing through 1993:

- a. Administrative Services Agreement between the SPB and PEBSCO (June 15, 1986).
- b. Amendment No. 1 to the Administrative Services Agreement between the SPB and PEBSCO (June 16, 1987).
- c. Amendment 2 to the Administrative Services Agreement between SPB and PEBSCO (October 18, 1988).
- d. Restated Plan Document (June 12, 1990).

21. In September 1994, the ASEA recommended that the SPB enter into or make applications for the following Plan-related agreements:

- a. Second Restated Funding Agreement between the SPB and NL;
- b. Amendment No. 3 to the Administrative Services Agreement between SPB and PEBSCO; and
- c. Applications by the SPB for the attached Governmental Plans Fixed Group Annuity Contract and Variable Annuity Contract.

22. At that time, the SPB approved of and entered into the Plan-related agreements recommended by the ASEA referenced in the preceding paragraph only after receiving assurances that a contract between the ASEA and PEBSCO in which PEBSCO agreed to reimburse ASEA for its Plan-related expenses provided only for the reimbursement of legitimate Plan expenses with a cap of 0.05% (five basis points) of total Plan assets per year.

23. None of Crossclaim-Defendants has since voluntarily disclosed any material change to the reimbursement arrangements disclosed to the SPB in 1994.

24. The Small Business Job Protection Act of 1996 (the “SBJPA”) became law on August 20, 1996.

25. The SBJPA mandated that by no later than January 1, 1999, all governmental 457(b) plan assets must be held in a custodial account, trust or annuity contract for the exclusive benefit of participants and their beneficiaries.

26. The following contains a list of Funding Agreements, Administrative Service Agreements, Plan Documents, and Annuity Contracts that one or more of NL, NRS, and Crossclaim-Defendants prepared and presented to the SPB, and, were, in fact approved by the SPB beginning in 1996 and continuing through 1999:

- a. First Amendment to Second Restated Funding Agreement (September 17, 1996).
- b. Amendment No. 4 to the Administrative Services Agreement between the SPB and PEBSCO (September 17, 1996).
- c. Amendment #1 to Restated Plan Document (January 1, 1997), which changed the plan document, in part, to provide that “All assets of the PLAN, including all deferred amounts, property and rights purchased with deferred amounts, and all income attributable to such deferred amounts, property or rights, shall (until made available to the PARTICIPANT or Beneficiary) be held in a trust, custodial account or annuity contract described in IRC Section 457(g) for the exclusive benefit of the PARTICIPANTS and their beneficiaries.”
- d. Endorsement which changed the ownership of the Government Plans Group Fixed Fund Retirement Contract from “The State of Alabama Personnel Board” to “The State of Alabama Personnel Board, for the benefit of the Participants and Beneficiaries of the State of Alabama Employees Deferred Compensation Plan” (effective January 1, 1997).
- e. Endorsement which changed the ownership of the Government Plans Group Variable Fund Retirement Contract from “The State of Alabama

Personnel Board” to “The State of Alabama Personnel Board, for the benefit of the Participants and Beneficiaries of the State of Alabama Employees Deferred Compensation Plan” (effective January 1, 1997).

- f. Second Amendment to the Deferred Compensation Program Second Restated Funding Agreement signed by the SPB and NL (July 21, 1999).
- g. Amendment No. 5 to the Administrative Services Agreement between the SPB and PEBSCO (July 21, 1999).

27. Through 1999, NL, NRS, and ASEA sought approval from the SPB for changes to the Plan, including the adoption or amendment of Plan Documents, Funding Agreements, Administrative Service Agreements and Annuity Contracts, which served as the investment vehicles for Plan participants.

28. After 1999, NL, NRS, and ASEA made changes to the Plan without seeking or obtaining approval from the SPB. Some of those changes detrimentally affected Plan assets and income.

29. Between July 21, 1999 and March 2004, no one informed the SPB of any change to the Plan.

30. Between July 21, 1999 and March 2004, no one sought any approval from the Board of any change to the Plan.

31. Nevertheless, Crossclaim-Defendants were making Plan-related changes that affected, among other things, the assets and income of the Plan without the knowledge or approval of the SPB.

32. As evidenced by pleadings filed by ASEA in Civil Action No. CV-09-804 in the Circuit Court of Montgomery County, Alabama, pursuant to contractual agreements effective in 2000 and dates thereafter, ASEA and PEBCO have received

periodic payments from NL and/or NRS regarding the Plan. These agreements were made without the approval of the SPB.

33. The Government Plans Group Fixed Fund Retirement Contract (for which the SPB had submitted an Application on September 16, 1994) provided:

#### 2.7 BLENDED INTEREST RATES PROHIBITED

Interest rates under the Contract shall not be blended, added to, or averaged with the interest rates, credits or performance returns of any other investment options.

34. The Government Plans Group Fixed Fund Retirement Contract (for which the Board submitted an Application on September 16, 1994) also provides that:

#### 8.7 PARTICIPATING, DIVIDENDS

This Contract is participating. Any dividends which accrue under this Contract will be determined at the sole discretion of the Board of Directors of the Company. Any dividends which may be allocated to this Contract will be treated as earnings and credited to the Contract.

35. During 2001, without SPB's knowledge or approval, NL, NRS, and Crossclaim-Defendants added an Endorsement to the Government Plans Group Fixed Fund Retirement Contract (for which the SPB had submitted an Application on September 16, 1994). By its terms, the Endorsement provides that:

1. Section 2.7 of the Contract is deleted in its entirety and replaced with the following:

#### "BLENDED INTEREST RATES

Interest rates under the Contract may be added to or averaged with the interest rates, credits or performance returns of other investment options under the Plan if agreed to in writing by the Company."

2. Section 8.8 of the Contract is deleted in its entirety and replaced with the following:

“NON-PARTICIPATING

This Contract is non-participating and will not share in the surplus of the Company.”

3. The face page of the Contract is amended by deleting the word “Participating” and replacing it with “Non-Participating.”

36. The addition of the Endorsement to the Government Plans Group Fixed Fund Retirement Contract has had a detrimental effect on returns earned by Plan participants investing in the Government Plans Group Fixed Fund Retirement Contract.

37. During 2001, without SPB’s knowledge or approval, NL, NRS, and Crossclaim-Defendants added a new Fixed Fund Annuity Contract to the Plan. Unlike the Fixed Fund Annuity Contract for which the Board submitted an Application on September 16, 1994, which provided a Guaranteed Minimum Rate of 3.5%, the new Fixed Fund Annuity Contract provided no Guaranteed Minimum Rate. The new Fixed Fund Annuity Contract provided for blended interest rates:

2.7 BLENDED INTEREST RATES

Interest rates under the Contract may be added to or averaged with the interest rates, credits or performance returns of other investment options under the Plan if agreed to in writing by the Company.

38. The new Fixed Fund Annuity Contract is also “non-participating”:

8.8 NON-PARTICIPATING

This contract is non-participating and will not share in the surplus of the Company.

39. The addition of the new Fixed Fund Annuity Contract has had a detrimental effect on the returns earned by Plan participants investing in the fixed fund account.

40. During Spring 2004, the ASEA presented representatives of the SPB with a draft Plan-related Funding Agreement. After internal and external review, it was determined that the document needed revision. Based upon representations from ASEA that the Funding Agreement had to be adopted or state employees would lose deferrals, the Agreement was placed on the March 10, 2004, Board Agenda, but only after changes to the document were made. At that Board meeting an attorney acting on behalf of the ASEA recommended to the SPB a Funding Agreement between NL, NRS, and the ASEA. One member of the SPB asked the ASEA's attorney whether ASEA would receive any kind of royalty or fee from the Program. The ASEA's attorney replied:

There is a thing set out in the agreement. Um—they—um--I think the answer is there are some requirements in this plan and some things that have to be done and I think the money goes back to the--the thing. And they will--ASEA will help them market this plan and will certainly expect some compensation for their effort. But this is the plan. This is the document.

A representative from NL or NRS as well as Robert Wagstaff on behalf of the ASEA were also in attendance at this meeting. The Board approved that Funding Agreement.

41. Despite the statements made on behalf of the ASEA at the SPB meeting, according to NRS's Complaint for Interpleader, NRS and PEBCO had previously entered into a March 1, 2004, Administrative Services Agreement, under

which NRS agreed to make payments to PEBCO and ASEA in return for their ostensible performance of certain administrative, marketing, sponsorship, and other services for NRS and NL. No one disclosed this agreement or its terms to the SPB at the March 10, 2004, SPB meeting.

42. According to NRS's Complaint for Interpleader, the Administrative Services Agreement additionally obligates NRS to maintain additional money for ASEA and PEBCO in a Draw Down Account to pay for their reimbursable expenses.

43. By its terms, the March 2004 Funding Agreement had a term of six years. Under the March 2004 Funding Agreement, Plan participants who invested in the Variable Fund Annuity Contract would be charged

--sixty-five basis points for any Fidelity funds,

--twenty-five basis points for any non-Fidelity funds (during the first five years of the contract) and twenty-three basis points during the sixth, and

--zero basis points for Gartmore Investor Destination Asset Allocation funds.

44. Currently, in contravention of the terms of the Funding Agreement, Plan participants are being charged zero basis points for Nationwide Investor Destination funds and twenty-eight basis points for other funds. Fidelity funds are no longer investment options in the Plan. No one informed or sought approval from the SPB for any of these changes to Plan charges or investment options.

45. During November 2007, two Plan participants filed a putative class action lawsuit against NL, NRS, the ASEA, and PEBCO alleging that payments from NL and/or NRS to the ASEA and/or PEBCO detrimentally affected Plan

assets, and ultimately the accounts of the Plan participants. That lawsuit is pending in the Circuit Court of Jefferson County, Alabama, Civil Action No. 07-4052.

46. The SPB became aware of the putative class action lawsuit after it was filed in November 2007.

47. Representatives of the SPB became aware of the existence of certain Form 990 tax returns filed by the ASEA. ASEA's Form 990 tax returns show that ASEA received income in an amount of

- \$754,080 for "Advertising Fees" in 2001;
- \$800,000 for "Nationwide Commission" in 2002;
- \$625,000 for "Nationwide Commission" in 2003;
- \$950,000 for "Nationwide Commission" in 2004;
- \$1,110,000 for "PEBCO Endorsement Fee" in 2005;
- \$1,200,000 for "PEBCO Endorsement Fee" in 2006; and
- \$1,256,000 for "PEBCO Endorsement Fee" in 2007.

48. Upon information and belief, these items of revenue are related to ASEA's and PEBCO's dealings concerning the Plan.

49. No one informed or sought approval from the SPB for the disbursement of such Plan-related payments to either ASEA or PEBCO for commissions, endorsement fees, or anything else.

50. Upon information and belief, these items of revenue are only a portion of the payments and other considerations received by ASEA, PEBCO, and other Crossclaim Defendants that is related to their involvement regarding the Plan.

51. Upon information and belief, these items of revenue do not constitute the reimbursement of either ASEA or PEBCO for necessary or reasonable Plan-related expenses.

52. Upon information and belief, ASEA, PEBCO, McArthur, Walkley, Parker, Lavender, McLain, Hebson, and Wagstaff sought and received from NL or NRS reimbursement from the Draw Down Account for expenses that were not Plan-related expenses.

53. Upon information and belief, ASEA, PEBCO, McArthur, Walkley, Parker, Lavender, McLain, Hebson, and Wagstaff sought and received from NL or NRS reimbursement from the Draw Down Account for expenses that were not necessary or reasonable Plan-related expenses.

54. Upon information and belief, ASEA, PEBCO, McArthur, Walkley, Parker, Lavender, McLain, Hebson, and Wagstaff sought and received from NL or NRS reimbursement from the Draw Down Account for expenses that were exorbitant and lavish.

55. Upon information and belief, the payments from NL or NRS to the ASEA, PEBCO, McArthur, Walkley, Parker, Lavender, McLain, Hebson, and Wagstaff have, directly or indirectly, detrimentally affected Plan assets and income.

56. Upon information and belief, but for payments from NL or NRS to ASEA, PEBCO, McArthur, Walkley, Parker, Lavender, McLain, Hebson, and Wagstaff, Plan participants investing in the Variable Fund Annuity Contract would have been charged fewer basis points for their investments.

57. Upon information and belief, but for payments from NL or NRS to ASEA, PEBCO, McArthur, Walkley, Parker, Lavender, McLain, Hebson, and Wagstaff, Plan participants investing in the Fixed Fund would have earned a higher returns.

58. On April 29, 2009, the SPB adopted an Amendment to the Plan (“Plan Amendment”) which prohibits transactions of any Interested Person relating in any way to the Plan absent authorization by the SPB after disclosure to the SPB of all terms, conditions, and surrounding information.

59. The Plan Amendment provides the SPB with the authority to approve a transaction, agreement or arrangement to provide services to the Plan that otherwise would be prohibited if the services are necessary for the establishment or operation of the Plan, the services are furnished under a contract or arrangement that is reasonable, and no more than reasonable compensation is paid for such services.

60. Since the SPB adopted the Plan Amendment, neither ASEA nor PEBCO, nor anyone else has sought approval from the SPB for any Plan-related transaction, agreement or arrangement.

61. By virtue of their participating in the establishment and maintenance of the Plan, Crossclaim-Defendants are obligated to conduct themselves with respect to the Plan in a manner that conforms with the requirements of I.R.C. Section 457, including the exclusive-benefit rule codified therein. At least to the extent that the ASEA makes recommendations contemplated by Alabama Code

§ 36-26-14, the ASEA is a fiduciary of the Plan and its trusts and quasi-trusts. As such a fiduciary, the ASEA is governed by Alabama law governing trusts and other fiduciary relationships. This law includes the Alabama Uniform Trust Code.

62. By virtue of their negotiation, preparation or presentation to the SPB of Plan-related documents incorporating the requirements of I.R.C. Section 457, including the exclusive-benefit rule codified therein and governed by other law as described in ¶ 61, Crossclaim-Defendants are obligated, by express, implied, or implied in law contractual or fiduciary duties, to conduct themselves with respect to the Plan in a manner that conforms with the requirements of I.R.C. Section 457, including the exclusive benefit rule codified therein and Alabama law.

63. Crossclaim-Defendants have used Plan assets for their own benefit and enrichment in contravention of I.R.C. Section 457(g), which mandates that said assets be held for the exclusive benefit of the Plan participants and their beneficiaries.

64. By virtue of their relationship to and dealings concerning the Plan, Crossclaim-Defendants are fiduciaries to the Plan and the Plan participants.

65. Rather than acting for the benefit of the Plan and the Plan participants, Crossclaim-Defendants engaged in acts of self-dealing and made Plan-related decisions that had a detrimental effect on the assets and income of the Plan.

66. Crossclaim-Defendants have concealed their Plan-related conduct from the SPB, even though they assert that the SPB is the sole fiduciary to the Plan

and the Plan participants as well as the owner of the annuity contracts, which constitute investment vehicles for Plan participants.

67. Crossclaim-Defendants have concealed their Plan-related conduct from the Plan participants.

68. As fiduciaries to the Plan and the Plan participants, and as those who have accepted the delegated governmental responsibility of participating in the process of selecting and maintaining the Plan, as those who have duties relating to the establishment and maintenance of a plan designed to conform to the requirements of I.R.C. Section 457, including the exclusive benefit rule codified therein, and/or otherwise, Crossclaim-Defendants were required to act honestly with full disclosure and in good faith with a view to the best interests of the Plan and the Plan participants, and to exercise the care, diligence, and skill that a reasonably prudent person would exercise in a like retirement plan's circumstances.

69. These duties include full and honest disclosures of their own Plan-related conduct to the SPB and to Plan participants.

70. Rather than making a full and honest disclosure of their Plan-related conduct and dealings to either the SPB or Plan-participants, Crossclaim-Defendants have acted in concert to conceal, have concealed, and continue to conceal such conduct and dealings from the SPB and from Plan participants, despite continued requests for documents and information by the SPB.

**COUNT I: RIGHT TO INTERPLEADED FUNDS AS AGAINST  
ASEA, PEBCO, McARTHUR, WALKLEY, PARKER,  
LAVENDER, McLAIN, HEBSON, AND WAGSTAFF**

71. The SPB hereby adopts and incorporates the allegations set forth in paragraphs 1 through 70 of its Crossclaims as if separately set forth herein.

72. None of ASEA, PEBCO, McArthur, Walkley, Parker, Lavender, McLain, Hebson, or Wagstaff has a legal or equitable right to the interpleaded funds.

73. None of ASEA, PEBCO, McArthur, Walkley, Parker, Lavender, McLain, Hebson, or Wagstaff has enforceable rights to the interpleaded funds because the contract or contracts upon which they might be premised are illegal and void ab initio as against public policy or ultra vires.

74. None of ASEA, PEBCO, McArthur, Walkley, Parker, Lavender, McLain, Hebson, or Wagstaff has enforceable rights to the interpleaded funds because the contract or contracts upon which they might be premised were entered in contravention of I.R.C. Section 457(g) and Alabama law, which require that Plan assets be held for the exclusive benefit of the Plan participants and their beneficiaries.

75. None of ASEA, PEBCO, McArthur, Walkley, Parker, Lavender, McLain, Hebson, or Wagstaff has enforceable rights to the interpleaded funds because governing Plan documents including, without limitation, the Plan Amendment, preclude their assertion of such a right (if any).

76. None of ASEA, PEBCO, McArthur, Walkley, Parker, Lavender, McLain, Hebson, or Wagstaff has enforceable rights to the interpleaded funds because the SPB never approved any such rights to those funds as was required under Alabama Code Section 36-26-14.

WHEREFORE, on behalf of the Plan (and the Plan's participants and their beneficiaries), the SPB demands that the interpleaded funds be restored to the Plan, its trusts, and the Plan participants.

**COUNT II: ACCOUNTING AGAINST ASEA, PEBCO, McARTHUR, WALKLEY, PARKER, LAVENDER, McLAIN, HEBSON, AND WAGSTAFF**

77. The SPB hereby adopts and incorporates the allegations set forth in paragraphs 1 through 76 of its Crossclaims as if separately set forth herein.

78. ASEA, PEBCO, McArthur, Walkley, Parker, Lavender, McLain, Hebson, and Wagstaff failed to faithfully execute their obligations to the Plan and Plan participants in various ways, and profited from the breaches of their duties through receipt of unauthorized and undisclosed amounts of money and other benefits through numerous transactions beginning at least as early as 2000.

79. ASEA, PEBCO, McArthur, Walkley, Parker, Lavender, McLain, Hebson, and Wagstaff are obligated to account to the SPB for the money and other considerations that they received or distributed during the course of their Plan-related activities beginning at least as early as 2000, an amount that, upon information and belief, exceeds \$7 million.

WHEREFORE, the SPB demands the following relief:

A. That ASEA, PEBCO, McArthur, Walkley, Parker, Lavender, McLain, Hebson, and Wagstaff be required to render an account to the SPB for the money and all considerations that they have received and/or distributed during the course of their Plan-related activities beginning at least as early as 2000;

B. That ASEA, PEBCO, McArthur, Walkley, Parker, Lavender, McLain, Hebson, and Wagstaff bear the fees and expenses of independent certified public accountants and their assistants, selected by the court or the court's special master, for an examination of the Crossclaim Defendants' accounts;

C. That ASEA, PEBCO, McArthur, Walkley, Parker, Lavender, McLain, Hebson, and Wagstaff be required to restore to the Plan and Plan participants the greater of the Plan's losses that arise out of the Crossclaim Defendants' conduct or the sums by which they have been unjustly enriched, plus interest on said sums;

D. That ASEA, PEBCO, McArthur, Walkley, Parker, Lavender, McLain, Hebson, and Wagstaff be required to make restitution to the Plan and Plan participants of all such sums they have received or distributed by virtue of transactions that do not comply with the SPB's Plan Amendment, plus interest on said sums;

E. That ASEA, PEBCO, McArthur, Walkley, Parker, Lavender, McLain, Hebson, and Wagstaff be required to restore to the Plan and Plan participants, all sums by which Plan assets or income have decreased as a result of their wrongful conduct, plus interest on said sums;

F. That ASEA, PEBCO, McArthur, Walkley, Parker, Lavender, McLain, Hebson, and Wagstaff be required to restore to the Plan and Plan participants, all sums by which Plan assets or income have decreased as a result of any of their Plan-related conduct that does not comply with I.R.C. Section 457's provisions, including the exclusive-benefit rule, plus interest on said sums;

G. That ASEA, PEBCO, McArthur, Walkley, Parker, Lavender, McLain, Hebson, and Wagstaff be required to pay the reasonable fees of the SPB's attorneys and their assistants; and

H. That costs be taxed against ASEA, PEBCO, McArthur, Walkley, Parker, Lavender, McLain, Hebson, and Wagstaff.

**COUNT III: BREACH OF FIDUCIARY DUTIES AGAINST  
ASEA, PEBCO, McARTHUR, WALKLEY, PARKER,  
LAVENDER, McLAIN, HEBSON, AND WAGSTAFF**

80. The SPB hereby adopts and incorporates the allegations set forth in paragraphs 1 through 79 of its Crossclaims as if separately set forth herein.

81. ASEA, PEBCO, McArthur, Walkley, Parker, Lavender, McLain, Hebson, and Wagstaff owe fiduciary duties to the Plan and Plan participants.

82. ASEA, PEBCO, McArthur, Walkley, Parker, Lavender, McLain, Hebson, and Wagstaff have breached the fiduciary duties they owe to the Plan and Plan participants by acting (and failing to act) other than according to the Plan's exclusive purpose and best interests. Even if a Cross-Claim Defendant did not otherwise breach his, her, or its fiduciary duties, each Cross-Claim Defendant breached his, her, or its fiduciary duties by failing to act prudently to correct,

mitigate, or remedy another fiduciary's breach. Even if a Cross-Claim Defendant did not otherwise breach his, her, or its fiduciary duties, each Cross-Claim Defendant breached his, her, or its fiduciary duties by failing and refusing to disclose their Plan-related conduct to the SPB and to Plan participants.

83. ASEA, PEBCO, McArthur, Walkley, Parker, Lavender, McLain, Hebson, and Wagstaff have breached fiduciary duties they owe to the Plan and Plan participants by engaging in transactions involving their receipt or use of the income or assets of the Plan.

84. ASEA, PEBCO, McArthur, Walkley, Parker, Lavender, McLain, Hebson, and Wagstaff have breached fiduciary duties they owe to the Plan and Plan participants by engaging in transactions in which their in own interests are adverse to the interests of the Plan and Plan participants.

85. ASEA, PEBCO, McArthur, Walkley, Parker, Lavender, McLain, Hebson, and Wagstaff have breached fiduciary duties they owe to the Plan and Plan participants by engaging in self-dealing with respect to the assets and income of the Plan.

86. ASEA, PEBCO, McArthur, Walkley, Parker, Lavender, McLain, Hebson, and Wagstaff have breached fiduciary duties they owe to the Plan and Plan participants by engaging in transactions that do not comply with the SPB's Plan Amendment.

87. As a proximate consequence of these breaches, the Plan and Plan participants have been damaged and the Plan suffered losses.

WHEREFORE, on behalf of the Plan, the SPB demands compensatory and punitive damages, costs, fees and expenses of the SPB's attorneys and their assistants, and any additional relief to which the SPB, the Plan and its trusts, and Plan participants might be entitled under the law against the ASEA, PEBCO, McArthur, Walkley, Parker, Lavender, McLain, Hebson, and Wagstaff.

#### **COUNT IV: FRAUD AGAINST ASEA**

88. The SPB hereby adopts and incorporates the allegations set forth in paragraphs 1 through 87 of its Crossclaims as if separately set forth herein.

89. At the SPB meeting occurring on or about March 10, 2004, when asked whether the ASEA would receive any kind of royalty or fee regarding the Plan, the ASEA, referring to the Funding Agreement it recommended to the SPB, represented that "this is the plan. This is the document." That statement was made by the ASEA's attorney, and not denied, contradicted, explained, or mitigated by any of the persons in attendance at the meeting, or later by or behalf of any of the Crossclaim Defendants, all of whom knew that the statement and the assurances the SPB sought were material to the SPB's evaluation of whether to approve the agreements presented.

90. The Funding Agreement does not provide for any payment, either directly or indirectly, to the ASEA, PEBCO, McArthur, Walkley, Parker, Lavender, McLain, Hebson, or Wagstaff.

91. Nevertheless, the ASEA, PEBCO, McArthur, Walkley, Parker, Lavender, McLain, Hebson, and Wagstaff received, either directly or indirectly,

payments relating to the Plan and the ASEA's recommendation of the Funding Agreement under the terms of the Administrative Services Agreement entered on March 1, 2004, between PEBCO and NRS, and otherwise.

92. The ASEA's representation concerning the absence of compensation was material to the SPB's decision to approve the Funding Agreement recommended to it by the ASEA.

93. The SPB reasonably relied on the ASEA's above-referenced representation in approving the Funding Agreement recommended by the ASEA.

94. As a proximate consequence of the ASEA's representation, the Plan and Plan participants were damaged and the Plan suffered losses.

WHEREFORE, on behalf of the Plan, the SPB demands compensatory and punitive damages, costs, fees and expenses of the SPB's attorneys and their assistants, and any additional relief to which the SPB, the Plan and its trusts, and Plan participants might be entitled under the law against the ASEA.

#### **COUNT V: FRAUDULENT SUPPRESSION BY ASEA**

95. The SPB hereby adopts and incorporates the allegations set forth in paragraphs 1 through 94 of its Crossclaims as if separately set forth herein.

96. At the SPB meeting occurring on or about March 10, 2004, when asked whether the ASEA would receive any kind of royalty or fee regarding the Plan, the ASEA failed to disclose the payments it was contractually entitled to receive, either directly or indirectly, under the Administrative Services Agreement.

97. The absence of ASEA's entitlement to Plan-related compensation was material to the SPB's decision to approve the Funding Agreement recommended to it by the ASEA.

98. The ASEA was under an obligation to disclose the Plan-related payments or compensation to which it was entitled under the Administrative Services Agreement or otherwise because the SPB asked that it do so, and by virtue of the ASEA's special relationship to the Plan under Alabama Code Section 36-26-14 and other fiduciary duties, the ASEA's acceptance of the delegated governmental responsibility of participating in the process of selecting and maintaining the Plan, the ASEA's undertaking to recommend investments and services for the Plan, the ASEA's adoption or acceptance of the Plan's and its trusts' provisions, including the Plan's and its trusts' exclusive-benefit provisions, the ASEA's duties and obligations to act honestly with full disclosure to the SPB with reference to the Plan, because the ASEA's failure to do so would result in making its representations to the SPB misleading, and otherwise.

99. The ASEA's failure to make such disclosures induced the SPB to approve the Funding Agreement recommended by the ASEA, to the detriment of the Plan and Plan participants, on whose behalf the SPB was acting.

WHEREFORE, on behalf of the Plan, the SPB demands compensatory and punitive damages, costs, fees and expenses of the SPB's attorneys and their assistants, and any additional relief to which the SPB, the Plan and its trusts, and Plan participants might be entitled under the law against the ASEA.

**COUNT VI: CONSPIRACY BY ASEA, PEBCO, McARTHUR, WALKLEY, PARKER, LAVENDER, McLAIN, HEBSON, AND WAGSTAFF**

100. The SPB hereby adopts and incorporates the allegations set forth in paragraphs 1 through 99 of its Crossclaims as if separately set forth herein.

101. The ASEA, PEBCO, McArthur, Walkley, Parker, Lavender, McLain, Hebson, and Wagstaff conspired among themselves and with others to deprive the Plan of its assets and income and to benefit themselves at the expense of the Plan and Plan participants by the commission of the acts and omissions described in these Crossclaims.

102. As a proximate result of this conspiracy, the Plan and Plan participants have been and continue to be damaged and the Plan suffered losses.

WHEREFORE, on behalf of the Plan, the SPB demands compensatory and punitive damages, costs, fees and expenses of the SPB's attorneys and their assistants, and any additional relief to which the SPB, the Plan and its trusts, and Plan participants might be entitled under the law against the ASEA, PEBCO, McArthur, Walkley, Parker, Lavender, McLain, Hebson, and Wagstaff.

Respectfully submitted,

/s/ Alice Ann Byrne

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**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed a copy of the above and foregoing Answer and Crossclaims with the Clerk of Court for the Circuit Court of Montgomery County, Alabama, and served the following via AlaFile and U.S. Mail, postage pre-paid and properly addressed:

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and that a copy of the same has been served by placing same in the U.S. mail, first-class postage prepaid and properly addressed, as follows:

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This the 21st day of August, 2009.

/s/ Heath A. Fite  
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