COMMONWEALTH OF KENTUCKY
COUNTY OF FRANKLIN CIRCUIT COURT
DIVISION I
CASE NO. 17-CI-1348

JEFFREY C. MAYBERRY, *et al.* PLAINTIFFS

vs.

The Tier 3 Plaintiffs' Submission re: KRS $1.2 Million Secret Report; Need for Open Proceedings; and Limitations on Use of Secret Report Without Its Public Disclosure

KKR & CO., L.P., *et al.* DEFENDANTS

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I. INTRODUCTION

The Attorney General ("AG") filed a motion seeking leave to file its Amended Intervening Complaint ("AIC"), several days after receiving a "Secret Report" based on a $1.2 million investigation conducted by a law firm hired by the Kentucky Retirement Systems ("KRS") and the Commonwealth — paid for with "trust funds" of a public pension fund. For months KRS said it could not decide what to do, and the AG said it could not craft and file its AIC, without the benefit of and prior to receipt of the Secret Report. In the end, KRS has done nothing other than turn that Secret Report over to the AG. ***The AG clearly relied***, ***in one way or another***, ***on the Secret Report***[1] ***in crafting his AIC***. If not, what have we been waiting on for the past months? What was the $1.2 million for?

The AG's AIC is another cut-and-paste copy using the Tier 3 Plaintiffs' proposed complaint in intervention. It adds not one new substantive allegation of wrongdoing despite the $1.2 million investigation. However, the AG has taken some independent steps. The AG's AIC eliminates KRS's 2015–2016 secret self-dealing advisory-services agreement ("ASA") with KKR/Prisma. The AG cuts out the involvement of KRS's ***current CEO/Executive Director*** David Eager or ***current*** and ***longest-serving***, ***most powerful and most involved Trustee*** T.J. Fulkerson in that conflict-laden arrangement and the follow-on self-dealing by KKR/Prisma, or its partner Michael Rudzik, they permitted inside KRS — while on the KKR/Prisma payroll — to season the self-dealing to taste. The AG also eliminated as a defendant KRS's ***current*** fiduciary

[1] The term "Secret Report" refers to the investigative report commissioned by KRS management and ultimately delivered to the KRS Board and the AG. The AG presumably used the Secret Report because he declined to file the AIC until he got a copy of it. Kentucky public interest groups are demanding the Secret Report be made public via "public records" requests. KRS and the AG have refused to do so.

counsel Ice Miller — who back then approved or permitted that (and much more) self-dealing, conflicts of interest and breaches of fiduciary duties to persist, even though this Court previously upheld the claims against Ice Miller as pleaded in the Tier 3 Complaint now, set out in the Mayberry Five's First Amended Complaint ("FAC") earlier. This white-wash of current KRS insiders is the apparent result of the $1.2 million investigation and Secret Report.

The Tier 3 Plaintiffs' complaint and earlier proposed amended complaints, by the Mayberry Five and the Tier 3 Plaintiffs, all laid out in great detail this critical aspect of the overall scheme, course of conduct and common enterprise to target, exploit and abuse KRS, its pension funds and its members. The Tier 3 Plaintiffs' complaint ***names*** Ice Miller and KKR/Prisma partner Rudzik as defendants, while pleading Eager and Fulkerson as ***active wrongdoers*** whose breaches of duty were aided and abetted by the Defendants with whom they were conspiring and pursuing an illegal common enterprise. Although their alleged participation in key parts of the overall conspiracy and common enterprise has either been upheld by the Court or been publicly alleged in verified filings for years, none of their names appear in the AIC.

Surely these publicly known matters were investigated in the $1.2 million investigation that looked into past investment misconduct at KRS and/or the wrongdoing alleged in the Tier 3 complaint. KRS has made clear that it is going to assert privileges with respect to the Secret Report, and both KRS and the AG have denied access to the Secret Report, rejecting public records requests for access. Earlier in this litigation, an "Open Proceedings" motion was filed by the Mayberry Plaintiffs, briefed and argued, but never formally ruled upon. While ultimately the real issue here will be whether ***any*** document in this case should be sealed and kept secret (and the correct answer is none should be), due to the AG's apparent use of the Secret Report to craft an expanded AIC

that seeks to usurp the Tier 3 Plaintiffs' claims and block their intervention, *i.e.*, seek judicial relief, the issue of the secrecy of the Secret Report is properly addressed now.

> The parties to a lawsuit are not the only people who have a legitimate interest in the record compiled in a legal proceeding … the public at large pays for the courts and therefore has an interest in what goes on at all stages of a judicial proceeding. …. The judge is the primary representative of the public interest in the judicial process[.]

Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co., 178 F.3d 943, 944–45 (7th Cir. 1999).

II. JUDICIAL RELIEF MAY NOT BE SOUGHT OR GRANTED BASED ON THE SECRET REPORT WITHOUT IT BEING MADE PUBLIC, AND DISCOVERY INTO, AND HEARINGS TO DETERMINE, THE INVESTIGATION'S INDEPENDENCE, THE REPORT'S ADEQUACY, AND KRS TRUSTEES' GOOD FAITH

A. All Proceedings Must Be Open and the Secret Report Made Public

The Secret Report must be open to the public to the KRS members, taxpayers, the press, public, regulators, legislators and law enforcement officials — all of whom have substantial interests in the events — misdeeds — covered by this lawsuit. ***There must be full public access to these proceedings including the Secret Report***.

Secrecy in the judicial process is disfavored. The public has a right to know what goes on in cases in its court rooms especially in cases involving public agencies. KRS members and Kentucky taxpayers have a right to know what goes on in a suit impacting them. These principles are of their utmost importance in a case like this — involving gross breaches of duty in dealing with public trust, public funds and public employees' life savings, where evident malfeasance and breaches of fiduciary duties have caused the worst fiscal crisis in the history of this Commonwealth.

This Court's commitment to open proceedings was made plain on January 24, 2018, when it first addressed an "Open Proceedings" Motion, noting that in this Court

"proceedings are open" and that "all court filings are public records" unless good cause is otherwise shown "and the Court authorizes" the sealing of filings. The Court again expressed a presumption of openness on March 5, 2018: "My philosophy is that, you know, ***once we get into discovery***, ***there's a presumption that the documents that are produced in discovery under the rules of court are presumed to be open***." Mar. 5, 2018 H'rg Tr. at 53:7–11.[2]

There is a compelling Kentucky public interest in this litigation.[3] There have been repeated inquiries into KRS by oversight boards[4] and an extensive independent investigation of KRS — at great expense to the taxpayers — that exposed falsification of assumptions and bad investments, indicating that the true condition of KRS Funds had been misrepresented for years.[5] This Court, early on, indicated this case should result in an "***inquest***." It later indicated that ***the public interest demands pursuit of the***

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[2] Unless otherwise noted, all emphases in quoted texts are added.

[3] *See*, *e.g.*, *Lowered Assumptions Result in Billions More in Pension Debt with More on the Horizon,* MYCN2.COM, KENTUCKY, May 18, 2017, *available at* http://mycn2.com/politics/lowered-assumptions-results-in-billions-more-pension-debt-with-more-on-the-horizon; Todd Dykes, *Kentucky Retirement Crisis: Public Pensions Underfunded by at Least $33 Billion*, WWW.WLWT.COM, KENTUCKY, Sept. 7, 2017, *available at* http://www.wlwt.com/article/kentucky-retirement-crisis-public-pensions-underfunded-by-at-least-33-billion/12195002; Tom Loftus, *Pension Plans Will Need Nearly $800 Million More Next Year, Kentucky Retirement System Says*, LOUISVILLE COURIER-JOURNAL, Dec. 7, 2017, *available at* https://www.courier-journal.com/story/ news/politics/2017/12/07/kentucky-retirement-systems-pension-reform/929961001/; Amy Whyte, *Kentucky Pension Recommits to Hedge Funds Amid Governance Turmoil*, WWW.AI-CIO.COM, May 20, 2016, *available at* https://www.ai-cio.com/news/kentucky-pension-recommits-to-hedge-funds-amid-governance-turmoil/; Valarie Honeycutt Spears, *Kentucky: One of the Worst States for Cuts to Education Spending, Report Shows*, LEXINGTON HERALD-LEADER, Nov. 29, 2017, *available at* http://www.kentucky.com /news/local/education/article187032268.html.

[4] *See*, *e.g.*, *Public Pension Oversight Board*, Research Memoranda No. 523 (Dec. 2016); *Report of The Task Force on Kentucky Public Pensions*, Research Memo No. 512, (Dec. 7, 2012).

[5] *See*, *e.g.*, PFM Consulting Group Report Dated August 28, 2017.

claims made by the KRS plan members for its benefit — first by the Mayberry Five now the Tier 3 Plaintiffs — on the merits. KRS has been roundly criticized for the secrecy surrounding the "Black Box" fund of hedge funds investments involved in this case.[6] ***That highly criticized secrecy must not be repeated during this litigation with a Secret Report that apparently lets current KRS officials/lawyers off the hook, without any public explanation***, in the AG's motion to file its AIC or otherwise.

The case for transparency here is absolute. All the claims pleaded by the Tier 3 Plaintiffs' predecessors that the Tier 3 Plaintiffs seek to continue have been ***upheld as to all Defendants***. A politically compromised and conflicted AG has intervened where his important political benefactors are defendants. He then — after making everybody wait for months while he received the Secret Report — filed an AIC that is 100% copy-and-paste of the substantive allegations in the Tier 3 Plaintiffs' (and earlier) complaints, changing it only to exempt ***all current KRS officials*** (***with whom defendants allegedly aided/abetted, and conspired and pursued a common and enterprise with***), ***and to eliminate KRS's then and now current "fiduciary counsel" law firm as a defendant***. It is not unreasonable to suspect a gloves-on (whitewash) investigation undertaken in secrecy, while ***a key alleged bad actor — KRS's current CEO Eager — has been running the show and its most***

[6] James McNair, *Kentucky Pensions Fees Much Higher Than Previously Reported*, WFPL.ORG, KENTUCKY, Sept. 15, 2015, *available at* http://kycir.org/2015/09/15/kentucky-pension-fees-much-higher-than-previously-reported/; John Cheves, *Kentucky Retirement Systems Pays Millions in Fees to Money Managers But Keeps the Details Secret*, WWW.KENTUCKY.COM, June 14, 2014, *available at* http://www.kentucky.com/news/politics-government/article44493327.html; James McNair, *When It Comes to Investments Kentucky Keeps Pension Holders in the Dark*, KYCIR.ORG, KENTUCKY, July 24, 2014, *available* at http://kycir.org/2014/07/24/when-it-comes-to-investments-kentucky-keeps-pension-holders-in-the-dark/.

influential and long serving and deeply implicated Trustee Fulkerson (***he was on the investment and finance committee for years***) ***continues to sit on the Board***, ***and the current Trustees continue to retain and rely upon as its current fiduciary counsel Ice Miller — a named Defendant in the Tier 3 Plaintiffs*' *Complaint — and against which the claims have already been upheld by this Court***.

> The principle that justice cannot survive behind walls of silence is … deeply imbedded in our Anglo-American judicial system …. One of the strongest demands of a democratic system is that the public should know what goes on in their courts.

Johnson v. Simpson, 433 S.W.2d 644, 646 (Ky. 1968).[7] This important public policy of judicial openness includes the public's right of access to court records. *Courier-Journal & Louisville Times Co. v. Peers*, 747 S.W.2d 125 (Ky. 1988), held:

> We recognize that the government belongs to the people, that its activities are subject to public scrutiny, and that the news media is a primary source of protecting the right of public access. This right includes the public's "right to inspect and copy public records and documents, including judicial records and documents."… Basic principles have emerged to guide judicial discretion respecting public access to judicial proceedings. These principles apply as well to the determination of whether to permit access to information contained in court documents because court records often provide important, sometimes the only, bases or explanations for a court's decision.

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[7] Kentucky's Constitution provides that "[a]ll courts shall be open." Ky. CONST. § 14. Applying that provision, the court of appeals has held that "the courts shall be public, open, no hiding place about them." *Ashland Publ'g Co. v. Asbury*, 612 S.W.2d 749, 752 (Ky. Ct. App. 1980) *(*internal citations and quotation marks omitted*)*. Notably, Kentucky was first in the nation to publish court proceedings on cable TV in 1981 when "the pioneer of court recordings," retired Madison Circuit Court Judge Chenault, (with whom Mayberry Five Plaintiff Brandy Brown began her legal career as a law clerk) instituted videotape as the official court record. Cheryl Truman, *Uncommonwealth: Kentucky's Pioneer of Court Recordings Turns 90*, LEXINGTON HERALD-LEADER, May 5, 2013, *available at* http://www.kentucky.com/news/local/counties/madison-county/article44422596.html.

Id. at 128 (citing *Nixon v. Warner Comm'ns*, 435 U.S. 589, 597 (1978), and *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1177 (6th Cir. 1983)).[8]

As this Court has noted, this case involves the squandering of huge amounts of public funds, taxpayer dollars and the contributions of public employees to a public pension fund backstopped at least to some degree by a guarantee of public funds, potentially involving billions. In *Central Kentucky News Journal v. George*, 306 S.W.3d 41 (2010), our Supreme Court cast aside the parties' secrecy agreement regarding a settlement because ***public dollars*** were involved:

> Again having reviewed the agreements, we conclude that any contention that their disclosure would constitute a clearly unwarranted invasion of personal privacy is meritless. Rather, the agreements merely contain some scant personal identifiers that could have easily been redacted. Against such a minimal privacy interest lies, as we have discussed, a strong public interest in knowing how its tax money is being put to use by the state's agencies.

Id. at 47.

Public money compels public access, ***especially where public corruption is possible***. *See, e.g., Courier-Journal & Louisville Times Co. v. Peers*, 747 S.W.2d 125, 130 (Ky. 1988) (disclosure of required primarily because the information concerned "the expenditure of public funds"); *Commonwealth v. Courier-Journal, Inc.*, 2019 Ky. App. Unpub. LEXIS 633 (Ky. Ct. App. May 17, 2019).

[8] From a federal perspective, the First Amendment identifies openness as essential to basic fairness and public confidence in the system. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569–71 (1980); *see also Press-Enterprise Co. v. Super. Ct.*, 478 U.S. 1 (1986) (constitutional right of access applied to pre-trial hearing transcript).

B. Use of Internal Investigations and Reports Is Severely Restricted in the American Civil Justice System

KRS's Trustees can commission an "***internal***" investigation and report anytime it wants to for its "***internal***" purposes. However, the use of "***internal***" investigations conducted in secret and resulting in secret reports written by lawyers hired by entities in litigation — ***being sued or sued for*** — where current officials implicated in the alleged wrongdoing, to influence judicial proceedings are antithetical to our legal system. They can delay or block valid legal claims and disrupt — even displace — the judicial function. Submissions seeking to influence judicial decisions based on ***secret*** "***internal***" ***investigations and reports are not permitted in our open***, ***adversarial civil justice system***. All the more so where public agencies and over $1 million in public funds are involved. We left the "Star Chamber" behind in England.

The AG opposes the Tier 3 Plaintiffs' intervention and moves for an order to allow the filing of the AIC. Apparently utilizing and relying on the Secret Report, the AG's motion seeks to block the filing of the Tier 3 Plaintiffs' complaint, usurp the claims they assert, then terminate the KRS member claims based on Section 61.645(15)(f), trust-beneficiary and common-law principles that were begun by the Mayberry Five and are now sought to be continued by the Tier 3 Plaintiffs. The AG/KRS cannot seek relief based (directly or indirectly) on KRS's internal investigation and Secret Report or use it to influence judicial proceedings until (1) the Report is made public; (2) the circumstances surrounding the Report are subject to discovery (not constrained by attorney-client privilege); and (3) briefing and an adversarial hearing(s) occur. ***Any party seeking to use the investigation or report to influence a judicial proceeding bears the burden proving*** (i) a proper procurement process; (ii) an adequate and independent investigation; (iii) by competent, qualified persons; and (iv) the good faith of all

concerned, including KRS's Trustees. Even if they prove all that, then an ***independent*** court review and evaluation of the Investigation and Report is still required, to evaluate the "***spirit***" of the proceedings and "***how issues of law and policy relate***" to the asserted claims so as to prevent the "***premature*** [***termination***] ***of grievances deserving of further consideration in the*** [***entity's***] ***interests***."

Any attempt to use "internal" investigations and reports to influence judicial actions in litigations is subject to multiple severe restrictions:

- First: The "Secret Report" ***and all filings and proceedings relating to it and the investigation must be unsealed and open to the public***. Even when a public entity and public money are not involved, like they are here, such reports and the "internal" investigation are ***not*** protected by the attorney-client or work-product protection.
- Second: Any party seeking to use such a report to influence judicial action, directly or indirectly, ***bears the burden of proving — on a summary judgment standard*** — the (1) ***purity of the procurement process***; (2) ***independence*** and ***thoroughness*** o***f the investigation***; (3) ***adequacy and competence of the investigators***; and (4) the ***good faith*** all of those involved.
- Third: Any opponent of use of the Report or argument based on it is entitled to ***"broad***" discovery — then ***adversarial*** hearings — on these issues.
- Fourth: even assuming a proponent can meet its stringent proof burdens — an ***independent judicial review*** — without any deference to the proffered findings or any presumption of legitimacy, adequacy, good faith or independence as to the process — informed by discovery — must occur, if

existing litigation claims are sought to be usurped, blocked or terminated regardless of the specific procedure used to seek that result.

The current CEO/Executive Director of KRS — Eager — is a key alleged wrongdoer. *See* Tier 3 Pls.' Compl. ¶¶ 57–61, 111–113, 117–118, 130. ***Yet***, ***Eager participated in the procurement process and award of the contract to the law firm that conducted the*** "***independent***" ***investigation and the drafting of the Secret Report***. Alleged wrongdoers like Madoff (the modern-day Ponzi), Lay (Enron) and Ebbers (Worldcom) would all have liked to have had lawyers ***they hired*** conduct an ***internal investigation of their alleged wrongdoing and that of the Wall Street bankers they were allegedly in cahoots with*** (***which they oversee***), and then use the secret report in "official" court filings based on it (which they helped write) to influence civil suits where they and the banks ***were alleged co-wrongdoers***, ***so they are named as wrongdoers or defendants***. But that's not how the American justice system works.

The trust/pension status of KRS and its plans, where its Trustees are required by law to act "***solely***" in the interests of, and ***"impartially***" toward, all KRS members and beneficiaries ***does not permit the use*** of such investigations and secret reports to block or terminate litigation by trust/plan members brought for the benefit of the Trust/Plan. *Joy v. North*, 692 F.2d 880 (2d Cir. 1982), and *Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1981), make clear how severely limited the use of such internal investigations and reports are, even in the "for profit" corporate arena where Directors are empowered by the "***business judgment rule***" to act in the "***best interests***" of the corporate constellation (not the "***sole***" interest of pension-plan members and trust beneficiaries).

Corporate directors are provided ***no deference whatsoever with respect to an internal investigation and report used to influence judicial action in***

pending proceedings. There is no presumption of independence, competence, adequacy or good faith, ***even for investigations contracted for and conducted under pristine circumstances that are absent here***. Advocates and /or users of any such report bear the burden of proof on all issues — subject to a summary judgment standard — after discovery and adversarial proceedings before the Court, and ***an independent court review*** of what has gone on, what is trying to be done and whether that is right and proper.

C. If the Secret Report Is to Be Utilized or Relied upon, Discovery Must Be Permitted into the Circumstances of the Retention, Investigation and Creation of the Secret Report

In *Ross v. Abercrombie & Fitch Co.*, 2008 U.S. Dist. LEXIS 24466 (S.D. Ohio Mar. 14, 2008), the court stressed the ***independent review obligations*** of the Court in ordering "***broad discovery***" to assist in opposing an attempt to seek judicial relief based on an internal investigation and report.

> As the *Zapata* decision makes clear, a derivative action is not to be dismissed at the request of the corporation simply because the corporation makes that request. Rather, the court to which the motion is directed must first "***inquire into the independence and good faith of the committee and the bases supporting its conclusions*** …." If the requisite level of independence and good faith is found, "***the Court must determine***, ***using its own business judgment***, ***whether the motion should be granted***."
>
> According to *Zapata*, this may result in instances where the court denies a motion for summary dismissal even though a truly independent committee has made a thorough investigation and has come reasonably to the conclusion that the continuation of the case is not in the corporation's best interests. ***In other words***, ***the reviewing court does not simply rubber stamp reasonable decisions of a Special Litigation Committee***, ***but evaluates them in light of such factors as the*** "***spirit***" ***of the proceedings***, ***whether the lawsuit is deserving of more thorough consideration***, ***and how issues of law and policy relate to the proposed dismissal***.

Id. at *7 (internal citations omitted). *Weiser v. Grace*, 179 Misc. 2d 116 (N.Y. Sup. Ct. N.Y. Cnty. 1998), noted that the "independent" judicial review exists to assure the judicial

function has not been contaminated and is not being circumvented. That independent judicial review

> is intended to thwart instances where corporate actions meet the criteria of pure process, independence, adequacy, good faith, but the result does not appear to satisfy its spirit, or where corporate actions ***would simply prematurely terminate a stockholder grievance deserving of further consideration in the corporation's interest***." ... ***The burden is upon the movant to prove the independence of the special litigation committee, and that it conducted a reasonable investigation of the matters alleged in the complaint in good faith***. ... ***The committee does not enjoy any presumption of independence, good faith or reasonableness***.
>
> Likewise, the court in *Ross* stated:
>
> *Kindt v. Lund*, 2001 WL 1671438 (Del. Ch. Dec. 14, 2001), ... allowed ... discovery ... relevant to "***the procedure by which the Committee reached its decisions***." *Strugo ex rel. Brazilian Equity Fund v. Bassini*, *supra*, allowed [discovery of] "***the notes of interviews*** ..." [because] ... any argument intended to persuade the Court that the committee erred in relying upon them would have to be based upon their content, making any transcripts, summaries or notes of those interviews clearly discoverable.
>
> The same can generally be said about the request to inspect the documents relied upon by the committee in reaching its conclusions on the factual and legal issues before it. *Abbey v. Computer & Communications Technology Corp.*, 1983 WL 18005 (Del. Ch. April 13, 1983), the derivative plaintiffs were ... entitled to see "***the documentary materials utilized or relied upon by the Committee during its investigation***." ... Otherwise, the plaintiffs would find it difficult to assess the reasonableness either of ***the committee's investigation or the conclusions it reached based upon the materials before it***.
>
> * * *
>
> Quite a number of courts ... ***have concluded that broad discovery concerning the activities of the Special Litigation Committee is appropriate*** ... ***the Court*** (***and therefore the parties affected by the Court's decision including the derivative plaintiffs***) ***must necessarily be privy to a good deal of information***. ... [T]he committee must disclose to the court and the parties not only its report but all underlying data."

Ross, 2008 U.S. Dist. LEXIS 24466, at **8, 12–13.

> The court in *Weiser* also stated:

> … the Court finds that the production of the notes, summaries and outlines regarding the committee's interviews of witnesses is necessary and will facilitate determination of the reasonableness and good faith of the … investigation [of the Special Litigation Committee ("SLC")] …. In order for plaintiffs to reasonably challenge the thoroughness of the SLC's factual investigation, they must be able to examine the questions posed and the subjects explored in the witness interviews. Similarly, ***it is impossible for the Court to assess whether the SLC pursued its charge with due diligence and zeal***, ***if the Court is unable to review the development of the factual record that underlies the … report***.
>
> ***
>
> When assessing the good faith and reasonableness of the SLC's investigation, ***the court must also determine whether the committee's reliance on counsel was in good faith***. ***If counsel incompetently conducted the interviews***, ***the SLC's reliance and good faith would be called into question*** ….

Weiser, 179 Misc. 2d at 120–22.

In *In re Big Lots, Inc. Shareholder Litigation*, 2017 U.S. Dist. LEXIS 76647 (S.D. Ohio May 19, 2017), the court stated:

> In this case, the SLC had access to over 293,000 documents, reviewed deposition transcripts of at least 10 witnesses, reviewed approximately 30,000 emails, conducted 15 interviews, and retained a securities and corporate governance law expert. ***This extensive volume of information was expressly relied upon by the SLC in drafting its Report and the Court finds the information could relate to the*** SLC's ***independence***, ***good faith***, ***and reasonableness***. Further, without this information, "[P]laintiffs would find it difficult to assess the reasonableness either of the committee's investigation or the conclusions it reached based upon the materials before it." … ***Courts across the country have found that plaintiffs are entitled to review the types of documents Plaintiffs seek here***.

Id. at *11; *see also Trs. of the Police & Fire Ret. Sys. v. Clapp*, 2010 WL 1253214 (S.D.N.Y. Mar. 29, 2010) ("committee must disclose to the court and the parties not only its report but all underlying data … and the process that produced said report.*")*.

D. No Confidentiality or Attorney-Client Privilege Can Limit Discovery into the Investigation and Secret Report

If the Secret Report is in any way to influence these judicial proceedings, including the relief sought by the AG to file an AIC based on the investigation and Secret Report, in

order for the Tier 3 Plaintiffs to be able to marshal the evidence needed to support arguments against ***any*** "offensive" use of the Secret Report to block their intervention or usurp the prosecution of their unique statutory and trust beneficiary claims — ***and*** to provide an adequate record for the Court's ***independent review of the Report and any arguments based on it***, ***discovery***, ***unimpeded by attorney-client***, ***work product and other confidentiality claims must take place***. There is no attorney-client privilege in this case.[9] Nor do courts permit that privilege or a work-product claim to be used to block discovery in this context. *See Wal-Mart Stores, Inc. v. Ind. Elec. Workers Pension Trust Fund*, 95 A.3d 1264 (Del. 2014) (no attorney-client or work product protections for materials surrounding SLC report); *In re Oracle Sec. Litig.*, 2005 WL 6768164 (N.D. Cal. Aug. 5, 2005) ("[s]ubmission of an SLC report … ***waives attorney-client privilege and work product privileges***"); *In re OM Grp. Sec. Litig.*, 226 F.R.D. 579 (N.D. Ohio 2005) (reliance on SLC report ***waives attorney-client and work product privileges***); *Grimes v. DSC Comm'ns.*, 724 A.2d 561 (Del. Ch. 1998) (waiver of attorney-client/work-product privilege because plaintiff "needs to

[9] This Court has already ruled in the context of denying Ice Miller's Motion to Dismiss that due to the fiduciary nature of KRS's relationships with its members there is no attorney client privilege. *See* Nov. 30, 2018 Opinion & Order at 19–21; *see also Durand v. Hanover Ins. Grp.*, 244 F. Supp. 3d 594 (W.D. Ky. 2016), for a comprehensive discussion of the fiduciary exemption and why for an ERISA litigation, *i.e.*, pension fund fiduciary litigation like this one there is no attorney-client privilege. This is consistent with a well-established body of law that there is no attorney client privilege available in well pleaded derivative litigation involving fiduciaries breaches. *See, e.g., Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970); *Nama Holdings, LLC v. Greenberg Traurig LLP*, 133 A.3d 46 (N.Y. App. Div. 1st Dep't 2015); *see also The Shareholders' Derivative Claim Exception to the Attorney-Client Privilege*, 48 LAW & CONTEMPORARY PROBLEMS NO. 3 at 199 (Duke Univ. 1985). The same fiduciary exception applies where, as here, beneficiaries of a trustee sue the Trustee's and other fiduciaries for breach of fiduciary duties. The same rule applies in the context of trustee-beneficiary litigation. *Riggs Nat'l Bank v. Zimmer*, 355 A.2d 709 (Del. 1976); *In re Kipnis Section 3.4 Trusts*, 329 P.3d 1055 (Ariz. Ct. App. Div. 1 2014); RESTATEMENT (THIRD) OF TRUSTS § 82 (2005).

have access to documents which ***reveal the deliberate processes which the committee and the board underwent***); *Riggs Nat'l Bank*, 355 A.2d at 709 (trustee may not bar discovery of legal memorandum from counsel from beneficiaries).

1. Suspicious Circumstances Abound

While the entitlement to discovery into the circumstances surrounding any internal secret report used for litigation purposes ***does not require*** any showing of "probable cause" or "suspicious circumstances" there are legitimate reasons to question both the purity of the procurement process and the independence of the Investigation and Secret Report. The contract for the Secret Report may be the product of a tainted procurement process and the investigation and report drafting may also have involved bias/self-interest, tainting them as well.

Current KRS Executive Director/CEO Eager — an alleged wrongdoer in the Tier 3 Plaintiffs' complaint (and the verified proposed amended complaints filed earlier by the Mayberry Five and the Tier 3 Plaintiffs) — ***was involved in hiring the firm that did the investigation and***, ***in the investigation***, ***and drafting of what was supposed to be an*** "***independent third-party***" ***report***. KRS's ***current*** Trustees may also be acting to protect their colleagues, Eager — KRS's ***current*** CEO, and long-term and current Trustee Fulkerson (2013 — ***current***) who sat on the key ***finance and investment committees*** at critical times and their ***current*** fiduciary counsel Ice Miller who as fiduciary counsel then blessed or allowed all of the fiduciary misconduct this Court has denounced and was held in as pleaded in the Tier 3 Plaintiffs' complaint now — the FAC earlier.

None of these actors — all current KRS insiders — is even mentioned in the AIC. Eager and Fulkerson allegedly committed serious breaches of duty including violating KRS's conflicts of interest policy, allowing KKR/Prisma to self-deal in KRS's trust assets

while Ice Miller blessed or permitted the wrongdoing even though it was fiduciary counsel to KRS. In 2015–2016 these and other KRS officials handed over control KRS's $1.6 billion hedge fund portfolio — placing management of the entire portfolio in the hands of the self-interested / conflicted KKR Prisma. They allowed a KKR partner (Rudzik) to be placed inside KRS while on KKR's ***payroll*** (effectively acting as inside director of KRS's hedge fund portfolio) — ***all alleged co-conspirators pursuing a common enterprise***. Eager and Fulkerson and others ***permitted KKR Prisma to self-deal with KRS trust assets under the guise of payment for*** "***advisory services***," a conflict laden and unlawful relationship. KKR Prisma was put in the position of selecting other hedge funds in which KRS would invest hundreds of millions of trust fund dollars. "In consideration" of "advising" KRS, KKR ***Prisma was permitted to use this inside*** "***gatekeeper***" ***position to*** "***further develop*** [***its own***] ***business relationships***," ***i.e.***, ***to leverage KRS assets for its own lucrative benefit***. See Tier 3 Pls.' Compl. ¶¶ 291–292.

This was an illicit, corrupt relationship. Eager, ***in his first and only*** Board/Board Committee meetings as a Trustee, championed these transactions, and engineered approval of these conflicted dealings. He also championed Board approval of an additional $300 million "investment" in Prisma's Daniel Boone "Black Box," despite it having been the worst-performing of the three original Black Boxes. ***Eager then immediately left the Board*** — (***after only one Committee and Board meeting***). He was given the high paying CEO/Executive Director job at KRS, ***even though he had never held any executive position at any public pension fund***. ***From that CEO position he then permitted the KKR/Prisma self-dealing he had gotten approval to continue***. ***He did nothing to red-flag or stop it***. Current KRS Trustee Fulkerson — who was on the key finance/investment committees

also authorized these corrupt arrangements and then permitted this conflict-laden self-dealing to continue for years. So did Ice Miller.

The Tier 3 Complaint in Intervention contains detailed and specific allegations laying out this sordid episode (Tier 3 Pls.' Compl. ¶¶ 57–61, 111–113, 117–118, 130–132), including naming Ice Miller as a Defendant (*id*. ¶¶ 210–218), as well as KKR/Prisma partner Rudzik, who came inside and took over KRS hedge fund portfolio, as a defendant. These ***verified allegations*** have been known to KRS management since February 2019. They were first made by way of the Mayberry Five's motion for leave to amend filed while the case was on appeal. ***The AG has not pleaded these 2015–2016 allegations***, even though they deal with a third party actually "taking control" of KRS trust assets, and even though the plain facts suggest at least the possibility of kick-backs or other criminal activity.

The claims based on Eager's misconduct — which directly ties to the KKR/Prisma role in the overall conspiracy/common enterprise — deep pocket Defendants — are very important. ***A key theory of liability of the Defendants in the claims asserted by the Tier 3 Plaintiffs is that they aided and abetted the breaches of the KRS Trustees' duties, rendering them liable to the Tier 3 Plaintiffs' § 61.645(15)(f) and breach-of-trust claims brought for the benefit of KRS's trust funds***. ***These claims alone are worth hundreds of millions of dollars in compensatory damages and who knows how much in punitive damages***. *See Yung v. Grant Thornton, LLP*, 563 S.W.3d 22, 69–70 (Ky. 2018) (upholding a four-time multiplier for punitive damages in fiduciary-duty context).

Were these matters investigated? ***Was the investigation and report really "independent"***? It is not unreasonable to suspect the investigation and Secret Report

either ignored or white-washed this alleged complicity of current KRS officials and its current fiduciary counsel in the wrongdoing.

There are also questions regarding the circumstances surrounding the procurement process for the contract for the investigation leading to the Secret Report. The "Solicitation" for the investigation contract was issued August 24, 2020 with a "close" of September 14, 2020. The ***only permitted KRS contact*** (identified as the "***Issuer Contact***"*)* in the Solicitation was Cassandra Weiss, a KRS procurement person — not a lawyer. Disclosure of the Kentucky proposal or ***any contact with any other KRS staff person was forbidden during the procurement process***.

On September 8/16, 2020 while the solicitation process was ***still open***, and no contract had yet been awarded, in a separate bid/submission for work in NY, the Calcaterra Pollack firm — which was later awarded the KRS/Commonwealth contract — was asked to:

> "Provide names and addresses for no fewer than three references for whom the Proposer ***has provided similar services*** or who are ***qualified to evaluate the Proposer's capability to perform this work***."

The answer provided included:

> Kentucky Retirement System
> Vicky Hale, Counsel
> 1260 Louisville Rd.
> Frankfort, KY US
> (502) 696-8800
> Victoria.hale@kyret.gov

In September, 2020, the Calcaterra firm had not yet been awarded the KRS / Commonwealth Contract. Did it have reason to know it was going to get the KRS contract? Why was Vicky Hale, a KRS ***staff attorney***, listed as a "***reference***" who was "***qualified***" to evaluate the Calcaterra firm, ***when Hale is not identified in the KRS Solicitation papers and Weiss was designated the exclusive contact***.

More questions arise from the Firm's registration with the Kentucky Secretary of State as a "foreign limited partnership" to conduct business in Kentucky on August 20, 2020 — ***four days before the Solicitation for the Contract was issued — something that was then 100% secret***. In fact, the Calcaterra firm started the registration process even earlier — on August 12, 2020. The timing of the Calcaterra firm's registration is curious because proof of registration to do business in Kentucky was a condition of bidding for the Contract, which had not yet been put out for bid. ***The newly formed New York City-based firm had no prior business contact with Kentucky or KRS***.[10]

The Tier 3 Plaintiffs' investigators have uncovered a ***long-standing*** relationship between Regina Calcaterra and Hale — ***many public social media contacts — over many years***. ***They took trips together to Las Vegas***. ***Regina Calcaterra calls Hale*** "***Lady V***." Did the Firm have an "inside track"? Was it given preference?

There are also questions as to the ***scope of the investigation***. The Contract provided:

> No modification or change of any provision of the contract could be made unless agreed to in writing by the Commonwealth. "Clarification" or "correspondence" cannot be construed as an amendment to the contract.

The Contract ***did not call*** for an investigation into the Tier 3 Plaintiffs' claims asserted in the Complaint in Intervention. ***That complaint did not exist when the Contract was bid or awarded***. The Solicitation and resulting Contract actually called for a much broader investigation:

[10] It appears the two lawyers from the firm made arrangements admitted to the Kentucky bar before any public release of information about the contact the firm would be awarded.

> … [to] investigate specific investment activities conducted by [KRS] to determine if there are any improper or illegal activities on the part of the parties involved and produce a ***detailed report documenting their investigation and findings***.

In a March 2, 2021 filing with this Court, KRS stated:

> Before the Tier 3 Individuals sought intervention here, Kentucky Retirement hired an independent third-party law firm to investigate the allegations contained in the proposed intervening complaint. [***KRS***] ***is investigating the allegations and will rely on the results of that investigation in choosing a path forward***.

How could the Commonwealth have hired the Calcaterra firm to investigate the Tier 3 Plaintiffs' allegations back in September–December 2020 when ***no such complaint had yet been filed***? The ***Contract called for a broad investigation into prior investment misconduct***. ***It made no reference to the Tier 3 Complaint in Intervention***. ***The Contract forbid any change to its terms without a signed amendment***, ***approved by the State***. ***Why was the scope of the Contract for the broad investigation*** (***contracted and paid for by the Commonwealth and KRS***) ***narrowed to target the Tier 3 Complaint***? ***By whom***? ***On what authority***? ***Why***? Maybe that mandated a ***broader investigation*** into long standing investment wrongdoing at KRS was restricted — after the fact — to focus on the Tier 3 Plaintiffs' allegations so that current KRS officials and law firms could be let off the hook.

It may be a coincidence, but it appears KRS decided to "deep-six" the "independent" report and do nothing regarding the lawsuit, following the Tier 3 Plaintiffs' earlier filing raising questions regarding the "independent" investigation. These are all matters of legitimate concern — ***and substantial public interest*** — as to which there must be open proceedings and public release of the Secret Report if it is to be used by ***any***

party at any time to support ***any*** arguments or request ***any*** relief.[11] That Secret Report cannot be used or relied upon to defeat intervention by treating the AIC upon which is based as blocking or justifying denial of intervention by the Tier 3 Plaintiffs. If it is, discovery is required into the investigation and Secret Report.

The court in *Big Lots* rejected a similar effort to delay moving forward on the ***merits*** of a long-pending case based on a tardy internal investigation and report, there in the "for profit corporation — SLC" context. That court stated:

> ***Big Lots chose not to convene the SLC until four years after the litigation began, and after more than 23,000 documents were produced.***[12] ***Regardless of why the SLC was belatedly formed, by expending significant resources to engage in merits discovery prior to forming the SLC, the policy considerations supporting a stay (such as saving resources) carry little weight at this juncture.*** … Finally, the Court finds that what has been deemed "merits" discovery, and the additional discovery sought by Plaintiffs from the SLC in order to respond to the Motion to Dismiss might overlap. ***The more efficient path is to allow merits discovery to proceed and avoid line-drawing discovery disputes between these two categories.***

Big Lots, 2017 U.S. Dist. LEXIS 76647, at **15–16.

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[11] That discovery will require production of all documents relating to the procurement process, e-mails, investigatory materials (both the Calcaterra Investigation and ***the earlier internal investigation that led to the Joint Notice in 2018 endorsing these same claims***), statements of KRS officials or notes of interviews, all KRS (and other) documents reviewed or relied (or not obtained, reviewed, relied on) and all communications with any Defendant or their counsel by KRS personnel as well as all counsel who participated in that process. Depositions of Eager, Fulkerson, the other Trustees involved in authorizing the Joint Notice, or the Calcaterra investigation and report (the investigation or report drafting), as well as Calcaterra, Hale and involved counsel — any person who may have influenced this purported "independent third party" investigation by a "qualified law firm" — must be taken.

[12] The KRS plan member plaintiffs who were prosecuting the claims for the benefit of KRS obtained the production of an estimated over 30,000 documents from certain Defendants prior to "new" discovery being stayed. Some of those discovery materials have been used in the "Companion Memo" and other filings, as well as the Tier 3 Plaintiffs' proposed Complaint in Intervention.

III. CONCLUSION

For the reasons set forth above and in the Tier 3 Plaintiffs' memorandum in opposition to the AG's motion to file the AIC, the Court should:

- reject any attempt to utilize the Secret Report to influence judicial proceedings, before the Secret Report is made public, discovery is taken and adversarial proceedings are conducted;
- deny the AG's motion to file the AIC; and
- grant the Tier 3 Plaintiffs' motion to intervene.

Dated: June 2, 2021

Respectfully submitted,

s/ Michelle Ciccarelli Lerach

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The above signature certifies that, on June 2, 2021, the foregoing was served via email in accordance with any notice of electronic service or, in the absence of an electronic notification address, via email or mail as indicated below, to:

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