

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CASE NO. 17-CI-01348
Electronically filed

JEFFREY C. MAYBERRY, *et al.*

Plaintiffs

and

COMMONWEALTH OF KENTUCKY

Intervening Plaintiff

v.

KKR & CO. LLP, *et al.*

Defendants

**COMMONWEALTH'S RESPONSE IN OPPOSITION TO
THE TIER 3 GROUP'S MOTION FOR PRESERVATION OF DOCUMENTS
AND TO BE PROVIDED A COPY OF CALCATERRA REPORT**

The Commonwealth of Kentucky, through its Attorney General, opposes the Tier 3 Group's "Motion for Entry of an Order Requiring That Documents Regarding the Calcaterra Pollack 'Investigation' be Preserved and That the Calcaterra Report be Provided to the Tier 3 Plaintiffs' Counsel," which the Tier 3 Group filed on May 3, 2021 ("Motion"). For the following reasons, the Motion should be denied.

I. The Tier 3 Group does not have standing to seek the relief requested in their motion.

In general, a non-party has no standing to seek any relief by motion in a Circuit Court case. *See Wells v. Holderfield*, No. 2019-SC-0093, 2019 WL 5678466, at *3 (Ky.

Oct. 31, 2019) (a non-party does not have standing to seek removal of trial judge); *Dodd & Dodd Attorneys, PLLC v. Burkett*, No. 2001-CA-2471, 2003 WL 21511961, at *1 (Ky. App. Jul. 3, 2003) (a non-party does not have standing to file a CR 60.02 motion prior to intervention). The Court has some discretion to consider arguments advanced by non-parties, but the Supreme Court of Kentucky has noted that “the timely and efficient administration of justice is often impeded by considering arguments advanced by non-parties asserting an interest in a pending action.” *A.H. v. W.R.L.*, 482 S.W.3d 372, 375 (Ky. 2016).

Here, the Tier 3 Group has a pending motion to intervene, but they are not yet parties to this action. The Tier 3 Group’s Motion is their latest in a series of vexatious filings by these non-parties, who act as though they have standing and have already been made parties to the case. But as non-parties whose motion to intervene has yet to be granted, they have no standing to seek the relief they request. At a minimum, the Court should deny their Motion without prejudice, until after it first considers their motion to intervene.

II. The Commonwealth objects to providing any privileged documents or attorney work product in possession of the Attorney General to the Tier 3 Group or their counsel.

The Tier 3 Group asks this Court to direct that “the Office of the Attorney General (“OAG”) . . . preserve all documents—including drafts and communications—relating to the investigation contracted by and between the Commonwealth of Kentucky and KRS on the one side, and the CALCATERRA FIRM on the other,” and further, to direct that “KRS turn over to the Tier 3 [Group] whatever report(s) are turned over to the OAG, at the same time[.]” (Motion, at 2). At the time of this filing,

the Office of the Attorney General does not have in its possession any draft reports, any documentation related to KPPA's retention of the Calcaterra Firm to conduct an independent investigation, the status or progress of the Calcaterra Firm's independent investigation, or any investigative materials generated as a result of the Calcaterra Firm's independent investigation. The Office had no role in KPPA's contracting with the Calcaterra Firm, and so it has no information relevant to KPPA's compliance with the Model Procurement Code. Further, the Office of the Attorney General has yet to receive the investigative report that this Court ordered KPPA to submit to it by May 17, 2021. (*See* Order entered April 22, 2021, at 3 ¶ 1.)¹

The only materials the Office of the Attorney General currently has in its possession that conceivably are relevant to the Tier 3 Group's Motion are the notes, emails, and other materials it has itself generated. Those materials were prepared in anticipation of litigation, during the course of litigation, or in preparation for trial, and include the mental impressions, conclusions, opinions, and legal theories of counsel for the Commonwealth in this case. As such, any such materials are core attorney work product, and absolutely exempt from disclosure to the Tier 3 Group under CR 26.02(3).

The Commonwealth therefore objects to the Tier 3 Group's Motion, or the entry of any order by the Court, to the extent it seeks, or requires, the Office of the Attorney

¹ The Calcaterra Firm's contract with KPPA also provides that KPPA "may ask [the Calcaterra Firm] to produce a summary report that would be suitable to publish to the public without waiving attorney/client privilege." (*See* Exhibit A to KPPA's emergency motion for extension of time (filed April 19, 2021), p. 2.) The Office of the Attorney General also has not received an advance copy of this summary report.

General to preserve its work product for possible future production to counsel for the Tier 3 Group. The Motion, and any such order, is improper under the Rules of Civil Procedure, the Open Records Act, and the Model Procurement Code.²

III. Conclusion

For the foregoing reasons, the Tier 3 Group's motion for preservation of documents and to be provided a copy of the Calcaterra Report should be denied.

Respectfully submitted,

/s/ Aaron J. Silletto

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² The Commonwealth reserves the right, upon its receipt of the Calcaterra Report, to object to its production, or to the production of the investigative files supporting it, on other grounds. Those other grounds may include, but not be limited to, such documents beyond the scope of discovery, CR 26.01(1); attorney-client privilege, KRE 503; or attorney work product, CR 26.02(3). *See Duffy v. Wilson*, 289 S.W.3d 555, 559 (Ky. 2009) (statements taken as part of an "independent investigation" were generated "in anticipation of litigation," and therefore subject to work-product protection); *see also* KPPA's Response in Opposition to the Non-Party Preservation Motion (filed May 7, 2021), at 3 n.2 (reserving objections to production).

CERTIFICATE OF SERVICE

I certify that on May 9, 2021, a copy of the above was filed electronically with the Court and served through the Court's electronic filing system upon the following:

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