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

JEFFREY C. MAYBERRY, *et al.* PLAINTIFFS

v.

REPLY MEMORANDUM IN OPPOSITION TO DEFENDANTS' ATTEMPT TO DELAY PROCEEDINGS AND IN FURTHER SUPPORT OF THE TIER 3 PLAINTIFFS' MOTION FOR LEAVE TO FILE A THIRD AMENDED COMPLAINT

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

ELECTRONICALLY FILED

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Ashley Hall-Nagy, Tia Taylor and Bobby Estes (the "Tier 3 Plaintiffs" or "Plaintiffs") respectfully submit this reply in opposition to Defendants' January 5, 2021 so-styled "preliminary objection"[1] to the Tier 3 Plaintiffs' motion for leave to file a third amended verified complaint (the "TAC").

I. INTRODUCTION

Having delayed this case for years Defendants' 2021 submissions show one thing for sure — they are going to continue to try to delay this case. They are continuing to pursue meritless technicalities — defenses of the type they have used to block this meritorious case for three years, a case the Kentucky courts have found pleads "***significant misconduct***" that "***demands accountability***" for the "***severe misconduct and breaches of fiduciary duty***" and "***serious wrongs***," and that the "***public interest***" demands be litigated on the merits. This continuing exploitation of technicalities to cause delay so that the alleged wrongdoers are ***not*** held accountable and KRS made whole should come to an end. The Tier 3 Plaintiffs' duly noticed motion — with the submission fully briefed — should be promptly determined and ruled on.

The proposed TAC by the Tier 3 Plaintiffs is proper. This Court denied the Tier 3 Plaintiffs' motion to amend ***without prejudice***, treating them as parties to the case. *See* Dec. 28, 2020 Order at 18, ¶ 3 (emphases added).[2] They have promptly complied with the Court's dispensation. To the extent the Defendants have managed to dream up some

[1] The Kentucky rules do not provide for a "Preliminary Objection" to a motion while reserving the right to more briefs later as Defendants attempt. Plaintiffs submit that Defendants have had ample time to fully respond to Plaintiffs' arguments, as their motion for leave to amend (in substance) has been pending for several months. In all, this matter has been fully briefed.

[2] *Mayberry v. KKR & Co., L.P.*, No. 17-CI-1348, slip op. (Ky. Cir. Ct. Franklin Cnty. Dec. 28, 2020) (Shepherd, J.).

purported technical defect in the way the Court has proceeded with the case and Plaintiffs' have attempted to pursue it, asserting that the Tier 3 Plaintiffs were not originally plaintiffs, those assertions are just more of the same. If there is some jurisdictional technicality implicated here, Plaintiffs have asked that the motion to amend be treated as a motion to intervene and granted. *See* the Tier 3 Pls.' Mot at 11, n.16. The new separate backstop action by the Tier 3 Plaintiffs has been filed and assigned to this Court,[3] obviating this issue. One way or another the claims of the Tier 3 Plaintiffs must be heard and determined ***on the merits***. Plaintiffs respectfully submit that the Court should move forward, rule on the motion to amend, deem the TAC filed and order the Defendants to promptly respond.

As argued in Plaintiffs' opening memorandum, the proposed amendments are not futile. Because of the nature of the Tier 3 Plaintiffs' benefits and the structure of their accounts within KRS they have standing under the rationale of *Overstreet*,[4] the *Thole* decision and ***a long line of federal court ERISA decisions — pre- and post-Thole — that participants in a contributory pension plan, like the Tier 3 Plaintiffs***' have standing to sue to recover damages ***on behalf of the pension plan in which they are enrolled***. ***The ERISA cases discussed* infra *show this beyond doubt***. The Tier 3 Plaintiffs' ***pension benefits have been and will be diminished*** as a result of Defendants' conduct, their unguaranteed insurance benefits are at risk of reduction or elimination by the legislature at any time (as they are not, as

[3] *Taylor v. KKR & Co., L.P.*, Case No. 21-CI-00020 (Ky. Cir. Ct. Franklin Cnty.) (Shepherd, J., presiding).

[4] *Overstreet v. Mayberry*, 603 S.W.3d 244 (Ky. 2020) (relying on *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615 (2020), a case arising under the Employee Retirement Income Security Act of 1974 ("ERISA")).

were the initiating plaintiffs, part of any "inviolable contract") — and the KRS funds remain on the brink of failure, meaning benefits due to the Tier 3 Plaintiffs are at greatly increased risk. The Tier 3 Plaintiffs are in a Hybrid Cash Balance Plan with individual retirement accounts maintained in a common investment pool, and their pension entitlement is variable depending upon fund investment returns, expenses, and the quality of plan administration and Trustee stewardship.

Defendants' claim that Plaintiffs have to go back to square one and make a demand on the Board of KRS to bring this case is, in a word, frivolous. ***This Court has ruled earlier in upholding the Mayberry Plaintiffs' complaint*** that demand is not required for this action to be brought under KRS § 61.645, which expressly authorizes plan members to sue on behalf of the plan to recover plan damages, ***does not contain any pre-suit demand provision***. *See* Nov. 30, 2018 Opinion & Order at 8.[5] The KRS Board supported this suit at the outset recognizing its merit and value to the fund, acknowledging that KRS lacked the expertise or funds to prosecute the case. Since then KRS has sat by, doing nothing. They never attempted to assist the case when it was going through the Appellate process. They have done nothing since the case came back to the Circuit Court. The previously uninvolved Office of the Attorney General ("OAG") Intervened upon remand. The Tier 3 Plaintiffs and their predecessors, utilizing their

[5] In *Mayberry v. KKR & Co., L.P.*, No. 17-CI-1348, slip op. (Ky. Cir. Ct. Franklin Cnty. Nov. 30, 2018) (Shepherd, J.), this Court has held that plaintiffs "are not bound by the precise statutorily-mandated procedures set forth for private shareholder derivative suits." Nov. 30, 2018 Opinion & Order at 8. This ruling is clearly correct. The main purpose of the demand requirement in shareholder derivative litigation is to provide an unconflicted Board the opportunity to take up the litigation in the name of the corporation — or decline to pursue it even if meritorious based on other corporate priorities. Here, the KRS Board would have ***no discretion*** to leave the Tier 3 members to lick their own wounds based on some other "priority" — like the asserted difficulty of recruiting new Trustees or better relations with vendors of investment products.

lawyers[6] ***are the ones — and only ones — who have been trying to prosecute these claims***. Demand would be a wasteful sideshow which would produce more delay — exactly what the Defendants want.

There is no reason to delay going forward with this case. While the Defendants now are now working to set up a briefing schedule with the OAG that serves their purposes, the substantive claims the Tier 3 Plaintiffs assert have already been upheld by this Court across the board. Extensive re-briefing is neither required nor necessary. The Tier 3 Plaintiffs are unwilling to wait.

While we ultimately hope to work with the OAG, if this Court decides it wants these complementary, but competing, conflicting cases/claims coordinated for pretrial purposes, at the moment the cases are separate. The OAG represents the Commonwealth, not KRS. This derivative case for KRS and its trust funds asserts independent and separate claims — ***claims that are trust assets of KRS and belong only to it***. The KRS derivative suit has been delayed far too long and should go forward now.

II. SUMMARY OF THE ARGUMENT

In response to the Tier 3 Plaintiffs' motion for leave to file a TAC, the Defendants have jointly filed their "Preliminary Objection," seeking yet more delay and yet more briefing, while asserting the unrestrained right to resuscitate and recycle arguments and defenses this Court heard, considered and rejected more than two years ago, in its Opinion & Order of November 30, 2018. What the "Preliminary Objections" do ***not*** do is engage in any serious way with the arguments advanced by the Tier 3 Plaintiffs. But the Defendants shouldn't be given yet another chance. They have long been aware of the

[6] The "highly competent counsel who were aggressively litigating those claims" to protect the interests of the Commonwealth." Dec. 28, 2020 Order at 14.

substance of the claims in the proposed TAC and have known for months that the Tier 3 Plaintiffs intended, whatever else happened, to pursue them. The Defendants don't need months to prepare elegant responses that, in the main, will just replay their greatest — but rejected — hits. They should not be permitted to reassert arguments they have lost.

This Court observed, at a recent hearing, that limitations issues — and in particular whether the relation-back doctrine will apply — seemed to animate Defendants' strident arguments against the intervention by the OAG in this case (as opposed to the OAG's pursuit of the same claims via a newly-filed case). That issue also is at play here as well. But that issue should not be permitted to block the forward progress of the Tier 3 Plaintiffs' claims — or, for that matter, the OAG's claims. The Tier 3 Plaintiffs have now, like the OAG, filed a separate action as a failsafe measure. We suggest that the solution, the way to blast past the continuing delay tactics, is to consolidate all three cases[7] then deal in the normal course with any limitations argument that hasn't already been decided in the context of the *Mayberry* complex of motions to dismiss. ***Limitations will not in any event be case-dispositive***.[8] There simply is no need to stop the train to decide these issues now.

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[7] *Mayberry v. KKR & Co., L.P.*, Case No. 17-CI-1348, *Commonwealth of Kentucky v. KKR & Co., L.P.*, Case No. 20-CI-00590, and *Taylor v. KKR & Co., L.P.*, Case No. 21-CI-00020.

[8] Even ***if*** the Court decided that limitations should be analyzed based on the filings dates of the OAG's stand-alone case (Case No. 20-CI-00590) and the new Tier 3 case (Case No. 21-CI-00020), and even *aside from* the tolling doctrine and other limitations-extenders discussed in this Court's Order & Opinion of November 30, 2018, the claims advanced by the Tier 3 Plaintiffs are within any applicable limitations period. First, the Tier 3 Plaintiffs allege a course of undisclosed, unlawful conduct that took place in 2015–2016 (*see* TAC ¶¶ 285–313), and in any event the structure of the Tier 3 plan incorporates a five-year look-back period, so for example a claim based on diminution of 2016 upside sharing interests would look back to 2011 or earlier.

The other reason the Defendants are so intent on nailing shut the *Mayberry* case is that they want to start from scratch on motions, objections and other dilatory tactics. By combining the cases as suggested above, the Court can avoid plowing the same ground again. ***There simply is no need for thousands of pages of briefs and exhibits***, ***and months of additional delay***, ***to hear and rule on the same issues***. That would be a monumental waste of judicial time and resources, and would unnecessarily delay the conclusion of this vitally important litigation, which actually has the potential to save KRS and give relief to the Commonwealth and its taxpayers for the billions they have poured into KRS in the past — which has been lost or wasted.

Defendants raise (if only by passing reference) a few other issues in their response brief. These issues may be grouped into a few clusters:

- *Whether the Tier 3 Plaintiffs lack constitutional standing*. The Defendants say the Tier 3 Plaintiffs "lack injury" — do not have *constitutional standing* — but they utterly ignore the unique features of the Tier 3 Cash Balance Plan as pleaded in the proposed TAC (and in the Tier 3 Plaintiffs' newly filed complaint). Because of the defined-contribution-like aspect of this plan, the Tier 3 Plaintiffs' future pension benefits have already been, and continue to be, diminished by the acts and omissions of the Defendants. They have concrete, particularized injuries that are fairly traceable to Defendants' conduct and are redressable through this litigation.[9] Thus the Tier 3 Plaintiffs have constitutional standing.

- *Whether the Tier 3 Plaintiffs lack prudential standing*. Defendants also take a swipe at prudential standing — whether the Tier 3 Plaintiffs have the right to prosecute the case derivatively on behalf of KRS. This Court previously ruled that KRS members *do* have statutory and common law standing. This aspect of this Court's November 30, 2018 Opinion & Order was not before the Supreme Court for decision, it was not disturbed by the Supreme Court's opinion. The Tier 3 Plaintiffs have, if anything, an even more compelling argument on this point. Because of the defined-benefit-like aspect of the plan — the fact that "the assets of the plan remain in a single investment pool like a

[9] The Tier 3 Plaintiffs have been injured both by diminution of their pension benefits and by severe risk to their insurance benefits (neither of which is covered by an inviolable contract).

traditional defined-benefit plan" — adequate and effective relief may *only* be obtained through an action that results in relief to the entire KRS "single investment pool." Under KRS § 61.645(15)(f), a "person" has the right to sue Trustees for breach of duty. Under the common law, the same plaintiff has the right to sue other KRS fiduciaries and aiders/abettors. And, a beneficiary of a trust can bring suit against a third party when "the trustee is unable, unavailable, unsuitable, or improperly failing to protect the beneficiary's interest." RESTATEMENT (THIRD) OF TRUST § 107(2)(b) (2012).

- *Whether the "demand" issue is a show-stopper.* Defendants basically recycle old arguments on the demand issue that this Court has already rejected. There is no demand requirement in KRS § 61.645(15)(f), or in the related common law. Nor is there a formal demand procedure in trust law. The Tier 3 Plaintiffs have clearly been harmed by Defendants' conduct. The KRS Board does not have the discretionary power to block the prosecution of these claims.

- *Whether the OAG's appearance in this case (and/or the OAG's separate case) occupies the field, protecting all legitimate interests and thereby leaving no room for claims brought by the Tier 3 Plaintiffs.* The Defendants made this argument in 2018 and did not prevail on it then. The OAG has appeared for the Commonwealth (and we have welcomed this important development). KRS, however, is distinct from the Commonwealth. As articulated in our motion to amend, the Tier 3 Plaintiffs seek monetary relief on behalf of KRS, seek to have all or some part of the ultimate recovery placed in the KRS trust fund (and thus its single investment pool), and seek to have those funds accounted for by Plan year so as to distribute "credits" in an appropriate fashion to the individual Tier 3 accounts. The OAG on behalf of the Commonwealth seeks to protect the taxpaying public and to have its recovery placed in the general fund of the state treasury, which will not completely protect Tier 3 members who do not benefit from an inviolable contract, and will do nothing to retroactively add to their individual accounts and thus their ultimate pension and insurance benefits.

- *Whether this case is a proper vehicle for the Tier 3 Plaintiffs' claims, and relatedly whether a motion to amend is an acceptable procedural device.* This devolves to whether the relation-back doctrine becomes part of the ultimate limitations analysis and whether prior rulings of this Court will have continuing force — and the issue need not be finally decided at this time.

- *Whether the Tier 3 Plaintiffs' claims are otherwise futile.* Defendants show their true hand in arguing futility; the thrust of the argument is that the rulings this Court made in November 2018 should be disregarded and Defendants should be permitted to start all over again despite losing these arguments before. Again, the solution suggested above — consolidate or coordinate these cases for (at least) pre-trial purposes and move forward with no more unnecessary delay — largely addresses these issues. To the extent there is anything new (and not waived) it can be dealt with in the continuing course of the litigation.

III. ARGUMENT

A. A Wealth of ERISA Authorities Show the Tier 3 Plaintiffs Have Constitutional Standing

1. Tier 3 Plaintiffs' Standing Allegations

When the Kentucky Supreme Court overruled this Court and ordered dismissal of the *Mayberry* FAC filed by Tier 1 and Tier 2 KRS members for lack of constitutional standing, it exempted Tier 3 members — none of whom had yet sued — from its ruling.[10] Nothing the Supreme Court said in that opinion addressed the constitutional standing of the Tier 3 members in the KRS Hybrid Cash Balance Plan.

The *Thole* case, upon which *Overstreet* was based, involved an overfunded ERISA ***defined-benefit plan***, with a solvent plan sponsor, (1) where all benefits were guaranteed by the federal government agency, and (2) where plaintiffs' benefits had not, and would not, be impacted by fiduciary misdeeds causing plan losses, excessive expenses or waste of plan assets past, present or future.

By contrast the named plaintiff Tier 3 KRS members are in a hybrid cash balance defined-contribution plan where:

- Their pension benefits are guaranteed by no one.[11]

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[10] *Overstreet*, 603 S.W.3d at 253 n.21, 263: "[T]this case concerns only the ability of beneficiaries of KRS to sue for alleged shortfalls in the KRS plan assets because of alleged administrative misconduct"; "Plaintiffs' counsel conceded at oral argument that none of the Plaintiffs are members of the KRS 'Hybrid Cash Balance Plan,' which has characteristics of both a defined-benefit plan a defined-contribution plan. That plan became available to members who began participation with KRS on or after January 1, 2014."

[11] None of the Tier 3 Members' benefits are protected or guaranteed by the State. Kentucky Revised Statutes Section 61.692:

> (2)(a) For members who begin participating in the Kentucky Employees Retirement System ***on or after January 1, 2014***, ***the General Assembly reserves the right to amend, suspend, or reduce the benefits and rights***

- Their pension benefits are determined by the final financial balance in their individual retirement account within the overall common KRS investment pool.

- Their final account balance and pension benefit has already been and continues to be impacted up or down by investment returns, expense levels and the quality of KRS's stewardship which have been lousy, excessive and terrible, respectively for years.

- The Tier 3 Plaintiffs have already suffered economic harm due to excessive hedge fund fees and terrible hedge funds returns as a result of the alleged course of misconduct of the KRS Trustees and Defendants that all but destroyed the finances of the KRS pension plans and insurance trusts, harming these individual plaintiffs.

- Causation is clear. The Tier 3 Plaintiffs have suffered individual harm due to "plan wide misconduct" which can be only be redressed by the financial recovery they seek ***for KRS and its plans*** while praying for the Court to direct a portion of that recovery be allocated to Tier 3 Members' individual accounts, if KRS fails to behave properly, to assure redressability.

To fully appreciate the devastating impact these ERISA decisions have on Defendants' meritless claims that the Tier 3 plaintiffs lack constitutional standing, we synthesize below the standing allegations in the TAC — which are accepted as true at this stage.[12] The TAC alleges the Tier 3 Plaintiffs' standing in paragraphs 10–15, 18, 77–79, 82–85, and 86–96:

> Tier 3 members are not in a defined benefit plan with a fixed and guaranteed future pension benefit. The Tier 3 Plan is a

> ***provided under KRS 61.510 to 61.705 if, in its judgment, the welfare of the Commonwealth so demands, except that the amount of benefits the member has accrued at the time of amendment, suspension, or reduction shall not be affected.***

[12] "The Supreme Court has made clear that when considering whether a plaintiff has Article III standing, a federal court must assume *arguendo* the merits of his or her legal claim." *Parker v. District of Columbia*, 478 F.3d 370, 377 (D.C. Cir. 2007). And "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Lujan v. Defender of Wildlife,* 504 U.S. 555, 561 (1992).

Hybrid Cash Balance Plan where the member's actual pension benefit depends on the value of the member's individual account when he/she retires. Tier 3 members have individual retirement accounts within KRS Funds and their individual retirement benefit is based on the value of their individual account at the time they retire, the value of which depends on the investment performance of KRS over the years the Tier 3 member works for the Commonwealth. The individual accounts, however, exist as accounting entries, the actual assets are part of the comingled whole of the KRS plans. Thus, if a plan (such as the KERS-NH pension plan) were to be depleted, the assets backing the Tier 3 individual accounts would be gone. TAC ¶¶ 93, 94.

The Tier 3 Plaintiffs — have contributed to and continue to contribute thousands of dollars of their personal funds to help fund KRS's ongoing operations and the KRS pension and insurance trusts that pay and promise to pay them benefits. They are required to contribute between 5-9% of their pay annually. These employee contributions are comingled with KRS's other monies. TAC ¶ 94.

The contributions of the Tier 3 members into KRS are placed in a common pool — comingled with the contributions of other plan participants which funds are invested and overseen by the Trustees and the advisors. TAC ¶¶ 11–12, 83, 87, 89–94.

Tier 3 Plan Hybrid Cash Balance Plan, has characteristics of both a defined benefit plan and a defined contribution plan. It resembles a defined contribution plan because it determines the value of benefits for each participant based on individual accounts. However, the assets of the plan remain in the single, comingled investment pool like a traditional defined benefit plan. Their final individual account balance, and thus their pension, depends on the stewardship of KRS's Trustees and KRS's investment returns over the years. Tier 3 members receive a minimum 4% annual return, plus an annual "upside" of 75% of KRS's investment returns over 4% computed on a 5 year basis and credited to their accounts. The "upside" credits of Tier 3 Plan participants have been diminished each year since 2015 as a result of the poor performance and excessive fees attributable to the hedge funds, *i.e.*, the alleged wrongdoing. TAC ¶¶ 14–15, 93–94.

The damage the T/Os and Defendants' alleged misconduct caused KRS impaired its investment portfolios, causing KRS

in 2016 to adopt a much more conservative, cautious "preservationist" investment strategy. This strategy caused diminished returns and curtailed the "upside" to the Tier 3 Plan participants compared to what they would get from a well-managed, well-funded liquid fund. The lost "upside" measures in the many millions of dollars to Tier 3 plan participants and significant individual financial injury to the Tier 3 named Plaintiffs. TAC ¶¶ 14, 71.

The alleged wrongdoing, *i.e.*, the course of conduct was still raging on inside KRS well into 2016 and the adverse economic impact of that misconduct, *i.e.*, the bad hedge fund investments and their excessive fees continued well into 2018–20. For instance, in fiscal 2016 the BAAM, PAAMCO and PRISMA hedge funds lost, respectively, 1.19%, 7.64% and 8.01%. Last year (2019) — the KERS hedge funds lost 0.54%. On top of the losses were excessive fees. TAC ¶¶ 95–97.

The poor hedge fund returns, resulting from the wrongful conduct complained of and caused in part by the excessive and wasteful Black Box hedge fund fees, were a drag on KRS returns for each 5-year period ended from 6/30/2015 through 6/30/2019, and thus diminished the amount of "upside sharing interest" the Tier 3 beneficiaries received. Were it not for the defendants' misconduct and waste of plan assets which have been ongoing well through 2018–20, the investment returns of KRS would have been higher, and the upside sharing of these Tier 3 beneficiaries would have been higher and their ultimate pension benefit greater. ***This injury in fact has already occurred***. The *minimum* "drag" for each of the five-year periods mentioned is (TAC ¶ 97):

fye 6/30/15	fye 6/30/16	fye 6/30/17	fye 6/30/18	fye 6/30/19
3.56%	3.89%	3.54%	2.97%	1.05%

They have been subjected to and suffered individual injury by poor investment returns the "Black Box" hedge funds) and wasteful expenses which have reduced/lowered their yearly "upside" credit and their ultimate pension benefits, all the result of the long ongoing scheme, conspiracy, common enterprise of the T/Os and Defendants which can be remedied to KRS and its plans. TAC ¶ 11.

All the Tier 3 plaintiffs' personal contributions to KRS face a clear increasing risk, along with loss or curtailment of their benefits, when the KRS funds fail likely as they will in the

> foreseeable future, benefits they have helped fund with via their mandatory contributions.
>
> Tier 3 Plaintiffs are stuck in in the worst funded public retirement funds in the United States, and are ***forced to continue to*** "***contribute***" ***their own earnings into the smoldering remains of what were once fully funded plans***, which the T/Os and Defendants helped destroy and where many of the benefits they are forced to help fund are outside of the inviolable contract protections. TAC ¶¶ 16–19.
>
> The named Plaintiffs bring this action to expose the wrongdoing of whose who betrayed their trust, and to recover, on behalf of KRS, as much money as possible to repair its prior losses and to improve KRS's current and ongoing financial condition and liquidity, which help protect Plaintiffs' existing and promised, ***but unguaranteed***, ***benefits***, ***as well as the safety of their past***, ***continuing and future personal contributions into the endangered funds***. TAC ¶¶ 16, 19.

2. The ERISA Case Law

Since the Tier 1 and Tier 2 Plaintiffs claims were thrown out based on ERISA authorities (*Thole*) and ERISA case precedents and rationales (*Overstreet*), these cases are obviously instructive. According to *Overstreet*, Kentucky has "adopt[ed] the federal test for constitutional standing." *Overstreet*, 603 S.W.3d at 257 n.46. To turn a phrase — if you die by the sword, you can live by the sword — so to speak.

A wealth of case law in the ERISA context establishes that members in a defined-contribution plan, without guaranteed or fixed benefits, whose individual retirement account balances, *i.e.*, retirement benefits are adversely impact by excessive fees,[13] bad investments, and trustee/advisor misconduct, have standing to sue to recover damages

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[13] KRS § 61.645(15)(h) ("In discharging his or her administrative duties under this section, a trustee shall strive to administer the retirement system in an efficient and cost-effective manner for the taxpayers of the Commonwealth of Kentucky and shall take all actions available under the law to contain costs for the trusts, including costs for participating employers, members, and retirees.").

for the overall plan from which they and all other plan members ***will benefit***. It does not matter that the plaintiff has not yet suffered damages, diminished benefits suffice, and it is not necessary at the pleading stage for the alleged harm to be pleaded in detail, much less quantified as the Tier 3 Plaintiffs have done here. *Boley v. Universal Health Servs., Inc.*, 2020 WL 6381395, at *3 (E.D. Pa. 2020) ("Standing allegations need not be crafted with precise detail nor must the plaintiff prove his allegations of injury.").

All of the ERISA cases discussed below involved individual injuries amidst plan-wide losses that pale in comparison to those suffered by the Tier 3 Plaintiffs and KRS, and often levels of misconduct by Defendants that pale as well — yet Article III standing was met. It would be a real failing of justice for the types of claims pleaded here, given the very serious allegations of wrongdoing this Court has pointed to and the huge multi-billion-dollar plan losses, if the Tier 3 Plaintiffs were denied even the opportunity to pursue relief via a state statute that provides them an express remedy, *i.e.*, statutory standing, on behalf of the plan.

These cases demonstrate that, while necessary to sue, constitutional standing is a ***technical*** requirement, the concrete-harm prong of which requires only minimal individual economic harm. Once this technical requirement is met the plaintiff suing on behalf of a plan ***may pursue litigation challenging plan-wide conduct before and after that plaintiff's membership in the plan to achieve a recovery that will make the plan whole***, ***benefiting the plaintiff and all other plan participants***. Once the Plaintiff pleads that veritable "***peppercorn***" of economic injury or harm and seeks a remedy that will help redress his individual loss by making a

recovery for the fund — as one judge said, the ***plaintiff has the* "*ball*" *and may* "*play*,"** *i.e.*, sue for everything.[14]

The ERISA body of jurisprudence discussed below all involve defined-contribution plans (not defined-benefit plans), which in the past decade have come to dominate the US pension world. These ERISA cases involve ***both*** derivative claims on behalf of the fund ***and*** class action claims on behalf of plan members, ***where under ERISA***, ***the recovery goes to the Plan*** — a hybrid cause of action creating a derivative remedy/result. In both types of suits — derivative for Plan or class action to benefit the Plan, the derivative class plaintiff/representative must demonstrate individual Article III constitutional standing.

In *Cassell v. Vanderbilt University*, 2018 WL 5264640 (M.D. Tenn. 2018) members of the retirement plan sued ***on behalf of the Plan*** alleging breach of fiduciary

[14] Both *Thole* and *Overstreet* referred to corporate derivative cases to show that standing was satisfied by a shareholder's obligation to own shares — at the outset and throughout the litigation. Citing *Thole*'s reliance on corporate derivative cases, *Overstreet* said: "The requirement that derivative plaintiffs maintain ownership of their shares … has constitutional standing implications as well … 'modest financial stake' in the outcome of a derivative suit [satisfies] constitutional standing." We note that this timeless line of jurisprudence allows shareholder suits asserting even multi-billion-dollar claims for the corporate entity, even if the shareholder plaintiff has a tiny holding ("peppercorn") no matter how large the corporate claim he attempts to pursue. *Subin v. Goldsmith*, 224 F.2d 753, 761 & n.9 (2d Cir. 1955) (Judge Frank "of course it is irrelevant that plaintiff owns but a few shares." "*Cf.* The Code of Maimonides, BK. IV. The Book of the Judges (Transl. 1949) Ch. XX, Clause 10: 'Think not that the foregoing rules apply only to a case involving a large sum of money to be taken from one (litigant) and given to the other. At all times and in all respects, regard a suit entailing one thousand maneh and one entailing a perutah as of equal importance.'"); *Lewis v. Curtis*, 617 F.2d 779 (3d Cir. 1982) ("The fact that Lewis' investment is comparably small ['a few shares'] is irrelevant."); *Marshall v. Spang & Co.*, 321 F. Supp. 310 (W.D. Pa. 1971) (owner of 400 shares out of 2.4 million — worth $2,200 can sue); *Dawson v. Dawson*, 645 S.W.2d 120 (Mo. Ct. App. 1983) ("de minimis" stake — 25 shares "more than adequate").

duty due to bad investments and excessive fees, which negatively impacted their retirement accounts (*id*. at **1–3, 6):

> All relief under this section must go to the benefit of the ERISA plan itself. *Id.; see also* 29 U.S.C. § 1109(a) (fiduciaries may be personally liable to make good *to such plan* any losses *to the plan)*.
>
> ... [T]he Court must determine whether Plaintiffs have constitutional standing to bring their claims. As Circuit Judge Sutton recently stated: "***Article III standing is to federal courts as a ball is to soccer***. ***If you have it***, ***you can play***. If you don't, you can just pretend." ...
>
> Courts have recognized that a plaintiff who is injured in his or her own plan assets — and thus has Article III standing — may proceed under Section 1132(a)(2) ***on behalf of the plan or other participants even if the relief sought sweeps beyond his own injury***.
>
> Once an individual has alleged a distinct and palpable injury to himself, he has standing to challenge a practice even if the injury is of a sort ***shared by a large class of possible litigants.***
>
> [***Plaintiffs alleged***] ***an imprudent process that allegedly injured all Plan participants, including Plaintiffs, when a portion of those fees were charged to individual accounts***. Plaintiffs have standing to bring these claims related to administrative, management and record-keeping fees.
>
> ***
>
> If the plaintiffs are successful, any assets recovered from Defendants ***would first be paid into the Plan and then allocated to Plaintiffs' individual accounts as appropriate***.

In *Boley*, 2020 WL 6381395, members of a defined-contribution plan sued for breach of fiduciary duties — bad investments and excessive plan fees — which reduced investment returns, negatively impacting their retirement accounts and pension entitlement. They sued "***on behalf of the Plan***." Because the named plaintiffs had invested in only a few of the investment funds offered by the Plan, defendants sought to

defeat, fracture or restrict the scope of plaintiffs' constitutional standing to sue ***for the plan*** (*see id.* at *2–3, 6):

> The Fiduciaries argue Ms. Boley, Ms. Sutter, and Ms. Johnson only invested in seven of the Plan's funds during the putative class period and therefore lack standing to bring claims about the remaining funds. They rely on the Supreme Court's recent analysis in *Thole v. U.S. Bank, N.A.* to argue the named participants cannot demonstrate injury with respect to the funds they did not invest in because "[w]in or lose, [p]laintiffs will receive 'not a penny less' (or more)." ***The Employees argue they have alleged injury with respect to each of their claims — which implicate "plan-level conduct" — and may therefore bring their claims on behalf of the Plan. We agree with the Employees and find they have standing.***
>
> The Employees seeking relief under ERISA must demonstrate injury to one's own plan account to have Article III standing. She may show injury through "[***d***]***iminished returns relative to available alternative investments and high fees … regardless of whether the plaintiff suffered an actual loss on his investment or simply realized a more modest gain***." ***The Employee may also satisfy this requirement by alleging an injury to a plan's assets unrelated to specific funds, if plan participants are all assessed a portion of the injury. Once an ERISA plaintiff has alleged injury to her own account, she "may seek relief under § 1132(a)(2) that sweeps beyond [her] own injury***."
>
> ***
>
> [T]he Fiduciaries err in arguing the nature of the plan was "irrelevant" to the [*Thole*] Court's standing analysis. We disagree; ***the Court stated the defined-benefit nature of the plan rather than a defined-contribution plan to be*** "[***o***]***f decisive importance***" because in a defined-benefit plan, participants "receive a fixed payment each month, and the payments do not fluctuate with the value of the plan or because of the plan fiduciaries' good or bad investment decisions" while in a defined-contribution plan, "benefits can turn on the plan fiduciaries' investment decisions." The Fiduciaries further attempt to "***make standing law more complicated than it needs to be***" ***by arguing ERISA plaintiffs are now required to demonstrate standing with respect to each of the***

> ***funds in a plan, regardless of the claims the plaintiffs bring***. The Supreme Court in *Thole* and the Constitution require plaintiffs demonstrate a concrete stake in the outcome of each of ***their claims*** — the Employees have done so here.
>
> Unlike in *Thole*, Ms. Boley, Ms. Johnson, and Ms. Sutter have demonstrated ***loss to their own accounts with respect to each of their three claims***. They suffered individualized injury for their first claim regarding the imprudence of the suite of Fidelity Freedom Funds because they each invested in at least one of those funds. They further allege injury arising to pursue their latter two claims related to the Plan's allegedly imprudent decision-making processes, ***because at least a portion of the excessive fees or lower returns affected their individual accounts. They sufficiently plead standing for their claims under Thole***, ***as the outcome of each of these claims could affect their returns***.

In *Cryer v. Franklin Templeton Resources, Inc*., 2017 WL 4023149 (N.D. Cal. 2017), a former participant in an employee retirement plan sued over his pension distribution which he alleged was reduced due to plan wide misconduct. The Court found constitutional standing (*id*. at **4–5):

> FRI argues in multiple ways that Plaintiff does not have standing to bring this lawsuit .... First, it argues that he does not have standing to bring claims regarding funds in which he did not invest ... that he lacks standing to pursue claims related to the funds in which he invested that outperformed comparable funds because he was not injured in those instances.
>
> These arguments fail primarily because ... ***the lawsuit seeks to restore value to and is therefore brought on behalf of the Plan***. The Supreme Court has explained that "recovery for a violation of 29 U.S.C. § 1109 for breach of fiduciary ***duty inures to the benefit of the plan as a whole, and not to an individual beneficiary***." ... The potential "liability of the fiduciary is "to make good to such plan any losses to the plan ... and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan." ... ***Accordingly***, ***in determining constitutional standing, courts look not to***

> ***individual funds but*** "***to the nature of the claims and allegations to determine whether the pleaded injury relates to the defendants*'*management of the Plan as a whole***." …
>
> FRI's arguments are not persuasive because … any ***recovery is on behalf of the Plan as a whole***. The common focus will be "on the conduct of Defendants: whether they breached their fiduciary duties to the Plan as a whole by paying excessive fees, whether they made imprudent investment decisions." …

Braden v. Wal-Mart Stores, Inc., 588 F.3d 585 (8th Cir. 2009), involved a contributory employee pension plan with one million participants and $10 billion in assets. Plaintiffs alleged past excessive fees and expenses of $60 million — and future waste of $20 million per year, suing on behalf of the plan. Article III standing was present and allowed the plaintiff to pursue ***plan wide relief*** (*id.* at 591–92):

> Article III generally requires injury to the plaintiff's personal legal interests, but that does not mean that a plaintiff with Article III standing may only assert his own rights or redress his own injuries. ***To the contrary***, ***constitutional standing is only a threshold inquiry, and*** "***so long as*** [***Article III***] ***is satisfied, persons to whom Congress has granted a right of action***, ***either expressly or by clear implication, may have standing to seek relief on the basis of the legal rights and interests of others***." ***In such a case***, ***a plaintiff may be able to assert causes of action which are based on conduct that harmed him, but which sweep more broadly than the injury he personally suffered***.
>
> ***
>
> [The district court] concluded that Braden had no standing for the period before he began participating in the Plan because "[u]nder ERISA, a fiduciary relationship does not exist towards potential participants in a plan and such potential participants have no standing to sue for … breach of fiduciary duty." It therefore granted appellees' motion to dismiss "all claims occurring prior to October 31, 2003." In reaching this conclusion, the district court mixed two distinct issues. Whether Braden may pursue claims on behalf of the Plan at all is a question of constitutional standing which turns on his personal injury. Whether relief may be had for a certain

> period of time is a separate question, ***and its answer turns on the cause of action*** **Braden** ***asserts***.
>
> Braden has satisfied the requirements of Article III ***because he has alleged actual injury to his own Plan account***. ***That injury is fairly traceable to appellees*****'** ***conduct because he has alleged a causal connection between their actions — even those taken before his participation in the Plan — and his injury***. Finally, the injury is likely to be redressed by a favorable judgment. Braden has thus "made out a 'case or controversy' between himself and [appellees] within the meaning of Art. III."

After finding statutory standing because a former plan member was still a statutory "participant" under ERISA, the court in *In re: Mutual Funds Investment Litigation*, 529 F.3d 207 (4th Cir. 2008), considered the constitutional standing of former plan members who had cashed out, to sue for the plan, alleging their pay out was diminished by fiduciary misconduct (*id*. at 210, 216–19):

> Because we conclude that the plaintiffs have "***statutory standing***" to bring their claims, we must also now decide whether they have constitutional standing ....
>
> In this case, the first two elements are not at issue: If the plaintiffs' allegations are true, they suffered injury in that their retirement accounts were worth less than they would have been absent the breach of duty, and this injury was caused as the plaintiffs have alleged, by the fiduciaries' misconduct. The defendants contend, however, that the plaintiffs have not satisfied the third element of constitutional standing — ***that their injury be redressable by a favorable decision in this litigation***.
>
> Defendants contend that even if the plaintiffs can prove the merits of their case, it is wholly speculative whether any recovery by the plan would pass through to the plaintiffs' individual accounts.
>
> Of course, a participant suing to recover benefits on behalf of a defined contribution plan for breach of a fiduciary duty is still not entitled to have monetary relief paid directly to him .... ***The recovery is obtained by the plan — even if it is for injury only to a particular individual account***

— ***because the aggregation of individual accounts defines the assets of the plan***. ... As the Supreme Court explained, "fiduciary misconduct need not threaten the solvency of the entire plan to reduce benefits below the amount that participants would otherwise receive." ***It is sufficient that "a fiduciary breach diminished plan assets payable to all participants and beneficiaries, or only to persons tied to particular individual accounts***."

The defendants' argument that restoration of individual accounts would be speculative following any recovery in these cases thus fails to recognize that in a defined contribution plan, ***it is the plan assets in the individual accounts that are restored*** ....

***

In sum, if we take the plaintiffs' cases as they come to us and therefore accept for now the allegations of the complaints as true — that the defendants breached fiduciary obligations imposed by ERISA section 409(a) ***and those breaches had an adverse impact on the value of the plan assets in the plaintiffs' individual accounts — then the plaintiffs have constitutional standing to bring these claims***.

***

And because the plans at issue are defined contribution plans, rather than defined benefit plans, we reject the defendants' argument that the plaintiffs' injuries are not redressable and therefore that they lack Article III standing.

"The benefit in a defined-contribution pension plan is, to repeat, just whatever is in the retirement account when the employee retires or ***whatever would have been there had the plan honored the employee's entitlement, which includes an entitlement to prudent management***." ...

In short, we conclude that participants in defined contribution plans controlled by ERISA have colorable claims against the fiduciaries of their plans when they ***allege that their individual accounts in the plans were diminished by fraud or fiduciary breaches and that the amounts by which their accounts were diminished constitute part of the participants' benefits under the plans. The plaintiffs' claims in***

> ***this case are for such additional benefits, not damages, and they therefore have standing to sue*** ….

In *George v. Kraft Foods Global*, 251 F.R.D. 338 (N.D. Ill. 2008), plaintiff sued "on behalf of the Kraft Foods Global Thrift Plan" seeking to recover alleged losses ***suffered by the Plan due to breach of fiduciary duty***, ***including excessive plan expenses that reduced investment returns to members*** (*id*. at 345–46):

> Here, plaintiffs bring this action ***on behalf of the Plan***. They have alleged that the Plan suffered actual injury and that it continues to suffer the real and imminent possibility of injury in the future, unless their requests for injunctive relief are granted. Plaintiffs link the injury alleged (the loss of value based on excessive fees and expenses) to the conduct of defendants, as the Plan's fiduciaries. … [T]he injuries alleged are fairly traceable to the challenged action if plaintiffs prove the allegations in the complaint, and the injury alleged is redressable by injunctive and other equitable relief. In the event plaintiffs prove excessive fees, and that leads to injunctive relief that affects how the Plan pays out fees in the future, that will redound to the benefit of future participants.
>
> ***
>
> ***In this case, plaintiffs obtain a recovery for the Plan, that will mean that persons who withdrew from the Plan during a period when excessive fees were paid will have received less than they should have received***. That possibility gives former participants standing, because they would have a claim to a benefit: that is, "[w]hatever would have been [in the Plan] had the Plan honored the employee's entitlement, which includes an entitlement to prudent management." … Thus, former participants who were members of the Plan at the time of the alleged conduct violating ERISA may be part of a class bringing suit ***on behalf of the Plan*** for violations that occurred while they were participants.

In *Clark v. Duke University*, 2018 WL 1801946 (M.D.N.C. 2018), pension plan participants who had invested in some but not all funds available, sued (id. at **3–5):

> … [T]he plaintiffs allege that all funds in the Plan incurred excessive fees and expenses because the defendants breached their fiduciary duties by failing to monitor plan fees, failing to leverage the plan size to obtain reduced service costs, and

> failing to obtain bids to secure the lowest priced services. The plaintiffs allege that the same decision-making process, or lack thereof, resulted in these excessive fees and expenses. The plaintiffs allege that these breaches injured them because they assessed a portion of the Plan's higher recordkeeping and service costs that were unrelated to specific funds.
>
> These allegation and undisputed facts are sufficient at this stage to establish that the named plaintiffs have Article III standing to pursue their theories of liability on all Courts in the Second Amended Complaint. The named plaintiffs have alleged actual injury to their individual Plan accounts .... That injury is fairly traceable to the defendants' conduct because the plaintiffs have plausibly alleged that the defendants' breaches of fiduciary caused their injury. Finally, a judgment in favor of the named plaintiffs is likely to redress the injury.
>
> The defendants contend that the named plaintiffs only have standing to challenge the 25 funds in which they invested and that they do not have standing to challenge the inclusion of any of the other 375 funds in the Plan because inclusion of those funds in the Plan because inclusion of those funds did not injure them However, courts have recognized that a plaintiff who is inured in his or her own plan assets — and thus has Article III standing — ***may proceed under section 1132(a)(2) on behalf of the plan or other participants even if the relief sought*** "***sweeps beyond his own injury***."
>
> "***At bottom, the gist of the question of standing is whether [plaintiffs] have such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination***."

In *Bekker v. Neuberger Berman Group LLC*, 2018 WL 4636841 (S.D.N.Y. 2018), a participant in the pension plan which included his "***individual account***" invested in a ***"collective trust***" alleged and sought to recover ***for the Plan***, alleged excessive fees paid over a 10 year period. The court made clear standing existed even if plaintiffs account had positive returns. ***Diminished returns suffice to provide concrete harm and constitutional standing*** (*id*. at **4–5).

> Defendants argue that Plaintiff lacks standing because he has suffered no concrete injury, incurring no personal financial loss, ***but rather received a positive return*** ....
>
> ***
>
> The Court finds Plaintiff's allegations sufficient in this regard. ***Diminished returns relative to available alternative investments and high fees represent concrete injuries, implicating a financial loss in comparison to what a plaintiff might have received but for the defendant's alleged breach of duty**, **which can support a cognizable injury regardless of whether the plaintiff suffered an actual loss on his investment or simply realized a more modest gain.***
>
> Here, Plaintiff's allegations that he received lower returns on his investments in the VEF than he would have received on an S&P 500-indexed investment had the actively-managed fund had not been kept available to Plan participants, and that he paid excessive fees in transactions that were prohibited by ERISA, suffice to support the requisite inference of a concrete injury.
>
> Injury to an employee benefit plan is, alone, insufficient to establish a particularized individual injury .... ***However***, ***injury to a plan does not preclude standing if a plaintiff can establish that he suffered individual harm*** .... ***In this case, however***, ***Plaintiff has alleged that the VEF***, ***a fund in which he personally invested***, ***underperformed and was charged improper fees***, ***establishing an injury particularized to him***, ***not merely an injury to the plan***. ***Plaintiff has therefore alleged a sufficiently particularized injury in fact***.

In *Taylor v. United Technologies Corp.*, 2008 WL 2333120 (D. Conn. 2008), plaintiffs — members of a contributory corporate retirement plan — sued as a class complaining of excessive expenses and bad investments, including fraud and breach of fiduciary duties, seeking to benefit the fund (*id.* at *3):

> Plaintiffs [allege] imprudent decisions and charges of excessive fees and costs ***that damaged the Plan as a whole***. ***Because a retirement plan is an "aggregation of its participants' individual accounts," any loss to the Plan causes a loss to Plan's participants***. ... Thus, plaintiffs fulfill standing based on their allegation that

> defendants breached their fiduciary duties by making decisions resulting in impaired returns or unreasonable fee charges and expenses. "If, but for the breach, the Fund would have earned more than it actually earned, there is a loss for which the breaching fiduciary is liable." *Dardaganis v. Grace Capital, Inc.*, 889 F.2d 1237, 1243 (2d Cir. 1989). Accordingly, the loss to the Plan assets due to excessive fees or impaired returns represents a concrete and actual injury to satisfy standing."

All the same factors that create constitutional standing for the Tier 3 plaintiffs create trust standing as well. In *Tibble v. Edison International*, 843 F.3d 1187 (9th Cir. 2016) (*en banc*) members of a deferred contribution plan sued in a class action against plan fiduciaries seeking to recover damages for the Plan (*id.* at 1191, 1197–98):

> Edison sponsors a defined-contribution 401(k) Savings Plan (Plan), wherein "participants' retirement benefits are limited to the value of their own individual investment accounts, which is determined by the market performance of employee and employer contributions, less expenses." ... "Expenses, such as management or administrative fees, can sometimes significantly reduce the value of an account in a defined-contribution plan."
>
> The Supreme Court tasked us with resolving "the scope of [Edison's] fiduciary duty" to monitor investments, while "***recognizing the importance of analogous trust law***."
>
> ***
>
> ERISA fiduciary duties are derived from the common law of trusts, so "courts often must look to the law of trusts" to "determin[e] the contours of an ERISA fiduciary's duty." ... "Under trust law, a trustee has a continuing duty to monitor trust investments and remove imprudent ones ... separate and apart from the trustee's duty to exercise prudence in selecting investments at the outset."
>
> Additionally, pursuant to the Restatement (Third) of Trusts, a trustee is to "incur only costs that are reasonable in amount and appropriate to the investment responsibilities of the trusteeship." ...
>
> As the Uniform Prudent Investor Act observes: "Wasting beneficiaries' money is imprudent. In devising and

> implementing strategies for the investment and management of trust assets, trustees are obliged to minimize costs."
>
> ***
>
> It is beyond dispute that the higher the fees charges to a beneficiary, the more the beneficiary's investment shrinks. As a simple example, if a beneficiary invested $10,000 the investment grew at a rate of 7% a year for 40 years, and the fund charged 1% in fees each year, at the end of the 40-year period the beneficiary's investment would be worth $100,175. If the fees were raised to 1.18% or 1.4%, the value of the investment at the end of the 40 year period would decrease to $93,142 and $85,198, respectively. Beneficiaries subject to higher fees for materially identical funds lose not only the money spent on the higher fees, but also "lost investment opportunity" that is, the money that the portion of their investment spent on unnecessary fees would have earned over time.

B. Defendants' Arguments Based on Demand Have Been Previously Rejected by the Court and Are Inapplicable and Meritless

The Court should reject out-of-hand defendants' argument regarding demand based on *Braddock v. Zimmerman*, 906 A.2d 776 (Del. 2006), a Delaware case governing typical shareholder derivative suits involving private corporations. In its November 30, 2018 Opinion & Order, this Court squarely rejected that same argument as both inapplicable and meritless. *See* Nov. 30, 2018 Opinion & Order at 8–9 ("[plaintiffs] are not bound by the precise statutorily-mandated procedures set forth for private shareholder derivative suits" and, in any event, have "essentially met" that requirement). The Court's ruling with respect to the demand argument is undisturbed by *Overstreet* and remains binding.

In any event, even if *Braddock* is applicable (and it is not), the Court should refrain from revisiting the demand issue because, as the Delaware Supreme Court held in *Braddock*, where, as here, an amended complaint is filed, the relevant board for the demand-futility analysis is the board as of the time when the original complaint was filed,

if the claims asserted in the amended complaint are already "validly in litigation." *See* 906 A.2d at 786 (citing *Harris v. Carter*, 582 A.2d 222, 230–31 (Del. Ch. 1990)). In so holding, the Delaware Supreme Court adopted the general rule that "a plaintiff does not need to make a demand before amending a derivative complaint where a new board of directors comes into power, if the amended derivative claims were 'validly in litigation' before the new board assumed control." *See id.* at 778 (citing *Harris*, 582 A.2d at 222).

Under this rule, a claim is "validly in litigation" if the original complaint has survived a demand-futility challenge, and the amended claims are based on the events and transactions that are similar to the original claims. *See Braddock*, 906 A.2d at 785 (quoting *Harris*, 582 A.2d at 231). This general rule applies here because this Court has already upheld the FAC with respect to the demand requirement (if any), and because the Tier 3 Plaintiffs' proposed TAC asserts claims that are based on the same events and transactions underlying the FAC. Accordingly, even if *Braddock* is applicable, the Defendants' argument based on Braddock is meritless and must be rejected.

IV. CONCLUSION

For the reasons set forth above and in the December 31, 2020 opening memorandum, the Tier 3 Plaintiffs respectfully urge the Court to order the TAC filed and reject Defendants' attempt to further delay these proceedings.

Dated: January 8, 2021

Respectfully submitted,

s/ Michelle Ciccarelli Lerach

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