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

JEFFREY C. MAYBERRY, *et al.* PLAINTIFFS

v.

THE MAYBERRY PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR APPOINTMENT OF LEAD PLAINTIFF, LEAD COUNSEL AND LIAISON COUNSEL

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

* * * * * * * *

PLEASE TAKE NOTICE that, on August 17, 2020, at the conclusion of the motion hour docket, or as soon thereafter as counsel may be heard, plaintiffs Jeffrey C. Mayberry, Hon. Brandy O. Brown, Martha M. Miller, Teresa M. Stewart, Steve Roberts,[1] Ashley Hall-Nagy, Tia Taylor and Bobby Estes (the "Mayberry Plaintiffs") will and hereby do move the Court, before the Honorable Phillip J. Shepherd, at the Franklin County Courthouse, located at 222 St. Clair Street, Frankfort, Kentucky 40601, for entry of the accompanying proposed order establishing a leadership structure for plaintiffs in this action and all subsequently consolidated actions as follows:

- the Mayberry Plaintiffs shall be appointed as Lead Plaintiff to oversee and direct this and any subsequently consolidated action with sole authority to make all decisions regarding the prosecution of the derivative claims asserted on behalf of the Kentucky Retirement Systems ("KRS"), including selection and retention of counsel;

[1] Mayberry, Brown, Miller, Roberts and Stewart (the "Mayberry Five") are plaintiffs who brought this action in December 2017 and the named plaintiffs in the January 17, 2018 first amended verified complaint.

- Lead Counsel for plaintiffs in this derivative action on behalf of KRS and any subsequently consolidated actions shall be Michelle Ciccarelli Lerach (MCL Law Group, APC), James D. Baskin and Bottini & Bottini, Inc.; and
- Liaison Counsel for plaintiffs in this and any subsequently consolidated actions shall be Jeffrey M. Walson.

The Mayberry Plaintiffs expect that the hearing time will exceed ten minutes.

In support of this motion, the Mayberry Plaintiffs submit the accompanying memorandum (with proposed order) and rely on all papers and proceedings in this action.

The Mayberry Five's September 9, 2019 motion to be appointed lead plaintiff is withdrawn.

Dated: August 4, 2020

Respectfully submitted,

s/ Michelle Ciccarelli Lerach

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CERTIFICATE OF SERVICE

The above signature certifies that, on August 4, 2020, 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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ELECTRONICALLY FILED

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MEMORANDUM IN SUPPORT OF THE MAYBERRY PLAINTIFFS' MOTION FOR APPOINTMENT OF LEAD PLAINTIFF, LEAD COUNSEL AND LIAISON COUNSEL

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INTRODUCTION AND OVERVIEW

Representative Plaintiffs Jeffrey C. Mayberry, Hon. Brandy O. Brown, Martha M. Miller, Teresa M. Stewart, Steve Roberts Ashley Hall-Nagy, Tia Taylor and Bobby Estes (the "Mayberry Plaintiffs") request that the Court appoint them as Lead Plaintiff with the authority to control and manage the derivative claims they assert in this litigation, including selection of:

- Lead Counsel — Michelle Ciccarelli Lerach ("MCL"), James D. Baskin ("JDB") and the law firm of Bottini & Bottini, Inc. ("B&B"), to which MCL and JDB are Of Counsel — to direct the prosecution and conduct of the litigation on a day-to-day basis; and
- Liaison Counsel — the Hon. Jeffrey M. Walson — to operate administratively in Kentucky under Lead Counsel's direction.

On July 9, 2020, the Kentucky Supreme Court reversed this Court's Opinion & Order upholding the January 18, 2018 First Amended Verified Complaint ("FAC"),[1] on the singular ground that standing had not been adequately pleaded.[2] Subsequently, the Kentucky Attorney General, adopting wholesale the principal allegations of the FAC, moved to intervene to prosecute claims on behalf of the Commonwealth (claims previously advanced by Plaintiffs as taxpayer claims). At the same time, the Mayberry Plaintiffs moved for leave to file a second amended verified complaint ("SAC") curing the pleading defects identified in the Supreme Court's opinion, and adding to the substantive allegations this Court has upheld and the Supreme Court found had already pleaded "***significant misconduct***." Assuming these motions are granted, this case will have been "rebooted." This motion is filed based on that assumption. The Mayberry Plaintiffs'

[1] *Mayberry v. KKR & Co.*, L.P., No. 17-CI-1348, slip op. (Ky. Cir. Ct. Cnty. of Franklin Nov. 30, 2018) (cited as "Opinion & Order").

[2] *Overstreet v. Mayberry*, Nos. 2019-SC-000041-TG, *et al.*, slip op., at 36, 2020 Ky. LEXIS 225 (Ky. July 9, 2020) (cited as "*Mayberry* Opinion").

purpose is to suggest a way forward to maximize recoveries on behalf of KRS (through the derivative case) and the Commonwealth (through the Attorney General's case) by playing to and meshing the strengths the two teams bring to the match, while minimizing same-side friction.

Concurrent private and public enforcement of the claims set out in Plaintiffs' FAC (now adopted by the Attorney General) and the additional claims pleaded in the Mayberry Plaintiffs' proposed SAC presents a tremendous opportunity to achieve a truly meaningful recovery, but will require this Court's supervisory hand to ensure that the most powerful joint team takes the field, with appropriate internal management. With largely common goals but potentially disparate (if not conflicting) interests bearing on the concurrent prosecution, it is important that procedures be put in place to assure coordination and consolidation of prosecution activities to maximize efficiency while avoiding duplication, waste or delay.

Concurrent public-private enforcement is not novel. The model is familiar to those with experience in complex multi-party litigation, such as class actions and multi-district litigation proceedings, in which leadership and related issues are typically handled with lead plaintiff/lead counsel orders, and also reflects current thinking emerging from the academy in the area of what one author terms "Public-Private Co-Enforcement Litigation." Professor Stephanie Bornstein's recent article of that title[3] starts with the observation that a response is needed in the face of "two urgent challenges in the enforcement of civil laws that protect the public":

> On the one hand is a well-documented decline in private individuals' access to the courts due to a decade of civil procedure jurisprudence that

[3] Stephanie Bornstein, *Public-Private Co-Enforcement Litigation*, 100 MINN. L. REV. 811 (2019).

> has intensified pleading requirements, narrowed class action rules, and increasingly embraced arbitration. On the other is a challenge with which scholars have largely yet to grapple: a new level of financial and political pressure on legislators and the executive branch pushing directly away from public enforcement of civil laws and toward deregulation.[4]

Professor Bornstein focuses on the different but coextensive challenges faced by public and private "enforcers," including the budgetary and political considerations that may constrain public agency enforcement.[5] Thus, the author proposes — sensibly in the Mayberry Plaintiffs' view — ***"co-counseling arrangements in which both parties collaborate as equals and fund their own efforts … to ensure access to justice for the public interest***." The potential power of this kind of arrangement and the enhanced potential for a recovery that could be meaningful in the context of Kentucky's deep retirement hole suggest the effort should be made.

A key first step in achieving that end is to assure a clear leadership structure for prosecution of KRS's derivative claims — not only to maximize the prosecution and recovery for those claims, but also to assure that the derivative prosecution team can speak with one authoritative voice to the Court, the Attorney General and the defendants.

In the past, absent Court-approved leadership, the derivative plaintiffs' internal management structure had proven unworkable. Indeed, infighting and dysfunction resulted in an inability to agree on case prosecution strategies, *i.e.*, how vigorously, or against whom and by which means to prosecute this litigation. This dysfunction must be

[4] *Id.* at 812–13.

[5] *Id.* at 827 & n.79 (suggesting that public agency attorneys are often constrained because they may be "underfunded … [or] prone to political pressures").

prevented from infecting the prosecution of the rebooted derivative claims.[6] Now that the Attorney General is prosecuting the taxpayer claims for the Commonwealth, steps should be taken to assure the maximum cooperative prosecution of these related claims, which arise from the same events and transactions and will necessarily be prosecuted and resolved together.

The Mayberry Plaintiffs request that (1) they be designated the Lead Plaintiff with sole authority to control and direct the *Mayberry* litigation and any subsequently filed duplicative or overlapping lawsuit; and (2) their counsel — MCL/JDB/B&B — be designated Lead Counsel to lead the prosecution of the litigation (including any subsequently filed duplicative or overlapping lawsuits) and Mr. Walson be designated as Liaison Counsel here in Kentucky.[7] *See* Proposed Order.

MCL/JDB/B&B have by far the most experience of plaintiffs' counsel in leading procedurally complex mega-cases like this one. They also have a proven track record of successes in recovering billions of dollars — much of it for pension funds — including prior representative suits against ***the same*** hedge fund defendants named in this action and represented by ***the same*** lawyers here. MCL/JDB/B&B are the only plaintiffs' lawyers in this case with ***any experience*** in derivative litigation, and the only lawyers who are willing to provide the millions of dollars in funding to ensure its success. In addition, MCL/JDB and their consulting experts, including William S. Lerach ("WSL"),

[6] In addition, with the Attorney General's entry into the case, it is imperative that there be a separation of authority regarding separate and potentially conflicting claims on behalf of separate interests.

[7] Several months ago, the original Mayberry Five terminated certain counsel ("Terminated Counsel"), and retained the Hon. Jeffrey M. Walson of Winchester, Kentucky.

have created almost all of the important substantive work in the case. MCL, assisted by WSL, conceived this case at the request of members of the Mayberry Five, spending ***months*** developing the case concept. MCL and her team spent close to a thousand hours creating the initial complaint and ultimately the FAC. They also discovered and undertook a multi-month effort to develop the new allegations contained in the SAC describing the secret and unlawful collaboration of KRS's former Chief Investment Officer, David Peden, and his former bosses at KKR Prisma, to hand control over the entire $1.6 billion hedge fund portfolio to KKR Prisma along with explicit "permission" for KKR Prisma to self-deal in violation of its fiduciary duty — to use its position as gatekeeper for hundreds of millions of dollars of KRS assets to enhance its own business interests. *See* SAC ¶¶ 302, *et seq*. The Mayberry Plaintiffs assume, but have not yet been able to confirm, that the Attorney General will adopt and pursue these allegations as well, even though they implicate current KRS Executive Director David Eager.

Most recently, this team — acting for the Mayberry Plaintiffs — has done all the legal work (again, working with experts) regarding the motion for leave to file the SAC, as well as the response to the Attorney General's motion to intervene. Simply stated, their team has done virtually all of the substantive work in this case. And other than a perceived pleading defect regarding standing — now corrected by the SAC — the work has been successful. KRS filed a Joint Notice with this Court on April 19, 2018 that recognized the merits of Plaintiffs' derivative claims, the standing and adequacy of the Mayberry Five as KRS's representatives and the talent and expertise of their counsel to prosecute the claims, admitting their own unwillingness and inability to do so. *See* Joint Notice at 3–4. This Court upheld the FAC all but 100%. *See generally* Opinion & Order. The Attorney General adopted most of it. In the Supreme Court, the Commonwealth's Legislature filed

an unprecedented *amicus* brief in support of the Mayberry Five's FAC, endorsing it and stressing the importance of those KRS claims being vigorously prosecuted.[8] And the Supreme Court recognized that the FAC pleaded "***significant misconduct***." *Mayberry* Opinion at 36.

ARGUMENT

I. The Court Should Appoint Lead Plaintiff and Lead Counsel to Ensure an Effective Prosecution Structure for the Derivative Claims in Coordination/Cooperation with the Attorney General's Taxpayer Claims

Today, when several representative lawsuits are filed in the wake of the publicity surrounding a major corporate fraud, wrongdoing or similar scandal, competing lead plaintiff/lead counsel motions are routinely made — and decided by the court — ***at the onset of the litigation***. However, this case was so unique, so entrepreneurial, and required so much pre-filing factual investigation and legal research that there were no competing cases filed. No one then even dared file a "copy-cat" case as frequently happens. This is no surprise in light of the tremendous pre-filing work required to review, digest, analyze, and understand what happened over a 20-year period at KRS in order to plead the case. Moreover, millions of dollars are necessary to fund the prosecution of the case on a wholly contingent basis. This case is a one-of-a-kind matter.[9]

Working initially at the behest of Judge Brown, who first retained her, and Captain

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[8] The Legislature's brief stressed the importance of the claims to KRS. It authorized actions on behalf of KRS to recover damages caused KRS due to breaches of fiduciary duties. *See* KY. REV. STAT. §§ 61.645(15), 61.650(1).

[9] The Mayberry Plaintiffs were complimented that the Attorney General's office used almost all of the FAC the Mayberry Plaintiffs and their counsel prepared, which this Court sustained and, as recognized by the Supreme Court, pleaded "significant misconduct." ***Afterall***, ***the Mayberry Plaintiffs invited the then-Attorney General to bring the taxpayers' claims based on the allegations of their complaint***. ***That Attorney General***, ***however***, ***declined the invitation***.

Mayberry and the other plaintiffs who retained her thereafter, MCL was tasked with not only investigating the case and drafting the complaint, but also assembling a prosecution team of consultants, experts, investigators and lawyers to file and then work together to prosecute the case. Thinking that counsel could work consensually and collegially without a formal court-approved lead-plaintiff structure, no lead-plaintiff motion was filed at the outset of this case. However, that turned out not to be the case.

Faced with a similar situation in another complex shareholder derivative litigation, the federal court in Delaware appointed a lead plaintiff and lead counsel based on their qualifications, experience and litigation conduct, in order to resolve the "divergent paths" taken by different plaintiffs' counsel:

> Although no statutory authority exists for the appointment of a lead plaintiff in shareholder derivative actions like these, courts have the inherent "authority to appoint a lead plaintiff … in a derivative action in order to create an efficient case-management structure." Here, the Court finds that although there are only two derivative actions at issue and two competing [p]laintiffs, appointing a lead plaintiff (and, relatedly, lead plaintiff's counsel) would be beneficial. To date, these two litigations have taken divergent paths in multiple courts, and the absence of an efficient, streamlined structure for directing this litigation on behalf of the corporation has only led to delay and inefficiency. Appointing a lead plaintiff should help to change this course.

KBC Asset Mgmt. NV v. McNamara, 78 F. Supp. 3d 599, 603 (D. Del. 2015) (citations omitted). Many courts have likewise recognized the benefits and efficiencies achieved by appointing a lead plaintiff and lead counsel in complex derivative actions: "elimination of duplication and repetition and in effect the creation of a coordinator of diffuse plaintiffs through whom motions and discovery proceedings will be channeled." *See*, *e.g.*, *MacAlister v. Guterma*, 263 F.2d 65, 69 (2d Cir. 1958). In another derivative litigation involving Tesla, Inc., the court appointed a lead plaintiff and lead counsel to establish "an efficient, streamlined structure for directing [the] litigation," and "to avoid[] any delays

or inefficiencies resulting from disagreement over divergent viewpoints." *Freeman v. Musk*, 324 F.R.D. 73, 79 (D. Del. 2018). Today, the lead-plaintiff appointment procedure utilized in *KBC* and *Freeman* is common practice in managing derivative or class action suits in courts across the country. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.22, at 32–35 (2018).

Consistent with this common practice, the Mayberry Plaintiffs request that the Court appoint them as the Lead Plaintiff to direct and oversee the litigation, and appoint their designated counsel — MCL and JDB, Of Counsel to B&B, along with the firm itself — as Lead Counsel to implement and manage the prosecution of this litigation. A copy of B&B's resume is attached as Exhibit 1 to this memorandum. Without a Court-approved, client-dominated structure in place for plaintiffs and their counsel to direct the prosecution of the derivative claims in this litigation, these claims — potentially worth billions of dollars — could be impaired.

Aside from ensuring the best-quality representation of KRS's claims, avoiding dysfunction (fighting over conflicting pre-trial and prosecution strategies) and having in place a structure to interact with the Attorney General while co-prosecuting the related claims are a prime reason for the Mayberry Plaintiffs to seek appointment of a lead plaintiff and their designated lead counsel.

Although there is no statutory provision for the appointment of a lead plaintiff in a derivative action, "courts have the inherent authority to appoint a lead plaintiff … in a derivative action in order to create an efficient case-management structure." *N. Miami Beach Gen. Emps. Ret. Fund v. Parkinson*, No. 10 C 6514, 2011 U.S. Dist. LEXIS 71736,

at *6 (N.D. Ill. July 5, 2011) (emphasis added).[10] Moreover, in large, complex litigation involving conflicting claims arising from common facts, courts frequently designate lead plaintiffs/counsel for those separate interests, *i.e.*, equity versus debt securities, direct versus indirect purchasers, often in situations where government claims are also being prosecuted. *See, e.g.*, *In re Cendant Corp. Litig.*, 182 F.R.D. 144, 149–50 (D.N.J. 1998) (appointing two lead-plaintiff groups to ensure adequacy of representation of the class because one group had a potential conflict of interest with the class). Appointment of a lead plaintiff/lead counsel to prosecute specified claims at the onset of — or even during a case[11] — is beneficial because it ensures the efficient and effective management and vigorous prosecution of the derivative claims by a representative (or small group of representatives) who can best represent the claims they assert here *i.e.* the KRS derivative claims. Factors to be considered by the court in selecting lead plaintiff, set forth in *Hirt v. U.S. Timberlands Service Co.*, C.A. Nos. 19575 *et al.*, 2002 Del. Ch. LEXIS 89, at *5 (Del. Ch. July 3, 2002), and *Chester County*, 2012 U.S. Dist. LEXIS 51932, at *11, include:

- the relative economic stakes/finances of any competing litigants in the outcome of the lawsuit or whether the plaintiff is sophisticated and used to dealing with lawyers and legal/financial matters;
- the willingness and ability to litigate vigorously the claims asserted;
- the enthusiasm or vigor with which the various contestants have prosecuted the lawsuit to date;
- the quality of the pleading [normally the complaint] that appears best able to

[10] *See also, e.g.*, *Chester Cnty. Emps.' Ret. Fund v. White*, No. 11-C-8114, 2012 U.S. Dist. LEXIS 51932, at *17 (N.D. Ill. Apr. 13, 2012) (appointing lead plaintiff in a derivative action); *Horn v. Raines*, 227 F.R.D. 1, 2 (D.D.C. 2005) (same).

[11] *KBC Asset Management* involved appointing a lead plaintiff when two separate ongoing overlapping cases prosecuted by competing and disagreeing lawyers came into conflict *eleven months after the initial commencement of the shareholder derivative litigation.*

represent the interests of the class or derivative plaintiffs;[12] and

- the competence of counsel and their access to the resources necessary to prosecute the claims at issue.

II. The Court Should Appoint the Mayberry Plaintiffs as Lead Plaintiff and Their Designated Counsel as Lead Counsel Because They Are Best Qualified and Uniquely Situated to Lead the Prosecution of the Complex, High-Stakes Derivative Claims

A. The Mayberry Plaintiffs Are Best Suited to Prosecute KRS's Claims Derivatively and Work Effectively with the Attorney General, Based on Their Background, Experience and Sophistication, as Well as Their Conduct in This Litigation to Date

1. The Mayberry Plaintiffs Include KRS Members Who Are Experienced in Legal Matters, Criminal Investigations, Law Enforcement, Court Proceedings, Supervision of Lawyers, and in Acting in the Best Interests of Kentucky

The Mayberry Plaintiffs, all members of KRS and its trust funds, consisting of both active and retired members and covering the entire Tiers 1, 2 and 3 benefit universe, include individuals with unique backgrounds, experiences, and qualifications that make them able to direct and control the prosecution of the derivative claims as lead plaintiff and oversee the prosecution of the case by lead counsel they retained, in whom they have confidence, with whom they can work effectively, and *who alone have committed millions*

[12] Additionally, many courts have relied on the Private Securities Litigation Reform Act of 1995 ("PSLRA"), which mandates selection of a lead plaintiff in federal court securities class actions, and expresses a preference for sophisticated institutions to serve as lead plaintiffs. *See*, *e.g.*, *In re JPMorgan Chase & Co. S'holder Derivative Litig.*, No. 08 Civ. 0974 (DLC), 2008 U.S. Dist. LEXIS 71353, at *34 (S.D.N.Y. Sept. 19, 2008) (noting that in both derivative and PSLRA lawsuits "there is a need to have plaintiffs who can adequately represent other shareholders and exercise a meaningful role in critical decisions such as whether to file suit or settle."); *Horn*, 227 F.R.D. at 3 (appointing institutional investors as lead derivative plaintiffs, noting that "although the [PSLRA] does not apply to derivative actions ...[,] Congress has demonstrated its preference for appointing institutional plaintiffs as Lead Plaintiffs in securities class actions because an institution acting as lead plaintiff can, consistent with its fiduciary obligations, balance the interests of the class with the long-term interests of the company and its public investors").

of dollars to finance this litigation, regardless of cost or duration.[13]

Jeffrey C. Mayberry was a member of Kentucky law enforcement from 1986 to 2011 as a Kentucky State Police ("KSP") Trooper, Sergeant, Lieutenant, and Captain. During his long-standing career in law enforcement, he was in charge of investigating many sophisticated white-collar, financial and organized crimes, as well as political and public corruption. As a lieutenant he was made ***Commander of Special Investigations*** and then was promoted to the rank of Captain. As a leader, he used his commonsense to make decisions and oversee their implementation. He is a leader. He believes in law enforcement. He knows right from wrong. Since his departure form KSP, he has continued to work in the security and law-enforcement arena.

The Hon. Brandy O. Brown has worked within the Kentucky legal system for most of her career. She started as a law clerk, and later became an Assistant County Attorney, and it is the basis of these two positions that she is a plaintiff in this lawsuit. Thereafter, she continued her work for the Commonwealth as a member of the judiciary, as a sitting Circuit Court Judge.

Martha M. Miller has worked within the Kentucky legal system for years, as deputy court clerk from 1977-2015, and later as chief deputy court clerk. She is currently the Clark County Circuit Court Clerk, and the first African American in the Commonwealth to hold that position.

Teresa M. Stewart was an employee of the Department of Health and Human

[13] As the U.S. Supreme Court has recognized, a plaintiff leading a derivative suit "assumes a position, not technically as a trustee perhaps, but one of fiduciary character," in which "[t]he interests of all in the redress of the wrongs are taken into his hands, ***dependent upon his diligence***, ***wisdom and integrity***." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 549 (1949) (emphases added).

Services as a social worker, protecting ordinary people within the legal system and who are often dependent on state aid or assistance, from 1996 until her recent retirement.

Steve Roberts was a Richmond, Kentucky firefighter from 1981 until he retired in 2014.

Ashley Hall-Nagy, ***Tia Taylor*** and ***Bobby Estes*** are new members of the Mayberry Plaintiffs team. They are post-January 1, 2014 state hires — so-called Tier 3 members. These Plaintiffs — a child welfare social worker, a deputy circuit court clerk and a sheriff's deputy — are members of the KRS Hybrid Cash Balance Pension Plan.

The collective experience of the Mayberry Plaintiffs — especially their experience in performing fiduciary functions and working within the judicial system — evidences a unique ability to supervise counsel in complex litigation and a commitment to working efficiently and decisively to push the litigation forward. Due to their sophistication, experience and demonstrated interest in ensuring that KRS's claims are vigorously and effectively prosecuted, the Mayberry Plaintiffs are best qualified to lead the prosecution of these claims and should be appointed Lead Plaintiff. *See Berg v. Guthart*, Nos. 14-cv-0515 EJD *et al.*, 2014 U.S. Dist. LEXIS 105357, at *6 (N.D. Cal. July 30, 2014) ("[a]n adequate representative must have the capacity to vigorously and conscientiously prosecute a derivative suit") (quoting *Hacker v. Peterschmidt*, Nos. C 06-3468 SI *et al.*, 2006 U.S. Dist. LEXIS 77325, at *2 (N.D. Cal. Oct. 11, 2006)).

The original Mayberry Five have worked together collegially from the outset. And the Mayberry Plaintiffs have functioned effectively to date. They defer to the wisdom and experience of Judge Brown, and are led by the tenacious law-enforcement veteran whose name appears first in the caption. Mr. Walson — the Mayberry Plaintiffs' own choice for local counsel — is available to them locally. The Mayberry Plaintiffs have, as necessary,

given their proxies to Judge Brown and Captain Mayberry in order to streamline any decisions needed to be made by them quickly and thus to move this litigation along efficiently.

MCL, one of the counsel chosen by the Mayberry Plaintiffs, has committed to financing this litigation to the tune of millions of dollars — the kind of money that is indispensable to prosecute a case of this size and complexity, no matter how long it lasts. No one can wage this kind of battle without an adequate war chest. Only the Mayberry Plaintiffs, and their chosen counsel, MCL/JDB, have this indispensable resource. However, that precious resource must not be wasted by lawyer dysfunction. Entry of this requested order is necessary to assure that the case can now go forward without disruption and be well-financed and well-prosecuted.

The Mayberry Plaintiffs (a team that, as stated above, includes a judge, a senior and junior court clerk, a former Captain in the Kentucky State Police, a deputy sheriff who have experience within the Kentucky court system, and social workers who care about peoples' lives) understand their fiduciary obligations — to KRS, as well as those harmed by the defendants in this case. Thus, the Mayberry Plaintiffs are ideally suited to ensure that the KRS derivative claims will be efficiently, effectively and vigorously litigated.

2. Consideration of the "Financial Interest/Sophisticated Institutional Investor" Factor Supports Appointing the Mayberry Plaintiffs as Lead Plaintiff for the Derivative Claims

In many lead-plaintiff situations, because the lawsuit involves a public company and/or trading in its stock, the concept of "financial interest" or "loss" is important in weighing a lead-plaintiff selection. Another factor often considered is whether the plaintiff is an institution with legal/financial sophistication and experience in dealing with financial matters, lawyers and the legal system. These inquiries are really markers

for commitment to the case and the legal/financial sophistication to oversee it. Economic loss numbers are not particularly relevant in the context of a suit where all the named plaintiffs are pension plan members with a taxpayer-guaranteed pension and thus have relatively small, even if legally significant, individual financial loss. Here, the claims are on behalf of the KRS entity and the taxpayers, so the individual plaintiffs' losses or financial interests are not as relevant as they are in a "stock loss" type of case.

However, numerical tests are just another way to measure sophistication and determination to recover a large amount in the litigation. The Mayberry Plaintiffs — a sophisticated law-enforcement commander, a sitting circuit court judge experienced in litigation, and a senior circuit court clerk with 32 years of experience — are uniquely suited to bring the same qualities to this litigation that a "sophisticated" institution — experienced in dealing with lawyers and the legal system — brings to securities class actions and/or derivative litigations involving public companies. The demonstrated advantages institutional investor Lead Plaintiffs have brought to representative litigations in generating multi-hundred million/billion dollar recoveries (*Enron*, *WorldCom*, *AOL Time Warner*, *Dynegy* — all cases MCL and/or JDB worked on and helped prosecute) can only be captured here via the Mayberry Plaintiffs with its collective law-enforcement/investigation/command skills, and lifetimes working within the Kentucky legal system, including dealing with and directing lawyers, demonstrated by the singular work they have done in this case to date.

B. The Mayberry Plaintiffs' Designated Counsel Have the Unmatched Experience, Prior Achievements and Financial Resources to Serve as Lead Counsel and Vigorously Prosecute the Claims on Behalf of KRS in Coordination with the Attorney General's Representation of Kentucky's Taxpayers

1. The Experience and Achievements of Lead Counsel Are Vitally Important

Many courts look to the experience, achievements, and reputation of the counsel the putative lead plaintiff has designated as lead counsel in evaluating who to designate as lead plaintiff/lead counsel in the case. *See, e.g.*, *Millman v. Brinkley*, Nos. 03-cv-3831 WSD *et al.*, 2004 U.S. Dist. LEXIS 20113, at *9 (N.D. Ga. 2004) (considering counsel's "experience and prior success record"). "Although the decision on a lead plaintiff should guide the court's related decision as to lead counsel … counsel of choice for the co-lead plaintiffs … should be afforded real weight." *Freeman*, 324 F.R.D. at 88. In fact, any other factors considered by courts in evaluating lead plaintiffs' designated lead counsel support the designation of MCL/JDB by the Mayberry Five.

MCL/JDB/B&B — and their litigation consulting team — are veterans of numerous class-action and derivative litigations. MCL/JDB (and their team) have created almost all the important substantive ***prosecutorial*** work done in this case. In addition to JDB's proven mega-case litigation talents and his demonstrated contribution and dedication to this case, the Mayberry Plaintiffs request JDB's and B&B's appointment to assure independent supervision of the activities of consultant WSL, so as to assure compliance with the ethical guidance provided to the plaintiffs by experts.

2. Only Michelle Ciccarelli Lerach and Her Team Have the Experience and Resources to Successfully Oversee and Manage the Derivative Claims in the Private-Public Context of a Joint Prosecution of Overlapping Claims

a. Michelle Ciccarelli Lerach's and James D. Baskin's Experience in Countless Representative Litigations, Involving Billions of Dollars in Recoveries for Pension Funds, Is Unmatched by Any Counsel in This Litigation

MCL's involvement arises from her legal career and her long-term relationships with members of the Mayberry Plaintiffs. As a partner and/or of counsel in the Milberg Weiss, Lerach Coughlin, Coughlin Stoia and Robbins Geller firms, MCL participated in prosecuting and settling many mega-cases — class action and derivative suits (including a derivative suit filed in Kentucky state court), often cases where public pension funds were court-appointed lead plaintiffs, and her firm was court-appointed lead counsel. Her cases generated billions of dollars of recoveries — much of it for the public and pension funds she represented.

As a result of their decades of achievements, MCL (and consultant WSL) came to lecture frequently at law schools, continuing legal education gatherings, and pension-fund conferences all over the world — often speaking about pension-fund governance, investments and litigation strategies to help protect pension-fund trust assets or to seek recoveries via litigation when they had suffered investment losses due to the misconduct of others. The law firm in which MCL continued to practice became the largest and most successful law firm in the United States that specialized in class action and derivative lawsuits, ultimately representing over 250 public and private pension funds with assets in the trillions of dollars.

Early on in the case, when it became apparent that plaintiffs would benefit from additional strong, experienced legal talent to deal with the unfolding litigation, MCL/WSL

reached out to JDB, an experienced lawyer with over 40 years of experience in litigating cases involving financial frauds and breaches of fiduciary duties. Working together with MCL/WSL, JDB has successfully prosecuted numerous class action or derivative suits. JDB played very important prosecution roles in, among others, the *Enron* (a case MCL likewise worked on) and *Dynegy* litigations, where billions of dollars were recovered in suits prosecuted by a large pension fund as lead plaintiff; and billions were recovered benefitting public pension funds. Since joining the prosecution team, JDB has worked constantly on the case. He has been a major strategist and tactician as well as factual investigator and has worked on every major substantive brief filed in the case since then. His value to the case cannot be overstated.

The hedge fund sellers sued here are no strangers to litigation. They have been repeatedly accused of breaching their fiduciary duties. They have retained hard-boiled, spare-no-expense, aggressive litigators. Not surprisingly, MCL and her team have encountered them before — and often bested them. Many years ago, Milberg Weiss filed one of the first breach of fiduciary duty — "going-private" — cases against Kolberg, Kravis and Roberts (now KKR), a firm specializing in corporate buyouts. Arcata was a small public company that had a great asset — thousands of acres of virgin redwood land — with the right to cut. Because the company was small it was not transparent and its stock was inefficient. Because Arcata reported its assets at the ***lower*** of cost or market, the huge appreciated current value of the redwood assets was concealed. KKR was working in cahoots with the insiders to get them to breach their fiduciary duties and help KKR steal these assets at a cheap price. Going into California state court, their firm filed the Arcata Corporation suit. Their firm sued for the shareholders and set forth a powerful legal theory of how to hold predatory firms like KKR liable in these kinds of cases — aiding and

abetting the breach of fiduciary duty by the Directors/Trustees — the same theory pleaded in this case.[14] The suit was successful and defendants were forced to settle.

In the $7.2 billion *Enron* class action — the largest such recovery in history, Milberg Weiss/Lerach Coughlin represented the Lead Plaintiff (Regents of the University California Pension Fund). Lead Plaintiff sued J.P. Morgan Chase (represented by Simpson Thacher, counsel for KKR here), and Citibank (represented by Paul Weiss, counsel for Blackstone here). After years of scorched-earth, no-holds-barred defense tactics, they were both forced to pay billions as part of the $7.2 billion defeat inflicted upon the Wall-Street banks by Lerach Coughlin and JDB — the largest securities class action recovery in history.

Next, these same lawyers were again bested by MCL's firm, Lerach Coughlin, in the *WorldCom* pension-fund "opt-out" litigation — where they represented a group of some 40-50 pension funds individually in a "mass action" which cost Simpson Thacher's client, J.P. Morgan, hundreds of millions to settle.

In 2007, KKR and Blackstone were sued by MCL's firm on behalf of public pension funds and others for conspiring to restrain competition and fix prices (keep them low) in going private transactions and buyouts, harming pension funds where investments include stock in buyout targets. KKR and Blackstone condemned the suit as "preposterous." Then they tried to keep incriminating e-mails secret. However, the litigation exposed a *conspiracy* led by KKR and Blackstone to cheat and benefit investors — in going-private deals by fixing a low price and then dividing the spoils. Once the court

[14] Indeed, it was this prior experience that facilitated the work by MCL/WSL in determining what happened in this case during the initial fact investigation requested by the Mayberry Five.

ordered those emails made public, KKR and Blackstone settled to avoid further litigation and any consequent sunlight from civil discovery.[15] The ultimate result was a $590 million recovery for plaintiffs. ***Simpson Thacher — counsel for KKR here — represented both the conspirators Blackstone and KKR in the private equity price fixing case***.

In almost all of these mega-cases, there have been companion related suits and prosecutions by government entities — the SEC, FDIC and often the DOJ. In fact, where wrongdoers injure public entities, suits by private parties (direct or representative) and by governmental regulators or prosecutors are routine. Securities fraud, bank fraud and antitrust violations often result in overlapping private and public suits. While this more often occurs in the federal arena, the same principles and pressure points exist in a state forum. How courts should deal with this ever-present result of dual enforcement was recently addressed in a comprehensive law-review article:

> A "***public-private co-enforcement*** ***scheme*** … means both federal agency attorneys and private plaintiffs' attorneys working in collaboration on litigation against the same violator for the same harms as, in effect, cocounsel. Co-enforcement would not usurp the independence of either public agency or private attorney enforcers, as nothing would require the parties to collaborate, or to refrain from separately pursuing an enforcement action, unless they agree to do so. The goal would be to develop mechanisms for coordinated litigation, particularly on complex or significant cases against important actors, for which ***combined resources could have the most deterrent impact on other potential violators***.
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> Both public and private halves of current hybrid enforcement schemes now face critical levels of constraint. On the one hand, federal agencies created by Congress to enforce public law statutes are hamstrung

[15] Henry Sender, *KKR, Blackstone and TPG Pay $325 Million to Settle Collusion Lawsuit*, FINANCIAL TIMES, Aug. 7, 2014, *available at* https://www.ft.com/content/0cee0c66-1e3e-11e4-bb68-00144feabdc0 (last visited Aug. 4, 2020) ("'They can't go to trial …. It's too ugly. The emails … are just too embarrassing.'").

> by slashed budgets and intense deregulatory political preferences, limiting their capacity to litigate enforcement actions. On the other, private attorneys general are limited by jurisprudence …. Given this new normative reality, … ***a proposal of co-equal co-enforcement has much to offer***, ***providing needed resources to public enforcers while helping private enforcers overcome procedural hurdles***.
>
> On the public enforcement side, collaboration offers the obvious advantage of providing desperately needed litigation financing to public agencies with limited budgets. Private attorneys general fund their cases through attorneys' fees, contingency fees, and private litigation financing mechanisms, all guided by their estimate of the value of the case rather than a narrow federal budget. ***Combining forces also provides public agencies with additional person-power***, ***and at a high level of expertise when those private attorneys are experienced in litigating complex class actions***.
>
> * * *
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> Rather than making one enforcer the dominant principal over the other, a co-equal collaborative design combines the benefits of both halves of the enforcement equation, with each providing a check on the other's limitations, in a manner that respects the talents and autonomy of each.
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> * * *
>
> Turning to the other half of hybrid enforcement mechanisms, public enforcement efforts also now face unprecedented challenges and limitations. Of course, federal agencies have always operated with limited resources determined by federal government budgets. Even scholars critical of rent-seeking private class action attorneys acknowledge that a major advantage of allowing private enforcement is its ability to multiply overall enforcement resources. Likewise, scholars who argue in favor of predominantly public enforcement regimes or who propose stronger public oversight of private attorneys general recognize that, to do so, requires leveraging the finances of the private bar.

Bornstein, 100 MINN. L. REV. at 831, 840–41, 858, 865 (2019) (emphases added).

Establishing effective working relationships with government prosecutors is almost always complex and seldom easy. However, the MCL/JDB/B&B team has successfully forded such fast-moving waters in the past. And the proposed Liaison Counsel is a former jurist skilled in calming troubled waters.

It is these kinds of successful litigations involving Wall-Street financial fiduciary misconduct that gives Judge Brown and Captain Mayberry and all of the Mayberry

Plaintiffs confidence in MCL/JDB/B&B to act as lead counsel and to utilize WSL's experience by having him be a pension-fund financial expert and litigation consultant/strategist.

B&B has years of experience and a proven track record of success in prosecuting complex securities class actions, shareholder derivative suits, and other high-stakes, complex suits representing victims of wrongdoing. The firm's attorneys have recovered hundreds of millions of dollars in suits involving Alibaba, Yahoo!, Brocade Communications, PG&E, Facebook, American Apparel, Pacific Capital Bancorp, Dole, Dell, Wells Fargo & Company and many more. These settled and ongoing cases include some of the highest stakes corporate derivative cases in history. *See* Ex. 1. Most recently, the firm is leading the prosecution of cutting-edge derivative cases involving claims on behalf of Oracle, Inc. and Facebook Inc. for failure of the companies' leadership in diversity — *e.g.*, systematic exclusion of African Americans from their boards.

The MCL/JDB/B&B team have substantial experience suing these defendants or litigating against their counsel or prosecuting large complex representative actions generally. MCL/JDB/B&B are best suited to lead the prosecution of these important derivative claims. Indeed, courts across the country have recognized that the "most persuasive factor" when choosing lead counsel is counsel's "experience in, and knowledge of, the applicable law in" the relevant field. *In re Terazosin Hydrochloride Antitrust Litig.*, 220 F.R.D. 672, 702 (S.D. Fla. 2004); *see also*, *e.g.*, *Outten v. Wilmington Trust Corp.*, 281 F.R.D. 193, 200 (D. Del. 2012) ("Experience and knowledge of the law is of the utmost importance when determining lead counsel."); *Nowak v. Ford Motor Co.*, 240 F.R.D. 355, 361 (E.D. Mich. 2006) (appointing co-lead counsel "because of their extensive experience in ERISA litigation"); *In re Cardinal Health, Inc. ERISA Litig.*, 225 F.R.D.

552, 555 (S.D. Ohio 2005) (appointing co-lead counsel based on "their extensive experience" in the field of law at issue in the case). For this reason alone, the Court should appoint MCL/JDB/B&B as Lead Counsel.

b. Michelle Ciccarelli Lerach's Access to the Human and Financial Assets Necessary to Oversee and Finance the Prosecution of This Case Are Unmatched by Any Other Counsel in This Litigation

i. Michelle Ciccarelli Lerach's Experience/Resources Enabled Her to Assemble an Unrivaled Prosecution Team to Create This Case

MCL used her unequalled experience in "big stakes" representative litigation to assemble a support team of experts and consultants to enable the case to be created, *i.e.*, researched, investigated and pleaded so as to "send a message" from the outset that this was a serious and well-pleaded case — to the Court and to defendants.

After being asked by Judge Brown and Captain Mayberry to investigate and evaluate the KRS scandal, MCL turned to WSL (who was known to both Brown and Mayberry) to undertake a thorough case investigation utilizing their combined experience and resources from their professional careers. Understanding the sensitivity of having a disbarred lawyer working as a consultant/investigator, MCL sought and received ethical opinions clearing WSL's participation, as conveyed to the Court in an earlier filing.

MCL initially reached out to alumni of the *Enron* and other successful mega-cases (like she had JDB) to provide research and infrastructure support for the investigation and complaint drafting. Together, they hired and utilized a proven forensic accounting firm, which provided hundreds of hours of analysis and numerous studies and comparisons to help put the case together. MCL/WSL contacted law professors, retired judges and lawyers who had extensive experience in prosecuting, overseeing and

financing mega-litigations against Wall-Street malefactors for input. They also retained world-class proven investigators who worked with them in prior *Enron*-scale litigations to help dig out the facts.

ii. Michelle Ciccarelli Lerach Has Committed Substantial Resources to Fund This Litigation to Date

MCL alone agreed to provide the financing of the case, millions of dollars, no matter how long it takes. The only financing for the major case expenditures in this case, which will clearly measure in the many millions of dollars, are being provided by MCL.

3. Michelle Ciccarelli Lerach and the Team She Originally Assembled Have Created Virtually All of the Important, Substantive Work Product in This Litigation to Date

WSL investigated the facts, and MCL analyzed the law, to create the *Mayberry* litigation at the request of the Mayberry Five. They have been constantly involved in the *Mayberry* litigation digging into the evidence and documents as part of a non-stop deep-dive investigation of KRS's activities over 20 years and an attempt to actively prosecute the case. MCL/JDB's efforts, assisted by WSL, in spearheading this litigation are summarized below. These facts require a finding that MCL/JDB/B&B are best-suited to lead the prosecution of this litigation, because courts have recognized that efforts to move a lawsuit forward can be the decisive factor in the appointment of lead counsel. *See In re Oclaro, Inc. Derivative Litig*., No. C-11-3176 EMC, 2011 U.S. Dist. LEXIS 103967, at *10 (N.D. Cal. Sept. 14, 2011) (appointing as lead counsel the firm who has done more work to advance the various shareholder derivative suits). The Attorney General paid the Mayberry Five the compliment of using their work product, whose merit was recognized by KRS long ago.

a. Michelle Ciccarelli Lerach and Her Team Created the Case and the Original Complaint, the FAC and the Currently Proposed SAC

At MCL's request, WSL undertook the initial factual investigation, a "deep dive" into everything about KRS since 2000 — many thousands of pages of materials. The investigation and complaint-drafting process took many months. As the facts were uncovered, assembled, analyzed, and understood, MCL, assisted by WSL, created and drafted the complaint that was filed in later 2017. The long and detailed complaint reflects over 1,000 hours of investigatory and drafting work, and the work of other investigators and consulting experts. This Court upheld that complaint as to all but one defendant. While the Supreme Court found it wanting on standing, it concurred it pleaded "significant misconduct." *Mayberry* Opinion at 36. No other part of this Court's Opinion & Order upholding the FAC has been disturbed. The Attorney General approved of the Mayberry Plaintiffs' work product by incorporating large portions of it in his complaint in intervention.

b. Michelle Ciccarelli Lerach and Her Team Insisted That Initial Discovery Requests Be Filed with the Complaint, Which Obtained the Evidence Allowing Them to Create the "Companion Memorandum" and the Proposed SAC

In addition to presenting the local counsel in Kentucky with all the necessary legal theories, a fully drafted factually laden complaint, providing assured millions in funding and outstanding — and upstanding — representative plaintiffs, MCL attempted to drive the case forward even at its very inception. MCL, as a Kentucky-licensed, experienced attorney, knew that under Kentucky procedures a plaintiff could file discovery requests with a complaint. Since — in a prior life — MCL had represented corporate defendants, she knew all too well how powerful a litigation thrust this discovery-with-the-complaint

tactic can be for the plaintiff. As a long-time representative plaintiffs' lawyer, MCL knew that in this case the defendants would immediately seek a stay of discovery claiming the case was specious. So, MCL insisted that document production requests accompany the complaint, and made sure that happened.

Predictably, defendants quickly sought a stay of new discovery. However, the Court, consistent with Kentucky practice, allowed the "old" discovery to go forward. While almost none of the defendants complied — a few did. And the documents (reviewed by MCL/WSL/JDB) showed how important this case prosecution step was — as the documents confirmed the key core allegations of the FAC. Plaintiffs were off to the races and the case was never the same. MCL/WSL/JDB discovered:

- The February 2009 memorandum warning the Trustees/Officers of the need to conduct "extensive due diligence" on the hedge fund sellers and their products confirming key allegations and making the "checkered pasts" of the hedge fund sellers highly relevant, greatly strengthening plaintiffs' case.

- The April 2010 RVK Bombshell Report with its blood curdling warning about not increasing KRS's investment risk — the single most incriminating document obtained in the case to date.

- The Buchan/Tosh documents that showed Buchan had lied in her jurisdictional declaration claiming she was not involved and was in fact intimately involved with KRS, the then Chief Investment Officer Tosh, and the black box sales. At MCL/JDB's insistence a motion to strike Buchan's perjurious jurisdictional declaration was filed over the objections of Terminated Counsel, and Buchan was forced to withdraw that motion without a hearing.

- The 2006 KRS Investment Committee "***No Hedge Funds — Too Many Red Flags***" minutes which provide a great launchpad for the FAC's theme that the hedge fund sellers targeted and preyed upon a post financial crisis/financially impaired KRS and its Trustees who were desperately seeking a way out, while covering up their own incompetence and complicity.

This early discovery was so very important because predictably defendants immediately began inundating the Court with reams of self-selected "exculpatory" evidence at the motion-to-dismiss stage. After the Court allowed the defense to put their

exculpatory matters into the record, *Plaintiffs were only able to fight back effectively against this tactic with the Companion Memorandum*. Only because of the initial discovery obtained because of MCL's strategy and insistence, were plaintiffs able to fight back on the "merits" early on. Creating this strategy of filing discovery with the complaint, or the resulting vital Companion Memorandum, was the work product of MCL/JDB and her expert team.

c. Michelle Ciccarelli Lerach and Her Team Created the Open Proceedings Strategy and Motion

MCL and the Mayberry Five have always believed that there is too much secrecy in "corporate" fraud breach of fiduciary duty litigations. One of the central issues in *Mayberry* is the risky, illiquid, fund of hedge fund "Black Boxes." Hedge fund operators notoriously crave secrecy — especially with respect to their fees and "proprietary" investment methods.

The facts here, including how the hedge fund sellers target underfunded pension funds, the specific investments, performance, and amount of fees, have been hidden for years. MCL insisted that the public interest in openness in this case had to overcome defendants' desire to maintain secrecy in a case like this one, involving a public pension fund investing the taxpayers' money.

In prosecuting the *Enron* litigation as lead counsel for the Lead Plaintiff, the $60 billion Regents of California Pension Fund, Milberg Weiss/Lerach Coughlin refused to go along with the defenses' insistence on the normal broad protective order almost always entered in complex cases — and one that would have secreted most of the evidence in the *Enron* case from public view. Instead, they filed a motion for "open proceedings" and prevailed, as argued briefly by MCL in court.

Enron established an important precedent — "open proceedings" — for these types

of litigations where the public interest is involved. ***MCL insisted on filing an open proceedings motion in this case at the very outset***, and created and drafted an open proceedings motion by which plaintiffs sought to have discovery in court filings in this case.

With the entry of the Attorney General into the case, the need for complete openness of all discovery materials is even more compelling.

d. Michelle Ciccarelli Lerach and Her Team Identified, Retained and/or Worked with Damages and Pension-Fund Experts, Forensic Accountants and Private Investigators to Create the Case

i. Forensic Accountants

From the outset of the initial investigation of this case it was obvious that this would be a complex task — the intersection of pension-fund actuarial and financial accounting in this context, involving events that began in 2000–2001 when KRS was 140% funded, the KRS funding plunge from 2001–2016 and how legislative funding (or lack thereof) contributed to this catastrophe. This is all complicated stuff, even for someone with legal, accounting and pension-fund expertise.

To get the accounting expertise needed, WSL reached out to a firm long known to them for its forensic strengths and investigatory work — a firm with years of financial fraud class and derivative litigation. The firm had worked successfully with Milberg Weiss/Lerach Coughlin in several mega-cases in past years. They spent countless hours creating tables and graphs using information from 20 years of Annual Reports to understand the investment losses and the assumed rate of return issues—all kinds of very valuable work product — that was utilized in creating and drafting the original complaint, the FAC and the newly filed proposed SAC.

ii. Private Investigators

In a case of this size and complexity, with hundreds of potential witnesses, the use of private investigators is essential to help locate, "feel out" and interview cooperative witnesses, or locate and help subpoena uncooperative ones and to dig into all kinds of records to find political contributions, assets, financial relationships and the like. This resource is a key part of a vigorous prosecution of any mega-case.

The MCL team has a decades-long relationship with a premier private investigatory firm. They have been involved in over 100 major financial fraud cases and virtually all of the billion-dollar recoveries the MCL team has been involved in. They are a priceless asset and their work on this case from the outset has been outstanding.

Recently, the MCL team has spent countless hours meeting and working with WSL and these investigators to develop a comprehensive nationwide third-party discovery plan. The MCL team identified at least 50 third-party witnesses all over the United States. They developed a list of people to interview. They also drafted extensive subpoenas to assure the production of all necessary documents from uncooperative witnesses.

iii. Graphic Visual Artists

Plaintiffs have made repeated use of what they call "Visuals" in the present case. From the FAC to the KRS SLC Presentation, to the motion-to-dismiss argument, to the briefs in the Supreme Court most recently filed, and the proposed SAC and related memoranda, plaintiffs have used these ever-evolving Visuals. In a huge multi-party 10-year long conspiracy — visuals are not only helpful — they are a vital necessity.

MCL/WSL, assisted by their longtime graphic artist, have years of experience in creating effective visuals in both litigation and pension-fund-outreach presentations. All the visuals that matter in this case were created by the MCL team and their graphic artist.

iv. Damages, Fiduciary Duty and Pension-Fund Experts

The *Mayberry* suit will require world-class testifying or consulting experts to maximize its value, as it proceeds towards summary judgment, settlement and/or trial. Because of MCL/JDB's years of experience in financial class and derivative cases, they have longstanding relations with highly qualified experts. MCL/JDB retained a world-class damages expert — who had worked with plaintiffs in *Enron*. Together MCL/JDB have located other hedge fund, fiduciary duty and pension governance experts MCL and her team may use.

CONCLUSION

A prosecution task force in a mega-case like this can only succeed if three things exist. ***First***, adequate financing to support a vigorous prosecution of the case — as much as it costs for as long as it takes which only MCL has agreed to provide. ***Second***, a command-and-control leadership structure capable of making quick decisions and operating as efficiently and effectively as possible to implement a client-directed and approved and "lead" counsel-implemented prosecution plan. ***Third***, a cooperative, reinforcing work environment operating under clear, established decisive leadership. What is needed is to assure a streamlined efficient decision-making structure going forward. This is of importance also to the Court, the defendants and the Attorney General. Everyone involved will benefit if the derivative plaintiffs speak with one voice that all can rely on. Efficiency will be enhanced, and the Court's workload lessened.

Relying on their inherent authority, courts — federal or state — presiding over derivative actions often invoke the lead-plaintiff procedure. They do it to preserve client control and assure effective and vigorous prosecution of the case by a court-empowered lead plaintiff and designated lead counsel, thus preventing case prosecution dysfunction.

This should have been done at the outset here, but was mistakenly thought as unnecessary. But now it is vital that a Lead-Plaintiff/Lead-Counsel structure be established with the case being "rebooted" and the Attorney General's arrival on the scene. This lawsuit is the largest contingent asset of KRS. It has been positioned to achieve a multi-billion-dollar recovery, if properly managed and prosecuted.

The Court's intervention is requested to protect these valuable derivative claims and assure that they are efficiently, effectively and vigorously litigated, to maximize the result for the ultimate beneficiaries.

Dated: August 4, 2020

Respectfully submitted,

s/ Michelle Ciccarelli Lerach

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

JEFFREY C. MAYBERRY, *et al.*	PLAINTIFFS
v.	
KKR & CO., L.P. *et al.*	DEFENDANTS

****

[PROPOSED] ORDER APPOINTING LEAD PLAINTIFF, LEAD COUNSEL AND LIAISON COUNSEL AND CONSOLIDATING ANY SUBSEQUENTLY FILED CASES

WHEREAS, it appears that the administration of justice would be best served by appointing a Lead Plaintiff, Lead Counsel and Liaison Counsel and consolidating any subsequently filed duplicative actions, and for good cause shown,

IT IS HEREBY ORDERED:

1. This Order shall apply to each and every derivative or direct action filed on behalf of Kentucky Retirement Systems ("KRS") arising out of the same, or substantially the same, transaction, events or occurrences as this case which is subsequently filed in, remanded to, reassigned to or transferred to this Court. Any such subsequently filed actions shall be consolidated into this action.

2. Named Plaintiffs Jeffrey C. Mayberry, Hon. Brandy O. Brown, Martha M. Miller, Teresa M. Stewart, Steve Roberts, Ashley Hall-Nagy, Tia Taylor and Bobby Estes shall be appointed as Lead Plaintiff in this and any subsequently consolidated actions. Lead Plaintiff shall oversee and direct this and any subsequently consolidated actions with sole authority to make all decisions regarding the prosecution of the derivative claims asserted on KRS's behalf, including selection and retention of counsel.

3. Lead Counsel for plaintiffs in this and any subsequently consolidated actions shall be:

- Bottini & Bottini, Inc.;
- Michelle Ciccarelli Lerach, MCL Law Group, APC, Of Counsel to Bottini & Bottini, Inc.; and
- James D. Baskin, Of Counsel to Bottini & Bottini, Inc.

4. Liaison counsel shall be Jeffrey M. Walson.

5. Lead Counsel shall have authority to conduct and direct this litigation for plaintiffs, and to set policy for the prosecution of this litigation, delegate and monitor the work performed by plaintiffs' attorneys to ensure that there is no obstruction or delay or duplication of effort, and to control and coordinate the initiation and conduct of discovery proceedings, and provide supervision and coordination of the activities of any other plaintiffs' counsel. No pleading or motion, request for discovery, or other pre-trial or trial proceedings will be initiated or filed without approval of Lead Counsel. Lead Counsel shall have sole authority to speak for plaintiffs in matters regarding pre-trial procedure, trial, and settlement negotiations and shall make all work assignments in such a manner as to facilitate the orderly and efficient prosecution of this litigation.

6. Defendants' counsel — and counsel for any other party — may rely upon all agreements made with Lead Counsel, and such agreements will be binding on the parties.

7. Liaison Counsel shall be responsible for communications to and from this Court, including handling filings and distributing orders and other directions from the Court to counsel. Liaison Counsel shall perform such other work as specified and directed by, and subject to the supervision of Lead Counsel and Lead Plaintiff.

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SO ORDERED this _____ day of August, 2020.

PHILLIP J. SHEPHERD, JUDGE
Franklin Circuit Court, Division I