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

JEFFREY C. MAYBERRY, *et al.* PLAINTIFFS

THE TIER 3 PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR ENTRY OF PRETRIAL ORDER NO. 1

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

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Tia Taylor, Ashley Hall-Nagy and Bobby Estes (the "Tier 3 Plaintiffs") respectfully submit this memorandum in support of their Motion for Entry of Pre-Trial Order No. 1 for the purpose of:

- establishing the ground rules for the efficient, effective and speedy prosecution of the claims asserted in this action, including (1) setting a schedule for discovery, (2) limiting the scope of, and setting a schedule for, motion practice directed to the pleadings and (3) appointing Kenneth R. Feinberg, Esq. as mediator to oversee any negotiations for a potential settlement of the claims; and
- establishing clear lines of authority for the co-prosecution of (1) the derivative claims on behalf of the Kentucky Retirement Systems ("KRS") by the Tier 3 Plaintiffs' counsel and (2) the direct claims on behalf of the Commonwealth and taxpayers by the Office of the Attorney General ("OAG").

INTRODUCTION

Justice delayed is sometimes justice denied. But not always. This case can still be the exception, if the Tier 3 Plaintiffs are allowed to move decisively beyond the stall tactics Defendants have so far successfully employed. Despite these delays, prosecuting the KRS derivative claims can move forward quickly because the legal claims asserted derivatively for KRS have previously been sustained across the board, assuming intervention of the Tier 3 Plaintiffs is or has been granted.[1] The OAG can participate as the progress of its yet untested claims on behalf of the Commonwealth, and its inclination, resources, and staff

[1] We anticipate the Court will decide the Tier 3 Plaintiffs' constitutional standing in connection with resolving their February 1, 2021 Motion to Intervene as they must have that standing to intervene and assert substantive claims.

levels permit.[2] The "***autopsy***" this Court indicated would take place when it first encountered the KRS derivative claims years ago (after they were filed by the original *Mayberry* Plaintiffs) has not taken place. Without Court intervention, it never will. There seems to be growing pressure from forces know and, perhaps, unknown, to try to shut down the "***adjudication on the merits***" this Court has said the "***public interest***" requires, to pursue recovery of the hundreds of millions — even billions — of dollars of "public funds" lost, wasted or stolen by the Defendants.

To move the cases forward in an orderly manner, the KRS Derivative Plaintiffs request that the Court enter a Pre-Trial Order No. 1 ("Order"),[3] setting forth ground rules for prosecution of the overlapping and conflicting KRS derivative and Commonwealth claims. To establish clear lines of authority for all counsel in this case, and to ensure accountability to the Court, KRS, its members, voters and taxpayers, the Court should designate the Tier 3 Derivative Plaintiffs' and their counsel in charge of prosecuting the Tier 3 derivative claims (as their counsel have been doing since inception, for over three

[2] The Attorney General's entry into the case, by copying the First Amended Complaint ("FAC") of the original *Mayberry* Plaintiffs was surrounded by headline publicity, praising him for filing claims against Wall Street Hedge Fund Sellers including Blackstone and Schwarzman personally, especially given Defendant Stephen A. Schwarzman's political support of the McConnell Republican political operation that spawned the Attorney General. The media blitz included assurances of a strong prosecution of the claims. He said: "Our goals in pursuing this litigation are straight forward" to protect the pensions of hardworking government employees and to safeguard taxpayer dollars. Morgan Watkins, *Kentucky Attorney General Daniel Cameron Steps into Public Pension Case Poised for Dismissal*, COURIER JOURNAL, July 22, 2020. When this Court granted intervention the media blitz continued. The Attorney General then said his office "looks forward to prosecuting this case with the best interests of Kentucky public servants in mind. Joe Sonka, *Judge Rules AG Cameron Can Intervene in Lawsuit Alleging Mismanagement of Pension Funds*, COURIER JOURNAL, Dec. 29, 2020. As they say in Texas, "All hat — no cattle."

[3] We submit our suggestion — proposed Pre-Trial Order No. 1 — with this motion.

years) and the OAG in charge of prosecuting the Commonwealth's taxpayer claims, if and when the OAG files an amended complaint and undertakes to prosecute those claims. Given the conflicts between the KRS Derivative and Commonwealth's Taxpayer claims, those parties and their counsel should be directed to, as much as possible, cooperate and coordinate activities to eliminate duplication — as should Defendants and their counsel. The qualifications of the KRS Derivative Plaintiffs' counsel to prosecute the KRS derivative claims and the benefits of a possible concurrent public/private prosecution of the Derivative and Commonwealth's taxpayer claims are discussed in Section II.

This case is not a *tabula rasa*. Let's not forget that the legal validity of the KRS derivative claims being (or to be) pursued by the Tier 3 Plaintiffs were completely upheld ***over two years ago***; nor the pages and pages of detailed factual allegations in verified complaints that laid out "***extremely serious violations of fiduciary and other common law duties on the part of certain KRS Board members and advisors and the defendant hedge fund managers***," "***severe misconduct and breaches of fiduciary duties***" involving "***self-dealing***, ***exorbitant fees***, ***conflicts of interest***" causing "***staggering losses of public funds***." And on top of that, the trove of existing evidence already obtained by the KRS Derivative Plaintiffs (some of which was set out in Plaintiffs' Companion Memorandum and other filings), forecloses any realistic possibility of summary judgment, especially in light of the fiduciary duties all the defendants have been found to owe KRS. *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 2d 476 (Ky. 1991). All this case needs is to be prosecuted on the merits.

This Court has stated that "any party that breached its fiduciary duties and engaged in reckless conduct, conflicts of interest, or self-dealing ***should be accountable***" and "principles of equity and public interest require that the factual allegations … ***should be***

adjudicated on the merits." December 28, 2020 Order at 16-17. This Court cannot adjudicate on the merits, if the parties don't litigate the merits. Rather than more delays amid continuing attempts by KRS insiders to cover up their own complicity in the extremely serious violations of duties alleged in the KRS derivative Claims (and frankly in no small part already documented), we should be pursuing litigation leading to an adjudication and resolution of these claims ***on the merits***.

ARGUMENT

I. The Court Should Enter an Order to Provide Rules for Concurrent Pursuit of the KRS Derivative Claims and Commonwealth's Taxpayer Claims, as Well as a Schedule to Move Forward

A. Merits Discovery

The Order should provide a schedule for focused but meaningful discovery sufficient to assure an ultimate resolution on the "***merits***" of the derivative claims. An initial round of document production should be completed over the next three months. There is no reason to delay document discovery. And initial round of depositions should also be completed in that timeframe. The substantive KRS derivative ***claims*** pleaded by the original *Mayberry* Plaintiffs ***were sustained across the board***. We have, since then, added detailed allegations about self-dealing and other wrongdoing in 2015-16 by Prisma/KKR/Cook, enabled (and kept secret) by Eager/Peden, but these allegations easily meet the legal standards already enunciated by the Court. Earlier discovery requests, while ignored by most Defendants, should have at least resulted in the gathering of core documents and steps to preserve all evidence. One way or another discovery is going to go forward. The "***death spiral***" of KRS continues — recently re-emphasized by KRS. *See* David L. Eager, *Kentucky's Pension Funding Method Must Be Fixed to Stop "Death Spiral,"* COURIER JOURNAL, Feb. 11, 2021. The sooner the financial pressure on

KRS can be relieved by a large enough recovery of damages to restore it to financial stability, the more likely it is that the Commonwealth's inviolable contracts, and the resulting pain inflicted on the Commonwealth's taxpayers, can be avoided.

In order to move matters forward, the Tier 3 KRS Derivative Plaintiffs have prepared discovery requests — interrogatories and document production requests — which they will serve on Defendants and submit to this Court on Monday, February 22, 2021. The Tier 3 KRS Derivative Plaintiffs request that the Court direct the Defendants to comply with the requests, without delay and ***without any protective order*** — and in the case of KRS and Ice Miller, LLP, without any assertion of attorney-client privilege.[4] Thus, all discovery will be available to all affected KRS members, the Commonwealth's Taxpayers and voters, and the media to inform the public at large. This case must be conducted completely in the open.[5] There should be no court-sanctioned secrecy.

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[4] This Court has already ruled in the context of denying Ice Miller's Motion to Dismiss that due to the fiduciary nature of KRS's relationships with its members there is no attorney client privilege. *See* Dec. 30, 2019 Order at 19-21; *see also Durand v. Hanover Ins. Grp.*, 244 F. Supp. 3d 594 (W.D. Ky. 2016), for a comprehensive discussion of the fiduciary exemption and why for an ERISA litigation, *i.e.*, pension fund fiduciary suits like these KRS derivative claims there is no attorney-client privilege. This is consistent with a well-established body of law that there is no attorney client privilege available in well-pleaded derivative litigation involving fiduciaries breaches. *See*, *e.g.*, *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970); *Wal-Mart Stores, Inc. v. Ind. Elec. Workers Pension Trust Fund*, 95 A.3d 1264, 1276–78 (Del. 2014); *Nama Holdings, LLC v. Greenberg Traurig LLP*, 133 A.D.3d 46 (N.Y. App. Div. 1st Dep't 2015); *see also The Shareholders' Derivative Claim Exception to the Attorney Client Privilege*, 48 Law & Contemporary Problems No. 3 at 199 (Duke Univ. 1985). The same fiduciary exception applies where, as here, beneficiaries of a trustee sue the Trustee's and other fiduciaries for breach of fiduciary duties. The same rule applies in the context of trustee-beneficiary litigation. *Riggs Nat'l Bank v. Zimmer*, 355 A.3d 79 (Del. 1976); *In re Kipnis Section 3.4 Trusts*, 329 P.3d 1055 (Ariz. Ct. App. Div. 1 2014); RESTATEMENT (THIRD) OF TRUSTS § 82 (2005).

[5] The original *Mayberry* Plaintiffs long ago moved for "open proceedings." These claims must be litigated in the open without protective orders. There are no current business or trade secrets involved here — just allegations of fraud on and looting of a huge

Documents should begin to be produced in 30 days with production completed in 90 days to allow for the inevitable motions to compel. Since the OAG is a party to the litigation, it will have access to the discovery responses provided to the Tier 3 Derivative Plaintiffs' discovery requests, even if its case is stalled — either by attacks on the Commonwealth's legal claims or by the Attorney General's lack of readiness or willingness to move forward to plead and prosecute whatever legal claims he believes the Commonwealth has. After document production is completed, Plaintiffs should be permitted to take 20 depositions over the following 90 days. KRS derivative counsel are prepared to move forward — now — with or without the OAG.

B. Motion Practice

There is no reason to waste time or money replaying the motion-to-dismiss contest again. Once the Tier 3 Plaintiffs' constitutional standing is recognized (which we believe is without question and thus have asked Defendants to stipulate to same — with no response), and they can go forward to pursue "***plan-wide misconduct which sweeps beyond their own injury***" and achieve "***plan-wide relief***" (*see* Tier 3 Plaintiffs' Feb. 1, 2021 Motion to Intervene at 15-26), little more remains in dispute — at least legally. Everything (or virtually everything) was briefed and argued *ad nauseum* and resolved in this Court's November 30, 2018 Opinion & Order upholding the adequacy of all factual allegations and legal claims in the *Mayberry* Plaintiffs' FAC.[6] The fundamental, "black

public employees' pension fund — the worst such abuse in the history of the United States. The broader public interest mandates open access.

[6] Contrary to the assertion of KRS's counsel at the last hearing, these are indeed the ***same claims*** brought by the Tier 3 Plaintiffs — although the later 2015-16 allegations (regarding the Cook/Eager/KKR misconduct) have been fleshed out in greater detail in the current version of the complaint — allegations the *Mayberry* Plaintiffs sought ***twice*** to add to the operative complaint before their dismissal from the case. As to her gripe of "different plaintiffs" (with whom neither KRS nor its counsel had any pre-existing

letter" principles of Kentucky law cited in that Order are more than sufficient to provide multiple paths to liability as to each defendant which include ***direct fiduciary claims against all defendants — as well as punitive damages***. *Yung v. Grant Thornton*, 563 S.W.3d 22 (Ky. 2018) (fiduciary held liable for punitive damages at 4x1 ratio). Liability and damages on the KRS derivative claims seem pretty obvious; yet Defendants, the OAG and now KRS, seem to be cooperating to block any prosecution of those claims on the merits.

While Defendants have their rights, whatever motion practice is pursued as to the Tier 3 Plaintiffs' derivative complaint should be ***strictly limited to matters not previously ruled upon*** — which are very few indeed. Because motion practice directed at the Tier 3 Plaintiffs' complaint should be sharply limited in scope, it can be concluded very quickly, ***while the parties are going forward with discovery***. The Commonwealth's claims, now asserted directly by the OAG, have not yet been fully tested by motion practice ***by any party***, but presumably will be when the OAG files an amended complaint. But this should not delay the previously sustained KRS derivative claims from going forward on the merits, with ***discovery available to all***.

The tight time-table the Tier 3 Plaintiffs propose is aggressive — but it is also absolutely essential to make meaningful progress in a case that has been stalled almost beyond belief. The schedule should not be a straitjacket or compel a needless scorched-earth discovery march, consuming millions and millions of legal fees, burning off insurance coverages, all to a pre-ordained outcome — resolution down the road.

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relationship, other than as Members of the Plan, no different than the Tier 3 Plaintiffs), the personal identity of the plaintiff has nothing to do with the substance of the allegations — even more so in the representative/derivative context, provided the plaintiffs have Constitutional standing.

C. Settlement Mediator/Conference

The KRS Derivative Plaintiffs suggest that given the public nature and overwhelming importance of the claims — both the KRS derivative and Commonwealth claims — the Court use its authority under Franklin County Court Rule 8.02 to appoint Kenneth R. Feinberg, Esq. as settlement mediator *now*, to be available to any of the parties who want to utilize his services and bear part of his fees. He is without question a world-class mediator with a proven track record in dealing with cases of this size and importance; he is consistently appointed by courts to deal with the largest and most complex matters, as no one has his skills, stature, record, or "throw weight." Kentucky is fortunate he is willing and available to help make progress in resolving this matter.[7]

Regardless of the Court's views regarding the suggestion above of appointing Mr.

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[7] Praised as "Mr. Fairness" by the *Wall Street Journal*, Feinberg has an unequaled record. For over 30 years, Feinberg has been involved in resolving some of the nation's most protracted, complex, and emotional disputes involving a wide range of interests and clients. *See* About the Firm, available at FeinbergLawOffices.com (last visited Feb. 14, 2021).

Mr. Feinberg is publicly recognized as redefining the practice of law, bringing opposing sides of legal disputes together. He is one of the nation's foremost mediators, arbitrators, and experts in other forms of alternative dispute resolution and negotiation strategy. From cases that affect only a few, to the largest, most complex disputes of our time, he consistently bridged the gap between parties by creating imaginative solutions.

Mr. Feinberg is consistently retained by Fortune 500 companies, nationally recognized plaintiff counsel, insurers, government agencies, and state and federal courts to design, implement, and administer innovative and sophisticated settlement solutions.

He has been involved in countless large securities fraud cases involving billions of dollars, as well as the BP Oil Spill disaster, the General Motors ignition scandal, the massive Foreign Exchange Price Fixing litigations, the 9/11 Disaster Compensation Program, the Holocaust litigations, the Hurricane Katrina settlements, and currently he is overseeing the resolution of the 125,000 Roundup cancer personal injury suits involving Bayer/Monsanto, where settlements exceeding $12 billion have been reached, subject to court approval. Yet because of the public importance of this case, he has agreed to take on this matter.

Feinberg now, the Tier 3 Plaintiffs submit that completion of discovery should be followed by a Court-mandated settlement conference conforming to Franklin County Court Rule 8.02, compelling attendance of all principals and insurance carriers.

Regardless of whether the Court formally designates Feinberg as a settlement mediator at this time — because the legal validity of the KRS derivative claims have been upheld across the board, and because of derivative counsel's ***thousands of hours invested in this case***, review of the discovery obtained to date, and their resulting knowledge of the facts, *i.e.*, the "***merits***," of the KRS claims against the differing defendants — derivative counsel is willing and able to talk settlement of the KRS derivative claims with any Defendant who in ***good faith*** wants to talk, so long as (1) discussions involve Mr. Feinberg, and (2) key documents and insurance coverages necessary to properly evaluate the claims against any particular Defendant are made available.

If Defendants insist on the forced march ***and*** pursuing frivolous summary judgment motions with little doubt as to the outcome — so be it. KRS derivative counsel are prepared for the march and motion practice. If their hands are untied and they are finally allowed to actually litigate these valuable claims after three years they will do so. There is nothing magical about this — all this case needs is for the sustained legal claims to be vigorously prosecuted. Nature will take its course. If such a prosecution on the merits takes place, as time goes by the price of peace will escalate — to reward those who come early *versus* those who force the march to go on needlessly. Knowing at the end of the march, if they force it, a mandatory settlement conference awaits them will hopefully incentivize Defendants to act responsibly sooner, rather than face the inevitable later.

D. No More Delay

This case has been delayed too long.

There is no need to wait for the results of an "outside" investigation controlled by KRS insiders who are implicated in the wrongdoing we have alleged after our own lengthy investigation completed many months ago. That the $1.2 million contract was awarded to a small, newly-formed law firm with little experience in this area and no apparent prior knowledge of the complex factual basis for the claims we have put forward does not justify confidence in the expenditure or the results. Who will tutor these new lawyers, who will bring them up to speed on the complex facts and inter-relationships or on the contested legal issues? The KRS insiders who are themselves implicated? Perhaps, like the OAG, they will seek to learn the case through conversations with the defendants and their lawyers? The fact that these new lawyers have not bothered to pick up the telephone to call and seek the perspective of the people who originated this case and have already spent many months and millions of dollars in attorney time on it strongly suggests that the cake was pre-baked.[8]

Certainly there should not be more delay waiting on them or because of the late

[8] KRS should not be allowed an expensive time-consuming do-over by claiming the Tier 3 Plaintiffs are "different" or "new" plaintiffs, as if the identity of the "named plaintiffs" in a derivative case had any impact of the quality of the substantive claims asserted; the ***substantive claims and*** the ***relief sought are indeed the same***. KRS is bound by the Joint Notice; regardless, the Tier 3 Plaintiffs have a right to proceed as long as they meet the constitutional standing requirement, which they clearly do, with or without KRS's blessing. Moreover, demand on the current Board of KRS is ***not*** required under KRS § 61.645(15). *See* Nov. 30, 2018 Opinion & Oder at 8-9. The Court also found that, if demand was required, it was executed. *Id*. at 9. In any event, even if demand is "required" as in a corporate stockholder derivative case, demand has been tested when the action was first filed and may not be relitigated as the action unfolds. *See Braddock v. Zimmermann*, 906 A.2d 776, 786 (Del. 2006) (prohibiting relitigation of the demand-futility issue with respect to "well-pleaded" derivative claims).

entry of the OAG who appears unable or unwilling to draft a complaint pleading facts avoiding triggering the *in pari delicto* defense it now faces (by asserting the legal claims directly) or articulating ripe or justiciable damages claims.[9] Indeed, with respect, we submit the real reasons for the Attorney General's slow-walk stall may be:

- He cannot articulate any actual "ripe," "justiciable" damages for the Commonwealth.
- He cannot sue for KRS without representing conflicting interests: Commonwealth recovery goes to State Treasury; KRS recovery to "trust funds."
- He does not have the staff or funds to undertake a real on-the-merits prosecution.
- Pursuing Blackstone's Schwarzman — one of the biggest political donors in the country, having spent at least $33.5 million supporting Republican candidates in the 2020 cycle alone — for serious money would be politically hazardous for the Attorney General. He would almost certainly face enormous pressure to settle quickly and (relatively) cheaply, and to help KRS sweep the whole course of conduct under the carpet without exposing the all the dirty laundry, rather than aggressively pressing Schwarzman/Blackstone for the kind of settlement that would make a difference to KRS.

When the AG moved to intervene, there was noteworthy media surprise that he had sued Blackstone and Schwarzman:

- Mark Vandervelde & Billy Nauman, *Kentucky Sues Blackstone and KKR Over Fund Performance*, FINANCIAL TIMES, July 22, 2020:

> State lawyers indicated in legal filings ***they expect to recover hundreds of millions of dollars*** … a meaningful portion of the profits flowed to top executives including Blackstone founder Stephen Schwarzman and his KKR counterparts, Henry Kravis and George Roberts.

- Peter Castagno, *Landmark Wall Street Scandal Implicates Top Trump & McConnell Donor*, CITIZENTRUTH.ORG, July 23, 2020:

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[9] ***Any party*** may move to dismiss a complaint not just a defendant. CR 12. If the OAG is going to be in this case, then the Court and the parties — ***all parties*** — are entitled to see that complaint and test its legal sufficiency.

> ***The Kentucky Attorney General's lawsuit not only targets Wall Street predator pension management practices but singles out Blackstone CEO and top McConnell and Trump donor Steve Schwarzman***.
>
> In a surprise move on Wednesday, Kentucky Attorney General Daniel Cameron intervened in a lawsuit alleging that the state's pension system has been exploited and mismanaged by top Wall Street fund managers Blackstone and KKR, drawing attention to not only the predatory business practices that experts say have swindled billions from retirees' savings, but to specific actors with tremendous influence over American politics.

- David Sirota, *A Huge Wall Street Scandal Just Exploded in Kentucky*, JACOBINMAG.COM, July 2020:

> ***GOP law enforcement officials are targeting Stephen Schwarzman***, ***the billionaire who bankrolls Mitch McConnell and Donald Trump's political machine***. The lawsuit breaks open a major financial scandal that threatens the world's largest equity firms.
>
> * * *
>
> If the case moves forward, it could tear open the veil of secrecy surrounding the private equity and hedge fund industries, which control hundreds of billions of dollars of retirement funds across the world.
>
> ***Adding to the precedent-setting nature of the case is the fact that the suit is now coming from a law enforcement office controlled by a Republican Party traditionally considered friendly to Wall Street***.
>
> Cameron's complaint echoes the earlier case's allegations that Blackstone and KKR unduly profited off a scheme to bilk the state pension system. The attorney general's suit additionally alleges that Schwarzman and KKR principals Henry Kravis and George Roberts have personally enriched themselves through the schemes.

If the OAG needs to trail (due to the Attorney General's unwillingness or inability to move forward promptly), the Tier 3 Plaintiffs' and their counsel are prepared to undertake the necessary discovery which will be available to all parties and arguably benefit the OAGs efforts on behalf of the Commonwealth's taxpayers. It's time for the "autopsy" to begin.

II. Clear Lines of Authority Should Be Established for Prosecution of the KRS Claims by KRS Derivative Counsel and the Commonwealth's Claims by the OAG

A. Conflicting Claims Can Be Co-Prosecuted

Vigorous representation of conflicting interests that share both common and conflicting goals is far from impossible. Successful concurrent private and public enforcement of the claims set out in the FAC, which the OAG adopted for the Commonwealth, and the additional facts pleaded in the Tier 3 Plaintiffs' derivative complaint, presents a tremendous opportunity to achieve a truly meaningful recovery. But this will require this Court's supervisory hand. With common goals but conflicting interests bearing on the concurrent prosecution, it is important that procedures be put in place to assure ***separate representation*** and thus ***adequate representation***, accountability to the Court, KRS, its members, the Commonwealth, its taxpayers and voters and coordination and consolidation of prosecution activities to achieve 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. It also reflects current thinking in the area of what one author terms "Public-Private Co-Enforcement Litigation." Stephanie Bornstein, *Public-Private Co-Enforcement Litigation*, 100 MINN. L. REV. 811 (2019). That title 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 has intensified pleading requirements.... 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.[10]

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.[11] Thus, the author proposes — sensibly in the KRS Derivative 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.

Honestly, no one knows how horrible the Hedge Fund Sellers' documents will be, but experience suing Wall Street Banks gives us reason to be confident they will indeed be incriminating — they always are. Why should $10-20 billion not be recovered? Over $40 billion was lost. Kentucky courts exist to provide its citizens remedies — especially against sophisticated outsiders who prey on those citizens and Kentucky's non-profit institutions. The legal rules provide a route to liability. The facts are there. The defense lawyers here are as skilled and ruthless as their clients are avaricious and dishonest, so no promises can be made as to the ultimate outcome — other than to push forward hard on the "merits." ***But the effort must be made***.

B. The KRS Derivative Counsel Should Prosecute the KRS Claims

A key first step in achieving that end is to assure a clear leadership structure for prosecution of KRS's derivative claims and the Commonwealth's Taxpayer claims. This

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[10] Bornstein, 100 MINN. L. REV. at 812–13.

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

is necessary — not only to provide separate representation of those conflicting claims but also to assure the separate prosecution teams can speak with authoritative voices to the Court, KRS and the Defendants. For this reason the Court should order the KRS Derivative Plaintiffs' counsel in charge of prosecuting the KRS claim. The OAG should of course litigate the Commonwealth's claims.

KRS derivative counsel have by far the most experience in prosecuting procedurally complex mega-cases like the KRS derivative claim. They also have a proven track record of successes in recovering billions of dollars — much of it for public pension funds — including prior representative suits against ***the same*** hedge fund defendants named in this action and represented by ***the same*** lawyers here. They are the only lawyers who have been willing to provide the millions of dollars in funding (as noted by KRS in its press release regarding the previously filed Joint Notice) to ensure its success. They and their consulting experts created ***all*** of the important substantive work in the case, and conceived this case at the request of members of the Mayberry Five — spending ***months*** developing the case concept and close to a thousand hours creating the original complaint/FAC.

At the outset they served discovery on defendants and ***the documents obtained showed how important this prosecution step was — as the documents confirmed the key core allegations of the FAC.***[12] Plaintiffs were off to the races and the case was never the same. KRS derivative counsel discovered and made public:

- The February 2009 memorandum warning the Trustees/Officers of the need to conduct "***extensive due diligence***" on the hedge fund sellers and their

[12] To our knowledge, the OAG has not yet taken a single step to access, let alone evaluate, this trove of valuable evidence.

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, then Chief Investment Officer Tosh, and the black box sales. A motion to strike Buchan's perjurious jurisdictional declaration was filed, 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. Predictably, as this Court will recall, 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 able to fight back effectively against this tactic with the Companion Memorandum. This strategy of filing discovery with the complaint, and the resulting vital Companion Memorandum, was the work product of KRS derivative counsel — not any government official or (as acknowledged by KRS in its press release regarding the Joint Notice) KRS.

While the case was pending, KRS derivative counsel undertook a multi-month effort to develop the new allegations contained in the previously proposed SAC and the current Tier 3 Plaintiffs' derivative complaint, describing the secret and unlawful collaboration of KRS's former Chief Investment Officer, David Peden, and his former bosses at KKR Prisma, and the current KRS executive director (then Trustee) David Eager's key role in the critical part of the wrongdoing to hand control over the entire $1.6 billion hedge fund portfolio to KKR Prisma (Cook — tied to KKR) 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. Complaint ¶¶ 57-59, 115-118, 285-302. Because the Attorney General has failed to file an amended complaint as ordered by the Court we do not know if he will adopt these allegations like he copied the FAC's (or whether he awaits KRS's self-funded $1.2 million analysis — likely determining that it has committed no wrongs). ***These allegations directly implicate current KRS Executive Director David Eager who played a key role then as a Trustee and later as a KRS executive director in this key wrongdoing.*** This may be why KRS is now paying $1.2 million for a "whitewash" report, and why KRS is signaling they are going to take an adverse position to the continued prosecution of these extremely valuable claims by derivative plaintiffs/derivative counsel — notwithstanding the fact that doing so is key to avoiding the imputation of KRS's Trustees' illegal conduct that would doom the claims if asserted directly.[13]

[13] In virtually every derivative case, the entity (typically a corporation) sued for derivatively is hostile to the derivative suit alleging its directors/trustees/officers' incompetence and dishonesty. After the "deep dive" investigation discussed in Footnote 14, *infra*, KRS initially supported the prosecution of the claims in a derivative format (*see*

Without the efforts of the KRS derivative plaintiffs and their counsel none of this — not the allegations, nor any of the "hot" incriminating documents — would be in the public domain. Simply stated, the KRS derivative counsel has done virtually all of the substantive work in this case. And other than a technical pleading defect regarding standing — now corrected by the intervention of the Tier 3 Plaintiffs — the work has been successful. In response to this Court's direct inquiry to state its position as to the KRS derivative suit, KRS filed a Joint Notice with this Court on April 19, 2018 that recognized the merits of these derivative claims, and the talent and expertise of KRS derivative counsel to prosecute the claims, admitting both the value of the claims and their own unwillingness and inability to do so.[14] *See* Joint Notice at 3-4. After the *Mayberry* action was filed the KRS Board stated in a release:

> The current Board ***commends*** Plaintiffs and their counsel for their diligent and significant legal and investigatory work that enabled them to present proper and potentially valuable claims on behalf of KRS — and without any compensation or assistance from KRS to date, thus undertaking significant risks to themselves for the benefit of the members of KRS. These actions demonstrate Plaintiffs' commitment and that of their counsel to represent the best interests of KRS and the Kentucky taxpayers in pursuing these claims.

See also John Cheves, *KY Retirement System Won't Join Lawsuit Alleging Pensions*

Joint Notice), but this did not facilitate the *Mayberry* Plaintiffs' constitutional standing. *Overstreet v. Mayberry*, 603 S.W.3d 244, 261 (Ky. 2020). Just as KRS could not save the initial plaintiffs' standing, nor can/should its apparent opposition and/or whitewash stop or impede this suit now — especially when to do so could very well damage these valuable claims.

[14] KRS, when controlled by honest new trustees who conducted a "deep dive" and uncovered and exposed the decade-long shocking wrongdoing inside KRS, received a detailed presentation by KRS derivative counsel, and in consultation with its own counsel, determined to support the derivative plaintiffs' claims. Most of those Trustees are gone due to the constant Board turnover at KRS, and Eager — the implicated CEO — now runs the day-to-day operations of KRS and has a dominant position and corrupting influence.

Were Cheated on Hedge Funds, LEXINGTON HERALD LEADER, Apr. 30, 2018 ("Plaintiffs and the current board have agreed that it is in the best in interests of KRS for the plaintiffs, through their experienced and capable counsel, to pursue the claims for the benefit of KRS and its member retirees and future retirees. A recovery in this litigation could go a long way in supporting the significantly underfunded retirement system."). Thereafter KRS filed the "Joint Notice" with the Court to formalize its support of the derivative claims.

The work product that created this praise and endorsement was not an accident. It was the result of an in-depth investigation utilizing experts over many months. 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 2000-01 when KRS was 140% funded, the KRS funding plunge from 2001-16 and how legislative funding (or lack thereof) may have contributed to this catastrophe.

To get the accounting expertise needed, KRS derivative counsel reached out to a firm known for its forensic strengths and investigatory work years of financial fraud class and derivative litigation. They have been involved in over 100 major financial fraud cases and virtually all of the prior billion-dollar recoveries KRS derivative counsel have been involved in. They are a priceless asset and their work on this case from the outset has been outstanding. Likewise, in a case of this size and complexity, with hundreds of potential witnesses, the use of private investigators is essential and the KRS derivative counsel have retained — and greatly benefited from — the services of an investigatory firm which also has a track record of involvement in multi-billion-dollar cases. To create maximum value the KRS derivative claim will require world-class testifying or consulting

experts. Again, KRS derivative counsels located and retained hedge fund, fiduciary duty and pension governance expert(s) with similar mega case credentials.

No one knows what skills in prosecuting cases of this size or complexity the OAG has.[15] But it is certain that office has no track record of achieving huge recoveries. Nor do they have the experience of KRS derivative counsel in prosecuting these types of claims against big Wall Street Banks and/or Hedge Fund Sellers, ***represented by the same defense lawyers involved here***.

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[15] While the OAG is an organization, the Attorney General is a political figure. He has no actual civil litigation big case experience. His team has no civil law or track record of successfully prosecuting complex cases to multi-billion-dollar recoveries as is the case with KRS derivative counsel. They have not hired outside counsel with such experience or a track record.

Sophisticated observers have already spotted what is going on. Yves Smith, *Mayberry v. KKR*: *Kentucky Attorney General True Colors, Looks Over Eager to Settle Pathbreaking Pension Case Rather Than Inconvenience Private Equity Kingpins Blackstone and KKR*, NAKED CAPITALISM, Feb. 5, 2021.

If KRS (and the Hedge Fund Sellers) pull off this after-the-fact absolution of their sins, they may indeed "***get away with it***." However, KRS's and the Commonwealth's reputation will be further tarnished by more corruption that, according to the U.S. Department of Justice ("DOJ"), has infested this state's government for decades. In a study by DOJ, Kentucky ranked highest in corruption "not only in the executive and legislative branches but also in the judicial branch" with corruption in the executive branch "very common," and in the legislative branch "extremely common." Overall "Kentucky is not only perceived to be illegally corrupt but also legally corrupt" — "Kentucky is the most corrupt state." Oguzhan Dincer & Michael Johnston, *Measuring illegal and legal corruption in America States: Some Results from the Corruption in America Study*, THE EDMOND J. SAFRA CENTER FOR ETHICS BLOG, Dec. 1, 2014; *see also* Don Thrasher, *Kentucky Corruption Ranked #1 by Harvard University*, THE KENTUCKY RECORD, Jan. 15, 2020; Joseph Gerth, *Kentucky Politicians Are Rated the Most Corrupt*, COURIER JOURNAL, Jan. 26, 2018 (Report from the Institution of Corruption Studies at Illinois State University). A July 31, 2015 Press Release by the U.S. Attorney's Office for the Western District of Kentucky and the DOJ, headlined *FBI Louisville Seeks the Public's Assistance in Identifying Public Corruption Within the Commonwealth of Kentucky*, quoted the U.S. Attorney: "[p]ublic corruption is a terribly destructive force throughout Kentucky."

The condition and operation of the politically controlled KRS pension funds are a big part of the reason Kentucky has earned this reputation for corruption.

KRS derivative counsel — and their consulting team — are grizzled veterans of huge, complex, class-action and derivative litigations. The hedge fund sellers sued here are no strangers to litigation either, and have been repeatedly accused of breaching their fiduciary duties. They have retained hard-boiled, spare-no-expense, aggressive litigators. Not surprisingly, KRS derivative counsel have encountered them before — and bested them. For example, in the $7.2 billion *Enron* class action — the largest such recovery in history — KRS derivative counsel represented the Lead Plaintiff (Regents of the University California Pension Fund) against 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, both were forced to pay billions as part of the largest securities class action recovery in history.[16] No promises — other than a similar effort, are made.

In almost all mega-cases, there have been companion related suits and prosecutions by government entities — the SEC, FDIC and often the DOJ. In fact, where

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[16] These same high priced Wall Street lawyers were again bested by KRS derivative counsel, 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 KRS derivative counsel's prior 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 ordered those emails made public, KKR and Blackstone settled to avoid further litigation and any consequent sunlight from civil discovery. 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***.

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, co-counsel. 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 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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> * * *
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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 always complex and never easy. However, the KRS derivative counsel have successfully navigated such fast-moving waters in the past. And their local Kentucky Counsel is a former jurist skilled in calming troubled waters.

CONCLUSION

Because the KRS claims are derivative — ***and involve one of the most important public trust entities in Kentucky*** — this Court has special oversight responsibilities, including reviewing any proposed settlement after notice and a public hearing. The Hedge Fund Sellers must not be permitted to escape to Wall Street and Newport Beach without being held accountable. No perpetrator should get off cheap. Nor should any true victim get short-changed. The Court can assure that outcome by oversight of any proposed settlements.

However, the Court's responsibility extends beyond approving any settlements. It encompasses directing the conduct of the litigation, assuring pursuit of the merits in an orderly, efficient matter to assure efficiency, transparency and public scrutiny. This is a

procedurally complex multi-party case where billions of dollars of pension contributions, benefits and tax dollars of Kentuckians — taxpayers and the 390,000 KRS public employees — are at stake one way or the other.

To effectively manage large complex cases, the federal judiciary promulgated and uses the Manual for Complex Litigation (Fourth), which states:

> Fair and efficient resolution of complex litigation requires at least that (1) the court exercise early and effective supervision (and, where necessary, control); (2) counsel act cooperatively and professionally; and (3) the judge and counsel collaborate to develop and carry out a comprehensive plan for the conduct and pretrial and trial proceedings. ...
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> * * *
>
> In planning and implementing case management, the court should keep in mind the goal of bringing out a just resolution as speedily, inexpensively, and fairly as possible. Judges should tailor case-management procedures to the needs of the particular litigation and to the resources available from the parties and the judicial system. Judicial time is the scarcest resource of all: Judges should use their time wisely and efficiently and make use of all available help. Time pressures may lead some judges to believe that they should not devote time to civil case management. Investing time in the early stages of the litigation, however, will lead to earlier dispositions, less wasteful activity, shorter trials, and, in the long run, economies of judicial time and fewer judicial burdens.

MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10, 10.1 General Principles/Judicial Supervision (2004). Consistent with this framework of wise judicial supervision, the Court should enter the proposed Pre-Trial Order No. 1.

Dated: February 15, 2021

Respectfully submitted,

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