COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
CASE NO. 17-CI-1348
***FILED ELECTRONICALLY***

JEFFREY C. MAYBERRY, et al. PLAINTIFFS

v.

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

**PAAMCO/PRISMA DEFENDANTS' OPPOSITION TO THE TIER 3 INDIVIDUALS' MOTION TO INTERVENE**

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases

**Rules, Statutes, and Constitutional Provisions**

**Other Authorities**

Defendants Prisma Capital Partners LP, Girish Reddy, PAAMCO Prisma, LLC (formerly Pacific Alternative Asset Management Company, LLC), and Jane Buchan (the "PAAMCO/Prisma Defendants"), by and through counsel, submit this opposition to the motion by Tia Taylor, Ashley Hall-Nagy, and Bobby Estes (the "Tier 3 Individuals") to file "on behalf of" Kentucky Retirement Systems ("KRS") an Intervening Complaint in the Attorney General's lawsuit (the "Motion").[1]

## INTRODUCTION

Over the objections of the Kentucky Attorney General and the KRS Board of Trustees, the Tier 3 Individuals want to intervene "on behalf of" KRS in the Attorney General's pending lawsuit that already seeks to recover damages for KRS.

The motion does not withstand scrutiny. KRS has confirmed that the Tier 3 Individuals and their counsel are not authorized to represent KRS. Nor could they, consistent with Kentucky's Model Procurement Code, the Constitution, Kentucky statute, or settled common-law derivative standing principles. Empowering private parties and their counsel to make litigation decisions for KRS in disregard of the fact that the KRS Board is now exerting control over these claims would impermissibly intrude on KRS's authority as an agency of Kentucky. It is beyond cavil that private parties cannot be left to unilaterally pursue litigation "on behalf of" a

[1] This Opposition is joined by KKR & Co., L.P., Henry Kravis, and George Roberts (the "KKR Parties"). The KKR Parties join this filing without waiver of, and expressly preserve, all defenses based on, among other things, lack of personal jurisdiction. The PAAMCO/Prisma Defendants and the KKR Parties, respectively, file and join this Opposition without waiving, and expressly preserving, their argument that this Court lacks jurisdiction to act on the Motion to Intervene or take any other action beyond dismissing this case consistent with the Supreme Court's directive. The PAAMCO/Prisma Defendants and the KKR Parties reserve all rights with respect to the Proposed Complaint in Intervention. The PAAMCO/Prisma Defendants and the KKR Parties fully join the oppositions filed by the Blackstone Defendants and the RVK Defendants.

government agency that seeks to "declare unenforceable" government contracts agreed to by the agency. In any event, intervention is unavailable because the Attorney General, the duly elected legal representative of the Commonwealth and its agencies, including KRS, adequately represents KRS's interests in these claims. Private lawyers who are not accountable to KRS and have no regard for Kentucky's best interests do not. Finally, intervention by the Tier 3 Individuals would be entirely impracticable. There would be immediate appellate constitutional challenges, intensifying plaintiff-side turf wars, and an even greater waste of resources by the Court, the Commonwealth, KRS, and Defendants.

The Tier 3 Individuals' intervention motion fails under CR 24. The Tier 3 Individuals, as putative "representatives" of KRS, are not entitled to intervene as of right in the Attorney General's lawsuit under CR 24.01. No statute confers on private citizens a right of intervention in suits the Attorney General is prosecuting on behalf of the Commonwealth and/or its agencies. And, as the Attorney General and KRS recognize, the Attorney General adequately represents KRS's interests. KRS is an arm of the Commonwealth. The Legislature authorizes the Attorney General to be the "legal advisor and attorney" for KRS. KRS § 61.645(11). The interests of the Attorney General and KRS are completely aligned. The Tier 3 Individuals incorrectly argue that the Attorney General cannot adequately represent KRS because any damages recovery by the Attorney General would go to the general fund, not KRS investment accounts. But, under the Model Procurement Code, any recovery obtained by the Tier 3 Individuals would also go to that ***same general fund***. *See* KRS § 45A.717(5). Grasping at straws, the Tier 3 Individuals also argue incorrectly that, if prosecuted by the Tier 3 Individuals, KRS's claims would fare better under the *in pari delicto* doctrine. But the *in pari delicto* doctrine bars these claims regardless of which party—the Tier 3 Individuals, KRS or the Attorney General—asserts them.

Nor do the Tier 3 Individuals articulate any legitimate basis for permissive intervention under CR 24.02. Allowing private individuals with their contingency fee counsel to participate as KRS representatives in the Attorney General's lawsuit would needlessly inject into the case blatant Model Procurement Code violations and constitutional defects, including violation of separation of powers and lack of standing. Moreover, having private individuals assert claims as de facto government officials in parallel to actual government officials asserting the same claims guarantees chaos that the case law and statutes cited herein are designed to prevent. The chaos would be amplified by the reality that the Tier 3 Individuals are accusing the Attorney General and the KRS Board, i.e., their would-be co-plaintiffs, of corruption and incompetence.

In short, allowing intervention would violate the Model Procurement Code and impinge the constitutional authority of the other branches of Kentucky's government. It would harm the financial and commercial interests of the Commonwealth. And it would unfairly subject Defendants—government contractors that performed in accordance with their contracts—to specious litigation claims being brought by counsel whose only interest is to take home a contingency fee. The motion to intervene should be denied and the responsible government officials should be left to do their jobs based on what they determine is best for the Commonwealth.

## BACKGROUND

As the Court is aware, prior to 2011, KRS lost billions of dollars in the public equity market when the dot-com bubble burst in 2000 and 2001 and during the financial crisis in 2008 and 2009. *See* Tier 3 Individuals' Proposed Compl. in Intervention (the "Proposed Compl.") ¶ 246. Following those losses, KRS's Board of Trustees engaged Defendant R.V. Kuhns & Associates ("RVK"), an independent consultant, to evaluate KRS's investment portfolio. After reviewing KRS's portfolio, RVK publicly reported to the General Assembly in 2010 that the

KRS plans were substantially underfunded. *See* Ky. Leg. Research Comm'n, Minutes of the Program Review and Investigations Comm. of the Gen. Assembly (July 8, 2010), *available at* https://apps.legislature.ky.gov/minutes/prog_rev/100708OK.HTM. RVK's later analysis determined that KRS could lower the risk and volatility within its investment portfolio by adjusting its asset allocation in a manner that, among other things, reduced its exposure to the stock market and reallocated a portion of the portfolio to alternative hedge fund strategies. *See* Ex. A (KERS Asset Allocation Discussion (Aug. 12, 2010)), at 6. KRS elected to reallocate 10% of its portfolio to so-called "absolute return" fund-of-funds investments, which would target a specific range for the return on investment even in the event of public equity market fluctuations. Ex. B (KRS Statement of Investment Policy (May 2011)), at 13, 16, 19-20.

In 2011, KRS, with the support of its independent consultants, conducted a competitive bidding process and selected three investment managers, PAAMCO, Prisma, and Blackstone Alternative Asset Management, L.P. ("BAAM"), to each manage a portfolio of hedge fund investments on behalf of KRS. *See, e.g.*, Proposed Compl. ¶¶ 257, 260. These "fund-of-funds" investment managers were bound by detailed contracts setting forth guidelines that the investment managers were required to follow with respect to their respective investment portfolios and that established target returns for each of the portfolios. *See, e.g.*, Ex. C (Prisma LLC Agreement) § 2.12 & Annex C. The investment managers managed their portfolios in accordance with the governing contracts and met the established performance targets, generating approximately $400 million, net of management fees, in positive returns for KRS. The fees charged by the investment managers for managing their portfolios were specified in the contracts. *See, e.g., id.* at Annex B. They were at or below market rates at the time. KRS represented to PAAMCO, Prisma, and BAAM that KRS was a sophisticated investor that had

independently determined the investments were suitable for KRS's overall portfolio and that KRS understood the fee structure. *See, e.g.*, Ex. D (Prisma Subscription Agreement) § 2(B), (D).

In December 2017, a handful of KRS members (the "*Mayberry* Plaintiffs"), represented by the same contingency-fee attorneys now representing the Tier 3 Individuals, brought a so-called "derivative" complaint "on behalf of KRS" against various defendants, including the PAAMCO/Prisma Defendants, contending that they breached common law fiduciary duties to KRS and/or aided and abetted others' breaches in connection with the fund-of-funds investments. *See* Compl. The theory of liability boiled down to the notion that, had it invested in a public equity index fund instead of fund-of-funds investments, KRS would have generated higher returns net of fees over the relevant period. The *Mayberry* Plaintiffs' complaint was drafted without even reading the operative contracts between KRS and the PAAMCO/Prisma Defendants. *See* Opp. to Mot. to Dismiss, at 16 n.27 (Apr. 26, 2018). The Kentucky Supreme Court unanimously ordered dismissal of the suit because the *Mayberry* Plaintiffs lacked constitutional standing to bring claims on behalf of KRS, and, as a result, their lawsuit was not justiciable under the Kentucky Constitution. *See Overstreet v. Mayberry*, 603 S.W.3d 244, 266 (Ky. 2020). As a result of the Supreme Court's decision, the original *Mayberry* lawsuit was deemed a nullity. In rendering its decision, the Supreme Court observed that the Attorney General "had the power to institute, conduct[,] and maintain suits and proceedings for . . . the protection of public rights" and was the appropriate representative "to initiate and defend actions on behalf of the people of the Commonwealth." *Id.* at 265 (internal quotation marks omitted).

After the Supreme Court's decision, on July 20, 2020, the Office of the Attorney General (the "OAG") moved to file an "Intervening Complaint" under this caption in an attempt to preserve the Commonwealth's interest in the claims. *See* OAG Mot. to Intervene (July 20,

2020). The Intervening Complaint tracked almost verbatim the complaint that the *Mayberry* Plaintiffs filed. On December 28, 2020, the Court granted the OAG's motion. *See* Dec. 28, 2020 Order at 18. In the Intervening Complaint, the OAG asserts claims "for the benefit of KRS and the Commonwealth." OAG Compl. In Intervention (the "OAG Compl."), at 123. The OAG Complaint seeks damages "for the losses incurred by KRS as a result of breaches of fiduciary and other duties" and for "the increased costs to the Commonwealth of restoring KRS and its Pension/Trust Funds to properly funded status." *Id.* ¶ 248. It requests that the Court use its "equity power to fashion such relief as is justified and necessary to benefit KRS and/or restore to KRS that to which it is entitled." *Id.* at 135. The OAG Complaint does not seek any category of damages incurred by the Commonwealth independent of the damages KRS allegedly incurred as a result of the alleged misconduct. *See id.* at 134-35. Nor does the OAG Complaint suggest that Defendants owed duties to the Commonwealth independent of the duties that were allegedly owed to KRS and arose as a result of KRS's legal relationship with Defendants.

At a hearing on January 11, 2021, the OAG represented to the Court that the Commonwealth intended to file an amended complaint. *See* Ex. E (Jan. 11, 2021 Hearing Tr.) at 4:25-5:3. Following that hearing, the Court ordered the OAG to file the Commonwealth's amended complaint by February 1, 2021. *See* Jan. 12, 2021 Order at 2. Prior to the January 12 Order, the Tier 3 Individuals surfaced and, even though they were not Parties to the case, moved for leave to file a third amended complaint "on behalf of" KRS. Mot. for Leave to File Third Amended Complaint, at 3 (Dec. 31, 2020). The January 12 Order directed that the Tier 3 Individuals file a motion to intervene by February 11, 2021, *after* the OAG's amended complaint was filed, because the "Court cannot rule on the motion to allow the Tier 3 Group to intervene

and assert claims until it knows the nature and scope of the claims that will be asserted by the OAG in its proposed Amended Intervening Complaint under CR 15." *Id.* at 1-2.[2]

On January 29, 2021, the OAG moved for an extension of time to file its amended complaint, citing KRS's "ongoing investigation" into "specific investment activities conducted by the Kentucky Retirement Systems to determine if there are any improper or illegal activities on the part of the parties involved." Mot. for Extension of Time at 2 (Jan. 29, 2021) (internal quotation marks omitted). The OAG reported to the Court that, in parallel to the KRS Board's independent investigation, the OAG itself was continuing to investigate the legal and factual merits of the claims and needed the additional time. *Id.*

Despite the absence of an amended complaint from the OAG, on February 1, 2021, the Tier 3 Individuals proceeded to file their motion to intervene in the Attorney General's lawsuit, seeking "to intervene to carry forward the prosecution of the previously sustained derivative claims on behalf of KRS . . . ." Mot. to Intervene at 4 (Feb. 1, 2021) (the "Motion"). The Tier 3 Individuals' Motion and subsequent filings level a series of inflammatory slanders against the OAG, including claims that the Attorney General is corrupt and incapable of objectively evaluating and prosecuting claims against Defendants. *See* Mot. at 54-55; *see also* Mot. for Entry of Pretrial Order No. 1 at 11, 20 n.15 (Feb. 15, 2021). They also personally attack the existing KRS Board of Trustees as well as KRS's Executive Director. *See, e.g.*, Mot. for Entry of Pretrial Order No. 1, at 10 (alleging that "KRS insiders . . . are implicated in the

[2] At the January 11 hearing, the Court observed that, as non-parties to this litigation, the Tier 3 Individuals would need to first move for intervention and stated that it would not consider any motions to intervene before it had seen the OAG's amended complaint because it was "impossible for the Court to determine what kind of an interest [proposed intervenors have] got and whether that interest is adequately represented by the Attorney General's office until we see whatever complaint the Attorney General may come forward with." Ex. E (Jan. 11, 2021 Hearing Tr.) at 4:2-13, 10:3-12.

wrongdoing"); *id.* at 17 (accusing KRS's Executive Director of playing a "key role" in "wrongdoing" at KRS and the KRS Board of "illegal conduct"); *id.* at 18 n.14 (accusing KRS's Executive Director of having a "corrupting influence" over KRS). They also malign the law firm hired by the KRS Board, Calcaterra Pollack LLP, as incompetent and predict that its investigatory report will be a "whitewash" that vindicates Defendants of any wrongdoing in connection with the fund-of-funds investments at issue. *Id.* at 10, 17.

On February 8, 2021, during a hearing to consider the OAG's motion for an extension, the OAG explained to the Court that an extension of time to file the amended complaint was warranted because the investigation by KRS's counsel, Calcaterra Pollack LLP, will not be concluded until the end of March 2021. *See* Ex F (Feb. 8, 2021 Hearing Tr.) at 4:18-24. For its part, KRS informed the Court at the hearing that the Tier 3 Individuals do **not** represent KRS in connection with these claims. *See id.* at 12:7-15. Counsel for the Tier 3 Individuals argued in response that KRS had previously authorized them to pursue claims derivatively on behalf of KRS pursuant to an April 19, 2018 Joint Notice that was filed by the *Mayberry* Plaintiffs and the KRS Board in the original *Mayberry* suit, which has now been dismissed with prejudice (the "Joint Notice"). *See id.* at 9:1-7. KRS reported to the Court that the Joint Notice no longer reflected KRS's position with respect to the claims the Tier 3 Individuals now wished to pursue, and pointed out to the Court that, in the Joint Notice, the KRS Board specifically reserved the right to take control of these claims in the event the original *Mayberry* Plaintiffs were found to lack standing. *See id.* at 12:7-15; *see also* Joint Notice at 4.

The Tier 3 Individuals are represented by a team of lawyers looking for a contingency fee that is prohibited by Kentucky law and who previously represented the *Mayberry* Plaintiffs (or at least certain of the *Mayberry* Plaintiffs) in an action that the Kentucky Supreme Court has

already ordered dismissed. They wish to assert the same "derivative" claims "on behalf of KRS" that the *Mayberry* Plaintiffs attempted to bring and that the OAG is now already asserting directly against Defendants. *See* Mot. at 6, 30. The Tier 3 Individuals contend that, regardless of the OAG lawsuit and the investigation being conducted at the direction of the KRS Board of Trustees, they should be permitted to intervene in the OAG lawsuit as representatives of KRS. The Tier 3 Individuals contend that, in contrast to the *Mayberry* Plaintiffs, they have constitutional standing to seek intervention on behalf of KRS because the pension plan they joined in August 2015, November 2016, and March 2019, i.e., years after the fund-of-funds investments at issue, was a hybrid cash balance plan (the "Tier 3 Plan"), which is structurally different from the plan in which the *Mayberry* Plaintiffs participated. *See* Proposed Compl. ¶¶ 77-79, 94-96. The Tier 3 Individuals are incorrect, and their Motion should be denied.

## ARGUMENT

### I. THE TIER 3 INDIVIDUALS HAVE NO LEGAL AUTHORITY TO REPRESENT KRS FOR PURPOSES OF SEEKING INTERVENTION IN THE OAG'S LAWSUIT

The Tier 3 Individuals are not authorized to pursue an intervention motion on behalf of KRS, an agency of the Commonwealth, especially over the Attorney General's and KRS's objection. KRS has confirmed to the Court that the KRS Board has not authorized the Tier 3 Individuals or their counsel to represent KRS for purposes of asserting this intervention motion. Rather, the KRS Board is conducting its own independent investigation of the facts, law, and proposed claims asserted in the Proposed Complaint and that investigation remains ongoing. There is no statutory or common law mechanism that gives these Tier 3 Individuals the legal authority to preempt the KRS Board's investigation and represent KRS for purposes of seeking immediate intervention in the Attorney General's lawsuit.

### A. Allowing Representation of KRS by Contingency-Fee Counsel Over the Commonwealth's Objection Would Violate the Model Procurement Code

The Tier 3 Individuals and their counsel seek to pursue claims "on behalf of KRS" on a contingency-fee basis in the absence of any form of agreement with the Commonwealth or KRS, let alone one that meets the mandatory requirements of Kentucky's Model Procurement Code (the "MPC"). The MPC imposes "strict statutory procurement and oversight requirements" that govern all contracts between state agencies and private parties. *See Overstreet*, 603 S.W.3d at 265-66. In 2018, the General Assembly amended the MPC to confirm that the "Code shall apply to every expenditure of public funds by this Commonwealth and *every contingency fee* under any contract or like business agreement" between a private party and a state agency. KRS § 45A.020(1) (italicized phrase added by 2018 Ky. L. Ch. 87, § 3 (HB 198)). The MPC establishes a number of unwaivable procedural and substantive requirements that must be satisfied before private parties are permitted to act on behalf of a state agency, including on a contingency fee basis. *E.g.*, KRS § 45A.705 (requiring that certain contracts (including personal services contracts) be approved by a Government Contract Review Committee and the Secretary of the Finance and Administration Cabinet); *id.* § 45A.717 (placing specific limits and requirements on contingency-fee contracts); *id.* § 45A.695 (describing procedures related to personal service contracts).

In *Landrum v. Commonwealth ex rel. Beshear*, 599 S.W.3d 781, 787-88, 792 (Ky. 2019), the Supreme Court held that, even without the language added in the 2018 amendment, the MPC strictly applied to contingency fee agreements with private counsel. As the Court explained, "[a]llowing governmental entities to escape application of the MPC by structuring their contracts with private entities on a contingency-fee basis would circumvent the purposes of the MPC, a result that we simply cannot accept as intended by the General Assembly." *Id.* at 792. As the

MPC itself explains, the MPC's purposes include "provid[ing] for increased public confidence in the procedures followed in public procurement," "insur[ing] the fair and equitable treatment of all persons who deal with the procurement system of the Commonwealth," and "provid[ing] safeguards for the maintenance of a procurement system of quality and integrity." KRS § 45A.010(2); *see also Landrum*, 599 S.W.3d at 790. The new language added in 2018 makes that point unmistakable. Under the MPC, this Court could never authorize any payment of contingency fees from public funds to the Tier 3 Individuals or their lawyers because there is no written contract between the Commonwealth and the Tier 3 Individuals or their lawyers satisfying the mandatory MPC requirements. *See also Dolt, Thompson, Shepherd & Conway, P.S.C. v. Commonwealth*, 607 S.W.3d 683, 687-89 (Ky. 2020) (law firm could not be paid for work done without an MPC-compliant fee agreement, absent specific authorization by General Assembly); *Commonwealth v. Whitworth*, 74 S.W.3d 695, 699-700 (Ky. 2002) (employees with oral employment contract could not be paid); *All-American Movers, Inc. v. Ky. ex rel Hancock*, 552 S.W.2d 679, 681-82 (Ky. 1977) (fees paid for work not authorized by written contract could be recovered by the state).

Indeed, in the *Mayberry* appeal, the Supreme Court emphasized that the engagement of private counsel to assert claims on behalf of a state agency must be subject to the "strict statutory procurement and oversight requirements" of the MPC. *See Overstreet*, 603 S.W.3d at 265-66; *see also Overstreet v. Mayberry* Oral Argument, 2019-SC-00041, 00042, at 22:50-23:20, 27:55-29:35 (Oct. 24, 2019), *available at* https://www.ket.org/program/kentucky-supreme-court-coverage/randy-overstreet-et-al-v-jeffrey-c-mayberry-et-al/; *Mayberry v. Shepherd* Oral Argument, 2019-SC-00232, at 18:50-20:34 (Oct. 24, 2019), *available at* https://www.ket.org/program/kentucky-supreme-court-coverage/jeffrey-c-mayberry-et-al-vs-hon-phillip-j-shepherd-

et-al/. It is no answer for the Tier 3 Individuals to suggest, as they did to the Supreme Court, that this Court's equitable review of counsel's fee petitions could displace the MPC. *Overstreet v. Mayberry* Oral Argument, 2019-SC-00041, 00042, at 29:25-30:12 (Oct. 24, 2019); *Mayberry v. Shepherd* Oral Argument, 2019-SC-00232, at 20:55-21:32 (Oct. 24, 2019). The Tier 3 Individuals likewise cannot dodge the MPC by alleging, again as they did to the Supreme Court, that they represent the beneficiaries of KRS.[3] The Supreme Court in *Landrum* held that the MPC applies to all expenditures of public funds, and that a contingency fee paid to counsel retained by the Commonwealth, including its agency, is "[u]nquestionably" an expenditure of public funds. *Landrum*, 599 S.W.3d at 788-89. This Court has no authority to direct the expenditure of public funds in a manner that violates the General Assembly's express legislative enactment. *Beshear v. Haydon Bridge Co.*, 416 S.W.3d 280, 295-96 (Ky. 2013). The Kentucky constitution is "exceedingly clear that the State Treasury is solely under the control of the legislative branch." *Id.* at 296.

### B. Appointing the Tier 3 Individuals to Assert Claims on Behalf of KRS Would Violate the Separation of Powers

The Motion should also be denied because the Court has no constitutional authority to appoint private parties, such as the Tier 3 Individuals and their counsel, to wield the power of an executive branch agency for purposes of asserting litigation claims, especially while KRS's Board, the statutorily-created body responsible for governing the agency, is asserting control over those claims. By allowing the Tier 3 Individuals and their counsel to dictate litigation

[3] Justice Keller expressly responded to the Tier 3 Individuals' counsel on this point at oral argument in the appeals of the *Mayberry* action, stating to the Tier 3 Individuals' counsel: "you're telling us that KRS is the real party. I mean, you said it at least 30 times here today between you and Mr. Oldfather, so we got to move beyond that." *Overstreet v. Mayberry* Oral Argument, 2019-SC-00041, 00042, at 29:05-29:14 (Oct. 24, 2019).

decisions for KRS, this Court would be in violation of separation of powers principles enacted in the "unusually forceful command" of Section 28 of the Constitution. *Fletcher v. Commonwealth*, 163 S.W.3d 852, 862 (Ky. 2005) (quotation omitted).

"Kentucky is a strict adherent to the separation of powers doctrine." *Haydon Bridge Co.*, 416 S.W.3d at 295 (quotation omitted). The "constitution contains explicit provisions which, on one hand, *mandate* separation among the three branches of government, and on the other hand, specifically *prohibit* incursion of one branch into the powers and functions of the others." *Vaughn v. Knopf*, 895 S.W.2d 566, 568 (Ky. 1995) (quotation omitted). For example, in *Legislative Research Commission v. Brown*, 664 S.W.2d 907, 911, 923 (Ky. 1984), the Supreme Court recognized that the General Assembly has no authority to make executive appointments, and that therefore, statutes that authorized the Speaker of the House, the President Pro Tem of the Senate and the Legislative Research Commission to appoint individuals to certain boards and commissions "fly in the face" of the separation of powers.

In Section 61.645, the General Assembly created the KRS Board, established the methods of appointing its Trustees, and specified the Board's powers, including the power to sue on behalf of the agency. KRS § 61.645. A majority of the Board, 10 of the 17 Trustees, is appointed by the Governor, subject to Senate confirmation. *Id.* § 61.645(1)(e). The Secretary of the Personnel Cabinet also serves as a Trustee along with 6 other individuals elected by KRS members. *Id.* § 61.645(1)(a)-(d). The Tier 3 Individuals, however, ask this Court to grant them executive authority to make litigation decisions, including bringing this intervention motion, in derogation of the Board's statutory authority. Circuit Courts have no constitutional authority to make executive branch appointments. *See Prater v. Commonwealth*, 82 S.W.3d 898, 907, 909 (Ky. 2002) (statute permitting "the judiciary to exercise the purely executive function of granting

parole" was unconstitutional because it allowed "one branch of government [to] exercise[] power properly belonging to another branch"). Nor can a court shift any executive authority from an agency created by the General Assembly to a group of private citizens. *See Brown v. Barkley*, 628 S.W.2d 616, 623 (Ky. 1982) (Governor could not shift executive powers the General Assembly assigned to the Department of Agriculture into other agencies). To the contrary, under Section 28 and Supreme Court precedent, a judicial appointment of, or delegation of executive authority to, private parties would violate the separation of powers. "[T]he 'high wall' erected by Section 28" precludes this Court from delegating any authority to the Tier 3 Individuals or other substitute appointees. *Fletcher*, 163 S.W.3d at 872, 871 (Governor has no power to appropriate funds when General Assembly failed to pass budget and neither "does the Court of Justice have the power to confer such authority"); *see also Commonwealth v. Garber*, 340 S.W.3d 588 (Ky. Ct. App. 2011) (VanMeter, J.) (granting writ of prohibition where family court orders directed investigations by executive agency in violation of separation of powers).

Private counsel and contingency-fee lawyers, unchecked by executive branch oversight, are not in a position to make litigation decisions on behalf of a government agency. Giving them this power would raise substantial public policy concerns. These same counsel filed the *Mayberry* suit without even reading KRS's relevant investment contracts and now take the position that KRS's contracts are "unenforceable." *See* Opp. to Mot. to Dismiss, at xii, 16 n.27 (Apr. 26, 2018).[4] They are incentivized to earn a contingency fee without regard to any other factor. Only the KRS Board can consider whether asserting claims is in KRS's interests based

[4] Notably, the Kentucky Constitution prohibits any "law impairing the obligation of contracts," including contracts with the Commonwealth itself. Ky. Const. § 19; *see Maze v. Bd. of Dirs. for Commonwealth Postsecondary Ed. Prepaid Tuition Trust Fund*, 559 S.W.3d 354, 368-74 (Ky. 2018) (holding that Section 19 prohibited retroactive impairment of contracts with Commonwealth).

on all relevant factors, including whether the claims are foreclosed by the governing contracts, whether pursuing the claims exposes KRS to liabilities, such as advancement and indemnification obligations under those same contracts, the litigation expense that KRS will be forced to incur, the disruption the litigation will needlessly cause KRS's management, and the multitude of commercial harms to KRS that may arise from pursuing claims that have no basis in fact. Under KRS 61.645(2), the KRS Board – rather than the Tier 3 Individuals or this Court – has the statutory authority to assess potential litigation claims and determine whether to sue on behalf of the agency.

### C. The Tier 3 Individuals Cannot File an Intervening Complaint "On Behalf Of KRS" Because They Lack Constitutional Standing

Like the *Mayberry* Plaintiffs, the Tier 3 Individuals also lack constitutional standing. They have not alleged (nor could they allege) that they suffered a "concrete" injury derivative of KRS's alleged injury sufficient to invoke this Court's subject matter jurisdiction. *See Overstreet*, 603 S.W.3d at 252. The Tier 3 Individuals instead argue that, as members of the Tier 3 Plan, they are participants in a "contributory pension plan," which they liken to an ERISA defined-contribution plan, in which participants have their own investment account and their assets rise or fall based on the investment performance of the overall plan. *See* Mot. at 9. But the Tier 3 Plan is actually a cash-balance plan, which is essentially a defined-benefit plan. That is because, as in a defined-benefit plan, the Tier 3 Plan's assets remain in a single asset pool in which Tier 3 Plan beneficiaries have no legal or equitable ownership interest. Participants in the Tier 3 Plan thus have no vested equity stake in that asset pool. The Tier 3 Individuals have a contractual right to a fixed amount of interest per year, which is not dependent on KRS's overall investment performance. *See* Hybrid Cash Balance Plan, at 5 (Nov. 2020), *available at* https://kyret.ky.gov/

Publications/Books/Tier% 203%20Guide.pdf. Even if KRS's returns were negative, the Tier 3 members would still receive 4% interest per year.[5]

It is unavailing for the Tier 3 Individuals to argue that, because they are contractually eligible for "upside sharing" if the Plan meets certain performance targets, i.e., if the "Geometric Average Net Investment Return" for the entire pension portfolio exceeds 4%, anything that harmed KRS's investment performance theoretically diminishes the likelihood that they would qualify for such a benefit. Mot. at 13-14. No case cited supports the Tier 3 Individuals' argument that this benefit confers constitutional standing. The purportedly diminished expectation for an "upside sharing interest" is purely speculative and, as such, cannot establish injury-in-fact. *See Overstreet*, 603 S.W.3d at 252. The Tier 3 members have no vested property interest in this hypothetical "upside sharing" benefit. To the extent that the Tier 3 Individuals argue that they have standing because their individual contributions face an increased risk of loss (Mot. at 12-14), that argument cannot be reconciled with the Supreme Court's holding that "KRS beneficiaries' rights are, in essence, only the receipt of promised funds." *Id.* at 262 (internal quotation marks omitted). Moreover, the Tier 3 Individuals have not pointed to any alternative investment that would have yielded increased upside sharing, nor could they. *See Hill v. Vanderbilt Cap. Advisors, LLC*, 834 F. Supp. 2d 1228, 1260 (D.N.M. 2011) (denying leave to

[5] The Tier 3 Individuals also cannot causally link the conduct that they allege occurred before they became members of the Tier 3 Plan (in August 2015 at the earliest) with any loss that occurred after they became members. *See Commonwealth Cabinet for Health & Family Servs., Dep't for Medicaid Servs. v. Sexton*, 566 S.W.3d 185, 196 (Ky. 2018) (holding that "causation" is a requirement for constitutional standing and that "[t]he injury must be fairly traceable to the challenged action" (internal quotation marks omitted)).

amend because plaintiffs "cannot make their allegations of underfunding causation anything less than speculative or conjectural").[6]

### D. The Tier 3 Individuals Cannot Sue Derivatively

KRS is a state agency overseen by a Board of Trustees with the "powers and privileges of a corporation." KRS § 61.645(2). Those powers include the power to "sue and be sued in its corporate name" and to "conduct the business and promote the purposes for which it was formed." *Id.* As with a corporation, the KRS Board has exclusive authority to exercise those rights. *See, e.g.*, *Allied Ready Mix Co., Inc. ex rel. Mattingly v. Allen*, 994 S.W.2d 4, 8 (Ky. Ct. App. 1998). There is no mechanism for KRS members to bring "derivative" claims on behalf of KRS. *See Porter v. Shelbyville Cemetery Co.*, No. 2007-CA-002545-MR, 2009 WL 722995, at *5 (Ky. Ct. App. Mar. 20, 2009) (unpublished). By express statutory command, it is the KRS Board, not individual members, that has the power to decide whether "to sue." KRS § 61.645(2)(a); *see also Bullitt Fiscal Court v. Bullitt Cty. Bd. of Health*, 434 S.W.2d 29, 39 (Ky. 2014); *Fisher v. Commonwealth*, 403 S.W.3d 69, 78 (Ky. Ct. App. 2013).

Even if a derivative claim was available under KRS's enabling statute, allowing it here would offend the most fundamental principles of derivative standing. The Board is actively investigating the conduct underlying the claims. The law does not permit the Tier 3 Individuals to preempt the Board's independent investigation by seeking to intervene on KRS's behalf now.

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[6] Even if the Tier 3 Individuals could properly invoke the absence of an inviolable guarantee of benefits, that would not rise to the level of a constitutionally sufficient "certainly impending" injury. *See Overstreet*, 603 S.W.3d at 255. Indeed, invocation of inviolable-contract protection arises only in the event of plan default, which the Tier 3 Individuals have not alleged is "certainly impending," nor could they. *See id.* The Tier 3 Individuals' reliance on purportedly unguaranteed *insurance* benefits (Mot. at 9) also fails because it too is conjectural, as any alleged lack of inviolable-contract protection as to insurance benefits would come into play only if the insurance plans were to fail.

Allowing this gambit would improperly "*usurp* [the KRS Board's] *legitimate authority*," because "[d]uring the time period reasonably needed for the [KRS Board] to perform its investigation and decide on its course of action, *[the KRS Board] has primacy in controlling this litigation*." *In re Oracle Deriv. Litig.*, 808 A.2d 1206, 1207, 1213 (Del. Ch. 2002) (emphases added). Indeed, even in cases where shareholders are initially authorized by the court to pursue claims derivatively on behalf of corporations, the corporation's board retains the authority to investigate derivative claims and stay or take control of derivative litigation. *See, e.g.*, *Allied Ready Mix Co., Inc.*, 994 S.W.2d at 7, 10 (holding that after special committee investigations, corporations, rather than derivative plaintiff, should maintain suit); *Braddock v. Zimmerman*, 906 A.2d 776, 785-86 (Del. 2006) (explaining that when a derivative action is pending, a new board "may cause the corporation to . . . take control of the litigation by becoming realigned as the party plaintiff; move to dismiss the action as not in the corporation's best interest; permit the plaintiff to carry the litigation forward; or appoint a special litigation committee to determine what action to take" (internal quotation marks omitted)); *In re Oracle Deriv. Litig.*, 808 A.2d at 1211 (noting that it is the court's "duty to stay derivative actions at the instance of a special litigation committee"); *Zapata Corp. v. Maldonado*, 430 A.2d 779, 785-86, 788-89 (Del. 1981); *see also* KRS § 271B.7-400(2) (providing that irrespective of whether demand made, if a "corporation commences an investigation of the charges made in the demand or complaint, the court may stay any proceeding until the investigation is completed").

Furthermore, under settled derivative principles, the Tier 3 Individuals, as new putative derivative plaintiffs seeking to assert new claims, are required to first make a demand on the KRS Board or plead with "factual allegations sufficiently particularized" that a majority of the Board is disqualified from fairly considering the claims. *White v. Lunsford*, No. 2005-CA-

001775-MR, 2006 WL 2787469, at *6 (Ky. Ct. App. Sept. 29, 2006) (unpublished) (citing *Rales v. Blasband*, 634 A.2d 927, 934 (Del. 1993)); *see also Gross v. Adcomm, Inc.*, 478 S.W.3d 396, 402 (Ky. Ct. App. 2015). The Tier 3 Individuals have neither made a demand nor pleaded facts to show that a majority of the Board is disqualified from considering a demand.[7] Instead, the Tier 3 Individuals argue that no demand or allegations of demand futility are necessary because of the April 2018 "Joint Notice." But that document was submitted in the context of a case that was subsequently dismissed. It was submitted by a KRS Board that was composed differently from the existing KRS Board of Trustees. It concerned different derivative plaintiffs. And the KRS Board specifically reserved the right to revisit whether it would exert control over the claims in the event it was determined that those prior plaintiffs lacked standing. *See* Joint Notice at 4.

For the same reasons, the Tier 3 Individuals cannot be deemed "substitutes" for the *Mayberry* Plaintiffs whose claims were dismissed. *See* Dec. 28, 2020 Order at 17. There is no pending derivative complaint and there are no derivative plaintiffs before the Court for whom the Tier 3 Individuals could "substitute." When a new derivative claim is asserted, the new derivative plaintiff must independently establish its standing to assert claims on behalf of the entity. *See Overstreet*, 603 S.W.3d at 257-58; *Lewis v. Anderson*, 477 A.2d 1040, 1049 (Del.

[7] There has been substantial turnover on the Board since the *Mayberry* Plaintiffs filed their complaint in December 2017. Because the Supreme Court held that this Court never had subject matter jurisdiction over the original action and mandated dismissal, any evaluation of a potential demand and the independence of the KRS Board must look to the composition of the Board when the motion to intervene was filed in early 2021. *See Braddock*, 906 A.2d at 786. The Tier 3 Individuals do not say anything about a majority of the current members of the KRS Board, so it is undisputed that a majority of the Board could fairly evaluate the results of the ongoing investigation. In addition, even the allegations against the other trustees, David Rich and J.T. Fulkerson, fail to show that they could not reasonably exercise their independent judgment. The Proposed Complaint does not assert any claims against them.

1984). None of the cases the Tier 3 Individuals cite stand for the notion that one derivative plaintiff can be substituted for a prior derivative plaintiff after the original plaintiff's derivative case has been dismissed for lack of constitutional standing. For example, in *Klein ex rel. Qlik Technologies, Inc. v. Qlik Technologies, Inc.*, 906 F.3d 215, 218 (2d Cir. 2018), the derivative plaintiff owned shares when she filed the case and thus had constitutional standing but lost her interest while the case was pending. And in *Yan v. ReWalk Robotics Ltd.*, 973 F.3d 22, 27, 38-39 (1st Cir. 2020), which the Tier 3 Individuals discuss at length, the original plaintiff had standing to assert a Securities Act claim so the court had subject matter jurisdiction from the start. A new plaintiff was allowed to join the case to assert a separate claim under the Securities Exchange Act, but a majority of the panel confirmed that they would have found differently had the original plaintiff lacked constitutional standing. *See id.* at 36-39 & n.6. *See also Mannato v. Wells*, No. 1:11-cv-4402-WSD, 2013 WL 12101909, at *2 (N.D. Ga. May 6, 2013) (unpublished) (explaining that the derivative plaintiff died while suit was pending).[8]

## II. THE TIER 3 INDIVIDUALS, AS PUTATIVE REPRESENTATIVES OF KRS, HAVE NO RIGHT TO INTERVENE IN THE OAG'S SUIT

Even if the Tier 3 Individuals lawfully represented KRS for purposes of bringing this intervention motion, CR 24.01 authorizes a party to intervene as of right only in two limited circumstances: "(a) when a statute confers an unconditional right to intervene, or (b) when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless that interest is adequately

[8] The Tier 3 Individuals' reliance on ERISA is misplaced. Congress expressly exempted state agencies like KRS from ERISA. *See* 29 U.S.C. §§ 1002(32), 1003(b)(1). In addition, Kentucky law does not grant KRS members the same rights as private company employees may have under ERISA in an ERISA-governed plan.

represented by existing parties." CR 24.01. As movants, the Tier 3 Individuals have the burden to establish their right to intervene. *Farmers & Traders Bank v. Ashbrook*, No. 2010-CA-002213-MR, 2012 WL 996687, at *1 (Ky. Ct. App. Mar. 23, 2012) (unpublished). They have failed to carry their burden.

### A. No Statute Confers an Unconditional Right to Intervene in This Action

No statute grants Tier 3 Individuals or any other KRS member an "unconditional right to intervene" on behalf of KRS in litigation that the Attorney General is pursuing to recover damages for KRS. The Tier 3 Individuals suggest that KRS § 61.645(15) gives them the right to intervene on behalf of KRS, but that statute says nothing at all about intervention. A supposed statutory right to assert claims is *not* a statutory right to intervene. The statutory intervention right must be express. *See Commonwealth, Cabinet for Health and Family Services v. L.J.P.*, 316 S.W.3d 871, 876-77 (Ky. 2010) (holding statute did not confer on grandparents a right to "intervene" in parental termination case); *accord Carter v. Smith*, 170 S.W.3d 402, 406 (Ky. Ct. App. 2004) (holding that movant had no statutory right to intervene because "nothing" in the relevant statute "grants anyone any unconditional right to intervene"). If the Legislature wished to confer a right to intervene, it would have specifically granted that right. *See, e.g.*, KRS § 15.240 ("the Attorney General shall have the authority to . . . intervene in actions brought pursuant to" certain statutes); KRS § 625.060(3) (granting foster parents the right to intervene in certain actions); KRS § 344.670(2) (granting certain persons the right to intervene in housing discrimination cases).

The Court's ruling that the OAG had the right to file its "Intervening Complaint" under the original *Mayberry* caption pursuant to KRS § 15.020 does not help the Tier 3 Individuals. Mot. at 28. The Court's determination was based on the Legislature's broad directive that the "[Attorney General] *shall* also commence all actions or enter his appearance in all cases,

hearings, and proceedings . . . in which the Commonwealth has an interest." Dec. 28, 2020 Order at 13 (quoting KRS § 15.020) (emphasis in Order). KRS § 61.645(15) does not grant such broad powers to Tier 3 members of KRS.

### B. The Untimely Motion Fails Because the OAG Adequately Represents KRS's Interests

To intervene under subpart (b) of CR 24.01, the Tier 3 Individuals would need to satisfy four requirements: (1) their "motion must be timely"; (2) they "must have an interest relating to the subject of the action"; (3) their "ability to protect [their] interest may be impaired or impeded" by the OAG's case; and (4) "none of the existing parties could adequately represent [their] interests." *See Farmers & Traders Bank*, No. 2010-CA-002213-MR, 2012 WL 996687, at *1.

As a threshold matter, the motion is untimely. For years, their counsel was on notice of the original *Mayberry* lawsuit and the Supreme Court's decision in *Sexton*, but the Tier 3 Individuals eschewed any effort to get involved in that case, waiting until *after* the Supreme Court's decision in this case. Their attempt to jump in now is untimely. The PAAMCO/Prisma Defendants fully join and incorporate by reference the timeliness arguments by the other Defendants. *See* Blackstone Opp. Br. Point I.

Regardless, the Tier 3 Individuals do not and cannot demonstrate that the Commonwealth, through the OAG, does not adequately represent the interests of KRS, an agency of the Commonwealth. The Legislature has expressly authorized the OAG to represent KRS's interests as "legal advisor and attorney" for the KRS Board. KRS § 61.645(11). This is consistent with the Attorney General's broad constitutional authority. *See* KRS § 15.020; Ky. Const. § 91. Having failed to show any conflict of interests between the Commonwealth, KRS,

and the OAG, the Tier 3 Individuals have no basis to argue that the OAG does not adequately represent KRS's interests.

CR 24 is substantially the same as its federal counterpart, Federal Rule of Civil Procedure 24, and Kentucky courts look to federal jurisprudence for guidance. *See Gayner v. Packaging Serv. Corp. of Ky.*, 636 S.W.2d 658, 660 (Ky. Ct. App. 1982); *see also* § 54:1. Intervention—CR 24, 11 Ky. Prac. Civ. Proc. Forms § 54:1 (rev. Apr. 2020). Under the federal rule, in actions brought by the Attorney General, there is a strong presumption, for any civil litigation it brings, that the state (with the Attorney General as its legal representative) adequately represents the interests of all citizens *and* political subdivisions within the state. *See, e.g., Victim Rights Law Center v. Rosenfelt*, No. 20-1748, 2021 WL 630453, at *3-4 (1st Cir. Feb. 18, 2021); *Acra Turf Club, LLC v. Zanzuccki*, No. 13-1634, 561 F. App'x 219, 222 (3d Cir. 2014) (unpublished); *Environmental Defense Fund v. Higginson*, 631 F.2d 738, 740 (D.C. Cir. 1979); *United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 987 (2d Cir. 1984); *United States v. Yale Univ.*, 337 F.R.D. 35, 40-41 (D. Conn. 2021); *see also State v. City of Dover*, 891 A.2d 524, 532, 534 (N.H. 2006) (holding that separate environmental lawsuits by cities seeking damages for pollution must yield to the attorney general's suit asserting similar claims).[9] Accordingly, "in an

[9] Similarly, courts consistently deny intervention motions brought by shareholders or beneficiaries in derivative suits where their interests are represented by the corporation or organization. *See, e.g., Comtide Holdings, LLC v. Booth Creek Mgmt. Corp.*, No. 2:07-cv-1190, 2010 WL 2670853, at *3 (S.D. Ohio June 29, 2010) (unpublished) ("Ordinarily, a corporation is deemed to be an adequate representative of the interests of all its shareholders because its duty is to maximize their return, including securing the largest judgment or settlement possible on the claim being asserted against the defendant."); *Pharm. Res. & Mfrs. v. Comm., Me. Dep't of Human Servs.*, 201 F.R.D. 12, 14-16 (D. Me. 2001) (denying shareholder's motion to intervene because shareholder's "interests and goals [were] the same as" the organization's and because shareholder could not rebut the presumption that a corporation adequately represents its shareholders interests); *Arthur G. McKee & Co. v. Gulf & W. Indus., Inc.*, 52 F.R.D. 332, 332, 335 (D. Del. 1971) (denying motion to intervene brought by stockholder on adequate

enforcement action by a governmental entity suing as a *parens patriae*, it is proper to require a strong showing of inadequate representation before permitting intervenors to disrupt the government's exclusive control over the course of its litigation." *Hooker Chems. & Plastics Corp.*, 749 F.2d at 987); *see also, e.g.*, *Little Rock Sch. Dist. v. N. Little Rock Sch. Dist.*, 378 F.3d 774, 780 (8th Cir. 2004) (requiring a "strong showing of inadequate representation" where government is a party); *United States v. City of New York*, 198 F.3d 360, 367 (2d Cir. 1999) (requiring "a particularly strong showing of inadequacy" where government is *parens patriae*); *Animal Legal Defense Fund v. Otter*, 300 F.R.D. 461, 464 (D. Idaho 2014) (requiring a "very compelling showing" by intervenors where state is a party). Any proposed intervenor in a lawsuit brought by the state would need to "demonstrate that its interest is in fact different from that of the state and that that interest will not be represented by the state." *Higginson*, 631 F.2d at 740. And, "it is not enough that the applicant would insist on more elaborate pre-trial or pre-settlement procedures or press for more drastic relief." *Hooker Chems. & Plastics Corp.*, 749 F.2d at 985); *see also Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003) ("Where parties share the same ultimate objective, differences in litigation strategy do not normally justify intervention"). In *Higginson*, for example, the court denied intervention by executive branch agencies in Colorado where Colorado was already party to the environmental lawsuit. *Higginson*, 631 F.2d at 740.

Here, the Tier 3 Individuals seek to intervene in the Commonwealth's lawsuit to assert claims on behalf of KRS, but they do not and cannot demonstrate that the interests of the Commonwealth and KRS are in conflict. As currently framed, the OAG's pending complaint

representation grounds where stockholder made a derivative demand and the corporation subsequently filed suit and adequately represented the stockholder's interest).

seeks to recover the same damages for the benefit of KRS based on the same legal theories as the proposed intervening complaint that the Tier 3 Individuals seek to file on behalf of KRS. *See* OAG Compl. at 123 (asserting claims "for the benefit of KRS and the Commonwealth"); *id.* at 135 (requesting the Court use its "equity power to fashion such relief as is justified and necessary to benefit KRS"); *id.* ¶ 248 (seeking damages "for the losses incurred by KRS"). KRS and Kentucky's interests and objectives with respect to these claims are identical. The Tier 3 Individuals even concede that "KRS and the Commonwealth may have a common interest in creating as big a pot as possible." Mot. at 38. Because the Tier 3 Individuals do not identify any legitimate conflicting interests between KRS and the Commonwealth or show that the OAG cannot adequately represent the Commonwealth's and its agency's shared interest in pursuing damages for KRS, their motion to intervene as of right fails. *See Roberts v. Estate of Bramble*, No. 2009-CA-001233-MR, 2010 WL 3927793, at *2 (Ky. Ct. App. Oct. 8, 2010) (unpublished) ("Appellants' interests in the underlying lawsuit . . . are the same as those of Country Gas, and therefore Country Gas could adequately represent Appellants' interests."); *United States v. Michigan*, 424 F.3d 438, 443-44 (6th Cir. 2005) ("[A]pplicants for intervention must overcome the presumption of adequate representation that arises when they share the same ultimate objective as a party to the suit."); *In re HealthSouth Corp. Ins. Litig.*, 219 F.R.D. 688, 693 (N.D. Ala. 2004) ("Where . . . the objectives of the intervenors and the existing defendants are identical, the Eleventh Circuit presumes that the existing parties will adequately represent the intervenor's interest.").

In *Commonwealth v. Kentucky Retirement Systems*, 396 S.W.3d 833 (Ky. 2013), the Supreme Court recognized that the Commonwealth and KRS are functionally interchangeable because KRS is an arm of the state. It held that, where KRS was a party to a lawsuit, it was "not

necessary" for the Commonwealth to also be party to the case because the "interests of the Commonwealth are already represented by [KRS]" and because the "state was already a party to this action through [KRS]." *Id.* at 840-41. That reasoning applies equally here. The OAG is already advancing KRS's interests.

The Tier 3 Individuals argue that a conflict of interests exists between the OAG and KRS because any recovery by the OAG must be placed in the general fund whereas a recovery by KRS could be placed directly into KRS's investment fund. *See* Mot. at 35-39. As an initial matter, differences as to how damages recoveries would flow would not create a conflict that would justify intervention as of right. It remains undisputed (Mot. at 38) that the OAG and KRS still have the same objective of maximizing a potential recovery within the law. In any event, as a statutory matter, any hypothetical damages recovery by the Tier 3 Individuals, as representatives of an agency of the Commonwealth, would also have to be deposited into the general fund of the State Treasury, *the same place where any recovery by the OAG will be deposited*. *See* KRS § 48.005(3)-(4); *id.* § 15.020 (AG statute requiring compliance with KRS § 48.005); *id.* § 45A.717(5) (Model Procurement Code requiring compliance with 48.005). Accordingly, allowing the Tier 3 Individuals to intervene would not even address the supposed conflict they identify.

The Tier 3 Individuals also argue that, as representatives of KRS, they will have stronger arguments in response to "unique defenses" that Defendants might assert in the OAG's lawsuit. Mot. at 40-52. The Tier 3 Individuals are correct that Defendants have, among numerous other defenses, case-dispositive defenses of "causation and *in pari delicto*" with respect to these

meritless claims. *Id.* at 47.[10] Those defenses are the same regardless of who represents KRS's interests. Every plaintiff, derivative or otherwise, must establish causation of damages. And as the Tier 3 Individuals' own authority makes clear, derivative claims are regularly barred by *in pari delicto* precisely *because* derivative plaintiffs step into the shoes of the entity they purport to represent. *See, e.g.*, *Stewart v. Wilmington Tr. SP Servs.*, 112 A.3d 271, 312-13 (Del. Ch. 2015) (noting that while "it is tempting to view the innocent claimant as the true plaintiff [in a derivative case] and to set aside the *in pari delicto* doctrine so as to allow the claim to be brought," doing so would "eviscerate *in pari delicto*"); *In re Optimal U.S. Litig.*, 813. F. Supp. 2d 383, 397 (S.D.N.Y. 2011) (holding *in pari delicto* barred derivative claims because "as derivative claimants, Plaintiffs stand in the shoes of the corporation whose 'unclean hands' bar *it* from bringing suit").[11]

[10] Under the *in pari delicto* defense, a party's "recovery is barred by the principles of equity" when its "actions are *in pari delicto* with the tortfeasor," i.e., when the party's own actions were a cause of his losses. *Sandoz Inc. v. Com. ex rel. Conway*, 405 S.W.3d 506, 512 (Ky. Ct. App. 2012). Here, insofar as KRS seeks damages arising from KRS's fund-of-funds investments, KRS's own actions were the cause of those damages. KRS represented to its investment managers that it was making those investments in reliance on its own judgment and independent advisors. KRS likewise represented to its investment managers that it understood the investment management fees associated with the investments.

[11] Contrary to the Tier 3 Individuals' assertions, Kentucky does not recognize any blanket exception to *in pari delicto* in cases involving claims against fiduciaries. While Kentucky recognizes an "adverse interest exception," which holds that "knowledge of [an] agent is not imputed to the principal when it is clear that the agent would not communicate the fact in controversy to the principal," the exception does not apply where the principal "benefits by the transaction" or "the interested agent acts for the principal." *BancInsure, Inc. v. U.K. Bancorporation Inc./United Ky. Bank of Pendleton Cty., Inc.*, 830 F. Supp. 2d 294, 302-03 (E.D. Ky. 2011); *see also Neblett v. Brothers*, 325 F. Supp. 3d 797, 811-813 (E.D. Ky. 2018) (discussing Kentucky's *in pari delicto* doctrine and holding as a matter of law that it barred claims by trustee in bankruptcy of claim for aiding and abetting CEO's breaches of fiduciary duty notwithstanding adverse-interest exception). In this case, it is undisputed that KRS received at least some benefit from the decision of its Trustees and Officers to invest with Defendants and that those investments were for KRS. No exceptions to *in pari delicto* apply.

The Tier 3 Individuals also conjure up something called the "non-imputation doctrine," under which they posit that, under Kentucky law, the *in pari delicto* doctrine would not bar derivative claims brought on behalf of an agency. *See* Mot. at 49 (quoting *Wilson v. Paine*, 288 S.W.3d 284 (Ky. 2009)). The cases cited by the Tier 3 Individuals, however, concern adverse domination, which is a doctrine for tolling statutes of limitations and has no relevance to the *in pari delicto* defense. *See In re CC Ops., LLC*, 618 B.R. 471, 482 (Bankr. W.D. Ky. 2020) (refusing to apply "adverse domination theory" because "[t]hat doctrine is not . . . applied outside of a 'discovery rule' context" and merely "tolls the statute of limitation when tortfeasors dominate and control a corporation so as to prevent the corporation from bringing a timely claim against them" (citing *Wilson*, 288 S.W.3d at 287)).

## III. THE TIER 3 INDIVIDUALS HAVE NOT DEMONSTRATED A BASIS FOR PERMISSIVE INTERVENTION

Permissive intervention is also not appropriate here. Permissive intervention is available only "(a) when a statute confers a conditional right to intervene or (b) when an applicant's claim or defense and the main action have a question of law or fact in common" and after "consider[ing] whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." CR 24.02.

Contrary to the Tier 3 Individuals' argument (*see* Mot. at 30), KRS § 61.645 does not confer on anyone a conditional right to "intervene." The statute is devoid of any reference to intervention.

As the Kentucky Supreme Court has underscored, "permissive intervention is more concerned with consolidating common legal and factual questions than with protecting the implicated rights of non-parties." *Bailey v. Bertram*, 471 S.W.3d 687, 690-91 (Ky. 2015). This is not a circumstance where Tier 3 Individuals, as representatives of KRS, and the OAG would

be pursuing different claims that share "common legal and factual questions." This is a circumstance where the OAG is already pursuing claims for alleged damages caused to KRS. And the Tier 3 Individuals want to intervene to pursue those same claims on behalf of KRS.

Moreover, permitting the Tier 3 Individuals to intervene in this action as representatives of KRS would needlessly delay the adjudication of the OAG's claims and result in unnecessary waste and disruption for both the Court and the actual Parties. Allowing the Tier 3 Individuals and their counsel to represent KRS, in disregard of the Model Procurement Code and over the objection of the Attorney General and the KRS Board, would violate the separation of powers and, once again, raise a constitutional standing defect under the Constitution. Defendants would inevitably seek immediate appellate relief. While the Tier 3 Individuals lament that the *Mayberry* Plaintiffs' lack of standing "delayed [this case] for three years," (Mot. at 30), their attempt to intervene only guarantees further delay by unnecessarily exposing this case to further constitutional challenges.[12]

Permissive intervention would also result in inefficiencies and disruption that would substantially prejudice Defendants, the OAG, and KRS. Neither the OAG nor KRS's Board of Trustees wants the Tier 3 Individuals to have any role in the OAG's lawsuit. In the original *Mayberry* matter, counsel for the Tier 3 Individuals aggressively attacked their co-counsel in Court filings. *See, e.g.*, *Mayberry* Plaintiffs' Opp. to Lainhart Group's Mot. to Defer Ruling on Mot. for Appointment of Lead Plaintiff, at 2-7 (Sept. 20, 2019); *Mayberry* Plaintiffs' Reply to Resp. to Mot. for Appointment of Lead Plaintiff, at 1-7, 17-18 (Aug. 13, 2020). There is every

[12] The Tier 3 Individuals' lack of constitutional standing is itself a basis for this Court to deny permissive intervention. As the court in *Nemes v. Besinger* explained in denying permissive intervention under the federal counterpart to Rule 24.02, an "uncertain assertion of Article III standing" is a factor counseling against permissive intervention. 336 F.R.D. 132, 139 (W.D. Ky. 2020).

reason to anticipate an even more dysfunctional dynamic here, especially given the fact that the Tier 3 Individuals have already accused the Attorney General and the entire Commonwealth government of corruption and incompetence. *See, e.g.*, Mot. for Entry of Pretrial Order No. 1, at 20 n.15 (Feb. 15, 2021) (accusing the Commonwealth, including the judiciary, and KRS of "corruption" and attacking the OAG's civil litigation experience); *id.* at 11 (accusing the OAG of being unwilling to properly litigate claims in light of political donations). Allowing the Tier 3 Individuals to intervene will invariably result in continued disruption of these proceedings and add unnecessary costs and inefficiencies, requiring the Court to address and Defendants to respond to competing discovery requests and parallel motions regarding the same issues. *See Ark Encounter, LLC v. Stewart*, 311 F.R.D. 414, 425–26 (E.D. Ky. 2015) (denying permissive intervention where interests and goals of proposed intervenors, four Kentucky taxpayers, were similar to those of the Commonwealth and "would likely result in duplication of the Defendants' efforts, thus resulting in undue delay").

Moreover, permitting the Tier 3 Individuals to intervene "on behalf of KRS" when KRS's interests are already adequately represented by the OAG is unnecessary and wasteful. *See Com. v. Ky. Ret. Sys.*, 396 S.W.3d at 840-41. Indeed, intervention would prejudice KRS and the Commonwealth by diminishing any hypothetical recovery to cover whatever contingency fees that the Tier 3 Individuals' counsel would seek. This diminished recovery, resulting from unmonitored arrangements with contingency-fee counsel purporting to represent a state agency without any oversight, would embody the very harm that the Model Procurement Code was enacted to avoid.

## CONCLUSION

For the reasons stated herein, the PAAMCO/Prisma Defendants respectfully request that the Court deny the Tier 3 Individuals' motion to intervene.

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**CERTIFICATE OF SERVICE**

The above signature certifies that, on March 2, 2021, the foregoing was electronically filed with the Clerk of the Court using the KCOJ e-filing system and pursuant to Notices of E-Service served via email pursuant to CR 5.02(2), to the following:

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# Exhibit A

RVKuhns

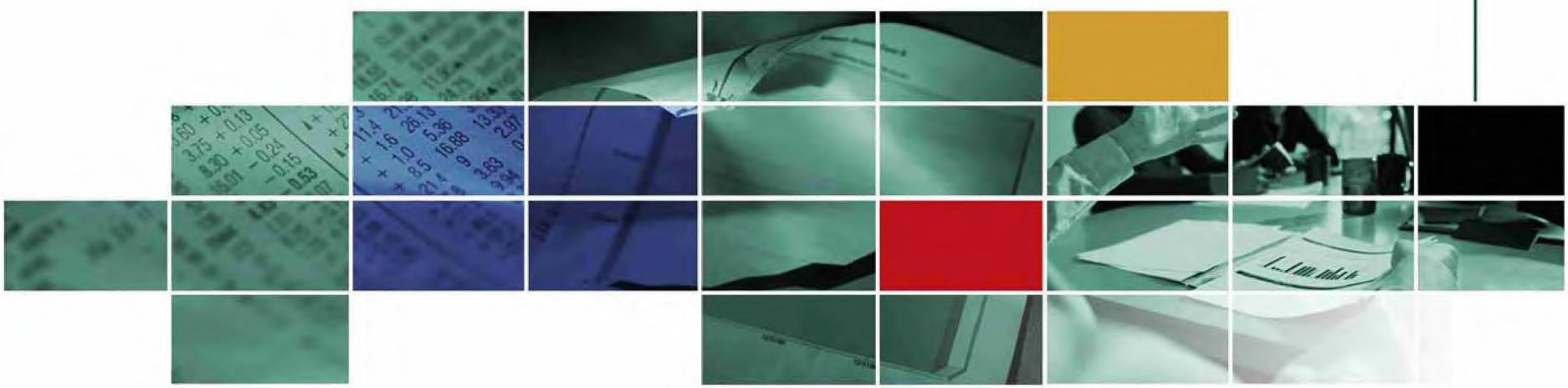
& ASSOCIATES, INC.

# Kentucky Employee Retirement System
# Asset Allocation Discussion

## Overview and Summary

**August 12, 2010**

**Presented by Tony Johnson**



# Executive Summary

## KERS Asset Liability Studies Completed

- **Presented A/L study results on the four KERS Plans to KRS Investment Committee, KRS Board, and Kentucky Legislature**
- **Discussed impact HB 1 will have on the funded status of each plan**
- **Discussed impact of "worst case scenarios" on asset balances**
- **Discussed difficulty balancing probable future liquidity needs with need to grow assets to meet promised obligations**

As noted by RVK, it may be difficult for KRS to invest its way out of the financial challenges confronting the KERS plans, particularly the non-hazardous pension plan. Therefore, it is important that the Investment Committee make prudent investment decisions to maximize returns and reduce the downside risk. Such steps could help preserve and grow assets to meet future benefit payments.

# Executive Summary

- **RVK will guide the Investment Committee through asset allocation discussions to help select the mix that best meets each plan's return needs at an acceptable level of risk**
- **Each plan has different funded ratios, payout ratios, and liquidity needs that may lead to different asset allocations among the plans**
- **In some cases, the proposed portfolios submitted by RVK as asset allocations the Investment Committee should consider are drastically different from the current target asset allocations**
- **The Investment Committee should refer to the asset/liability studies to help frame the decision on the appropriate allocations for the four KERS plans**

# Executive Summary

- **The KERS non-hazardous pension plan faces significant cash flow challenges and its asset allocation needs to consider near-term liquidity needs while striving to earn the 7.75% assumed rate of return over a long period of time**

- **RVK proposes reallocating assets from traditional equities and fixed income to alternative investment strategies in most of the plans**

- **The increase in alternative strategies does not mean significant lock-up periods (under normal market conditions)**
  - Hedge funds: Quarterly redemption windows
  - Real Estate: Quarterly redemption windows
  - Real Return: Separate account – less than 30 days to liquidate
  - Private Equity: Cease further allocations because of long term lock-up and redistribute distributions to other asset classes

# KERS Non-Hazardous Pension Plan

# KERS Non-Hazardous Pension Plan

## RVK Proposed Recommendations

- **The funded ratio is currently at 45% and is projected to fall as low as 16% in years 2017 through 2020 which merits greater consideration of near-term liquidity needs**
- **Investment Committee should consider adopting either Portfolio 1 (moderately conservative) or Portfolio 2 (moderately aggressive)**
- **Portfolio 1 and Portfolio 2 have the similar allocations to alternative investments (real estate, absolute return, private equity, and real return) and differ in the allocations to equities and fixed income**
- **For Portfolio 1, RVK recommends reducing equities from the current target allocation of 57% to a proposed target allocation of 29% (US, developed international, and emerging markets) in order to reduce the higher risk associated with US and international equities.**
- **For Portfolio 2, RVK recommends reducing equities from the current target allocation of 57% to a proposed target allocation of 44% which allows the plan to take advantage of the higher expected returns but the relatively high allocation adds risk to the total portfolio**
- **For Portfolio 1, RVK recommends increase in fixed income from the current target allocation of 25% to the proposed target allocation of 33% while Portfolio 2 calls for a reduction to 20%**
  - In both Portfolios, dedicated TIPS portfolios are eliminated and some assets are redeployed to a real return mandate
  - Portfolio 1 has a higher allocation to non-US and high yield bonds
- **RVK recommends allocating 10% to absolute return strategies (hedge funds) and 12% to real return strategies (inflation-sensitive strategies)**
  - Halt further private equity investments in this portfolio
  - Carefully deploy assets into real estate



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# KERS Non-Hazardous Pension

## RVK Recommends Either Portfolio 1 or 2

| Asset Class | Current Allocation | Target Allocation | Conservative Portfolio | Potential Portfolio 1 | Potential Portfolio 2 | Aggressive Portfolio |
|---|---|---|---|---|---|---|
| Broad US Equity | 25.9% | 30.0% | 10.0% | 14.0% | 20.0% | 17.0% |
| Broad Int'l Equity | 19.5% | 22.0% | 5.0% | 12.0% | 20.0% | 30.0% |
| Emerging Markets | 3.4% | 5.0% | 3.0% | 3.0% | 4.0% | 10.0% |
| Core Fixed Income | 22.8% | 10.0% | 43.0% | 15.0% | 10.0% | 5.0% |
| Non-US Fixed Income UH | 0.0% | 5.0% | 9.0% | 10.0% | 5.0% | 1.0% |
| High Yield | 0.0% | 5.0% | 5.0% | 8.0% | 5.0% | 2.0% |
| TIPS | 10.6% | 5.0% | 0.0% | 0.0% | 0.0% | 0.0% |
| Low Duration Fixed Income | 0.0% | 0.0% | 0.0% | 0.0% | 0.0% | 0.0% |
| Real Estate - Core | 0.6% | 5.0% | 5.0% | 5.0% | 5.0% | 5.0% |
| Absolute Return | 0.2% | 0.0% | 5.0% | 10.0% | 10.0% | 10.0% |
| Private Equity | 14.7% | 7.0% | 7.0% | 10.0% | 10.0% | 15.0% |
| Commodities - Broad | 0.0% | 5.0% | 0.0% | 0.0% | 0.0% | 0.0% |
| Real Return | 0.0% | 0.0% | 8.0% | 12.0% | 10.0% | 5.0% |
| Cash Equivalents | 2.3% | 1.0% | 0.0% | 1.0% | 1.0% | 0.0% |
| **Expected Return - Arithmetic** | **7.68%** | **7.82%** | **6.64%** | **7.49%** | **7.93%** | **8.76%** |
| **Expected Risk** | **11.93%** | **12.59%** | **7.05%** | **9.90%** | **11.86%** | **14.98%** |
| **Expected Sharpe Ratio (3% RF)** | **0.39%** | **0.38%** | **0.52%** | **0.45%** | **0.42%** | **0.38%** |
| **Expected Return/Risk Ratio** | **0.64%** | **0.62%** | **0.94%** | **0.76%** | **0.67%** | **0.58%** |
| **Expected Return - Compound** | **7.02%** | **7.10%** | **6.41%** | **7.03%** | **7.28%** | **7.74%** |

Current allocation as of June 30, 2010



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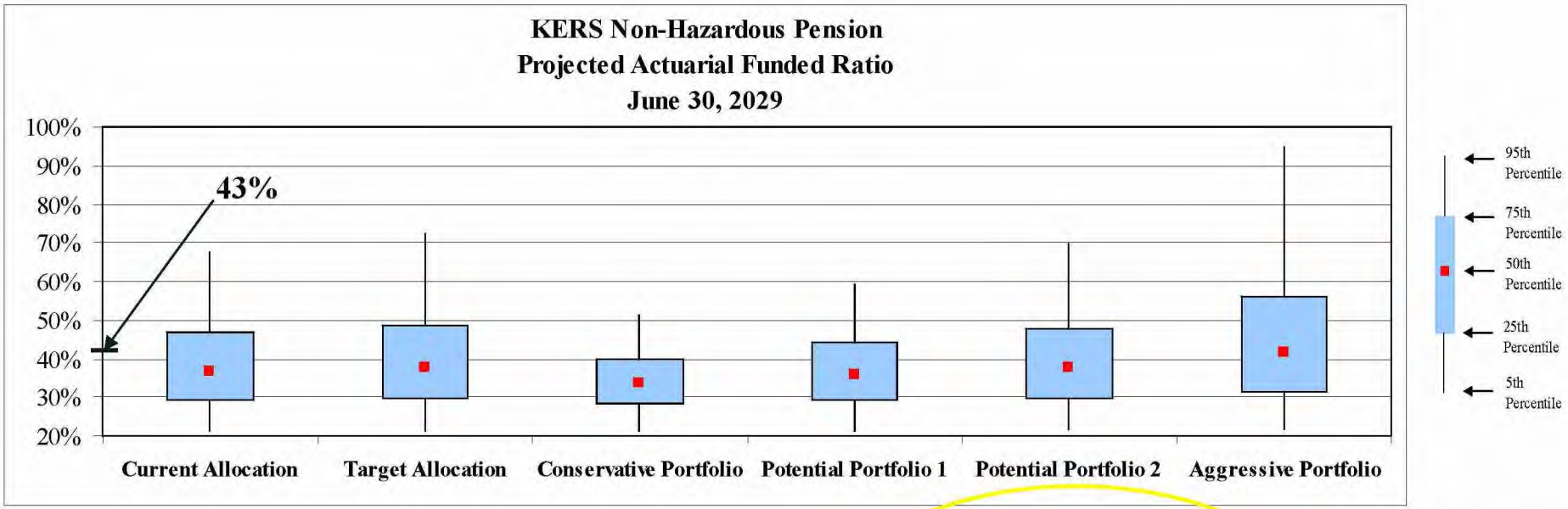
# KERS Non-Hazardous Pension

## Stochastic Analysis – Possible Long Term Outcomes




| | Current Allocation | | Target Allocation | | Conservative Portfolio | | Potential Portfolio 1 | | Potential Portfolio 2 | | Aggressive Portfolio | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | Unfunded Liability (Mil) | Funded Ratio | Unfunded Liability (Mil) | Funded Ratio | Unfunded Liability (Mil) | Funded Ratio | Unfunded Liability (Mil) | Funded Ratio | Unfunded Liability (Mil) | Funded Ratio | Unfunded Liability (Mil) | Funded Ratio |
| 5th Percentile | $10,465.3 | 21.4% | $10,387.7 | 21.5% | $10,316.7 | 21.3% | $10,248.5 | 21.5% | $10,271.4 | 21.6% | $10,357.2 | 21.9% |
| 25th Percentile | $9,520.5 | 29.2% | $9,453.0 | 29.6% | $9,649.0 | 28.2% | $9,500.2 | 29.1% | $9,386.1 | 29.8% | $9,224.3 | 31.5% |
| 50th Percentile | $8,733.9 | 36.8% | $8,649.8 | 37.6% | $9,152.1 | 33.6% | $8,870.7 | 35.7% | $8,591.5 | 37.7% | $8,125.6 | 41.5% |
| 75th Percentile | $7,590.3 | 47.0% | $7,378.2 | 48.6% | $8,590.3 | 39.9% | $8,057.8 | 44.2% | $7,498.0 | 47.7% | $6,308.4 | 56.1% |
| 95th Percentile | $4,633.4 | 67.7% | $4,066.9 | 72.5% | $7,438.5 | 51.0% | $6,064.6 | 59.2% | $4,561.9 | 69.6% | $836.7 | 94.7% |



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# KERS Non-Hazardous Pension

## Monte Carlo Scenarios in Severely Distressed Markets

| | Funded Ratio in Year 20 | | | Worst Case Scenario |
|---|---|---|---|---|
| | 50th | 5th | 95th | |
| Current Allocation | 36.8% | 21.4% | 67.7% | Insufficient assets to cover benefit payments by 2019 |
| Target Allocation | 37.6% | 21.5% | 72.5% | Insufficient assets to cover benefit payments by 2019 |
| Conservative Portfolio | 33.6% | 21.3% | 51.0% | Sufficient assets but funding ratio drops as low as 0.6% |
| Potential Portfolio 1 | 35.7% | 21.5% | 59.2% | Sufficient assets but funding ratio drops as low as 0.3% |
| Potential Portfolio 2 | 37.7% | 21.6% | 69.6% | Insufficient assets to cover benefit payments by 2020 |
| Aggressive Portfolio | 41.5% | 21.9% | 94.7% | Insufficient assets to cover benefit payments by 2018 |
| *Deterministic* | *42.8%* | *N/A* | *N/A* | *N/A* |



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# KERS Hazardous Pension Plan

# KERS Hazardous Pension Plan

## RVK Proposed Recommendations

- **The funded ratio is currently at 75% and is projected to fall to 57% by 2013 before rising to 77% by year 2029 which allows this plan to assume more risk in order to earn a higher return**

- **RVK recommends reducing equities from the current target allocation of 57% to the proposed target allocation of 44% (US, developed international, and emerging markets)**

- **RVK recommends decreasing in fixed income from the current target allocation of 25% to the proposed target allocation of 20% (US core, non-US, and high yield)**
  - Eliminate dedicated TIPS portfolio and partially redeploy assets to real return mandate
  - Increase allocation to non-US and high yield bonds

- **RVK recommends allocating 10% to absolute return strategies, 10% to real return strategies, and cap private equity at 10%**
  - Halt further private equity investments in this portfolio
  - Carefully deploy assets into real estate

# KERS Hazardous Pension

## RVK Recommends Portfolio 2

| Asset Class | Current Allocation | Target Allocation | Conservative Portfolio | Potential Portfolio 1 | Potential Portfolio 2 | Aggressive Portfolio |
|---|---|---|---|---|---|---|
| Broad US Equity | 21.3% | 30.0% | 10.0% | 14.0% | **20.0%** | 17.0% |
| Broad Int'l Equity | 15.2% | 22.0% | 5.0% | 12.0% | **20.0%** | 30.0% |
| Emerging Markets | 2.6% | 5.0% | 3.0% | 3.0% | **4.0%** | 10.0% |
| Core Fixed Income | 20.7% | 10.0% | 43.0% | 15.0% | **10.0%** | 5.0% |
| Non-US Fixed Income UH | 0.0% | 5.0% | 9.0% | 10.0% | **5.0%** | 1.0% |
| High Yield | 0.0% | 5.0% | 5.0% | 8.0% | **5.0%** | 2.0% |
| TIPS | 6.7% | 5.0% | 0.0% | 0.0% | **0.0%** | 0.0% |
| Low Duration Fixed Income | 0.0% | 0.0% | 0.0% | 0.0% | **0.0%** | 0.0% |
| Real Estate - Core | 1.0% | 5.0% | 5.0% | 5.0% | **5.0%** | 5.0% |
| Absolute Return | 1.2% | 0.0% | 5.0% | 10.0% | **10.0%** | 10.0% |
| Private Equity | 14.6% | 7.0% | 7.0% | 10.0% | **10.0%** | 15.0% |
| Commodities - Broad | 0.0% | 5.0% | 0.0% | 0.0% | **0.0%** | 0.0% |
| Real Return | 0.0% | 0.0% | 8.0% | 12.0% | **10.0%** | 5.0% |
| Cash Equivalents | 16.8% | 1.0% | 0.0% | 1.0% | **1.0%** | 0.0% |
| **Expected Return - Arithmetic** | **7.09%** | **7.82%** | **6.64%** | **7.49%** | **7.93%** | **8.76%** |
| **Expected Risk** | **10.36%** | **12.59%** | **7.05%** | **9.90%** | **11.86%** | **14.98%** |
| **Expected Sharpe Ratio (3% RF)** | **0.39%** | **0.38%** | **0.52%** | **0.45%** | **0.42%** | **0.38%** |
| **Expected Return/Risk Ratio** | **0.68%** | **0.62%** | **0.94%** | **0.76%** | **0.67%** | **0.58%** |
| **Expected Return - Compound** | **6.59%** | **7.10%** | **6.41%** | **7.03%** | **7.28%** | **7.74%** |

Current allocation as of June 30, 2010



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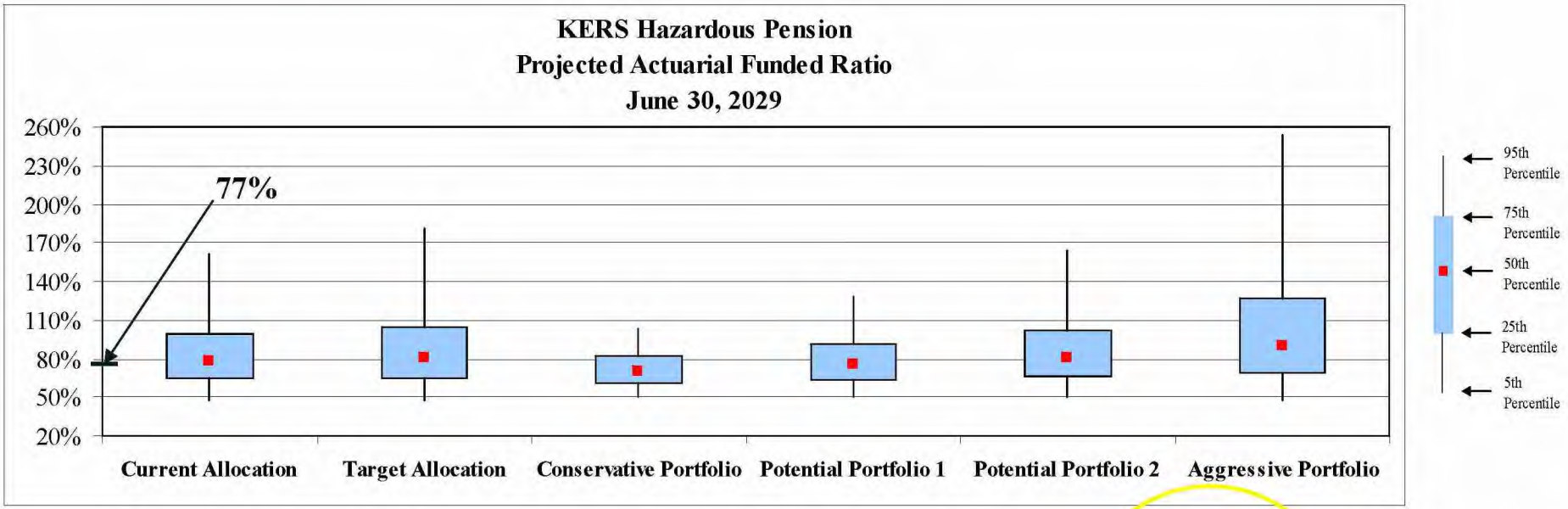
# KERS Hazardous Pension

## Stochastic Analysis – Possible Long Term Outcomes




| | Current Allocation | | Target Allocation | | Conservative Portfolio | | Potential Portfolio 1 | | Potential Portfolio 2 | | Aggressive Portfolio | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | Unfunded Liability (Mil) | Funded Ratio | Unfunded Liability (Mil) | Funded Ratio | Unfunded Liability (Mil) | Funded Ratio | Unfunded Liability (Mil) | Funded Ratio | Unfunded Liability (Mil) | Funded Ratio | Unfunded Liability (Mil) | Funded Ratio |
| 5th Percentile | $635.1 | 47.2% | $631.5 | 47.4% | $593.8 | 50.4% | $598.5 | 50.1% | $609.0 | 49.8% | $627.8 | 48.2% |
| 25th Percentile | $445.3 | 64.4% | $437.5 | 64.6% | $476.7 | 61.4% | $443.1 | 64.1% | $419.1 | 66.2% | $384.4 | 69.4% |
| 50th Percentile | $273.4 | 78.6% | $243.3 | 80.8% | $377.1 | 70.5% | $305.8 | 75.8% | $242.2 | 81.1% | $118.5 | 90.5% |
| 75th Percentile | $5.0 | 99.6% | ($54.6) | 104.0% | $244.7 | 81.9% | $109.3 | 91.7% | ($26.0) | 102.0% | ($354.2) | 126.3% |
| 95th Percentile | ($835.5) | 161.5% | ($1,074.4) | 180.6% | ($35.4) | 102.6% | ($364.5) | 128.0% | ($863.5) | 163.3% | ($2,159.2) | 253.7% |



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# KERS Hazardous Pension

## Stochastic Analysis – Drawing Inferences

| | Funded Ratio in Year 20 | | | Payout Ratios | | |
|---|---|---|---|---|---|---|
| | 50th | 5th | 95th | Year 20 Median | 2009-2029 Peak | 2009-2029 Trough |
| Current Allocation | 78.6% | 47.2% | 161.5% | 9.6% | 19.2% | 4.3% |
| Target Allocation | 80.8% | 47.4% | 180.6% | 9.3% | 19.3% | 4.0% |
| Conservative Portfolio | 70.5% | 50.4% | 102.6% | 11.0% | 18.0% | 6.9% |
| Potential Portfolio 1 | 75.8% | 50.1% | 128.0% | 10.1% | 18.1% | 5.6% |
| Potential Portfolio 2 | 81.1% | 49.8% | 163.3% | 9.3% | 18.4% | 4.3% |
| Aggressive Portfolio | 90.5% | 48.2% | 253.7% | 8.2% | 19.1% | 2.7% |
| *Deterministic* | *77.2%* | *N/A* | *N/A* | *N/A* | *N/A* | *N/A* |

# KERS Non-Hazardous Insurance Plan

# KERS Non-Hazardous Insurance Plan

## RVK Proposed Recommendations

- **The funded ratio is currently at 12% and is projected to fall to 9% before increasing to 49% by 2029 which merits a more liquid, conservative allocation that meets or exceeds the assumed rate of return of 4.50%**

- **RVK recommends reducing equities from the current target allocation of 70% to the proposed target allocation of 30% (US and global excluding US)**

- **RVK recommends creating a new allocation to US fixed income of 45% and to increase the dedicated TIPS allocation from the current target allocation of 12% to the proposed target allocation of 15%**
  - The US fixed income portfolio includes a 15% allocation to low duration fixed income

- **RVK recommends allocating 10% to real return strategies**

- **RVK recommends winding down private equity investments in this portfolio**

# KERS Non-Hazardous Insurance

## RVK Recommends Potential Portfolio 1

| Asset Class | Current Allocation | Target Allocation | Conservative Portfolio | Potential Portfolio 1 | Potential Portfolio 2 | Aggressive Portfolio |
|---|---|---|---|---|---|---|
| Broad US Equity | 28.7% | 40.0% | 0.0% | **15.0%** | 28.0% | 30.0% |
| Broad Int'l Equity | 31.6% | 30.0% | 0.0% | **15.0%** | 27.0% | 30.0% |
| Emerging Markets | 6.3% | 0.0% | 0.0% | **0.0%** | 0.0% | 0.0% |
| Core Fixed Income | 0.4% | 0.0% | 45.0% | **30.0%** | 15.0% | 0.0% |
| Non-US Fixed Income UH | 0.0% | 0.0% | 0.0% | **0.0%** | 0.0% | 0.0% |
| High Yield | 0.0% | 0.0% | 0.0% | **0.0%** | 0.0% | 10.0% |
| TIPS | 11.9% | 12.0% | 10.0% | **15.0%** | 15.0% | 0.0% |
| Low Duration Fixed Income | 0.0% | 0.0% | 45.0% | **15.0%** | 0.0% | 0.0% |
| Real Estate - Core | 0.3% | 5.0% | 0.0% | **0.0%** | 0.0% | 5.0% |
| Absolute Return | 1.2% | 0.0% | 0.0% | **0.0%** | 10.0% | 10.0% |
| Private Equity | 9.7% | 10.0% | 0.0% | **0.0%** | 0.0% | 10.0% |
| Commodities - Broad | 0.0% | 0.0% | 0.0% | **0.0%** | 0.0% | 0.0% |
| Real Return | 0.0% | 0.0% | 0.0% | **10.0%** | 5.0% | 5.0% |
| Cash Equivalents | 9.8% | 3.0% | 0.0% | **0.0%** | 0.0% | 0.0% |
| **Expected Return - Arithmetic** | **7.81%** | **8.08%** | **4.41%** | **5.96%** | **7.18%** | **8.41%** |
| **Expected Risk** | **13.55%** | **14.24%** | **3.85%** | **6.76%** | **10.57%** | **14.26%** |
| **Expected Sharpe Ratio (3% RF)** | **0.36%** | **0.36%** | **0.37%** | **0.44%** | **0.40%** | **0.38%** |
| **Expected Return/Risk Ratio** | **0.58%** | **0.57%** | **1.15%** | **0.88%** | **0.68%** | **0.59%** |
| **Expected Return - Compound** | **6.97%** | **7.15%** | **4.34%** | **5.75%** | **6.66%** | **7.49%** |

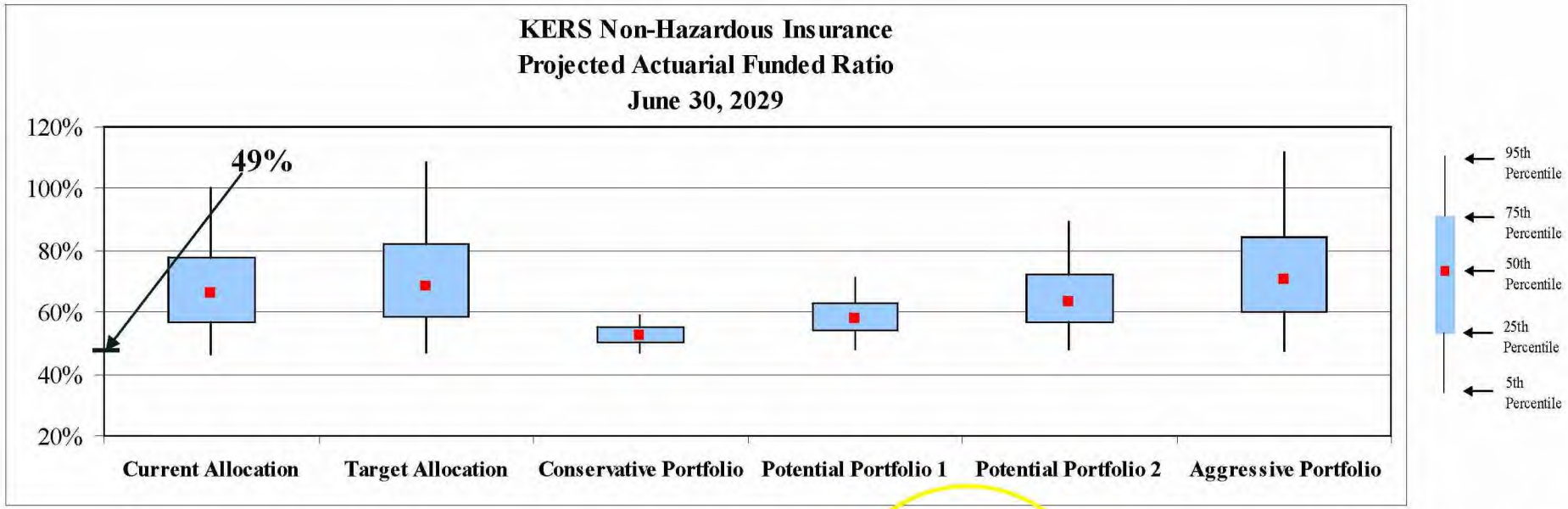
Current allocation as of June 30, 2010



RVKuhns & ASSOCIATES, INC.

# KERS Non-Hazardous Insurance

## Stochastic Analysis – Possible Long Term Outcomes




| | Current Allocation | | Target Allocation | | Conservative Portfolio | | Potential Portfolio 1 | | Potential Portfolio 2 | | Aggressive Portfolio | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | Unfunded Liability (Mil) | Funded Ratio | Unfunded Liability (Mil) | Funded Ratio | Unfunded Liability (Mil) | Funded Ratio | Unfunded Liability (Mil) | Funded Ratio | Unfunded Liability (Mil) | Funded Ratio | Unfunded Liability (Mil) | Funded Ratio |
| 5th Percentile | $4,332.6 | 46.5% | $4,256.6 | 46.8% | $4,980.2 | 47.0% | $4,481.5 | 48.2% | $4,312.5 | 47.9% | $4,172.0 | 47.7% |
| 25th Percentile | $3,178.1 | 57.0% | $3,049.1 | 58.7% | $3,974.5 | 50.0% | $3,565.2 | 54.0% | $3,256.8 | 56.8% | $2,926.9 | 59.9% |
| 50th Percentile | $2,433.1 | 66.0% | $2,222.3 | 68.5% | $3,440.0 | 52.5% | $2,996.2 | 58.1% | $2,575.9 | 63.6% | $2,099.1 | 70.5% |
| 75th Percentile | $1,552.9 | 77.7% | $1,242.1 | 82.0% | $2,943.9 | 55.0% | $2,466.2 | 63.0% | $1,857.9 | 72.3% | $1,085.8 | 84.2% |
| 95th Percentile | ($6.0) | 100.1% | ($616.0) | 108.6% | $2,340.0 | 59.3% | $1,837.1 | 70.9% | $771.8 | 89.2% | ($862.4) | 111.9% |



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# KERS Non-Hazardous Insurance

## Stochastic Analysis – Drawing Inferences

| | Funded Ratio in Year 20 | | | Payout Ratios | | |
|---|---|---|---|---|---|---|
| | 50th | 5th | 95th | Year 20 Median | 2009-2029 Peak | 2009-2029 Trough |
| Current Allocation | 66.0% | 46.5% | 100.1% | 7.2% | 51.7% | 4.2% |
| Target Allocation | 68.5% | 46.8% | 108.6% | 6.8% | 52.3% | 3.8% |
| Conservative Portfolio | 52.5% | 47.0% | 59.3% | 9.5% | 43.8% | 8.2% |
| Potential Portfolio 1 | 58.1% | 48.2% | 70.9% | 8.3% | 45.3% | 6.4% |
| Potential Portfolio 2 | 63.6% | 47.9% | 89.2% | 7.4% | 48.5% | 4.9% |
| Aggressive Portfolio | 70.5% | 47.7% | 111.9% | 6.6% | 51.8% | 3.7% |
| *Deterministic* | *49.3%* | *N/A* | *N/A* | *N/A* | *N/A* | *N/A* |

# KERS Hazardous Insurance Plan

# KERS Hazardous Insurance Plan

## RVK Proposed Recommendations

- **The funded ratio is currently at 61% and is projected to fall to 49% before increasing to 71% by 2029 which allows for maintaining a well diversified, growth-oriented allocation that meets the assumed rate of return of 7.75%**

- **RVK recommends reducing equities from the current target allocation of 70% to the proposed target allocation of 44% (US, developed international, and equity emerging markets)**

- **RVK recommends creating a new allocation to fixed income of 20%**
  - Eliminate dedicated TIPS portfolio and redeploy partial assets to real return mandate
  - Include allocation to non-US and high yield bonds

- **RVK recommends allocating 12% to absolute return strategies, 10% 5o real return strategies, and limiting the allocation to private equity to 7%**

# KERS Hazardous Insurance

## RVK Recommends Portfolio 2

| Asset Class | Current Allocation | Target Allocation | Conservative Portfolio | Potential Portfolio 1 | Potential Portfolio 2 | Aggressive Portfolio |
|---|---|---|---|---|---|---|
| Broad US Equity | 33.0% | 40.0% | 10.0% | 14.0% | **20.0%** | 17.0% |
| Broad Int'l Equity | 20.1% | 30.0% | 5.0% | 12.0% | **20.0%** | 30.0% |
| Emerging Markets | 3.8% | 0.0% | 3.0% | 3.0% | **4.0%** | 10.0% |
| Core Fixed Income | 0.4% | 0.0% | 43.0% | 15.0% | **10.0%** | 5.0% |
| Non-US Fixed Income UH | 0.0% | 0.0% | 9.0% | 10.0% | **5.0%** | 1.0% |
| High Yield | 0.0% | 0.0% | 5.0% | 8.0% | **5.0%** | 2.0% |
| TIPS | 10.5% | 12.0% | 0.0% | 0.0% | **0.0%** | 0.0% |
| Low Duration Fixed Income | 0.0% | 0.0% | 0.0% | 0.0% | **0.0%** | 0.0% |
| Real Estate - Core | 2.6% | 5.0% | 5.0% | 5.0% | **5.0%** | 5.0% |
| Absolute Return | 1.1% | 0.0% | 5.0% | 10.0% | **12.0%** | 10.0% |
| Private Equity | 6.3% | 10.0% | 7.0% | 10.0% | **7.0%** | 15.0% |
| Commodities - Broad | 0.0% | 0.0% | 0.0% | 0.0% | **0.0%** | 0.0% |
| Real Return | 0.0% | 3.0% | 8.0% | 12.0% | **10.0%** | 5.0% |
| Cash Equivalents | 22.2% | 0.0% | 0.0% | 1.0% | **2.0%** | 0.0% |
| **Expected Return - Arithmetic** | **6.98%** | **8.19%** | **6.64%** | **7.49%** | **7.74%** | **8.76%** |
| **Expected Risk** | **11.10%** | **14.44%** | **7.05%** | **9.90%** | **11.29%** | **14.98%** |
| **Expected Sharpe Ratio (3% RF)** | **0.36%** | **0.36%** | **0.52%** | **0.45%** | **0.42%** | **0.38%** |
| **Expected Return/Risk Ratio** | **0.63%** | **0.57%** | **0.94%** | **0.76%** | **0.69%** | **0.58%** |
| **Expected Return - Compound** | **6.41%** | **7.24%** | **6.41%** | **7.03%** | **7.16%** | **7.74%** |

Current allocation as of June 30, 2010



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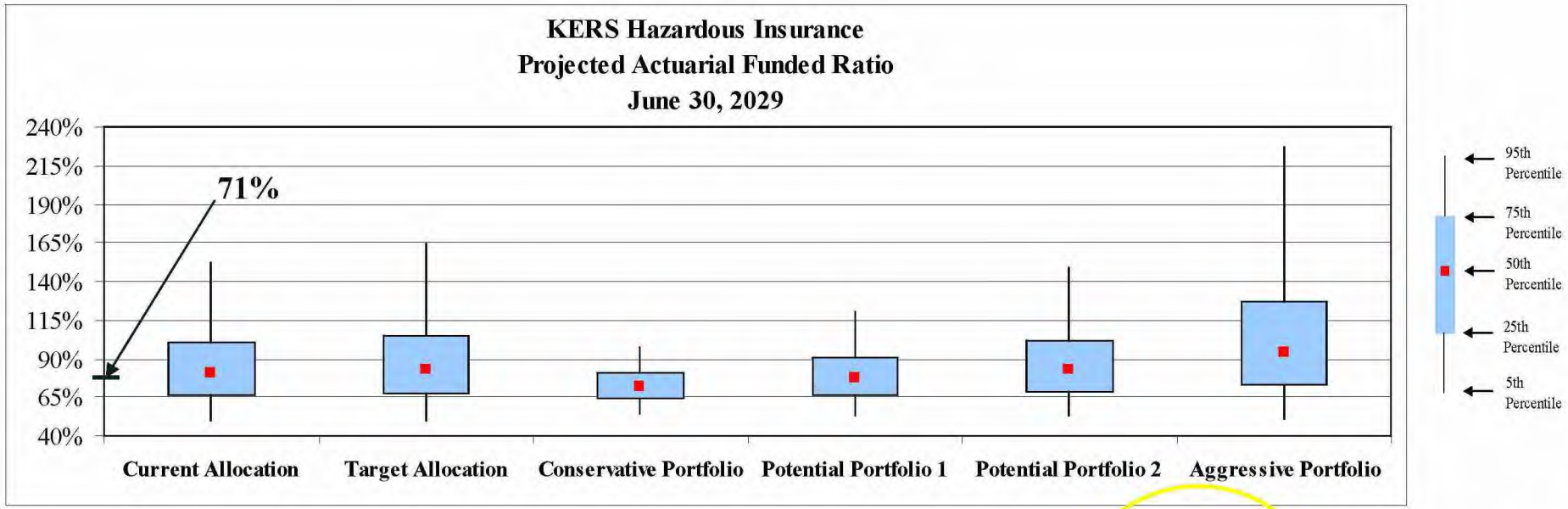
# KERS Hazardous Insurance

## Stochastic Analysis – Possible Long Term Outcomes




| | Current Allocation | | Target Allocation | | Conservative Portfolio | | Potential Portfolio 1 | | Potential Portfolio 2 | | Aggressive Portfolio | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | Unfunded Liability (Mil) | Funded Ratio | Unfunded Liability (Mil) | Funded Ratio | Unfunded Liability (Mil) | Funded Ratio | Unfunded Liability (Mil) | Funded Ratio | Unfunded Liability (Mil) | Funded Ratio | Unfunded Liability (Mil) | Funded Ratio |
| 5th Percentile | $566.5 | 50.0% | $554.0 | 50.3% | $528.6 | 53.7% | $521.0 | 53.2% | $521.6 | 52.7% | $536.5 | 50.9% |
| 25th Percentile | $350.9 | 66.4% | $339.9 | 67.4% | $386.6 | 63.7% | $347.7 | 66.7% | $323.6 | 68.9% | $282.1 | 72.6% |
| 50th Percentile | $199.6 | 80.6% | $179.8 | 82.4% | $294.3 | 71.4% | $228.4 | 77.4% | $173.4 | 83.0% | $66.1 | 93.5% |
| 75th Percentile | ($5.6) | 100.6% | ($47.5) | 104.7% | $189.9 | 81.1% | $90.2 | 90.8% | ($16.4) | 101.6% | ($297.2) | 127.1% |
| 95th Percentile | ($527.4) | 152.5% | ($667.2) | 164.3% | $31.7 | 96.9% | ($204.5) | 120.2% | ($529.6) | 148.9% | ($1,354.6) | 227.3% |



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# KERS Hazardous Insurance

## Stochastic Analysis – Drawing Inferences

| | Funded Ratio in Year 20 | | | Payout Ratios | | |
|---|---|---|---|---|---|---|
| | 50th | 5th | 95th | Year 20 Median | 2009-2029 Peak | 2009-2029 Trough |
| Current Allocation | 80.6% | 50.0% | 152.5% | 9.0% | 16.5% | 4.5% |
| Target Allocation | 82.4% | 50.3% | 164.3% | 8.8% | 16.7% | 4.2% |
| Conservative Portfolio | 71.4% | 53.7% | 96.9% | 10.4% | 14.8% | 6.5% |
| Potential Portfolio 1 | 77.4% | 53.2% | 120.2% | 9.5% | 15.1% | 5.6% |
| Potential Portfolio 2 | 83.0% | 52.7% | 148.9% | 8.8% | 15.5% | 4.6% |
| Aggressive Portfolio | 93.5% | 50.9% | 227.3% | 7.6% | 16.5% | 3.0% |
| *Deterministic* | *71.1%* | *N/A* | *N/A* | *N/A* | *N/A* | *N/A* |

# Appendix

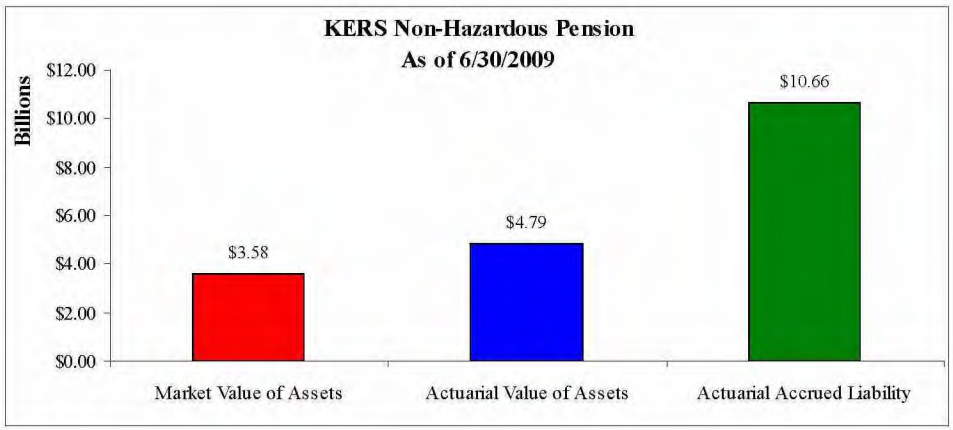


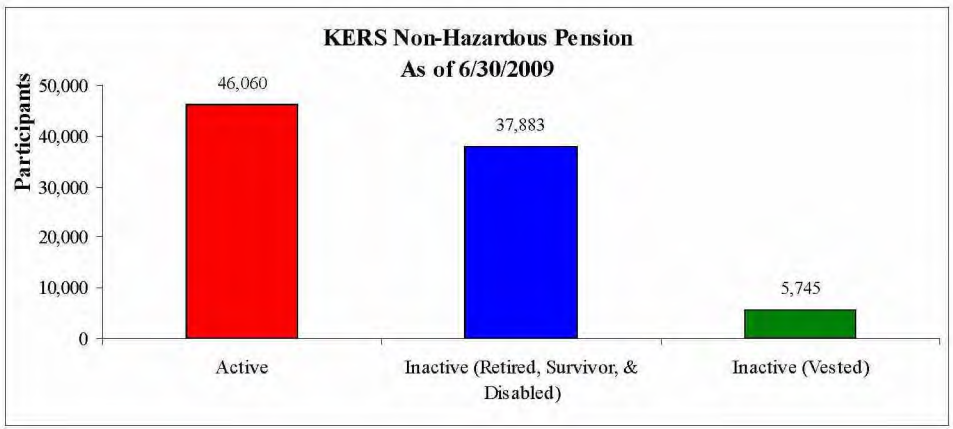
RVKuhns & ASSOCIATES, INC.

# KERS Non-Hazardous Pension

## Deterministic Analysis – Current Status

| | |
|---|---|
| **Valuation Date** | **June 30, 2009** |
| **Market Value of Assets (MVA)** | **$3,584,196,429** |
| **Actuarial Value of Assets (AVA)** | **$4,794,611,365** |
| **Actuarial Accrued Liability (AAL)** | **$10,658,549,532** |
| **Actuarial Funded Ratio (AVA/AAL)** | **45%** |
| **Market Value Funded Ratio (MVA/AAL)** | **34%** |
| **Active Participants** | **46,060** |
| **Inactive (Retired, Survivor, & Disabled) Participants Retirees and Beneficiaries** | **37,883** |
| **Inactive (Other) Participants Vested** | **5,745** |



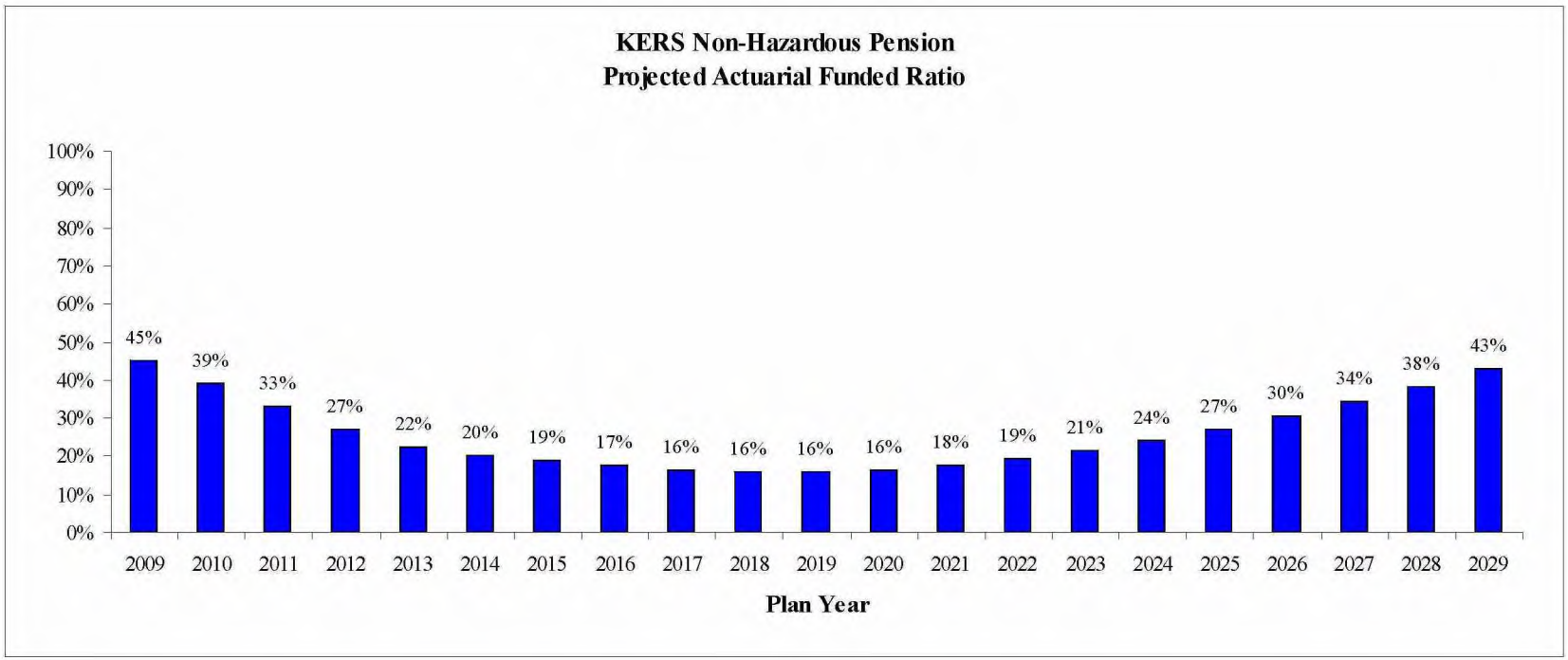






RVKuhns & ASSOCIATES, INC.

# KERS Non-Hazardous Pension

## Deterministic Analysis – Actuarial Funded Ratio



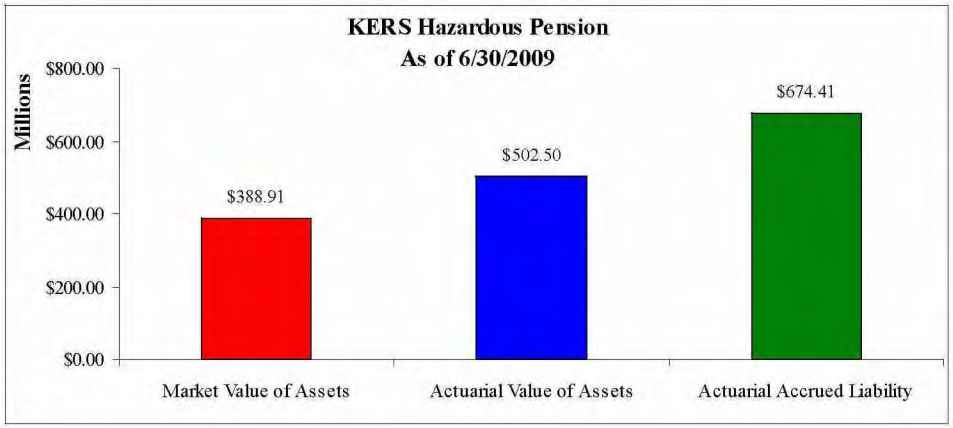


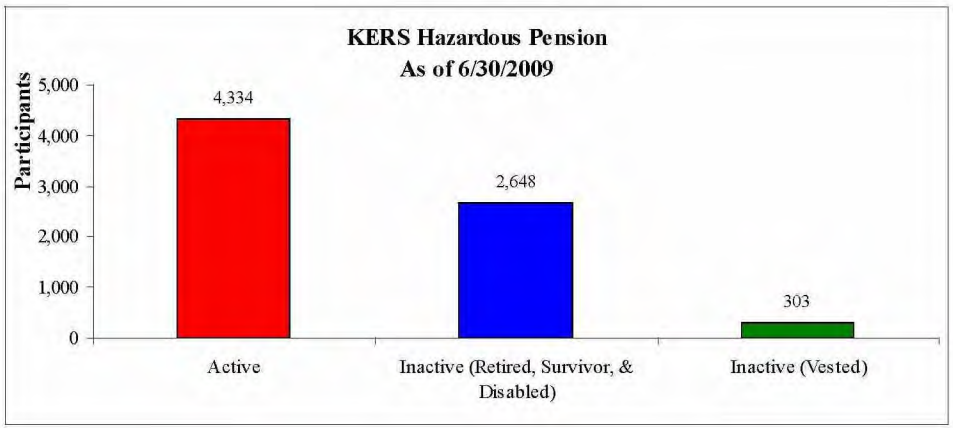

RVKuhns & ASSOCIATES, INC.

# KERS Hazardous Pension

## Deterministic Analysis – Current Status

| | |
|---|---|
| **Valuation Date** | **June 30, 2009** |
| **Market Value of Assets (MVA)** | **$388,913,374** |
| **Actuarial Value of Assets (AVA)** | **$502,503,286** |
| **Actuarial Accrued Liability (AAL)** | **$674,411,780** |
| **Actuarial Funded Ratio (AVA/AAL)** | **75%** |
| **Market Value Funded Ratio (MVA/AAL)** | **58%** |
| **Active Participants** | **4,334** |
| **Inactive (Retired, Survivor, & Disabled) Participants Retirees and Beneficiaries** | **2,648** |
| **Inactive (Other) Participants Vested** | **303** |



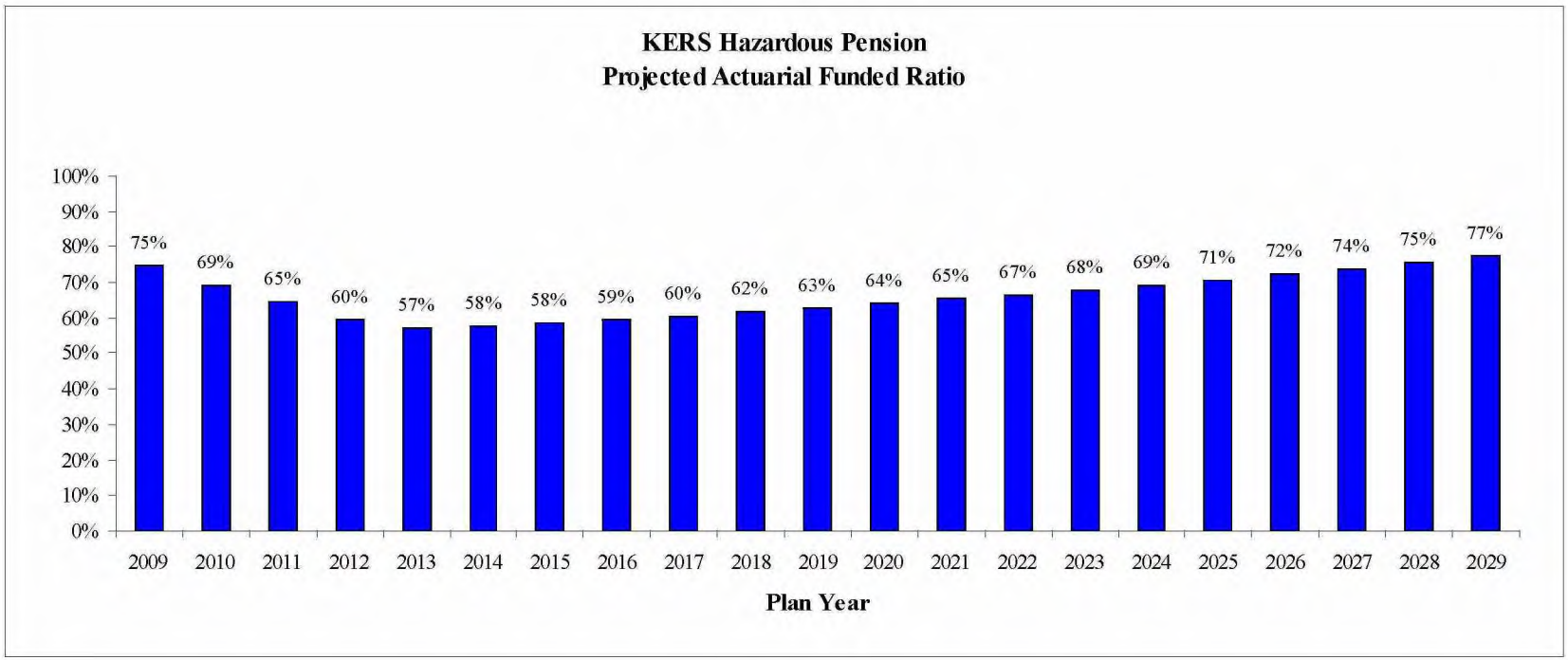






RVKuhns & ASSOCIATES, INC.

# KERS Hazardous Pension

## Deterministic Analysis – Actuarial Funded Ratio



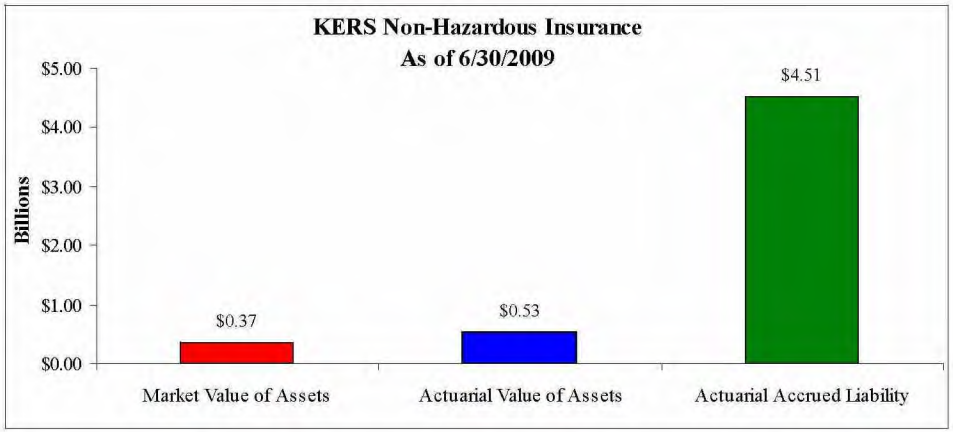


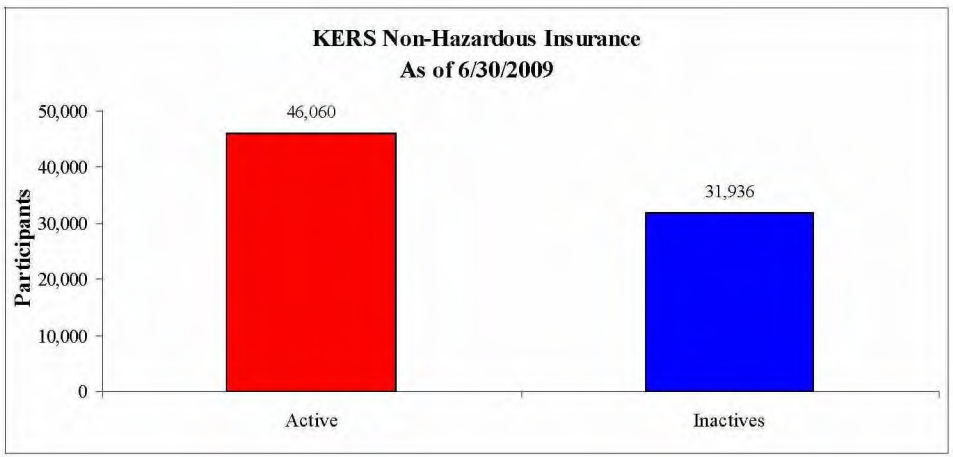

RVKuhns & ASSOCIATES, INC.

# KERS Non-Hazardous Insurance

## Deterministic Analysis – Current Status

| | |
|---|---|
| **Valuation Date** | **June 30, 2009** |
| **Market Value of Assets (MVA)** | **$365,771,088** |
| **Actuarial Value of Assets (AVA)** | **$534,172,581** |
| **Actuarial Accrued Liability (AAL)** | **$4,507,325,571** |
| **Actuarial Funded Ratio (AVA/AAL)** | **12%** |
| **Market Value Funded Ratio (MVA/AAL)** | **8%** |
| **Active Participants** | **46,060** |
| **Inactive Participants Retirees and Beneficiaries** | **31,936** |



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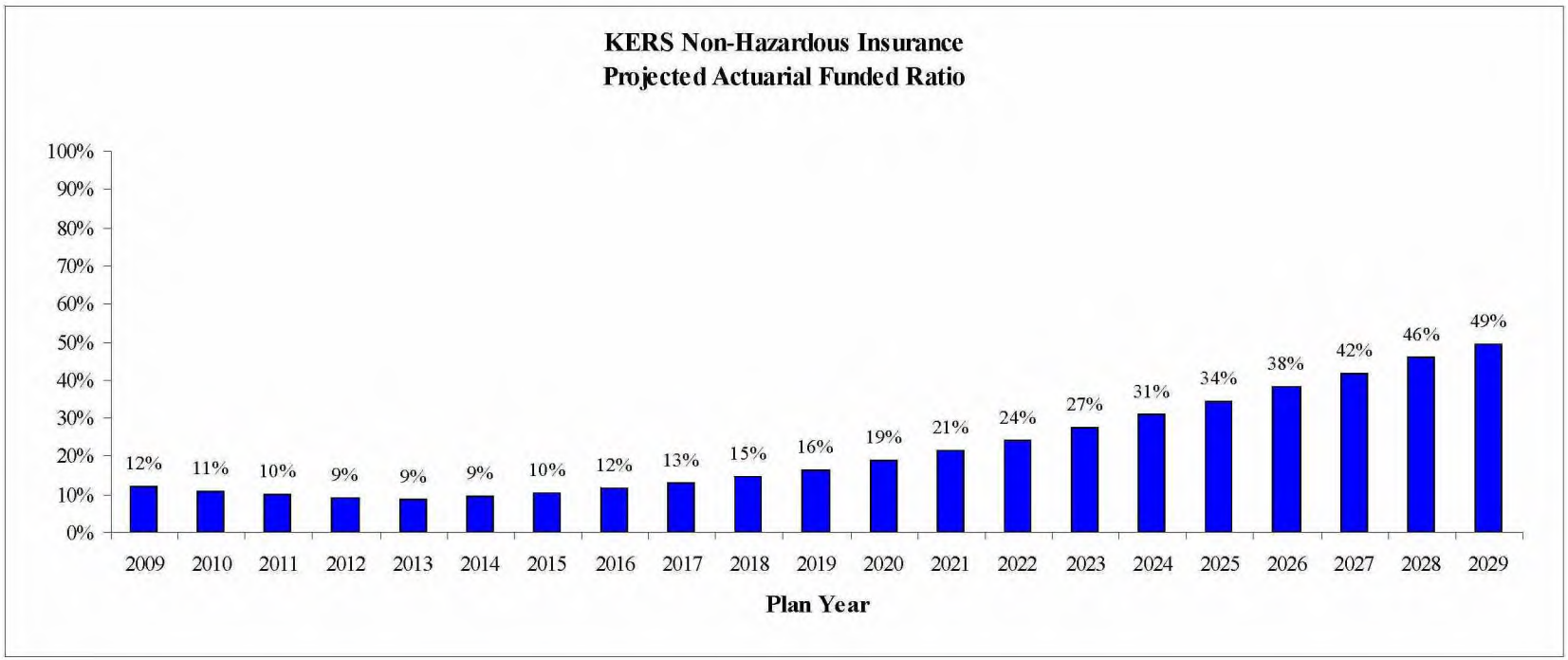
# KERS Non-Hazardous Insurance

## Deterministic Analysis – Actuarial Funded Ratio



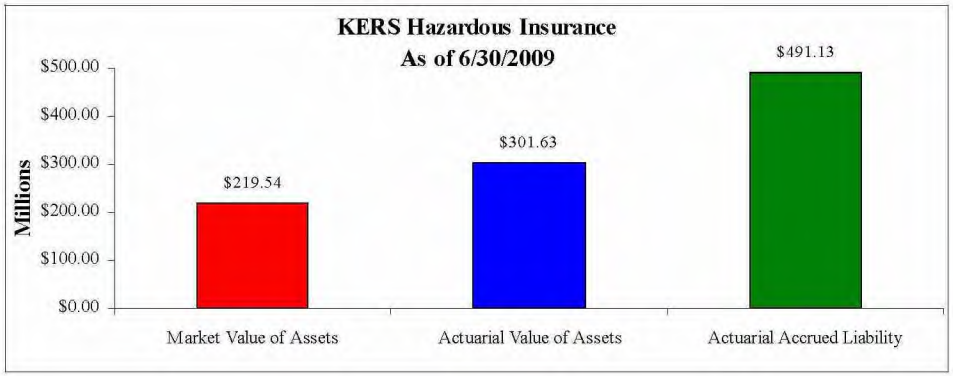


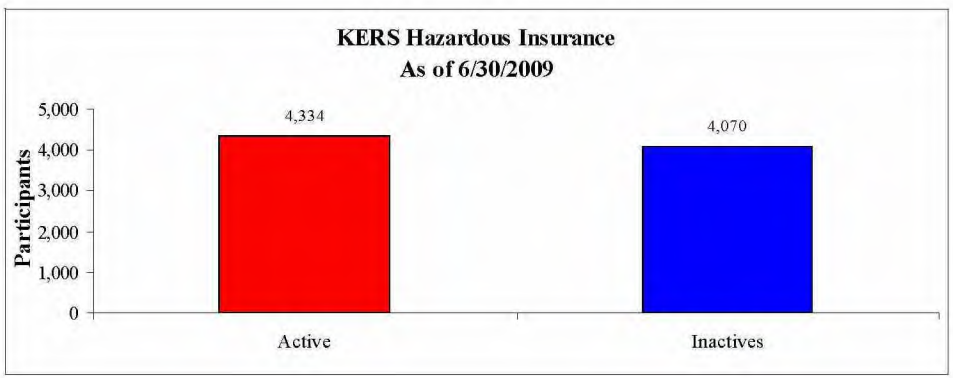

RVKuhns & ASSOCIATES, INC.

# KERS Hazardous Insurance

## Deterministic Analysis – Current Status

| | |
|---|---|
| **Valuation Date** | **June 30, 2009** |
| **Market Value of Assets (MVA)** | **$219,537,255** |
| **Actuarial Value of Assets (AVA)** | **$301,634,592** |
| **Actuarial Accrued Liability (AAL)** | **$491,132,170** |
| **Actuarial Funded Ratio (AVA/AAL)** | **61%** |
| **Market Value Funded Ratio (MVA/AAL)** | **45%** |
| **Active Participants** | **4,334** |
| **Inactive Participants Retirees and Beneficiaries** | **4,070** |



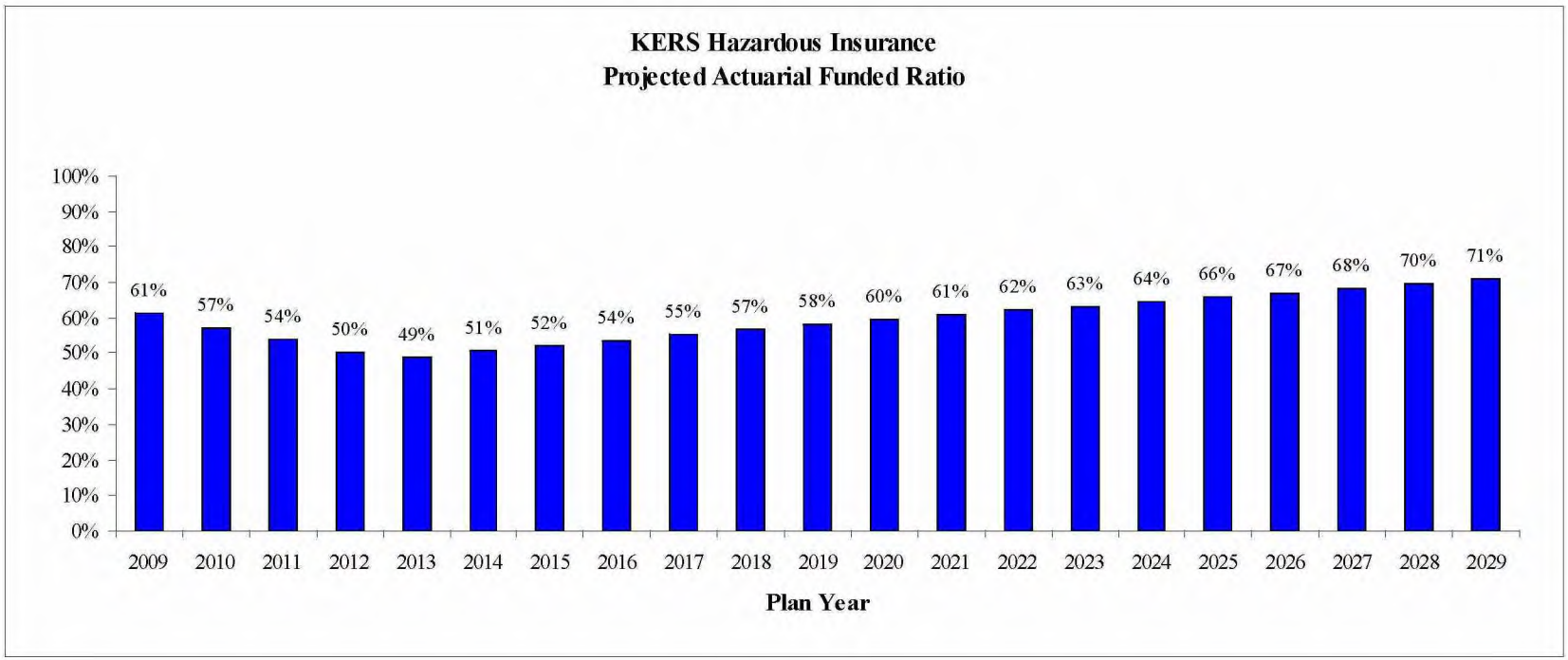






RVKuhns & ASSOCIATES, INC.

# KERS Hazardous Insurance

## Deterministic Analysis – Actuarial Funded Ratio



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# KERS Asset/Liability Studies

## Footnotes

- Used data from the most recent (June 30, 2009 KERS Actuarial Valuation to project liabilities.
- Took into account the effects of House Bill 1 from 2008 which sets future State contributions as a percentage of the Annual Required Contribution.
- Used the Actuarial Cost Method and assumes these assumptions remain constant in the future.
- Compared these specific investment strategies – (A) Current Allocation, (B) Target Allocation, (C) a conservative illustrative portfolio (Conservative Portfolio), (D) diversified lower risk (Potential Portfolio 1), (E) diversified higher risk (Potential Portfolio 2), and (F) an aggressive illustrative portfolio (Aggressive Portfolio) – expressed as total fund asset allocations to the projection of Fund liabilities.
- Did not assume any actuarial adjustments that may take place in future years.

# Exhibit B

# Kentucky Retirement Systems

Statement of Investment Policy
Approved May 2011

This statement of investment policy is issued by the Board of Trustees of the Kentucky Retirement Systems (Systems) in connection with investing the pension and insurance funds of the Kentucky Employees Retirement System, the County Employees Retirement System and the State Police Retirement System. This document supersedes all prior documents entitled Statement of Investment Policy.

## I. The Board of Trustees

The Kentucky Retirement Systems is a "Qualified Pension Plan" under Section 401 of the Internal Revenue Code and is administered by a board of nine trustees.

KRS 61.701 establishes the "Kentucky Retirement Systems Insurance Fund" as a separate fund to provide fringe benefits to recipients of the Kentucky Employees Retirement System, County Employees Retirement System and State Police Retirement System. KRS 61.702 provides that all amounts necessary to provide for insurance benefits shall be paid to the insurance fund. The Board shall administer the fund in the same manner as the retirement funds.

Three trustees are appointed by the Governor of the Commonwealth of Kentucky (two of which must be filled by persons with specific experience as required in Section 61.645.1.e.2), two trustees are elected by the membership of the Kentucky Employees Retirement System, two trustees are elected by the membership of the County Employees Retirement System, and one trustee is elected by the membership of the State Police Retirement System. The Secretary of the Personnel Cabinet is an ex-officio trustee.

The Board of Trustees authorizes and directs the appointment of an Investment Committee with full power to act for the board in the acquisition, sale and management of the securities and funds of the Systems in accordance with the provisions of the Statutes and Investment Policy of the Board. The Board shall review the actions of the Investment Committee at each quarterly Board meeting.

## II. The Investment Committee

The Investment Committee consists of five members of the Board of Trustees. Three members of the committee are appointed by the chairperson of the Board of Trustees. In accordance with statute, two position are filled by the Trustees that were appointed to the board as persons with specific experience (Section 61.645.1.e.2). The committee acts on behalf of the board on investment related matters.

The Investment Committee has the following oversight responsibilities:

A. Assure compliance with this policy and all applicable laws and regulations.

B. Approve the selection and termination of service providers.

C. Meet quarterly to evaluate whether this policy, the investment activities and

management controls and processes continue to be consistent with meeting the Systems' goals. Mandate actions necessary to maintain the overall effectiveness of the program.

D. Review assessment of investment program management processes and procedures, and this policy relative to meeting stated goals.

## III. Staff Responsibilities

The Chief Investment Officer is responsible for administration of investment assets of the Systems consistent with the policies, guidelines and limits established by the law, this Statement of Investment Policy and the Investment Committee.

The Chief Investment Officer receives direction from and reports to the Investment Committee and the Executive Director of the Systems on all investment matters, including but not limited to the following:

A. Maintaining the diversification and risk exposure of the funds consistent with policies and guidelines.

B. Monitoring and assessing service providers, including annual onsite visits, to assure that they meet expectations and conform to policies and guidelines.

C. Assess and report on the performance and risk exposure of the overall investment program relative to goals, objectives, policies and guidelines.

D. Recommend changes to service providers, statutes, policies or guidelines as needed to maintain a productive relationship between the investment program and its goals; act as liaison on all investment related matters.

E. Communicating with the mass media and other agencies, entities or institutions regarding investment related issues.

F. Identify issues for consideration by the Investment Committee and prepare recommendations regarding such matters.

The Chief Investment Officer or designee is authorized to execute trades on fixed income and equity securities (including ETF's) and to execute proxies for the Board consistent with this Policy.

To carry out this Policy and investment related decisions of the Board, the Chief Investment Officer or designee is authorized to execute agreements and other necessary or proper documents pertaining to investment managers, consultants, investment related transactions or other investment functions.

## IV. Service Providers

A. Investment Managers

In instances where the Investment Committee has determined it is desirable to employ the services of an external Investment Manager, the following shall be applicable:

1. Investment Managers shall be qualified and agree to serve as a fiduciary to the Systems and shall generally have been in the business of investment management for

large United States institutional investors for at least three to five years.

2. Investment Managers shall manage assets in accordance with this Policy and any additional guidelines established by contract, as may be modified in writing from time to time.

B. Custody Bank

The Board shall hire custodians and other agents who will be fiduciaries to the Systems and who will assume responsibility for the safekeeping and accounting of all assets held on behalf of the Systems and other duties as agreed to by contract.

C. Investment Consultants

Qualified independent investment consultants may be retained by the Systems for asset allocation studies, asset allocation recommendations, performance reviews, manager searches and other investment related consulting functions and duties as set forth by contract.

D. Selection

Qualified investment managers, custody banks, investment consultants and other service providers shall be selected by the Investment Committee or Chief Investment Officer as required. The selection shall be based upon the demonstrated ability of the professional(s) to provide the required expertise or assistance. In order to create an efficient and effective process, the Investment Committee or Chief Investment Officer may, in their sole discretion, utilize RFI, RFP, third party proprietary software or database, review of existing service provider capabilities or any combination of these or other methods to select a service provider. Relevant criteria for the selection of investment managers are contained in the Transactions Procedures statement.

All contact and communication with service providers seeking a business relationship with the Systems shall be directed to the Division Director for that specific asset class. However, this rule is not applicable to existing service providers if the contact or communication is in response to an information request from the Investment Committee or if it is incidental contact not related to specific Systems business.

## V. Investment Philosophy

The Trustees of the Kentucky Retirement Systems recognize their fiduciary duty not only to invest the Systems' funds in formal compliance with the Prudent Person Rule but also to manage those funds in continued recognition of the basic long term nature of those systems. The Trustees interpret this to mean, in addition to the specific guidelines and restrictions set forth in this document, that the assets of the three systems shall be proactively managed -- that is, investment decisions regarding the particular asset classes, strategies, and securities to be purchased or sold shall be the result of the conscious exercise of discretion.

The Trustees recognize that, commensurate with their overall objective of maximizing long-range return while maintaining a high standard of portfolio quality and consistency of return, it is necessary that proper diversification of assets be maintained both across and within the classes of securities held to minimize/mitigate overall portfolio risk. Consistent with carrying out their Fiduciary

Responsibilities and the concept of Modern Portfolio Theory, the Trustees will not systematically exclude any investments in companies, industries, countries, or geographic areas unless required to do so by statute. Within this context of proactive management and the necessity for adherence to proper diversification, the Trustees rely upon appropriate professional advice from multiple service providers.

The Trustees and other fiduciaries shall discharge their duties with respect to the Systems: (1) solely in the interest of the participants and beneficiaries; (2) for the exclusive purpose of providing benefits to participants and beneficiaries; (3) with the care, skill and caution under the circumstances then prevailing which a prudent person acting in a like capacity and familiar with those matters would use in the conduct of an activity of like character and purpose; (4) impartially; (5) incurring and paying appropriate and reasonable expenses of administration and (6) in accordance with a good faith interpretation of the laws, regulations and other instruments governing the Systems.

Additionally, the Trustees and other fiduciaries shall not engage in any transaction which results in a substantial diversion of the Systems income or assets without adequate security and reasonable rate of return to a disqualified person or in any other prohibited transaction described in Internal Revenue Code Section 503(b).

## VI. Investment Objectives

The Board of Trustees realizes that prudent investment management is a duty. In fulfillment of this duty, the Board of Trustees recognizes that while long-term objectives are important, it is also necessary that short-term benchmarks be used to assess the periodic performance of the investment program.

Accordingly, the Board of Trustees has established the following investment objectives:

- Long-Term:
  - The total assets of the Systems should achieve a return which exceeds the actuarially required rate of return of 7.75%.
  - In addition to exceeding the actuarially required rate of return, the total fund return should exceed the return achieved by its blended performance benchmark.
- Short-Term:
  - The returns of the particular asset classes of the System, measured on a rolling basis, should seek to exceed the returns achieved by comparable passive market indices as described in the appropriate Addendum of this statement.

## VII. Derivative Securities and Leveraging

Derivative Securities

Investment managers may invest in derivative securities, or strategies which make use of derivative investments, for exposure, cost efficiency and risk management purposes, if such investments do not cause the portfolio to be leveraged beyond a 100% invested position. Examples of such derivatives include, but are not limited to, foreign currency forward contracts, collateralized mortgage obligations (CMOs) , futures, options, and swaps.

Investments in securities such as collateralized mortgage obligation (CMO), planned amortization class (PAC) issues, interest only (IO), principal only (PO), inverse floater, or structured note securities are prohibited unless specifically allowed in a managers contract. They will then only be allowed if, in the judgment of the investment manager, they are not expected to be subject to large or unanticipated changes in duration or cash flows. IO, PO, inverse floaters, and structured note securities are not allowed for use in cash or core fixed income portfolios. Investment managers may make use of derivative securities for defensive or hedging purposes.

Any derivative security shall be sufficiently liquid that it can be expected to be sold at, or near, its most recently quoted market price.

Leveraging

Leveraging for purposes of enhancing yield or total return is expressly prohibited except for investments in alternative and absolute or real return investments. Investment managers in these strategies/investments are granted the authority to engage in positive leverage to the extent authorized in their offering memorandum or written agreement.

The above is not intended to limit the Systems from borrowing to cover short-term cash flow needs nor prohibit the Systems from loaning securities in accordance with a securities lending agreement.

## VIII. Asset Allocation Guidelines

In establishing asset allocation guidelines the Board recognizes that each system has its own capacity to tolerate investment volatility, or risk. Therefore, each system has been studied and asset allocation guidelines have been established on a system by system basis. The Board will cause the asset allocation guidelines of each system to be reviewed annually. The Board will also undertake an asset liability study every three to five years as determined by program needs.

The intent of the Board of Trustees in allocating funds to the investment managers is for the investment managers to fully invest the funds. However, the Board of Trustees is aware that from time to time the investment manager will require a portion of the allocated funds to be held in cash provided the cash holdings do not exceed three percent (3%) of the manager's allocation for any given quarter, unless such cash holdings are an integral part of a fixed income manager's investment strategy.

The individual plan level asset allocations of the each Pension and Insurance Fund constituent will be reviewed monthly by staff relative to its target asset class allocation. Staff shall reallocate the assets when the actual asset class allocation is within one percentage point of the allowable range boundary, but may also opportunistically reallocate when the actual asset class allocation exceeds the target asset class allocation by a margin of +/- 1 percentage points. See Appendix A and B for current asset allocation targets.

In keeping with its responsibility as trustee and wherever consistent with its fiduciary responsibility, the board encourages the investment of the fund's assets in investments, funds, and securities of corporations which provide a positive contribution to the economy of the Commonwealth of Kentucky. However, where any security is not a prohibited investment under the governing laws and policies,

discretion will be granted to the appointed investment managers in the selection of such securities and timing of transactions consistent with the following guidelines and restrictions.

A. Domestic Equity Investments

Investment may be made in common stock, securities convertible into common stock, preferred stock of publicly traded companies on stock markets, asset class relevant ETF's or any other type of security contained in a manager's benchmark. Each individual domestic equity account shall have a comprehensive set of investment guidelines prepared, which contains a listing of permissible investments, portfolio restrictions and standards of performance for the account.

The internally managed equity index funds are intended, consistent with the governing plan documents, to gain exposure to a broad asset sector to replicate the characteristics of the asset class, to minimize administrative expenses and to help achieve overall portfolio objectives. These objectives can be achieved through several management techniques, including but not limited to, portfolio optimization, non-reinvestment of index dividends and other management techniques intended to help achieve the objectives of the entire pension fund.

B. International Equity Investments

Investments may be made in common stock, securities convertible into common stock, preferred stock of publicly traded companies on stock markets, asset class relevant ETF's or any other type of security contained in a manager's benchmark. Each individual international equity account shall have a comprehensive set of investment guidelines prepared, which contains a listing of permissible investments, portfolio restrictions and standards of performance for the account.

The internally managed equity index funds are intended, consistent with the governing plan documents, to gain exposure to a broad asset sector to replicate the characteristics of the asset class, to minimize administrative expenses and to help achieve overall portfolio objectives. These objectives can be achieved through several management techniques, including but not limited to, portfolio optimization, non-reinvestment of index dividends and other management techniques intended to help achieve the objectives of the entire pension fund.

C. Fixed Income Investments

Fixed Income investments will be similar in type to those securities found in the KRS fixed income benchmarks and the characteristics of the KRS fixed income portfolio will be similar to the KRS fixed income benchmarks. The fixed income accounts may include, but are not limited to the following fixed income securities: U.S. Government and Agency bonds, investment grade U.S. corporate credit, investment grade non-U.S. corporate credit, non-investment grade U.S. corporate credit including both bonds and bank loans, non-investment grade non U.S. corporate credit including bonds and bank loans, municipal bonds, non-U.S. sovereign debt, mortgages including residential mortgage backed securities, commercial mortgage backed securities, and whole loans, asset-backed securities, and emerging market debt including both sovereign EMD and corporate EMD and asset class relevant ETF's.

Each individual fixed income account shall have a comprehensive set of investment guidelines prepared, which contains a listing of permissible investments, portfolio restrictions, risk parameters, and standards of performance for the account.

D. Alternative Investments

Subject to specific approval of the Investment Committee of the Board of Trustees, investments may be made for the purpose of creating a diversified portfolio of alternative investments. Examples of such investments include, but are not limited to, venture capital partnerships, private equity, leveraged buyouts and funds, private debt, timberland, oil and gas partnerships, commodities and private placements. While it is expected that the majority of these assets will be invested within the United States, a portion has been allocated to non-US investments. These non-U.S. investments are not restricted by geography.

It is expected that these investments will typically be structured as Limited Partnerships, with KRS serving as one of the Limited Partners, but not as a General Partner. It is also expected that KRS will not engage in direct investments or co-investments, in which the System would purchase majority control in individual corporate entities.

Alternative investments are unique, illiquid and long term in nature; as such, public indices do not serve as a true benchmark. Given this, circumstance leads to the possibility of large short term performance discrepancies, KRS more appropriately measures its alternative investments based on a preponderance of indices. In order to address differences between the long-term performance and biases introduced by life cycle stage dependent return profiles inherent to many alternative investments, on an annual basis, the Total Alternative Investment allocation and its underlying investments will be compared to other investments with similar strategies and of the same vintage year as reported by Venture Economics.

Over the long term, KRS will use a specified index plus risk premium approach.

*Total Alternative Investment Allocation:* The Total Alternative Investment Allocation shall have a performance benchmark that consists of the KRS Alternative Investment Index. Alternative Investment sub-asset class segments shall be assigned a performance benchmark and comply with relevant Standards.

Venture Capital

Description: Venture capital investments are seed stage, early stage, later stage, and expansion stage investments. Investments are often made in years one through five and distributions typically occur in years four through ten, or longer.

Investment Constraints: Over the life of the fund, no more than 35% of total net assets of an individual partnership may be invested in securities or obligations of foreign entities issued outside the U.S. No more than 50% of total net assets of an individual partnership may be invested in a single segment within a particular industry.

Buyouts

Description: Buyout investments typically involve the purchase of a control position (primarily majority positions, with some minority positions) in an established company. Leverage may be used. Investments are often made in years one through four and distributions typically occur in years three through six.

Investment Constraints: Over the life of the fund, no more than 35% of total net assets of an individual partnership may be invested in securities or obligations of foreign entities issued outside the U.S. No more than 50% of total net assets of an individual partnership may be invested in a single segment within a particular industry.

Debt-Related

Description: Debt-related investments combine a debt instrument, which provides a current yield, with an equity participation in warrants, etc. Investments are typically made in years one through three and provide current income combined with capital appreciation supplied by the warrants or other "equity kickers".

Investment Constraints: Over the life of the fund, no more than 35% of total net assets of an individual partnership may be invested in securities or obligations of foreign entities issued outside the U.S. Investments may be made in equity or debt related real estate assets. The General Partner may not purchase securities on margin or otherwise borrow funds for the purposes of purchasing securities.

International

Specific International guidelines will follow the sections covering buyout, venture capital, and debt related investments. However, international investments are exempt from the investments constraints prohibiting investments outside of the U.S. as these investments are expected to hold majority of their assets outside of the U.S.

To ensure prudent diversification and due to unique characteristics of international private equity markets, it is expected that the international exposure will be provided by fund-of-fund vehicles, and targeted direct partnership vehicles.

The following sub-asset target allocations are based on market value:

| **Sub-Category** | **Target Allocations** | **Ranges** |
|---|---|---|
| Venture Capital | 20.0% | 10-30% |
| Buyouts | 60.0% | 40-70% |
| Debt-Related | 20.0% | 10-30% |

E. Real Estate Investments

Subject to specific approval of the Investment Committee of the Board of Trustees, Investments may be made in equity and debt real estate for the purpose of achieving the highest total rate of return possible consistent with a prudent level of risk. Allowable real estate investments include open-end and closed-end commingled real estate funds, joint venture investments,

public and private REITs (real estate investment trusts), public real estate operating companies, and real estate related debt .

KRS has determined that the primary role of the real estate asset class is to provide for the following:

- Attractive risk adjusted returns through active management and ability to access managers with the expertise and capabilities to exploit market inefficiencies in the asset class.

  The illiquid nature of real estate investments combined with the complexity of investments makes it difficult for casual investors to effectively access the asset class effectively.

  It is the belief that through active management and by investing in top tier managers with interests aligned through co-investment and incentive based compensation, KRS can maximize its risk adjusted returns.

  This active management approach will be pursued.

- Diversification benefits through low correlations with other asset classes, primarily the U.S. equity markets.

- Provide a hedge against unanticipated inflation, which real estate has historically provided due to lease structures and the increases in material and labor costs during inflationary periods.

- Permit KRS to invest in unique opportunities that arise due to dislocations in markets that occur from time to time.

Allocation to Real Estate Asset Class

KRS will endeavor to achieve the target allocation over a three to five year period by averaging into the market and avoiding any concentrated vintage year risks.

For purposes of this investment Policy, the real estate investment universe is divided into the following sectors, with descriptive attributes to follow:

A. Core Properties

- Operating, substantially leased office, retail, industrial or apartment properties. Several alternative property types may be included in Core such as self-storage, medical office, ground leases, senior housing and triple net leased properties to the extent they exhibit similar risk and return attributes to the traditional Core property types.

- Generally have institutional qualities for size, physical attributes and location.

- Target total returns of 7%-9% per year (net of fees and promoted interest), with a high proportion of the total return to be generated from current income and a small proportion of the total return generated from appreciation.

- Leverage for core properties is moderate with an upper limit of 50% loan to value.

B. Value Added Properties

- Office, retail, industrial or apartment properties that have moderate risk associated with their investment. Several alternative property types may be included in Value-Added such as self-storage, medical office, senior housing and triple net leased properties to the extent they exhibit similar risk and return attributes for Value-Added investments.

- Value-Added investments are targeted to capitalize on defects with specific properties that can be identifiable and correctable through leasing, re-development, management and/or recapitalization.

- Target returns for value added investments are 9% to 12% per year (net of fees and promoted interest).

- Leverage for value added investments is generally limited to approximately 65% loan to value.

C. Opportunistic Investments

- Opportunistic investments can be comprised of any property sector. Opportunistic investments can include office, retail, industrial and apartments with high-risk attributes. In addition, hotels, operating companies, development, land and distressed properties are all examples of opportunistic investments

- Leverage for opportunistic investments can be 75% loan to value or higher in certain cases.

- Opportunistic investments will generate returns in excess of 12% (net of fees and promoted interest) in order to compensate for the additional risk commensurate with the increased risk compared to core property investments.

D. Public Securities

- Real estate public securities ("Public Securities") do not allow control over the assets or management.

- Public Securities generally have higher risk and return characteristics than Core properties due to higher leverage and operating company risks. In addition, the daily pricing of securities result in additional reported volatility of returns.

- Daily pricing and public market trading provide liquidity. However, due to small float and limited market capitalization of Public Securities, improved liquidity may come at a price.

- The emergence of the international Public Securities market has broadened the universe to include Asia, European, Australian and North American property companies.

- Expected returns are approximately 9%-11% (net of fees) over a 10-year period and 11-13% (net of fees) for non-U.S. Public Securities.

KRS will seek to limit investments using the following diversification limits:

| | Target | Range |
|---|---|---|
| Core: | 70% | 50% to 90% |
| Value Added: | 20% | 10% to 30% |
| Opportunistic: | 10% | 0% to 20% |
| Public Securities: | 0% | 0% to 20% |

KRS seeks to maintain the flexibility to overweight or underweight any sector in order to capitalize on market opportunities.

Investment Vehicles

Due to the size of KRS's portfolio, the preferred investment structure is commingled funds. Exceptions may be for public equity accounts which may be efficiently invested through a separate account or single property investments. Single property investments shall be limited to no more than 5% of the total real estate allocation.

KRS may also consider co-investment opportunities in cases where discounted fees and appropriate diversification can be achieved for a particular investment opportunity.

Diversification

KRS will seek to control risk in its real estate investment program by diversifying its investments by investment manager, property type and location diversification.

E. Investment Manager

KRS will limit the amount committed to one investment manager to no more than twenty percent (20%) of the total allocation for real estate investments.

F. Property Type Diversification

KRS will seek to limit investments by property type diversification using the following limits:

| | |
|---|---|
| Office: | 0% to 40% of the total allocation |
| Retail: | 0% to 40% of the total allocation |
| Apartment: | 0% to 40% of the total allocation |
| Industrial: | 0% to 40% of the total allocation |
| Other: | 0% to 40% of the total allocation |

(other includes hotels, self-storage, parking, etc.)

Total Leverage

KRS recognizes that leverage is an inherent component of real estate investments and use of leverage can be an effective means to increase overall returns from time to time on a risk-adjusted basis. There will be a limit of 75% of the total portfolio placed on the use of leverage.

All portfolio leverage will be secured through the individual fund investments. There will be no recourse debt permitted.

Investment Size

The maximum investment size for any single investment shall be limited to fifteen percent (15%) of the total real estate allocation, or $100 million, whichever is greater.

E. Real Return Investments

Real return investment strategies target a return that exceeds inflation by some premium (e.g. CPI + 3%) based on the risk inherent in the overall program. Real return managers typically invest in a core of "real" return assets, such as TIPS (and Linkers), commodities, infrastructure, timber, oil, energy, MLP's and core real estate, as well as traditional asset classes such as equity and fixed income. Additionally, real return managers attempt to add value by tactically allocating to asset classes they perceive to be undervalued, thus contributing to the "real" return orientation.

To avoid concentration risk, real return investments must be diversified by asset class, and maintain a core portfolio position in real assets, or assets that generally exhibit a positive correlation with inflation over time. Leverage shall not be employed within real return portfolios.

F. Cash Equivalent Securities

Selection of particular short-term instruments, whether viewed as liquidity reserves or as investment vehicles, should be determined primarily by the safety and liquidity of the investment and only secondarily by the available yield. The following short-term investment vehicles are considered acceptable:

Publicly traded investment grade corporate bonds, variable rate demand notes, government and agency bonds, mortgages, and collective STIFs, money market funds or instruments (including, but not limited to, certificates of deposit, bank notes, deposit notes, bankers' acceptances and commercial paper) and repurchase agreements relating to the above instruments. Instruments may be selected from among those having an investment grade rating at the time of purchase by at least one recognized bond rating service. In cases where the instrument has a split rating, the lower of the two ratings shall prevail. All instruments shall have a maturity at the time of purchase that does not exceed two years. Repurchase agreements shall be deemed to have a maturity equal to the period remaining until the date on which the repurchase of the underlying securities is scheduled to occur. Variable rate securities shall be deemed to have a maturity equal to the time left until the next interest rate reset occurs, but in no case will any security have a stated final maturity of more than three years.

The Systems' fixed income managers that utilize cash equivalent securities as an integral part of their investment strategy are exempt from the permissible investments contained in the preceding paragraph. Permissible short-term investments for fixed income managers shall be included in the investment manager's investment guidelines.

**Absolute Return Program**

Subject to specific approval of the Investment Committee of the Board of Trustees, investments may be made for the purpose of creating a diversified portfolio of absolute return investments. Examples of such investments include, but are not limited to, fund of hedge funds, multi-strategy hedge funds, and single strategy hedge funds. The objective of the absolute return strategy is to preserve capital and deliver positive (absolute) returns under most market conditions. It is anticipated that the returns from this program should largely be uncorrelated to market movements in both the equity and fixed income markets (systematic risk) and primarily be based on manager skill; therefore, helping to diversify the overall KRS portfolio. It is intended that this program be structured so that risk should be specific to each manager, not to the systematic risk of the markets. By emphasizing absolute, rather than relative returns, and utilizing a wider range of investment techniques, such as leverage, short selling and derivatives to achieve their objectives, hedge funds are expected to deliver an absolute return with a risk level between that of stocks and bonds. As such, the objective of the Absolute Return Program is designed to help reduce the volatility of the overall KRS portfolio while seeking to enhance returns in a variety of market environments.

KRS does not consider Absolute Return Strategies to be a separate asset class, but rather a set of investment strategies utilizing public and private securities and instruments.

The list of absolute return strategies that the KRS absolute return portfolio may utilize via direct hedge funds or fund of hedge funds include, but are not limited to:

- **Convertible Arbitrage:** Investment strategy that is long convertible securities and short the underlying equities
- **Distressed Securities:** Invests long (and some short) securities of companies that are in reorganizations, bankruptcies, or some other corporate restructuring
- **Emerging Markets:** Investment in securities of companies in developing or "emerging" countries - primarily long
- **Growth Funds:** Investment in a portfolio or "core" holdings in growth stocks. Many of these portfolios are hedged by shorting and utilizing options
- **Macro Funds:** The investment philosophy is based on shifts in global economies. Derivatives are often used to speculate on currency and interest rate moves
- **Market Neutral:** Strategy that attempts to lockout or "neutralize" market risk
- **Market Timing:** Allocation of assets among investments primarily switching between mutual funds and money markets
- **Merger Arbitrage:** Invests in event-driven situations of corporations, such as leveraged buy-outs, mergers, and hostile takeovers. Managers purchase stock in the firm being taken over and, in some situations, sell short the stock of the acquiring company
- **Multistrategies:** Specific portions are utilized for separate strategies, e.g., growth, convertible arbitrage, and market neutral
- **Opportunistic:** Investment theme is dominated by events that are seen as special situations or opportunities to capitalize from price fluctuations or imbalances
- **Sector Funds:** Invest in companies in sectors of the economy, e.g., financial institutions or bio-technologies. These funds invest in both long and short securities and will utilize options
- **Short Selling:** Short selling of securities
- **Derivative Funds:** These funds invest in derivative instruments such as futures and options with the aim of achieving high returns
- **Commodity Funds:** These funds invest in shares of companies that operate in commodity related industries or hold physical commodities such as bullion
- **CTA:** A fund that is a Commodity Trading Advisor's account where the trades are generally focused in commodity futures, options, and foreign exchange with a high degree of leverage
- **Short Bias:** A fund that consistently maintains a net short position to the overall market

## IX. Standards of Measurement

Performance Measurement

The Kentucky Retirement Systems ("KRS") overall fund performance is measured relative to the KRS Pension or Insurance Total Fund Benchmark. The benchmark is calculated by means of a weighted average methodology. This method is consistent with industry-wide standards and the practices utilized by the CFA Institute. It is the product of the various component weights (i.e., asset classes' percentages) by their respective performance (returns). Due to market fluctuations and acceptable divergence, the asset classes' weights (percentages) are often not equivalent to the benchmark's weights. Therefore, the performance may indicate that the Funds have outperformed (underperformed) relative to their respective benchmarks, even when the preponderance of lesser weighted categories have underperformed (outperformed) their indices.

KRS measures its asset classes, sub-asset classes, sectors, strategies, portfolios, and instruments (investment) performance with indexes that are recognized and published (e.g., S&P 500 & Barclays Aggregate Bond Index). These indices are determined to be appropriate measures of investments and composites of investments with identical or similar investments profiles, characteristics, and strategies. The benchmarks and indexes are intended to be objective, investable, replicable, representative and measurable of the investment mandate and, developed from publicly available information that is acceptable to KRS and the investment manager/advisor as the neutral position consistent with the underlying investor status. KRS' investment consultant and staff recommend the benchmarks and indexes. These measures shall be subject to the annual review and approval of the KRS Investment Committee and ratification of the Kentucky Retirement Systems' Board of Trustees.

The KRS Total Fund Benchmarks and sub-components, indexes, are described in Appendix A and B of this document.
The following descriptions represent general standards of measurement that will be used as guidelines for the various classes of investments and managers of the Kentucky Retirement Systems. They are to be computed and expressed on a time-weighted total return basis:

*Total Public Asset Class Allocations*

Short-term

- For periods less than five years or a full market cycle, the Asset Class Allocation should exceed the returns of the appropriate Index.

- Intermediate & Long-term

- For periods greater than five years or one market cycle, the Asset Class Allocation should exceed the appropriate Index, compare favorably on a risk-adjusted basis, and generate returns that rank above the median return of a relevant peer group. Volatility, as measured by the standard deviation of monthly returns, should be comparable to the Index.

*Individual Public Security Portfolios:* Individual portfolios shall be assigned a market goal or benchmark that is representative of the style or market capitalization of the assignment. Individual accounts should be monitored using the following Standards:

- Short-term

- For periods less than five years or a full market cycle, individual portfolios should exceed the returns of their market goal or benchmark.

- Intermediate & Long-term

- For periods greater than five years or one market cycle, individual portfolios should exceed the return of their market goal or benchmark, compare favorably on a risk-adjusted basis, and generate returns that rank above the median return of a relevant peer group. Volatility, as measured by the standard deviation of monthly returns, should be comparable to the benchmark.

Alternative Assets:

In addition to exceeding the appropriate benchmark listed in Appendix A and B, the Alternative portfolio should also seek to achieve the following:

Short-term

- Alternative investments should earn a Net IRR that place the investment above the median Net IRR of other similar funds, of the same vintage year, as reported by Venture Economics.

Intermediate & Long-term

- Alternative investments should earn a Net IRR that exceeds the KRS Private Equity Index (annualized) and that place the investment above the median Net IRR of other similar funds, of the same vintage year, as reported by Venture Economics.

Real Estate

The Total Real Estate allocation of the fund shall be benchmarked to the appropriate benchmark.

In addition, target returns for value added investments should be 9% to 12% per year (net of fees and promoted interest). Target returns for Opportunistic investments should be in excess of 12% (net of fees and promoted interest) in order to compensate for the additional risk commensurate with the increased risk compared to core property investments.

Real Return

The total Real Return allocation shall seek to :

(1) Achieve a rate of return that exceeds the appropriate benchmark annually over a complete market cycle (3-5 years), net of all investment management fees.

(2) Achieve a rate of return that exceeds the appropriate real return composite index over a complete market cycle (3-5 years), net of all investment management fees.

(3) Achieve a positive risk/reward trade-off when compared to similar style real return Investment Managers.

Absolute Returns

The total Absolute Return allocation shall seek to :

(1) Achieve a rate of return that exceeds the appropriate benchmark annually over a complete market cycle (3-5 years), net of all investment management fees.

(2) Achieve a positive risk/reward trade-off when compared to similar style FOF return Investment Managers.

## X. Investments Performance Review Procedures

On a timely basis, but not less than quarterly, the Investment Committee, on behalf of the Board of Trustees, will review the performance of the portfolio for determination of compliance with this Statement of Investment Policy. On an annual basis, a comprehensive review of each asset class and underlying portfolios shall be conducted by the staff and presented to the Investment Committee. The review shall consist of an organizational, performance and compliance assessment.

The Compliance Officer shall perform tests each month to assure compliance with the restrictions imposed by this policy. These tests shall be performed at the asset class and total fund level. Quarterly, the Compliance Officer shall prepare a report to the Investment Committee detailing the restrictions tested, exceptions, the cause of the exception and the subsequent resolution. The Investment Committee shall report the findings to the Board of Trustees at the next regularly scheduled meeting.

The following restrictions shall be tested monthly:

- The amount of stock in the domestic or international equity allocation in any single corporation shall not exceed 5% of the aggregate market value of the Systems' assets.
- The amount of stock held in the domestic or international equity allocation shall not exceed 3% of the outstanding shares of any single corporation.
- The amount of stock in any one industry in the domestic equity allocation shall not exceed 10% of the aggregate market value of the Systems' assets.
- Investment in "frontier" markets (those countries not included in the MSCI EM Index) shall not exceed 5% of the System's international equity assets.
- The duration of the total fixed income portfolio shall not deviate from the KRS Fixed Income Index by more than 25%.
- The duration of the TIPS portfolio shall not deviate from the KRS TIPS by more than 10%.
- The amount invested in the debt of a single corporation shall not exceed 5% of the total market value of the Systems' assets.
- No public fixed income manager shall invest more than 5% of the market value of assets held in any single issue short term instrument, with the exception of U.S. Government issued, guaranteed or agency obligations.
- The amount invested in SEC Rule 144a securities shall not exceed 15% of the market value of the aggregate market value of the Systems' fixed income investments.

The Chief Investment Officer shall develop a comprehensive set of investment guidelines for each externally managed account. These guidelines should ensure, at the total fund and asset class level, that the restrictions set forth above are preserved. The Compliance Officer shall perform tests each month to assure compliance with the guidelines. Quarterly, the Compliance Officer shall prepare a report to the Investment Committee detailing the restrictions tested, exceptions, the cause of the

exception and the subsequent resolution. The Investment Committee shall report the findings to the Board of Trustees at the next regularly scheduled meeting

## XI. Additional Items

A. Proxy Voting Policy dated May 2011

The Board of Trustees reserves the right to direct the Chief Investment Officer, or designee, to vote proxies in accordance with the Investment Committee Proxy Voting Policy, which is hereby incorporated by reference.

B. Brokerage Policy dated May 2011

The Investment Committee brokerage policy is hereby incorporated by reference.

C. Transactions Procedures Policy dated May 2011

The Investment Committee transaction procedures are hereby incorporated by reference.

D. Securities Litigation Policy and Procedures dated May 2011

The Investment Committee securities litigation policy and procedures are hereby incorporated by reference.

E. Securities Lending Guidelines dated May 2011

The Investment Committee securities lending policy and procedures are hereby incorporated by reference.

F. Securities Trading Policy for Trustees and Employees dated May 2011

G. Placement Agent Statement of Disclosure dated May 2011

Signatories

As Adopted by the Investment Committee
Date: May 3, 2011

Signature: Tommy Elliott
Tommy Elliott
Chair, Investment Committee

As Adopted by the Board of Trustees
Date: May 19, 2011

Signature: Jennifer Elliott
Jennifer Elliott
Chair, Board of Trustees

# Kentucky Retirement Systems

Appendix A: Addendum to the Statement of Investment Policy
Pension Fund – Asset Allocation / Benchmark Composite
Effective July 1, 2011

This addendum to the investment policy is issued by the Board of Trustees of Kentucky Retirement Systems (Systems) in connection with investing the pension funds of the Kentucky Employees Retirement System, the County Employees Retirement System and the State Police Retirement System. This document supersedes all prior documents entitled Addendum to the Statement of Investment Policy.

## I. Asset Allocation with Benchmarks

| KRS Pension Fund - Asset Allocation | | | | | | | |
|---|---|---|---|---|---|---|---|
| **Asset Class** | **Benchmark** | **Target** | | | | | **Allowable Range (+/- Target)** |
| | | **KERS** | **KERS Hazardous** | **CERS** | **CERS Hazardous** | **SPRS** | |
| US Equity | Russell 3000 | 20.0% | 20.0% | 20.0% | 20.0% | 20.0% | 5.0% |
| Non US Equity | MSCI ACWI Ex-US Standard | 20.0% | 20.0% | 20.0% | 20.0% | 20.0% | 5.0% |
| Emerging Market | MSCI Emerging Markets | 4.0% | 4.0% | 4.0% | 4.0% | 4.0% | 2.0% |
| Core Fixed Income | Barclays US Aggregate | 10.0% | 10.0% | 10.0% | 10.0% | 10.0% | 3.0% |
| High Yield Bonds | Barclays US High Yield | 5.0% | 5.0% | 5.0% | 5.0% | 5.0% | 2.0% |
| Global Bonds | Barclays Global Agg | 5.0% | 5.0% | 5.0% | 5.0% | 5.0% | 2.0% |
| Real Estate | NCREIF ODCE | 5.0% | 5.0% | 5.0% | 5.0% | 5.0% | 3.0% |
| Absolute Return | HFRI Diversified FOF | 10.0% | 10.0% | 10.0% | 10.0% | 12.0% | 3.0% |
| Real Return | CPI + 300 bps | 10.0% | 10.0% | 10.0% | 10.0% | 10.0% | 3.0% |
| Private Equity | Russell 3000 + 300 bps | 10.0% | 10.0% | 10.0% | 10.0% | 7.0% | 5.0% |
| Cash | Cit Grp 3-mos Treasury Bill | 1.0% | 1.0% | 1.0% | 1.0% | 2.0% | - |

## II. Total Fund Blended Benchmark Composite

| **Pension Fund Composite** | | |
|---|---|---|
| US Equity | Russell 3000 | 20.0% |
| Non US Equity | MSCI ACWI Ex-US Standard | 20.0% |
| Emerging Market | MSCI Emerging Markets | 4.0% |
| Fixed Income | Barclays Universal Index | 20.0% |
| Real Estate | NCREIF ODCE | 5.0% |
| Absolute Return | HFRI Diversified FOF | 10.0% |
| Real Return | CPI + 300 bps | 10.0% |
| Private Equity | Russell 3000 (lagged 1 qtr) + 400 bps | 9.9% |
| Cash | Cit Grp 3-mos Treasury Bill | 1.0% |

Signatories

As Adopted by the Investment Committee
Date: May 3, 2011
Signature: Tommy Elliott
Tommy Elliott
Chair, Investment Committee

As Adopted by the Board of Trustees
Date: May 19, 2011
Signature: Jennifer Elliott
Jennifer Elliott
Chair, Board of Trustees

# Kentucky Retirement Systems

Appendix B: Addendum to the Statement of Investment Policy
Insurance Fund – Asset Allocation / Benchmark Composite
Effective July 1, 2011

This addendum to the investment policy is issued by the Board of Trustees of Kentucky Retirement Systems (Systems) in connection with investing the insurance funds of the Kentucky Employees Retirement System, the County Employees Retirement System and the State Police Retirement System. This document supersedes all prior documents entitled Addendum to the Statement of Investment Policy.

## I. Asset Allocation with Benchmarks

| KRS Insurance Fund - Asset Allocation | | | | | | | |
|---|---|---|---|---|---|---|---|
| **Asset Class** | **Benchmark** | **Target** | | | | | **Allowable Range (+/- Target)** |
| | | **KERS** | **KERS Hazardous** | **CERS** | **CERS Hazardous** | **SPRS** | |
| US Equity | Russell 3000 | 28.0% | 20.0% | 20.0% | 20.0% | 20.0% | 5.0% |
| Non US Equity | MSCI ACWI Ex-US Standard | 27.0% | 20.0% | 20.0% | 20.0% | 20.0% | 5.0% |
| Emerging Market | MSCI Emerging Markets | - | 4.0% | 4.0% | 4.0% | 4.0% | 2.0% |
| Core Fixed Income | Barclays US Aggregate | 15.0% | 10.0% | 10.0% | 10.0% | 10.0% | 3.0% |
| High Yield Bonds | Barclays US High Yield | - | 5.0% | 5.0% | 5.0% | 5.0% | 2.0% |
| Global Bonds | Barclays Global Agg | - | 5.0% | 5.0% | 5.0% | 5.0% | 2.0% |
| Real Estate | NCREIF ODCE | - | 5.0% | 5.0% | 5.0% | 5.0% | 3.0% |
| Absolute Return | HFRI Diversified FOF | 10.0% | 12.0% | 10.0% | 10.0% | 10.0% | 3.0% |
| Real Return | CPI + 300 bps* | 20.0% | 7.0% | 10.0% | 10.0% | 10.0% | 3.0% |
| Private Equity | Russell 3000 + 300 bps | - | 10.0% | 10.0% | 10.0% | 10.0% | 5.0% |
| Cash | Cit Grp 3-mos Treasury Bill | - | 2.0% | 1.0% | 1.0% | 1.0% | - |

*KERS 20% allocation to Real Return includes a 15% dedicated allocation to US TIPS, thus the benchmark for KERS is CPI +250 bps.

## II. Total Fund Blended Benchmark Composite

| Insurance Fund Composite | | |
|---|---|---|
| US Equity | Russell 3000 | 21.1% |
| Non US Equity | MSCI ACWI Ex-US Standard | 21.0% |
| Emerging Market | MSCI Emerging Markets | 3.4% |
| Fixed Income | Barclays Universal Index | 19.3% |
| Real Estate | NCREIF ODCE | 4.3% |
| Absolute Return | HFRI Diversified FOF | 10.2% |
| Real Return | CPI + 300 bps | 11.4% |
| Private Equity | Russell 3000 (lagged 1 qtr) + 400 bps | 8.2% |
| Cash | Cit Grp 3-mos Treasury Bill | 1.0% |

Signatories

As Adopted by the Investment Committee
Date: May 3, 2011
Signature: Tommy Elliott
Tommy Elliott
Chair, Investment Committee

As Adopted by the Board of Trustees
Date: May 19, 2011
Signature: Jennifer Elliott
Jennifer Elliott
Chair, Board of Trustees

# Exhibit C

# LIMITED LIABILITY COMPANY AGREEMENT

## Daniel Boone Fund LLC

This LIMITED LIABILITY COMPANY AGREEMENT dated as of August 23, 2011, is entered into by and between the Kentucky Retirement System, a retirement system of the Commonwealth of Kentucky, as member ("KRS"), Prisma Capital Partners LLC, a Delaware limited liability company, as member (the "Special Member"), and Prisma Capital Partners LP, a Delaware limited partnership, as the sole manager (the "Manager"), for the purpose of regulating the business and affairs of Daniel Boone Fund LLC (the "Company"), a Delaware limited liability company formed pursuant to the provisions of Chapter 18 of Title 6 of the Delaware Code entitled "Delaware Limited Liability Company Act," as amended from time to time (the "Code"). The Special Member may also possess a membership interest in the Company, which is designated herein as "Special Member's Interest." The membership Interest held by KRS shall be held in part by Kentucky Retirement Systems (Insurance Fund) and in part by Kentucky Retirement Systems (Pension Fund) and shall be so reflected on the Company's books and records. Unless otherwise indicated, whenever the term KRS is used in this Agreement, it shall include both Kentucky Retirement Systems (Insurance Fund) and Kentucky Retirement System (Pension Fund). Whenever the masculine or feminine gender is used in this Agreement, it will equally, where the context permits, include the other, as well as include Entities.

WITNESSETH:

WHEREAS, the Company was formed on August 5, 2011 pursuant to the provisions of the Code by the filing, in the office of the Secretary of State of the State of Delaware, of a duly authorized and executed Certificate of Formation (the "Certificate");

NOW, THEREFORE, in consideration of the terms and provisions set forth herein, the benefits to be gained by the performance thereof and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Manager and KRS hereby agree as follows:

## ARTICLE I

## GENERAL PROVISIONS

Section 1.1 Formation. Daniel Boone Fund LLC has been formed as a limited liability company pursuant to the provisions of the Code. The existence of the Company commenced upon the filing of the Certificate in the office of the Secretary of State of the State of Delaware in accordance with the provisions of the Code and shall continue until the Certificate is canceled pursuant to and in accordance with the provisions of Article VIII hereof.

Section 1.2 Company Name. The name of the Company is Daniel Boone Fund LLC.

Section 1.3 Business and Purpose. The Company's business and purpose is to conduct any business that may be lawfully conducted by a limited liability company under the Code, including, but not limited to, profiting from:

(a) investing and reinvesting its assets in securities issued by limited partnerships, limited liability companies, business trusts, managed accounts, corporations or other Entities

(including U.S. and non-U.S. hedge funds and other unregulated private funds) that acquire, own, hold, sell, sell short, trade, exchange or otherwise engage in lawful transactions in Financial Instruments or other assets (each such Entity, a "Pooled Investment Vehicle");

(b) with the prior approval of KRS, which may be withheld for any reason or no reason, the Company also may access a particular Pooled Investment Vehicle through an intermediate entity advised, established or sponsored by the Manager or an Affiliate of the Manager and in which other funds or assets managed by the Manager or Affiliates of the Manager have an interest (an "Intermediate Entity"), which (i) feeds into a Pooled Investment Vehicle advised by an unaffiliated Portfolio Manager, or (ii) invests directly in a pool of assets managed by a unaffiliated Portfolio Manager. If an Intermediate Entity is utilized, for so long as this Agreement is in effect, the Company will not be subject to any additional management fees or incentive fees payable to the Manager or any of its Affiliates and charged by the Intermediate Entities, but will be subject to the management fees and incentive fees of the unaffiliated Portfolio Manager, any fund operating expenses at the Intermediate Entity level (such as audit, custody and administrative fees and expenses), and, if applicable, the other fees and expenses charged by the Pooled Investment Vehicle in which such Intermediate Entity invests, as it would be had it invested in such Pooled Investment Vehicle directly. In the event the Company is invested in an Intermediate Entity at the time the Manager ceases to be the manager of the Company, the Manager will, if requested by KRS, use reasonable best efforts to seek to arrange for a redemption in kind of the Company's allocable share of the Pooled Investment Vehicle held by the Intermediate Entity with respect to Intermediate Entities described in clause (i) above; provided that KRS agrees and acknowledges that for (A) any Intermediate Entity described in clause (ii) above and (B) any other Intermediate Entity that cannot be transferred in kind to the Company following the Manager's reasonable best efforts, the Company shall be required to redeem any such investments as soon as reasonably practicable. In order to assist KRS in deciding whether or not to approve a particular investment in an Intermediate Entity, the Manager will use reasonable best efforts to provide to KRS the following information in writing

(i) the terms of the investment in the Intermediate Entity including the name and type of entity, its jurisdiction of formation and confirmation in writing that the allocation of income, gains and loss from such investment will be pro rata based on the amount invested by the Company and such other funds or assets managed by the Manager that have invested or will invest in such Intermediate Entity;

(ii) the name of the Pooled Investment Vehicle in which the Intermediate Entity will be making its investment, as well as the name of the Portfolio Manager that the Pooled Investment Vehicle will be investing in or managed by; the fees that will be charged by such Pooled Investment Vehicle; and the terms of any hard or soft lockup; and

(iii) such other information as KRS shall reasonably request.

Section 1.4 Registered Office and Registered Agent for Service of Process. The registered office of the Company is at 615 South DuPont Highway, Dover, Delaware 19901, and the Company's registered agent for service of process shall be National Corporate Research, Ltd. The Manager may from time to time change the Company's registered office and/or the Company's registered agent for service of process.

Section 1.5 Principal Place of Business. The principal place of business of the Company shall be in care of the Manager at the Manager's principal place of business at One Penn Plaza,

Suite 3515, New York, New York 10119, or at such other place as the Manager shall determine from time to time.

Section 1.6 Fiscal Year; Fiscal Quarters; Accounting Periods; Accounting Methods; Audit.

(a) The Fiscal Year of the Company shall be the period commencing on January 1 of each year and ending on December 31 of such year (except that the last Fiscal Year of the Company shall end on the date on which the Certificate is cancelled), unless the Manager determines otherwise.

(b) Each Fiscal Quarter of the Company shall be the calendar quarter (except that the first Fiscal Quarter of the Company shall begin on the date on which the Certificate is filed and the last Fiscal Quarter of the Company shall end on the date on which the Certificate is cancelled), unless the Manager determines otherwise.

(c) Each Accounting Period shall commence immediately after the close of the first preceding Accounting Period and close as of the close of business on the first to occur of (i) the last calendar day of the calendar month in which such Accounting Period commenced; (ii) the date immediately prior to the effective date of any additional Capital Contribution by KRS; (iii) the effective date of any Capital Withdrawal; (iv) the date on which any Management Fee is earned; and (v) the date the Certificate is canceled as provided in Section 8.1 ("Accounting Period"). For the avoidance of doubt, the Accounting Period in effect immediately prior to the appointment of the Manager closed on the date on which Manager was appointed as Manager.

(d) The Company shall keep its financial books under the accrual method of accounting, and, as to matters not specifically covered in this Agreement, in accordance with US generally accepted accounting principles ("GAAP") applied on a consistent basis.

(e) The books of account and records of the Company shall be audited as of the end of each Fiscal Year by independent certified public accountants designated from time to time by the Manager and approved by KRS. For the Fiscal Year ended December 31, 2011, the Manager shall arrange (at the expense of the Company) for an audit for the period beginning on the date on which the Manager assumed responsibilities described in this Agreement, and ending on the last day of the Fiscal Year. The initial independent certified public accountant designated by the Manager and approved by KRS shall be PricewaterhouseCoopers LLP. KRS shall have the right to approve any change in the Company's auditor, such approval not to be unreasonably withheld.

(f) In any year in which the Company has more than one manager, at KRS's discretion, a separate audit or such other auditing procedures as determined by KRS may be performed for the tenure of each such manager.

(g) All matters concerning accounting practices not specifically and expressly provided for by the provisions of this Agreement will be determined by the Manager in good faith.

Section 1.7 Rights, Powers and Authority. The Company shall possess every right, power, authority and privilege that a limited liability company formed under the Code may lawfully possess, and may exercise or invoke any such right, power, authority or privilege to the maximum extent permitted by law.

Section 1.8 Contributions. Each member has contributed capital to the Company. Members may, but are not required to, make additional Capital Contributions in accordance with Section 4.1.

Section 1.9 Loans. KRS may, but shall not under any circumstances be required to, loan money to the Company under any terms that KRS shall agree, at its discretion.

Section 1.10 Definitions. Capitalized terms used in this Agreement and not otherwise defined have the meanings given them in Article XI of this Agreement.

Section 1.11 Merger and Conversion. The Company may merge with, or convert into, another entity only in accordance with a plan of merger or conversion approved by KRS, and upon prior written notice to the Manager.

## ARTICLE II

## MANAGEMENT OF THE COMPANY

Section 2.1 Management of the Company. The Company shall be managed by the Manager, which shall have sole discretion to make investments on behalf of the Company and to exercise the powers set forth in Section 2.2. The Manager may appoint such agents of the Company as it deems necessary, desirable or convenient, which agents shall hold such offices and shall exercise such powers of the Manager in the management of the Company and perform such duties in connection therewith as shall be determined from time to time by the Manager. The Manager shall devote so much of its time and efforts to the business and affairs of the Company as is necessary to accomplish the purposes of the Company.

Section 2.2 Powers of the Manager. The Manager shall have the following powers on behalf of the Company to be exercised in accordance with Section 2.1:

(a) execute and acknowledge such certificates, instruments and other documents (and amendments thereto) as the Manager may determine, and file the same with Governmental Entities, for the purpose of effecting and continuing the Company's valid existence as a limited liability company or qualifying the Company as (or to do business as) a limited liability company or a company in which KRS has limited liability.

(b) execute, deliver and perform such contracts, agreements, subscription documents, undertakings and instruments (and amendments thereto) as the Manager may determine, with such Pooled Investment Vehicles, Portfolio Managers, broker-dealers (including "prime brokers"), banks, other financial institutions, custodians, administrators, attorneys, accountants, auditors, record-keepers, appraisers, consultants, other service-providers and counterparties as the Manager may select from time to time, on such terms and subject to such conditions as the Manager may determine;

(c) invest, reinvest, and withdraw the Assets in Pooled Investment Vehicles and otherwise engage in any lawful transaction in any Financial Instrument; provided, however, ownership of the Assets shall remain with the Company, and shall be titled in the name of the Company or a custodian used by the Company in the capacity as nominee of the Company. The Manager shall not, under any circumstances, take possession, custody, title, or ownership of any of the Assets. The Manager shall not have the right to have the Company's securities registered in its own name or in the name of its nominee, nor shall the Manager in any manner acquire or

become possessed of any income or proceeds distributable by reason of selling, holding or controlling any Assets. The Manager shall not have the authority to cause the Company to deliver securities and other property, or pay cash to the Manager other than payment of the Management Fee and Incentive Fee, and the reimbursement of expenses as provided for in this Agreement;

(d) register any Assets in the name of the Company, in the name of a nominee, or in "street" name;

(e) enter into a credit facility or incur borrowing on behalf of the Company, as provided for in the Investment Guidelines, including for purposes of bridging redemptions from and subscriptions to Pooled Investment Vehicles, and secure the payment of obligations of the Company by mortgage upon, or pledge or hypothecation of, or guarantee of, all or any part of the property of the Company;

(f) open, maintain and close accounts, including margin and custodial accounts for the limited purpose of holding cash and/or Financial Instruments which have been distributed to the Company by the Pooled Investment Vehicles, with brokers and dealers, including brokers and dealers that are Manager Affiliates, which power shall include the authority to issue all instructions and authorizations to brokers and dealers regarding the Assets and/or money therein;

(g) subject to the provisions of Section 2.8, cause the Company to pay such costs and expenses as the Manager determines to be reasonably necessary, advisable, appropriate or convenient for the conduct of the business of the Company, including, without limitation: (i) the compensation to the Manager, as provided in **ANNEX B**; (ii) brokerage commissions and other costs of executing transactions; (iii) interest expenses and the fees associated with any borrowing facility; (iv) insurance costs; (v) legal, accounting, auditing, tax preparation and other professional fees and expenses; (vi) administrative costs (including the fees and out-of-pocket expenses of a third party administrator (the "Administrator") used by the Company, who shall be selected in the manner set forth in Section 2.2(j)) and fees in connection with the custody of Assets, (vii) any other operating or administrative expenses reasonably related to accounting, research, due diligence, reporting and portfolio management services; (viii) and all other costs related to the Company's investment in the Pooled Investment Vehicles; provided, however, that expenses paid to third parties, including fees paid to the Manager, the Administrator, the Custodian, the independent auditor (including for tax-related services) and any other party, shall not exceed eight basis points (0.08%) per annum of the quarterly average Net Asset Value (net of all fees and expenses) without the prior consent of KRS. All expenses paid by the Company shall be set forth in monthly reports delivered to KRS;

(h) initiate, defend, compromise, settle or submit to arbitration any legal or contractual claim by or against the Company;

(i) vote proxies relating to securities held by the Company in accordance with the Manager's proxy voting guidelines in effect at the relevant time;

(j) select the Administrator; provided, however, that (A) KRS shall be consulted as to the Administrator that will be selected; (B) KRS shall have the right to require, but not more frequently than once in a 12-month period, that the Administrator be terminated and a new Administrator be engaged; and (C) the contract with the Administrator shall clearly indicate that in the event the Administrator is terminated, the Administrator shall continue to assist the Company and its agents in understanding all of its activities during its tenure (including, but not

limited to, assisting auditors who are auditing that time period); (D) the contract with the Administrator shall require the Administrator to assist with the valuation of the Company's assets, in the event the Manager is terminated and replaced with another manager, in order to facilitate a smooth transition; (E) the contract with the Administrator shall allow KRS to communicate directly with the Administrator, and require that the Administrator provide reports and other information to KRS in such form and substance as KRS may reasonably request; and (F) the contract with the Administrator shall provide that, in the event the Manager is terminated, KRS shall have the right to provide instructions and direction to the Administrator; provided, however, that KRS shall in no event be deemed to be in control of the Company, and as such shall not have control person liability;

(k) cause the Company to engage in agency, agency cross and principal transactions with Manager Affiliates to the extent permitted by applicable laws;

(l) authorize any partner, member, employee or other agent of the Manager or Manager Affiliate or other agent of the Company to act for and on behalf of the Company in all matters incidental to the foregoing; and

(m) do any and all acts on behalf of the Company as it may deem necessary or advisable in connection with the maintenance and administration of the Company, and exercise all rights of the Company.

Section 2.3 Limitation of Liability; Indemnification.

(a) Notwithstanding anything to the contrary set forth in this Agreement, to the extent that, at law or in equity, the Manager or any Manager Affiliate has duties (including fiduciary duties) and liabilities relating thereto to the Company or KRS, the Manager or such Manager Affiliate shall not be liable for any and all loss, liability and expense, judgments, civil fines, amounts paid in settlement, monetary or other damages, and other amounts reasonably paid or incurred to the Company or KRS for the Manager's or such Manager Affiliates' good faith reliance on the provisions of this Agreement or for losses sustained or liabilities incurred by the Company or KRS as a result of or arising from: (i) errors in judgment on the part of the Manager or such Manager Affiliate, or any act or omission of the Manager or of such Manager Affiliate, if the Manager or such Manager Affiliate did not act fraudulently or in bad faith or with willful misconduct or with gross negligence or otherwise breach the standard of care set forth in Section 2.4; (ii) errors in judgment on the part of any Person, or any act or omission of any Person, selected by the Manager to perform services for the Company (including, but not limited to: (A) any general partner, managing member and/or investment manager or adviser of and any other Person that provides services to a Pooled Investment Vehicle or (B) any Portfolio Manager); provided that, in selecting such Person, the Manager did not act fraudulently or in bad faith or with willful misconduct or with gross negligence or otherwise breach the standard of care set forth in Section 2.4; (iii) circumstances beyond the Manager's or such Manager Affiliate's control, including, but not limited to, the bankruptcy, insolvency or suspension of normal business activities of any bank, brokerage firm or transfer agent that directly or indirectly holds Assets, if the Manager or such Manager Affiliate otherwise did not act fraudulently or in bad faith or with willful misconduct or with gross negligence or otherwise breach the standard of care set forth in Section 2.4; (iv) failure to obtain the lowest negotiated brokerage commission rates, or to combine or arrange orders so as to obtain the lowest brokerage commission rates, with respect to any transaction on behalf of the Company, or failure to recapture, directly or indirectly, any brokerage commissions for the benefit of the Company, if the Manager or such Manager Affiliate otherwise did not act fraudulently or in bad faith or with willful misconduct or with gross

negligence or otherwise breach the standard of care set forth in Section 2.4; or (v) any action taken or failed to be taken by the Company prior to the appointment of the Manager as manager of the Company.

(b) So long as the Manager and each Manager Affiliate acts in good faith, such Manager and each Manager Affiliate shall be fully protected in relying upon (i) the records of the Company and (ii) information, opinions, reports or statements presented to the Company by KRS or any of the Company's agents (including, but not limited to, legal counsel, accountants, auditors, appraisers, investment bankers and other independent experts) as to matters the Manager or such Manager Affiliate reasonably believes are within such other Person's professional or expert competence and who has been selected in accordance with the standard of care set forth in Section 2.4 by or on behalf of the Company, including, but not limited to, information, opinions, reports, or statements as to the value and amount of the Assets, Liabilities, profits or losses of the Company or any other facts pertinent to the existence and amount of Assets from which distributions to KRS might properly be made.

(c) So long as the Manager and each Manager Affiliate acts in good faith, such Manager and the Manager Affiliates may rely upon and shall be protected in acting or refraining from acting upon any instruction from, or document signed by, any authorized person of KRS who is listed on the subscription agreements executed by KRS (the "Subscription Agreements"), as such Subscription Agreements may be updated by KRS from time to time and provided to the Manager. If the Manager receives instructions or notices from a source other than a person of KRS who is listed on the Subscription Agreements, the Manager shall promptly notify KRS in writing of such unauthorized instructions or notices.

(d) The Company shall, solely out of the Assets, hold the Manager, each Manager Affiliate and each Person designated as a Liquidator pursuant to Section 8.2 (each of the foregoing, an "Indemnitee") harmless from and shall indemnify such Indemnitee against any and all loss, liability and expense (including, without limitation, reasonable legal and expert witness fees and expenses reasonably incurred in connection with investigating, preparing for and/or defending against any claim, action, suit or proceeding, threatened or commenced), judgments, civil fines, amounts paid in settlement, and other amounts reasonably paid or incurred by the Indemnitee to the extent arising from the good faith performance by the Indemnitee of his, her or its responsibilities to the Company (including without limitation any liability as a result of any action taken or failed to be taken by the Company prior to the appointment of the Manager as manager of the Company); provided, however, that an Indemnitee shall not be indemnified for losses, liabilities or expenses, judgments, civil fines, amounts paid in settlement, and other amounts actually and reasonably paid or incurred by the Indemnitee resulting from his, her or its fraud, bad faith, willful misconduct, gross negligence or breach of the standard of care set forth in Section 2.4. The Company may, in the reasonable discretion of the Manager and upon prior written notice to KRS, advance amounts and/or pay expenses as incurred in connection with the defense of a claim for which indemnification is available. In the event that such an advance is made by the Company, the applicable Indemnitee shall agree in writing prior to receiving such advance to reimburse the Company to the extent that it is ultimately determined that it, he or she was not entitled to such indemnification by the Company. Notwithstanding the foregoing, no indemnification shall be provided to the Manager or any Manager Affiliate with respect to a dispute solely between one or more of the Manager and Manager Affiliates. Notwithstanding the foregoing, the Company shall not advance amounts or pay expenses incurred in connection with the defense of a claim for which indemnification would otherwise be available, if the claim is being brought against the Indemnitee by KRS. Notwithstanding anything herein to the contrary, before the Company may advance any funds to an Indemnitee, the Manager must first obtain a

written confirmation of the repayment obligation of such Indemnitee and if it deems it appropriate, obtain reasonably adequate security for such Indemnitee's obligation. Any amounts that are advanced to an Indemnitee in connection with any criminal fines or penalties shall be reimbursed by such Indemnitee if the fines or penalties are finally determined to be due after all appeals have been exhausted. In addition, KRS agrees to provide the Manager or any Manager Affiliate with reasonable assistance in defending all claims, demands and causes of action of whatever kind or nature asserted against the Manager or any Manager Affiliate; provided that the Manager shall pay KRS's costs (or reimburse KRS, at KRS's option) for its reasonable and documented out-of-pocket expenses incurred in connection with providing such assistance, and the Manager shall only be permitted obtain separate indemnification from the Company for such amounts if the right to such indemnification is otherwise granted by the terms of this Section 2.3.

(e) Notwithstanding the foregoing, no exculpation or indemnification of the Manager or any Manager Affiliate or another Indemnitee shall be permitted hereunder to the extent such exculpation or indemnification would not be permitted under applicable Securities and Commodities Laws or any other applicable law, including Kentucky law. With respect to Kentucky law:

(i) The Company and Manager understand and acknowledge that the laws of Kentucky may limit KRS's ability to be subject to personal indemnification obligations or to provide indemnification to any Person, and agree that KRS may therefore be prohibited from making payments of indemnification or advancement of expenses under this Section.

(ii) The Company and Manager acknowledge that KRS may be prohibited under Kentucky law from making payments (including Capital Contributions or returns of distributions) to the Company if the Company or Manager intends to use such amounts to indemnify third parties or themselves. In such event, KRS shall be excused from making such payment.

(iii) The Company and Manager have been informed by KRS that payment of damages or expenses may be tantamount to indemnification under Kentucky law. The Company and Manager agree that if any provisions of this Agreement requiring payment of damages or expenses by KRS (or by the Company, using capital contributed by KRS) are construed by a court of competent jurisdiction or by a written opinion of the Kentucky Attorney General to be indemnification provisions under Kentucky law, then such payment and KRS's contribution obligations shall be subject to the limits on indemnification contained in this Agreement.

(iv) KRS may be prohibited under Kentucky law from making payments to the Company that would be used to satisfy criminal fines, expenses or levies. The Company and Manager agree that KRS shall be excused from making the foregoing payments.

(f) The indemnification provided in Section 2.3(d) shall in no event cause KRS to incur any liability beyond the limited liability provided in Section 3.4, and KRS shall have no obligation to contribute capital or to return distributions to pay for such indemnification.

(g) Indemnification shall only be provided to Persons who are expressly entitled to indemnification under the terms of this Agreement, and the Assets shall not be used to indemnify any Person who is not expressly entitled to indemnification under this Agreement; provided that

this Agreement will not prevent the Company from entering into agreements with Pooled Investment Vehicles, administrators, custodians, accountants, brokers and other service providers and counterparties containing customary indemnification provisions that shall not impose liability on KRS.

Section 2.4 Standard of Care. With respect to the performance of its duties and responsibilities hereunder, the Manager will comply with all applicable laws and regulations, including applicable Securities and Commodities Laws, and the Manager will exercise the care, skill, prudence and diligence under the circumstances then prevailing that a reasonably prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims. The Manager agrees that it owes fiduciary duties and responsibilities to KRS and to the Company.

Section 2.5 Reliance by Third Parties.

(a) Notwithstanding any limitation on any right, power or authority of the Manager described herein, any Person dealing with the Company shall be entitled to assume that the Manager has full right, power and authority to cause the Company to exercise or invoke any right, power, authority or privilege that a limited liability company formed under the Code may lawfully exercise or invoke, and no Person dealing with the Manager shall be obligated to ascertain that the provisions of this Agreement have been complied with or to inquire into the necessity or expedience of any action of the Manager.

(b) Each and every certificate, instrument or other document executed on behalf of the Company by the Manager shall be conclusive evidence in favor of each and every Person relying thereon or claiming thereunder that: (i) at the time of the execution and delivery of such certificate, instrument or document, this Agreement was in full force and effect; (ii) the Person executing and delivering such certificate, instrument or document was duly authorized and empowered to do so for and on behalf of the Company; and (iii) such certificate, instrument or other document was duly executed and delivered in accordance with this Agreement and is binding upon the Company.

Section 2.6 Representations, Warranties and Agreements of the Manager. The Manager hereby represents and warrants to, and agrees with, the Company and KRS, as of the date hereof, that:

(a) the Manager will act as the investment manager of the Company until the earlier of (i) the resignation or termination of the Manager as the manager of the Company pursuant to Section 2.11 or (ii) the appointment of a Liquidator of the Company pursuant to Section 8.2; in this role the Manager will oversee the investment of the Assets, comply with all laws and regulations to which it is subject in connection with the foregoing activities and, insofar as it is within its power to do so, cause the Company to comply with all laws and regulations to which the Company is subject;

(b) the Manager is a limited partnership duly organized and validly existing under the laws of the State of Delaware;

(c) the Manager has full power and authority to execute and deliver this Agreement and perform its obligations under this Agreement;

(d) this Agreement has been duly and validly authorized, executed and delivered on behalf of the Manager and, assuming the due authorization, execution and delivery by KRS, is a valid and binding agreement of the Manager, enforceable against the Manager in accordance with its terms;

(e) the execution and delivery of this Agreement by the Manager and the performance by the Manager of its obligations hereunder do not violate, or constitute a breach of or default under, the constituent documents of the Manager or any agreement or instrument by which it is bound, and the Manager has no knowledge that its performance of such obligations will violate, or constitute a breach of or default under, any order, rule, law or regulation applicable to the Manager of any court, Governmental Entity or self-regulatory authority having jurisdiction over the Manager;

(f) there is not pending, and the Manager has no knowledge that any party has threatened, any action, suit or proceeding before or by any court or other Governmental Entity to which the Manager is a party which might reasonably be expected to result in a material adverse change in the financial condition or regulatory qualifications of the Manager, or which could impair the Manager's reputation;

(g) the Manager is registered as an investment adviser under the Advisers Act, and the Manager and its Affiliates together have not less than $5 billion of assets under management;

(h) neither the Manager, nor any Affiliate of the Manager, is indebted to the Commonwealth of Kentucky or owes delinquent taxes to the Commonwealth of Kentucky;

(i) the Manager has managed multi-manager, multi-strategy investment portfolios, where the Manager allocates such portfolios' assets to the discretionary investment authority of third-party investment management firms that invest, both long and short, in a wide range of "alternative" investment strategies for longer than five (5) years;

(j) upon reasonable request, the Manager will be available for ad-hoc telephone conferences and consultation with the staff of KRS and committees thereof, and the Manager agrees to consult with KRS and keep KRS informed as part of the portfolio selection and asset management process (including, with respect to any investments that are, in the Manager's judgment, troubled or that present headline risk), and agrees to take into account KRS's requests and suggestions;

(k) as reasonably requested and upon reasonable notice, the Manager will attend in person, when required or requested, meetings with the staff of KRS (for the avoidance of doubt, travel expenses incurred by the Manager in connection with any such meetings will not be reimbursed by the Company, KRS);

(l) all approvals, consents and authorizations to the extent necessary to make the Manager's execution and delivery of this Agreement a valid, binding and enforceable obligation of the Manager have been obtained;

(m) the Manager will comply with provisions stated in the Statement of Investment Objectives, Policies, and Guidelines of Kentucky Retirement Systems (attached hereto as **ANNEX F**) as it relates to the management of the Assets as contemplated by this Agreement;

(n) KRS retains the right to contract with or assume contracts, to the extent reasonably possible, between the Company and the Portfolio Managers, should the Manager be terminated;

(o) the Manager agrees to make full disclosure to KRS of its intent to employ or subcontract with an individual who was an employee or subcontractor of KRS at any time within the twenty-four (24) months preceding the date of such proposed employment or subcontract. The Manager shall not permit an employee or subcontractor who is a former employee or subcontractor of KRS to perform services or fill any position that relates to any project that such former employee or subcontractor worked on while employed or subcontracted by KRS;

(p) the fees payable to the Manager are, as of the date hereof, at least as favorable as those charged to a Comparable Client (as defined below). If the Manager or any Manager Affiliate (collectively, "Prisma") enter into any subsequent agreement or arrangement (each, an "Arrangement") with any Comparable Client, which Arrangement grants such Comparable Client a better overall fee structure, in the Manager's reasonable discretion, than the one accorded to KRS (the "Preferential Terms"), the Manager will provide prompt written notice to KRS of the Preferential Terms and will offer to extend such Preferential Terms to KRS. KRS will be deemed to reject such offer unless, within 90 days after such offer, KRS delivers written notice to the Manager accepting such Preferential Terms. For the avoidance of doubt, where a Preferential Term is offered to any Comparable Client that is dependent on other terms also being accepted by such investor (collectively, a "Package"), KRS shall only be offered that Package and may not select only certain terms (including, without limitation, Preferential Terms) from that Package. For these purposes, a "Comparable Client" shall mean any client who invests in an investment fund managed by Prisma (each, a "Prisma Fund") and/or for whom Prisma manages a managed account and (i) the amount of assets managed by Prisma on behalf of such client in the aggregate is equal to or less than the amount of assets managed by Prisma on behalf of KRS in the aggregate (in each case, as adjusted for additions and redemptions but not net capital appreciation or net capital depreciation), (ii) with the exception of any special withdrawal, redemption or termination rights provided to the client or KRS in order to allow such client or KRS to comply with or avoid violation of applicable laws or regulations, the client's ability to withdraw assets or redeem shares from the Prisma Fund or managed account or terminate its arrangement with Prisma is substantially similar (or more favorable) to KRS's ability to withdraw assets shares from the Company or terminate this Agreement and (iii) the investment mandate with respect to such Prisma Fund or client is substantially similar to those of the Company, as reasonably determined by the Manager. For purposes of the foregoing sentence, the Manager may aggregate investments by affiliated investors and/or by investors who are introduced to the Manager by the same third party. For the avoidance of doubt, a "Comparable Client" shall not include (1) the Manager, (2) AEGON N.V. and its affiliates (collectively, "AEGON"), (3) any employee or principal of the Manager or AEGON or their respective affiliates (including any vehicle for the benefit of the immediate family members of such employees or principals), (4) any affiliate of the Manager or AEGON, or (5) any client to whom the Manager or any affiliate provides services as of the date hereof.

(q) the Manager shall be an independent contractor for matters relating to this Agreement. The Manager and its employees are not employees of KRS for any purpose and shall not be entitled to participate in any plan, arrangement, or distribution by KRS pertaining to or in connection with any pension, bonus, or other benefit extended to KRS employees;

(r) the Manager shall defend and hold KRS and the Company harmless from and shall indemnify KRS and the Company against any and all loss, liability and expense (including,

without limitation, reasonable legal and expert witness fees and expenses reasonably incurred in connection with investigating, preparing for and/or defending against any claim, action, suit or proceeding, threatened or commenced), judgments, civil fines, amounts paid in settlement, and other amounts actually and reasonably paid or incurred by KRS relating to or arising from the Manager or Manager Affiliate's fraudulent or bad faith acts, willful misconduct, gross negligence or breach of any provision of this Agreement (including any breach of the standard of care set forth in Section 2.4 of this Agreement), as finally determined by a court of competent jurisdiction. In addition to the foregoing agreement to defend, hold harmless and indemnify, the Manager agrees to provide KRS and Company with reasonable assistance in defending all claims, demands and causes of action of whatever kind or nature asserted against KRS or the Company relating to the transactions contemplated by this Agreement for which the Manager is not obligated to indemnify KRS and the Company pursuant to the previous sentence; provided that the Manager shall be reimbursed for its reasonable out-of-pocket expenses incurred in connection with providing such assistance;

(s) the Manager acknowledges that KRS and the Company reserve all immunities, defenses, rights or actions arising out of KRS's status as a sovereign state or entity, including those under the Eleventh Amendment to the United States Constitution and applicable Kentucky law;

(t) the Manager will allocate limited investment opportunities in Pooled Investment Vehicles among the Company and other investment vehicles or accounts advised by the Manager that may invest in similar or different investments in accordance with the Manager's allocation policies, as provided to KRS on or prior to the date hereof and as may be amended from time to time; provided that the Manager shall promptly advise KRS of any such amendment in writing. KRS acknowledges that, due to the timing of investments, availability of capital, investor eligibility requirements, investment guidelines and restrictions and other factors applicable to individual accounts managed by the Manager and its Affiliates and the Pooled Investment Vehicles in which they invest, it often will not be possible to allocate opportunities to invest in Pooled Investment Vehicles on a pro rata basis among all accounts managed by the Manager and its affiliates using the same or a similar strategy, and accordingly that the performance of different accounts managed by the Manager will vary;

(u) the Manager will maintain insurance coverage in accordance with the levels set forth in **ANNEX G**;

(v) the personnel and agents of the Manager responsible for discharging the Manager's duties and obligations under this Agreement are and will be individuals experienced in the performance of the various functions contemplated by this Agreement; none of such individuals has been convicted of any felony, found liable in a civil or administrative proceeding, pleaded no contest, or agreed to any consent decree with respect to any matter involving breach of trust, breach of fiduciary duty, fraud, violations of any federal or state securities law or the FINRA Code of Conduct, or bankruptcy law violations; and

(w) the Manager agrees that it has policies, procedures and internal controls in place that are reasonably designed to comply with applicable anti-money laundering laws and regulations, including the regulations and sanction programs administered by the US Department of the Treasury's Office of Foreign Assets Control ("OFAC") and the USA PATRIOT Act, as applicable. Such policies, procedures and internal controls may include reliance on third-party service providers. The Manager shall use reasonable best efforts not to, and shall use reasonable best efforts to cause the Company not to, make any payment to any Person in violation of the

U.S. Foreign Corrupt Practices Act (as amended from time to time), the substantive prohibitions of the anti-boycott laws of the United States, any of the foreign assets control regulations of the United States Treasury Department (31 CFR, Subtitle B, Chapter V, as amended), and any enabling legislation or executive order relating thereto. The Manager shall make reasonable inquiries to ensure that any Pooled Investment Vehicle in which the Company invests has in place appropriate procedures that govern the foregoing terms as applicable.

Section 2.7 Compensation to the Manager. The Manager shall be compensated for its performance of services as Manager pursuant to this Agreement in such manner and in such amounts as are set forth in **ANNEX B** to this Agreement (which **ANNEX B** is incorporated by reference as if set forth in this Section in full).

Section 2.8 Expenses.

(a) The Company will not bear or reimburse the Manager or any Manager Affiliate for any of the Manager's or such Manager Affiliate's overhead or other internal costs, such as employee payroll and benefits, office space and furnishings, travel and entertainment, and telecommunications; provided, however, that the Company shall bear all expenses described in Section 2.2(g) that do not exceed the cap in Section 2.2(g), except as otherwise agreed between the Manager and KRS, and will pay all reasonable out-of-pocket costs and expenses incurred by the Manager, directly or indirectly, in connection with the operation of the Company.

(b) Such expenses, other than the Management Fee and Incentive Fee, will be charged to the Capital Accounts of all members on a *pro rata* basis.

(c) If any of the expenses listed in Section 2.2(g) are incurred jointly for the account of the Company and any other account or fund managed by the Manager or its Affiliates, such expenses shall be allocated among the Company and such other accounts or funds in proportion to the size of the investment made by each to which such expense relates, or in such other manner as the Manager considers fair and equitable.

(d) The Manager shall not be required to discharge any duty under this Agreement that requires the payment of funds to any Person unless adequate Company funds are readily available for that purpose.

Section 2.9 Refunds Due to KRS. If KRS reasonably and in good faith determines that KRS is due a refund of any amount paid to the Manager or Manager's Associates hereunder or of any charge made to the Capital Account, the Manager shall pay the undisputed portion of any such amount within thirty (30) days of the Manager's receipt of written notice that such refund is due describing in reasonable detail the nature of the claim and the basis for the refund request. The parties shall attempt in good faith to resolve any dispute. Any dispute relating to any accounting matter that cannot be resolved in good faith shall be referred to the Company's auditors. If the Manager fails to make timely payment of any amount that is ultimately determined to be owed to KRS, then KRS may obtain an amount equal to the outstanding balance of such refund amount from the Manager by any means permitted by law, including, but not limited to, offset, counterclaim, cancellation, termination, suspension, total withholding, and/or disapproval of all or any subsequent applications for said funds.

Section 2.10 Liabilities of the Manager and Manager Affiliates. Except to the extent otherwise required by law or as specifically set forth in this Agreement, neither the Manager nor any Manager Affiliate shall be personally liable for: (a) the repayment, satisfaction or discharge of any debt, liability, obligation or commitment of the Company, whether arising in tort, contract or otherwise; (b) the

repayment, to KRS, of any Capital Contribution by KRS or (c) any decrease in the value of the Capital Account of KRS.

Section 2.11 Resignation or Termination of the Manager; Assignment.

(a) The Manager may resign as the manager of the Company for any reason, or for no reason, by giving KRS at least ninety (90) days' prior written notice of such resignation. KRS may terminate the Manager as the manager of the Company, for any reason or for no reason, by giving the Manager at least thirty (30) days' prior written notice of such termination. A pro rata rebate of any prepaid portion of the Management Fee (based upon the number of days between the effective date of any such termination and the end of the period covered by such prepaid Management Fee) will be paid to the Company by the Manager as soon as practicable thereafter. In the event of such termination or resignation:

(i) To the extent the Company's investment portfolio is not liquidated prior to the effective date of resignation or termination, KRS may elect to continue the Company's operations (either with or without a replacement manager), or (alternatively) the Company (and any replacement manager) may arrange for the orderly liquidation of the Company's investment portfolio.

(ii) Following the notice of resignation by the Manager to KRS or the notice of KRS of termination of the Manager, the Manager agrees (and agrees to cause the manager of any Intermediate Entity that invests in other Pooled Investment Vehicles (an "Intermediate Feeder Entity")):

(A) to consult with KRS with respect to all portfolio decisions taken by the Manager or, if any such decision may affect the Company's portion of the Pooled Investment Vehicle, by the manager of an Intermediate Feeder Entity, including the best approach to pursue as part of such transition (it being understood that each of the Manager and the manager of any such Intermediate Feeder Entity remains bound by fiduciary duties at all times, so long as it is a manager of the Company or of such Intermediate Feeder Entity); and

(B) not to make any further investments on behalf of the Company (including indirect investments attributable to the Company made via the Intermediate Feeder Entity) without first informing KRS, and giving KRS a fifteen (15) Business Day period to discuss such investment with the Manager (and as part of the notice, the Manager shall describe whether the proposed investment is likely to reduce the liquidity of the Company's investment portfolio); and

(C) not to liquidate the Company's or the portion of the Intermediate Feeder Entity's investment portfolio attributable to the Company, and not submit any notice of redemption to any manager of any Pooled Investment Vehicles in respect of the Company's portion of the relevant Pooled Investment Vehicle, without first informing KRS, and giving KRS a fifteen (15) Business Day period to discuss such liquidation proposal with the Manager or the manager of the Intermediate Feeder Entity; it being understood that the mechanics of liquidations at the Intermediate Entities are described in Section 1.3(c).

(iii) Upon submission or receipt, as the case may be, of notice of any such resignation or termination, the Manager will in good faith reasonably assist KRS in the transition of the management of the Company to a replacement manager (which may be KRS) following the effective date of resignation or termination. Such assistance shall include, without limitation, instructing third-party service providers (including the Administrator and Custodian) and managers of the Pooled Investment Vehicles in which the Company is invested) to take instruction from the replacement manager (which may be KRS).

(iv) In the event the Manager is notified that it has been placed on KRS's "Watch List," Sections 2.11(a)(ii)(B) (regarding future investments) and 2.11(a)(ii)(C) (regarding liquidations) shall apply to the Manager and also to the manager of any relevant Intermediate Feeder Entity with respect to investments attributable to the Company.

(v) In the event the Company has made investments using Intermediate Feeder Entities, the Manager agrees that it shall use its best efforts to cause the Intermediate Feeder Entity to abide by the principles set forth herein that are applicable to the Manager.

(vi) Upon engagement of a replacement manager for the Company, KRS will cause the Company to redeem Special Member's Interest for an amount equal to the balance of its Capital Account, if the Company were dissolved on the date of redemption. KRS may also, in its sole discretion, cause the Company to redeem Special Member's Interest at any time prior to hiring of a replacement manager (e.g., the receipt by KRS or the Company of a tax ruling from the Internal Revenue Service (the "IRS") indicating that the Company will not be treated as a corporation under federal tax law).

(vii) Notwithstanding anything to the contrary herein, in the event of the resignation or termination of the Manager, the Special Member shall maintain its Capital Account balance in accordance with Section 4.2(d) until the earliest of: (1) engagement of a replacement manager for the Company; (2) the admission to the Company of a third member; (3) the receipt by KRS or the Company of a tax ruling from the IRS indicating that the Company will not be treated as a corporation under federal tax law; or (4) the 12 month anniversary of the Manager's resignation or termination. Upon the occurrence of any of the events enumerated in the preceding sentence, KRS shall immediately cause the Company to redeem the Special Member's Interest for an amount equal to the balance of its Capital Account.

(b) The Manager shall not assign or subcontract any of its rights or responsibilities under this Agreement without prior written amendment to this Agreement properly executed by both KRS and the Manager. For purposes of the preceding sentence, the term "assign" shall have the meaning given that term in Section 202(a)(1) of the Advisers Act and Rule 202(a)(1)-1 thereunder. For the avoidance of doubt, (i) the Manager shall be entitled to rely on advice received from, and may delegate the performance of certain of its obligations hereunder to, certain of its Affiliates (it being represented by Manager that such delegation shall not reduce KRS's rights or the Manager's obligations under this agreement, including but not limited to the rights and obligations set forth in Section 2.11(a) and Section 2.13), and (ii) investing the Assets in securities issued by Pooled Investment Vehicles and causing the Company to acquire, own, hold, sell, sell short, trade, exchange or otherwise engage in financial transactions in Financial

Instruments under the direction of a Portfolio Manager shall not constitute an assignment or subcontract for purposes of this Agreement.

Section 2.12 Investment Policies. The Manager will (i) make investments on behalf of the Company in investments that comply with the "Investment Guidelines" set forth in **ANNEX C** to this Agreement (the "Investment Guidelines") (which **ANNEX C** is included by reference as if set forth in this Section in full), which Investment Guidelines may be amended from time to time by KRS with the Manager's prior written consent; and (ii) direct all investments and reinvestments of the Assets in a manner consistent with the Investment Guidelines. In addition, the Manager agrees to use reasonable efforts to consult with KRS, and keep KRS informed, and consider KRS's reasonable requests and suggestions, as part of the portfolio selection and asset management process. Finally, the Manager agrees to provide to KRS a Fund Summary substantially in the form attached hereto as **ANNEX A** with respect to each investment in a Pooled Investment Fund that the Company plans to make directly (or indirectly via an Intermediate Entity).

Section 2.13 KRS Access to Managers of Underlying Pooled Investment Vehicles. The Manager agrees to cooperate and provide reasonable assistance to provide KRS with access to the managers of each Pooled Investment Vehicle that the Company invests in, whether directly or via an Intermediate Entity. Without limitation, this includes the following:

(a) upon the initial investment, notifying the manager of each Pooled Investment Vehicle (including those held via an Intermediate Entity) of the identity of KRS, the contact information of KRS, and informing them that KRS invites direct communication and, upon KRS's reasonable request, notifying any such manager thereafter;

(b) to the extent permitted by the managers, KRS shall be provided the name and contact information of each manager of a Pooled Investment Vehicle (including those held via an Intermediate Entity);

(c) the Manager agrees that (i) KRS may have (or may initiate) separate relationships with one or more managers of the Pooled Investment Vehicles during the term of this Agreement (including managers of Pooled Investment Vehicles with whom KRS becomes acquainted via the information transmittals described in this Section 2.13); (ii) that KRS and such third party manager may discuss with each other Manager Confidential Information related to the relevant Pooled Investment Vehicle; (iii) that KRS has no obligation to disclose the existence of any such relationship to the Manager; and (iv) that the Manager has no right to management fees or other compensation that arises out of any such relationship; and

(d) the Manager agrees that it shall not interfere with KRS's ability to maintain a relationship with a manager of Pooled Investment Vehicles (including by indicating to the manager of any such Pooled Investment Vehicle that maintaining such a relationship might be detrimental to the relationship between the Manager and the manager of such Pooled Investment Vehicle).

Section 2.14 Activities of the Manager and Manager Affiliates. The Company and KRS acknowledge and agree that the Manager and the Manager Affiliates may engage in other businesses and make investments for their own accounts, and may render services similar to those described in this Agreement for other individuals, companies, trusts or persons, including those which follow an investment program substantially similar to that of the Company, and shall not by reason of such engaging in such other businesses, making such investments or rendering of services for others be deemed to be acting in conflict with the interests of the Company. Notwithstanding the foregoing, the Manager or

the Manager Affiliates shall devote so much of their time to the Company's affairs as is necessary to fulfill its obligations hereunder.

## ARTICLE III

## THE MEMBER(S) AND THE INTEREST

Section 3.1 Creditors. KRS has a membership Interest in the Company. The Manager also may have a membership Interest in the Company which (if any) will be designated the "Special Member's Interest." The provisions of this Agreement are intended to benefit the members and, to the fullest extent permitted by law, shall not be construed as conferring any benefit upon any creditor of the Company.

Section 3.2 Nonassessability of Interests. Each member's Interest is fully paid and nonassessable, and neither the Company, nor any officer, employee or agent of the Company, shall have the right, power or authority to call upon any member for the payment of any sum of money or assessment whatsoever in respect of such Interests, whether in the form of a capital contribution, a loan to the Company or otherwise.

Section 3.3 Admission of Additional Members. It is not anticipated that any Person other than KRS and the Special Member will be admitted to the Company as a member. No other Person may be admitted to the Company as a member without the prior written approval of KRS. The Special Member's Interest shall be redeemed if KRS, at any time, in its sole discretion, elects for the Company to redeem it and notifies the Manager. If KRS determines that any other Person should be admitted to the Company as a member, KRS and the Manager shall cooperate to amend and restate this Agreement to reflect the admission of such Person as a member and to establish the rights and responsibilities of the members of the Company and to govern their relationships. Notwithstanding anything to the contrary herein, any proposed member shall be required to make representations and warranties in form and substance reasonably satisfactory to the Manager, and no proposed admission as a member will be recognized until the documents relating to it and reasonably requested by the Manager or Administrator have been approved by the Manager or Administrator, as applicable.

Section 3.4 Limited Liability. No member of the Company shall be liable for the debts, liabilities or obligations of the Company, including without limitation any debts, liabilities or obligations of the Company under a judgment, decree or order of a court, solely by reason of being a member of the Company, except as otherwise required by law.

Section 3.5 Competing Activities. Notwithstanding any duty otherwise existing at law or in equity, (a) neither the Manager, nor any of its Affiliates, partners, members, shareholders, directors, managers, officers or employees, shall be expressly or impliedly restricted or prohibited solely by virtue of this Agreement or the relationships created hereby from engaging in other activities or business ventures of any kind or character whatsoever and (b) the Manager and its Affiliates, partners, members, shareholders, directors, managers, officers and employees, shall have the right to conduct, or to possess a direct or indirect ownership interest in, activities and business ventures of every type and description, including, but not limited to, activities and business ventures in direct competition with the Company.

## ARTICLE IV

## CAPITAL CONTRIBUTIONS; CAPITAL ACCOUNTS

Section 4.1 Capital Contributions. KRS and the Special Member have made one or more Capital Contributions to the Company prior to or as of the date of this Agreement. Neither KRS, the Manager nor the Special Member shall have a duty or obligation to contribute capital to the Company, for the benefit of any creditor of the Company or otherwise, except as otherwise required by law; provided, however, that KRS (but not the Manager or the Special Member) may make additional Capital Contributions to the Company at any time in its sole discretion (for which its Capital Account balance shall be appropriately increased). The Company shall use reasonable efforts to provide at least ten (10) Business Days prior notice to the Manager of any additional contributions to the Company.

Section 4.2 Capital Account.

(a) The Manager shall establish and maintain on the books of the Company a capital account for each of its members (the "Capital Accounts"). For the avoidance of doubt, it is understood that separate Capital Accounts shall be established and maintained on the books of the Company for each of Kentucky Retirement Systems (Insurance Fund) and Kentucky Retirement Systems (Pension Fund).

(b) Subject to the provisions of Section 4.3, a member's Capital Account as of a particular date shall be reflected on the financial statements of the Company that are delivered to KRS, and shall be calculated based on the following formula:

(i) an amount equal to the sum of all Capital Contributions that such member has made to the Company on or prior to the date thereof, less the sum of all withdrawals from the Capital Account of such member on or prior to the date thereof; plus

(ii) the adjustments, if any, to such account in accordance with the provisions of Section 10.1 and Article V. (For avoidance of doubt, all fees payable to the Manager under Section 2.7 are reflected in the profits and losses determined by Article V.)

(c) Compensation paid to the Manager pursuant to this Agreement shall be debited solely to KRS' Capital Accounts.

(d) Notwithstanding anything to the contrary herein, until the Company is dissolved in accordance with Section 8.2 or the Manager is replaced as manager of the Company in accordance with Section 2.11, the Special Member shall maintain a balance in its Capital Account equal to no less than $50,000.

Section 4.3 Certain Adjustments to Capital Accounts. The amount of withdrawals, if any, made by a member shall be deducted from such member's Capital Account as of the date of such withdrawal.

Section 4.4 Interest on Capital Contributions. No member shall be entitled to interest on its Capital Contributions or on its Capital Account.

Section 4.5 Loans. Loans to the Company shall not be considered Capital Contributions. Unless the Manager determines otherwise in its sole and absolute discretion, if KRS advances funds to the Company that are designated as not being Capital Contributions, the making of such advances shall not result in any increase in the Capital Account of KRS. The amounts of any such advances shall be a debt of the Company to KRS and shall be payable or collectible out of the Assets in accordance with the terms and subject to the conditions upon which such advances are made. The repayment, upon the winding up of the business and affairs of the Company, of loans made to the Company shall be subject to the order of priority set forth in Section 8.3(a).

## ARTICLE V
## DETERMINATION AND ALLOCATION OF NET PROFITS AND NET LOSSES; NEW ISSUES

Section 5.1 Allocation of Net Profits and Net Losses. Any Net Profits or Net Losses (as defined in Section 5.2) of the Company during any Accounting Period shall be allocated to the members in proportion to their Capital Account balances.

Section 5.2 Determination of Net Profits and Net Losses. "Net Profits" or "Net Losses" of the Company for an Accounting Period shall be determined by the Manager or Administrator on the accrual basis of accounting using GAAP as a guideline and further in accordance with the valuation policy of the Manager. The Company's allocation of Net Profits or Net Losses may be based upon estimated or unaudited reports provided by Pooled Investment Vehicles and/or their agents, and may be subject to later adjustment or revision by such Pooled Investment Vehicles which may increase or decrease the value of KRS's Capital Account at the time that the Company is provided with information regarding the adjustment.

Section 5.3 Tax Allocations. Allocations of specific items of income, gain, loss or deduction as determined for US federal income tax purposes shall be made in accordance with Treasury Regulations Section 1.704, as amended.

Section 5.4 New Issues. From time to time the Company may, to the extent permitted by the rules and regulations of FINRA, as the same may be amended from time to time (the "FINRA Rules"), purchase certain equity securities or invest in Pooled Investment Vehicles that purchase equity securities that are part of an initial public offering ("new issues"). Under the FINRA Rules, brokers may not sell such securities to a private investment fund (such as the Company) if the fund has investors who are "Restricted Persons" unless the fund has a mechanism in place that excludes such Restricted Persons from receiving allocations of profits and losses from new issues. KRS confirms that KRS has consistently taken the position that KRS is not a "Restricted Person" and is an "exempted person," and agrees to cooperate with the Manager in any future situation where such determination is requested. KRS acknowledges that the Manager may request KRS to provide periodic updates of such information.

## ARTICLE VI

## WITHDRAWALS AND DISTRIBUTIONS FROM CAPITAL ACCOUNT

Section 6.1 Withdrawals from Capital Account.

(a) KRS shall have the right, in its sole discretion, to withdraw and receive the fair value of all (or any portion of) KRS's Capital Account in the Company, in accordance with the

terms (including, but not limited to, notice timeframes) set forth in **ANNEX D** (which **ANNEX D** is incorporated by reference as if set forth in this Section in full).

(b) The Manager shall use its reasonable efforts to cause the Company to pay out the full proceeds of a requested withdrawal, as further set forth in **ANNEX D**.

(c) Anything herein to the contrary notwithstanding, in the event the Company is unable to effect withdrawals/redemptions from Pooled Investment Vehicles in which the Company invests as of the effective date of any withdrawal by KRS, the Manager will promptly remit any withdrawal/redemption proceeds to KRS as soon as possible following receipt by the Company of such proceeds from the Pooled Investment Vehicles, and the Manager will also consult with KRS as to whether KRS desires to receive, to the extent reasonably practicable, withdrawal proceeds in-kind, via transfer of ownership of interests in Pooled Investment Vehicles.

(d) Subject to Section 2.11(a)(vii), the Special Member may, upon forty-five (45) days' prior written notice to KRS, withdraw from its Capital Account; provided that the Special Member maintains the minimum Capital Account balance pursuant to and in accordance with Section 4.2(d).

Section 6.2 Distributions. The Manager shall cause the Company to make distributions to the members in the manner set forth in Section 6.1.

## ARTICLE VII

## RECORDS AND ACCOUNTING; REPORTS; CONFIDENTIALITY

Section 7.1 Company Books and Records; Inspection Rights.

(a) The Manager shall cause the Company and the Administrator to maintain such books and records relating to the business and affairs of the Company and Administrator as are required to be maintained under the Code and such other books and records as are typically maintained by a similar company with a similar objective.

(b) At the expense of the Company and subject to the provisions of Section 7.4, all books and records shall be open to inspection, copying and audit at all reasonable times and upon reasonable advance notice by any Person designated by KRS. Upon termination of this Agreement, KRS may request that all books and records be transferred to it, except for those books and records that are required to be retained by the Manager. Except for accounts and records routinely or customarily destroyed in the ordinary course of business in compliance with existing laws governing the retention of such documents, no books or records may be destroyed by the Manager unless the Manager first notifies KRS in writing of the intention to do so and then provides KRS with the opportunity to take possession of such books and records.

Section 7.2 Determination and Calculation of Liabilities and Valuation of Assets.

(a) The Manager shall cause the Administrator to value the Assets in accordance with the valuation policy of the Manager as previously provided to KRS and as shall be provided to KRS in the event of any alteration thereto by the Manager. The Manager shall review and, if applicable, reconcile such calculation and notify KRS and the Administrator promptly if the

Manager disagrees in any material respect with such calculation. Moreover, in the event the Administrator changes, the Manager shall use reasonable efforts to ensure that the Company's books and records are trued up, brought current, and accurate, as of the date of the transition in Administrators. All values assigned to Assets by the Manager in accordance with this Section 7.2(a) shall be final and conclusive as to all of the members.

(b) The Manager shall use commercially reasonable efforts to cause the Administrator to determine the amount of the Liabilities in accordance with GAAP (except as otherwise provided in Section 7.2(d)), and the Manager shall review and, if applicable, reconcile such determination and notify KRS and the Administrator promptly if the Manager disagrees in any material respect with such determination.

(c) For purposes of determining the Liabilities at a particular time, the Manager may estimate costs or expenses that are incurred on a regular or recurring basis over yearly or other periods and treat the amount of any such estimate as accruing in equal portions over any such period.

(d) The Manager shall establish (and increase or decrease from time to time) such reserves for the Company as the Manager may determine are necessary or advisable for: (i) the payment of estimated, contingent, unknown or unfixed liabilities or obligations of the Company (including, without limitation, anticipated audit preparation fees and expenses) or (ii) for any other reason, even if such reserves are not required by GAAP ("Reserves"). Any such Reserves, to the extent reversed, shall be restored to the Capital Accounts of the members.

Section 7.3 Reports.

(a) As soon as reasonably practicable after the end of each Fiscal Quarter, the Manager shall cause to be delivered to KRS a report setting forth (i) an unaudited statement of the rate of return of the Company for such Fiscal Quarter and the value of KRS's Capital Accounts as of the end of such Fiscal Quarter; (ii) a statement setting forth the fees (including management fee and annual performance fee) payable by the Company to the Manager for the next Fiscal Quarter; and (iii) such other financial reports and information as the Manager may deem appropriate or as otherwise requested by KRS (in the case of each such financial report, prepared in accordance with GAAP). In addition, KRS may communicate directly with the Administrator, and the Company's agreement with the Administrator shall require that the Administrator cause to be delivered to KRS such financial reports and information as KRS may reasonably request.

(b) As soon as reasonably practicable after the end of each Fiscal Year, the Manager will cause to be delivered to KRS financial statements of the Company for such year audited by the Company's independent certified public accountants designated according to Section 1.6(e). Such audited financial statements shall generally include (i) a statement of assets, liabilities and member's capital (including a condensed schedule of investments), (ii) a statement of operations, (iii) a statement of changes in member's capital and (iv) a statement of cash flows, in each case prepared in accordance with GAAP. Each audit will be conducted in accordance with GAAP. In the event of any change of the Manager, KRS may instruct the Manager to provide a separate set of financial statements, and a separate audit, each at the Company's expense, for the period ending on the termination or resignation of the Manager, and beginning with the new manager's tenure.

(c) The Manager will use reasonable best efforts to provide KRS with the reports specified in **ANNEX E**, as such **ANNEX E** may be amended or supplemented from time to time

with the mutual consent of KRS and the Manager (which **ANNEX E**, in its current form, is incorporated by reference as if set forth in this Section in full). The Manager agrees to reasonably cooperate with KRS and the Administrator (including by instructing the Administrator to honor requests made by KRS) in good faith to provide reports that satisfy KRS's reasonable reporting requirements, and to amend or supplement **ANNEX E** accordingly.

Section 7.4 Confidentiality.

(a) Subject to the provisions of Section 7.4(e), the Manager and the Company agree that, without KRS's express prior written consent, they shall not, and shall not authorize or permit any Manager Affiliate to: (i) use or disclose any Member Confidential Information for any purpose other than the opening, administering, servicing and closing of KRS's account with the Company and enforcing the rights of the Manager and the Company under this Agreement; (ii) disclose any Member Confidential Information to any Person who does not agree to be bound by this Section 7.4(a) as though such Person were the Manager or the Company, except as required by Section 2.13; or (iii) issue any public disclosure or news release regarding this Agreement; provided, however, that the Manager (or its Affiliates) may do the following if it obtains the prior consent (which may be oral consent) from KRS in advance of the disclosure: (A) include KRS's name in on specific lists of representative clients that the Investment Manager or an Affiliate may distribute to an identified list or group of prospective investors in Manager's funds, products or services, and (B) provide KRS's name as a reference in connection with the Manager's business development opportunities; provided, however, that any disclosure of KRS's identity for any purpose other than set forth above shall require KRS's express prior written consent. Notwithstanding anything to the contrary in this Agreement, the parties hereto agree that the Manager shall use the Company's investment performance on an undisclosed basis in its composite performance presentations.

(b) The Manager shall have the right to keep confidential from the members for such period of time as the Manager determines is reasonable based upon advice of counsel with appropriate expertise (i) any information relating to the Company that the Manager reasonably believes to be in the nature of trade secrets and (ii) any other information (A) the disclosure of which the Manager in good faith believes is not in the best interest of the Company or could adversely affect the Company or its investments or (B) that the Company is required by law or by agreement with a third Person to keep confidential; *provided*, that, the Manager will inform the members in the event it withholds information pursuant to this Section 7.4(b) and shall, to the extent permissible and possible without compromising the confidential nature of the information, provide the members with a general description of the information; and, provided, further that, to the extent such information continues to be withheld, the Manager shall use its commercially reasonable best efforts to provide the members with access to such information by another means that the Manager believes would not adversely affect the Company or its investments.

(c) Subject to the provisions of Section 7.4(e), KRS and the Company agree that, without the Manager's express prior written consent, they shall not, and shall not authorize or permit any KRS Associate:

(i) to use or disclose any Manager Confidential Information for any purpose other than:

(A) the administration of this Agreement and the exercise and enforcement of rights granted hereunder, including without limitation monitoring, administering, transitioning, and terminating investments;

(B) other purposes reasonably related to KRS's investment in the Company, the Company's investment of its Assets in the Intermediate Entities, and the Intermediate Entities' investments in Pooled Investment Vehicles;

(C) to communicate with the managers of the underlying Pooled Investment Vehicles (as further described in Section 2.13); or

(ii) to disclose any Manager Confidential Information to any Person who does not agree to be bound by this Section 7.4(c) as though such Person were KRS or the Company (and the Manager agrees that in light of the foregoing covenant by KRS, the Manager shall use reasonable best efforts to ensure that KRS is not required to execute other nondisclosure or confidentiality agreements in order to receive information hereunder (including information that relates to an unaffiliated Pooled Investment Vehicle)).

(d) Each party acknowledges that remedies at law might be inadequate to protect the non-disclosing party against any actual or threatened breach of this Section 7.4. Without prejudice to any other rights and remedies otherwise available, but, to the extent applicable, the non-disclosing party will be entitled to any remedy available at law or in equity including, without limitation, a temporary restraining order, preliminary and permanent injunctive relief and specific performance, without the need to post any bond or offer proof of actual damages, and shall be entitled to reimbursement of its reasonable costs and expenses (including, without limitation, legal fees and expenses) incurred in connection with such matter.

(e) Notwithstanding the provisions of Sections 7.4(a) and 7.4(c):

(iii) Either party may provide or disclose Manager Confidential Information or Member Confidential Information, as applicable, to its officers and employees, to its financial, legal, tax and other advisors, and to such other Persons as the non-disclosing party may approve in its sole and absolute discretion (each of the foregoing, an "Authorized Person"), for any purpose reasonably related to the Company; provided that the disclosing party has a reasonable belief that such Authorized Persons are subject to similar confidentiality restrictions.

(iv) Either party (or any of its Authorized Persons) may provide or disclose the confidential information of the other party to any Person if: (A) the information contemplated to be provided or disclosed is publicly known at the time of the proposed disclosure as a result of actions other than a breach by the disclosing party or any of its Authorized Persons of the provisions of this Section 7.4; (B) such disclosure is required by law or regulation; (C) such disclosure is required to be made by a Governmental Entity or Official Entity having jurisdiction over the disclosing party; (D) such disclosure is made in good faith in response to a written request for information by a Governmental Entity or Official Entity having jurisdiction over the disclosing party; (E) such disclosure is made in good faith during the course of an examination of the disclosing party by a Governmental Entity or Official Entity having jurisdiction over the disclosing party; or (F) such disclosure is approved in advance by the non-disclosing party. Notwithstanding the foregoing, if a disclosing party or any Authorized Person determines that it will provide or disclose Manager Confidential Information or Member Confidential Information, as applicable, pursuant to clauses (B)-(F) of this Subsection (other than in connection with a regulatory examination or inquiry by state regulatory authorities in the ordinary course of business or if required by the ORA (as further described in Section

7.4(e)(iv))), then the disclosing party will, to the extent legally permissible, promptly provide prior notice to the non-disclosing party of such request and determination to allow the non-disclosing party to seek an appropriate protective order or other remedy and the disclosing party will reasonably assist the non-disclosing party; provided, however, if the confidential information is to be disclosed, the disclosing party will only disclose that information that its counsel in good faith advises is required or necessary to be so disclosed.

(v) Either party (or any of its Authorized Persons) may disclose to any and all Persons, without limitation of any kind, the anticipated tax treatment and tax structure of the Company and transactions contemplated by the Company, and all materials of any kind (including, but not limited to, opinions or other tax analyses) related to such tax treatment and tax structure, if any.

(vi) The Manager understands that KRS, as an entity formed under the laws of the Commonwealth of Kentucky, is subject to Kentucky laws regulating governmental entities, including the Kentucky Open Records Act ("ORA") (Kentucky Revised Statute §§61.870 to 61.884). Accordingly:

(A) The Manager acknowledges and agrees that KRS shall be entitled to disclose publicly any information required to be disclosed pursuant to the ORA, as amended from time to time, provided that, in the event any information is required to be disclosed by KRS under such laws, rules or regulations, KRS shall, unless prohibited by law, rule, regulation or court order, use reasonable efforts to promptly notify the Manager, in writing, of the information required to be disclosed, which notification shall include the nature of the legal requirement and the extent of the required disclosure. KRS agrees to take such actions as may be required to protect the confidential nature of the Manager Confidential Information consistent with applicable law, including, for example, claiming trade secret status, as applicable. Furthermore, to the extent not prohibited by applicable law, KRS shall use reasonable efforts to cooperate with the Manager in the event the Manager takes action to preserve the confidentiality of such information consistent with applicable law. Notwithstanding the foregoing, the Manager acknowledges and agrees that KRS shall be entitled to disclose publicly the following information without providing notice to the Manager: (1) the name of the Company; (2) the name of the Manager; (3) the compensation paid to the Manager hereunder; (4) the investment strategy of the Company; (5) the Net Asset Value of the Company as of any date; (6) the date of KRS's Capital Contribution; and (7) returns on investment in the Company.

(B) The Manager further confirms that it shall not withhold any information from KRS, or restrict access to information (e.g., via "view-only" disclosures) due to KRS being subject to the ORA, or any similar law or regulation, unless otherwise agreed by KRS.

Section 7.5 Tax Matters.

(a) KRS hereby represents that it is a tax exempt entity under United States federal, state and local laws, and has never been subject to, and is unlikely to be subject to, any tax withholding requirements of a United States federal, state or local taxing authority.

(b) The Manager shall cause to be prepared and filed all U.S. and, if appropriate, non-U.S., tax returns required to be filed for the Company. The Manager may, in its discretion, make, or refrain from making, any income or other tax elections for the Company that it deems necessary or advisable; *provided* that neither the Manager nor any other Person shall make any election that would cause the Company to be treated, for U.S. federal income tax purposes, as anything other than a partnership.

(c) The Manager, in its discretion, may take appropriate steps on behalf of the Partnership that it deems necessary or advisable to comply with the tax laws of any jurisdiction.

## ARTICLE VIII

## TERM AND DISSOLUTION OF THE COMPANY

Section 8.1 Term of the Company. The Company shall continue until it is dissolved in accordance with this Article VIII and the Certificate is cancelled in accordance with the provisions of the Code.

Section 8.2 Dissolution of the Company.

(a) Subject to Section 8.2(b), the Company shall continue indefinitely, unless: (i) KRS, in its sole discretion elects to terminate the Company's existence for any reason; or (ii) dissolution of the Company is required by the Code or other applicable law. Upon the dissolution of the Company, the Manager (or, in the event of the resignation, termination or Bankruptcy of the Manager) the Person or Persons selected by KRS to wind up the Company's business (each such Person, a "Liquidator"), shall take all steps necessary or appropriate to wind up the business and affairs of the Company as promptly as practicable thereafter.

(b) The services of the Manager as the manager of the Company shall commence on the Effective Date and shall continue until terminated pursuant to Section 2.11 hereof. Termination of the Manager shall not result in dissolution of the Company.

Section 8.3 Procedure on Winding Up.

(a) Upon the winding up of the Company, a full account of the Assets and Liabilities shall be taken and, subject to the provisions of **ANNEX D**, the Assets shall be liquidated to the extent determined by the Manager (or the Liquidator) and, promptly after the completion of a final audit of the Company's books and records, the cash proceeds thereof shall be applied in the following order of priority:

(i) to payment and discharge of the claims of all creditors of the Company (other than KRS, if KRS is a creditor of the Company), including the Manager to the extent the Company owes any Management Fees to the Manager, is obligated to reimburse the Manager and the Manager Affiliates for expenses for which they are entitled to receive reimbursement under this Agreement or owes Indemnification Obligations to the Manager; and

(ii) to Manager, to redeem the Special Member's Interest (if any) in the amount of its Capital Account related thereto; and

(iii) to KRS (including in payment and discharge of the claims of KRS as a creditor of the Company).

(b) In the event that the Company is dissolved on a date other than the last day of a Fiscal Quarter, the date of such dissolution shall be deemed the last day of an Accounting Period.

(c) Distributions made pursuant to subparagraph (a)(i) shall be made solely in cash.

(d) Upon the winding up of the Company, the name of the Company and its goodwill shall not be appraised, sold or otherwise liquidated.

## ARTICLE IX

## TRANSFERS OF INTERESTS

KRS may Transfer its Interest (or any interest therein) upon prior written notice to the Manager; provided, however, that notice may be provided after the date of Transfer in the event of a Transfer to another political sub-division, department or unit of the Commonwealth of Kentucky, an Entity wholly owned by KRS or to an Entity that is an Affiliate of KRS; provided that prior notice to and approval of the Manager shall be required (such approval not to be unreasonably withheld) if such Transfer would cause any adverse tax or regulatory consequence to the Manager. A proposed transferee shall be required to make representations and warranties in form and substance reasonably satisfactory to the Manager, and no proposed Transfer will be recognized until the documents relating to it and reasonably requested by the Manager or Administrator have been approved by the Manager or Administrator, as applicable. Upon the Transfer of an Interest or an interest therein in accordance with this Article IX, the transferee shall become a member upon the execution of such agreements and other documents as shall be required by the Manager.

KRS may Transfer all or any portion of its interest in the Company to any Affiliate or successor of KRS. The Manager agrees that it shall not unreasonably withhold or delay approval in connection with a proposed Transfer by KRS of all or a portion of its interest in the Company to any third party; provided, that such proposed transfer shall otherwise comply with the requirements of this Agreement. The Manager further confirms that any transferee of KRS's interest shall receive the benefit of all covenants and representations contained in this Agreement to the extent applicable.

## ARTICLE X

## MISCELLANEOUS PROVISIONS

Section 10.1 Withholding Taxes. Any taxes, fees or other charges the Company is required to withhold under applicable law with respect to KRS shall be withheld by the Company and paid to the appropriate governmental authorities only after prompt notice to KRS of its intent to do so and KRS's opportunity to object to the imposition of such withholding. Any such taxes or charges withheld shall be deducted from the Capital Account of KRS as of the last day of the Accounting Period or Fiscal Year with respect to which such amount is required to be withheld. The Manager will use commercially reasonable efforts to prepare all tax rebate reduction or reclaim forms or other filings or elections that are required to obtain any available exemption from, reduction in, or refund of, any withholding or other taxes required in any taxing jurisdiction on behalf of KRS, and to assist KRS to obtain refunds for taxes withheld or paid with respect to KRS as to which a refund is obtainable, and take such other action as may reasonably be necessary for KRS to accomplish the foregoing. The Manager shall also make on behalf of the Company, and assist KRS with making, all other federal, state, and foreign filings that are

required under applicable tax and other regulatory schemes, including by way of example Report of Foreign Bank and Financial Accounts ("FBAR") filings. At the Company's expense, the Manager may retain an independent tax adviser in connection with the satisfaction of the obligations set forth in this Section.

Section 10.2 Power of Attorney. KRS does hereby constitute and appoint Manager as KRS's true and lawful representative and attorney-in-fact, in KRS's name, place and stead, to make, execute, sign and file:

(a) the Certificate of Formation and any amendment thereto or termination thereof which is or may be required by the laws of the State of Delaware;

(b) any certificate required by reason of the dissolution of the Company; and

(c) any application, certificate, report or similar instrument or document required to be submitted by or on behalf of the Company to any governmental or administrative agency or body, to any securities exchange, board of trade, clearing corporation or association or to any Official Entity.

Said attorney is not by this Section 10.2 granted any authority on behalf of KRS to amend this Agreement.

Section 10.3 Notices.

(a) All notices, reports and correspondence provided for under this Agreement must be in writing and will be deemed to have been duly given as indicated if sent to the Manager's or KRS's address as set forth in Subsection (b):

(i) if delivered in person or by courier, on the date it is received;

(ii) if sent by certified or registered mail (airmail, if overseas) or the equivalent (return receipt requested), on the date that the mail is delivered or its delivery is attempted;

(iii) If sent by first class mail, three (3) Business Days after the date of postmark;

(iv) If sent by facsimile, on generation of confirmation; and

(v) If sent by email, on generation of confirmation of receipt.

(b) All notices, reports and correspondence shall be sent to the following Persons:

To the Manager: Francis J. Conroy, Chief Operating Officer
Prisma Capital Partners LP
One Penn Plaza
Suite 3515
New York, New York 10119

| | |
|---|---|
| To KRS: | TJ Carlson, Chief Investment Officer<br>Thomas Masthay, Analyst-Alternative Investments<br>Kentucky Retirement Systems<br>1260 Louisville Road<br>Frankfort, Kentucky 40602 |
| With a copy to: | Jussi P. Snellman<br>Reinhart Boerner Van Deuren s.c.<br>22 East Mifflin Street, Suite 600<br>Madison WI 53705 |

The Manager or KRS may change its address for purposes of this Agreement upon five (5) days' prior written notice to the other party given in accordance with this Section 10.3.

Section 10.4 Binding Effect of this Agreement. This Agreement, including Section 10.2 hereof, shall be binding on the successors, assigns and the legal representatives of each of the parties hereto. Section 2.3 shall inure to the benefit of the Manager Affiliates in accordance with its terms. For purposes of the preceding two sentences, the Manager Affiliates are hereby expressly made third-party beneficiaries of this Agreement. The provisions of Sections 2.3, 2.11, 7.4, 7.5 and 10.1 and 10.3 through and including 10.8 shall survive the termination of this Agreement regardless of the manner in which it is terminated.

Section 10.5 Severability. If any provision of this Agreement shall be determined to be invalid or contrary to any existing or future law by a court of competent jurisdiction, such determination shall not impair the operation of or affect those portions of this Agreement which remain valid.

Section 10.6 Signature Authority; Final Expression; Superseding Document; Amendments; Waivers. Each party hereto certifies that the person signing this Agreement on its behalf has been properly delegated this authority. All Annexes attached hereto are incorporated in and made a part of this Agreement by reference. This Agreement represents the final and complete expression of the terms of agreement between the parties hereto pertaining to the subject matter hereof. This Agreement supersedes any previous understandings or negotiations between the parties not expressly incorporated herein. Any representations, oral statements, promises or warranties that differ from the terms of this Agreement shall have no force or effect. This Agreement may be modified, amended or extended only by formal written amendment properly executed by both KRS and the Manager. The failure of the Manager or KRS to insist, in any one or more instances, upon performance of any provision of this Agreement shall not be construed as a waiver or a relinquishment of any right granted hereunder or of the future performance of any term, covenant or condition contained in this Agreement.

The form and content of the reports provided to KRS pursuant to Section 7.3(c) may be amended or supplemented from time to time with the mutual consent of the Manager and KRS, without setting forth such amendment or supplement in a formal written amendment.

Section 10.7 Choice of Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Delaware, all as now adopted or as they may be hereafter amended, except as expressly provided otherwise in this Agreement or otherwise preempted by applicable federal law.

Section 10.8 Counterparts. This Agreement may be executed in more than one counterpart with the same effect as if the parties executing the several counterparts had all executed one document.

Section 10.9 Notification by the Manager

(a) Change in the Manager's ownership. The Manager shall, to the extent required by Section 205(a)(3) of the Advisers Act, provide KRS with notice of any change in the ownership of the Manager within a reasonable time after such change.

(b) Inaccuracy of Representations and Warranties. The Manager shall notify KRS within five (5) Business Days if any of the representations and warranties contained in Section 2.6 cease to remain true and accurate in any material respect.

Section 10.10 Receipt of Form ADV. KRS hereby acknowledges receipt of Part 2 of the Manager's current Securities and Exchange Commission Form ADV, as and to the extent required by Rule 204-3 under the Advisers Act, more than 48 hours prior to the date of this Agreement.

Section 10.11 Ex Parte Communications. None of the Manager nor any of its agents or Affiliates has lobbied or has had ex parte communication regarding the relationship that is memorialized by this Agreement with any official of the Commonwealth of Kentucky, or has made any political contributions to any official of the Commonwealth of Kentucky in violation of any Kentucky law, statue or regulation pertaining to a conflict of interest including, but not limited to, KRS 121.056, during the three (3) years prior to the date of this Agreement. The Manager shall promptly notify KRS, including KRS's General Counsel, in writing if any such contribution is made subsequent to the execution of this Agreement.

Section 10.12 Covered Persons; Placement Fees.

(a) No fees, bonuses or other compensation, including placement fees or finder's fees, have been paid by or on behalf of the Manager or Manager Affiliates to any placement agent, finder or other individual or entity for the purpose of obtaining this Agreement or becoming the Manager of the Company. Moreover, the Manager and Manager Affiliates have not, and covenant that they will not, accept anything of substantial economic value (as described in greater detail in Section 10.12(d)), from parties in which the Company makes investments (including from parties associated with Pooled Investment Vehicles). The Manager has not, and shall not, engage in any financial or other transaction with: (i) any of the following individuals in their individual capacity: Randy J. Overstreet, Vince Lang, Christopher Tobe, Jennifer Landrum Elliott, Bobby D. Henson, Thomas K. Elliot, Timothy Longmeyer, Susan Smith, or Robert Wilcher (ii) any person to which it has actual knowledge to be a trustee, staff member, or employee of KRS in his or her individual capacity.

(b) "Covered Person" shall mean any board member of KRS, and also includes the immediate family members of a Covered Person (i.e., a spouse, parent, child, sibling), and any Affiliates of any of the aforementioned Persons.

(c) To the best of the Manager's knowledge based on due inquiry, none of the Manager or any principal or employee having authority to act on behalf of the Manager, has a personal or private relationship (including a commercial, investment, or business relationship) with a Covered Person, or an employer of a Covered Person (other than KRS).

(d) Neither the Manager nor any Affiliate of the Manager has any knowledge that any Covered Person has been offered, promised, or provided, directly or indirectly, anything of substantial economic value for his or her private benefit from any party, including any adviser, broker or placement agent in connection with hiring the Manager to manage the Company. Items of substantial economic value include (by way of example, but not by way of limitation) any economic opportunity, future employment, gift, loan, gratuity, discount, trip, favor, and service.

(e) Neither the Manager nor any Manager Affiliate or any of their Affiliates has been indicted, convicted of bribery or attempting to bribe an officer or employee of the Commonwealth of Kentucky, nor have any of them made an admission of guilt of such conduct.

Section 10.13 Contingency. This Agreement, including any amendments, extensions or subsequent contracts, is executed by KRS contingent upon the availability of appropriated funds by legislative act. Notwithstanding any other provision in this Agreement or any other document, this Agreement is void upon the insufficiency (in KRS's reasonable discretion) or unavailability of appropriated funds. Expenditures and/or activities for which the Manager may claim reimbursement shall not be accrued or claimed subsequent to receipt of such notice from KRS.

Section 10.14 No Third Party Beneficiary. Except to the extent expressly provided herein, this Agreement shall not be construed to create any right in any Person not a party hereto other than the permitted successors and assigns of KRS and Manager.

## ARTICLE XI

## DEFINITIONS

"Accounting Period" means a period determined in accordance with Section 1.6(c).

"Advisers Act" means the Investment Advisers Act of 1940, as amended.

"Affiliate(s)" of a specified Person means any Person that directly, or indirectly through one or more intermediaries, Controls, is Controlled by, or is under common Control with, such specified Person.

"Agreement" means this Limited Liability Company Agreement, as amended and/or restated from time to time in accordance with the Code.

"Assets" means (i) all of the Company's investments in Pooled Investment Vehicles and other Financial Instruments (including accrued interest and dividends receivable in respect of such investments); (ii) all of the Company's cash on hand or on deposit and cash equivalents, including any interest accrued thereon; (iii) all of the Company's accounts receivable; and (iv) all of the Company's other assets of every kind and nature, including prepaid expenses; provided, however, that no value shall be placed on the name or goodwill of the Company.

"Authorized Person" is defined in Section 7.4(c)(i).

"Bankruptcy" of a Person means (i) such Person (A) makes an assignment for the benefit of creditors; (B) files a voluntary petition in bankruptcy; (C) is adjudged a bankrupt or insolvent, or has entered against it an order for relief, in any bankruptcy or insolvency proceeding; (D) files a petition or answer seeking for itself any reorganization, arrangement, composition, readjustment, liquidation,

dissolution or similar relief under any statute, law or regulation; (E) files an answer or other pleading admitting or failing to contest the allegations of a petition filed against it in any proceeding of such nature; or (F) seeks, consents to or acquiesces in the appointment of a trustee, receiver or liquidator of such Person or of all or any substantial part of its properties; or (ii) one hundred and twenty (120) calendar days after the commencement of any proceeding against such Person seeking reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under any statute, law or regulation, the proceeding has not been dismissed, or if within ninety (90) calendar days after the appointment without such Person's consent or acquiescence of a trustee, receiver or liquidator of such Person or of all or any substantial part of its properties, the appointment is not vacated or stayed, or within ninety (90) calendar days after the expiration of any such stay, the appointment is not vacated. Without limiting the scope of the foregoing, if a Person is a partnership, Bankruptcy of such Person shall also include the Bankruptcy of any general partner of such Person.

"Business Day" means any day other than a day on which the New York Stock Exchange is closed.

"Capital Account" of KRS is defined in Section 4.2(a).

"Capital Contribution" means the amount of cash contributed by a Person to the capital of the Company.

"Capital Withdrawal" means a withdrawal of cash or other property from the Capital Account or, and any distribution of cash or other property from the Capital Account to a member, pursuant to this Agreement (including distributions pursuant to the provisions of Section 6.2). Each Capital Withdrawal shall be deemed to be effected as of the end of an Accounting Period, notwithstanding that a distribution in connection with such Capital Withdrawal is made after the end of such Accounting Period. The amount of a Capital Withdrawal shall be the amount of cash distributed in connection with such withdrawal (to the extent cash is distributed in connection with such withdrawal) plus the net value of any Assets distributed in connection with such withdrawal (to the extent Assets are distributed in connection with such withdrawal), determined in accordance with the valuation policy of the Manager.

"Certificate" means the Certificate of Formation of the Company described under the heading "WITNESSETH" in this Agreement, as originally filed in the office of the Secretary of State of the State of Delaware and as subsequently amended and/or restated from time to time in accordance with this Agreement and the Code.

"Code" is defined in the preamble to this Agreement.

"Company" is defined in the preamble to this Agreement.

"Control" when used with respect to a particular Person, means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of such Person, whether through the ownership of voting securities, by contract or otherwise.

"Entity" means any domestic or foreign corporation, partnership (whether general or limited), joint venture, limited liability company, business trust, trust, estate, custodian, Governmental Entity, cooperative or other entity, or any unincorporated association or organization or account, whether acting in an individual or representative capacity.

"Financial Instruments" means (i) capital stock (including common and preferred stock); (ii) shares of beneficial interest, partnership interests, limited liability company interests and similar

financial instruments, including interests in Pooled Investment Vehicles and Intermediate Entities; (iii) bonds, notes and debentures (whether subordinated, convertible or otherwise); (iii) shares of open and closed-end investment companies and other mutual funds, including money market funds; (iv) commercial paper; (v) obligations of any Governmental Entity; (vi) any other instruments that are defined as "securities" under the Securities and Commodities Laws or that are commonly known as "securities;" (vii) currencies; (viii) spot and forward currency transactions; (ix) commodity, interest rate, currency, equity and other derivative products, including (A) futures contracts (and options thereon) relating to stocks, stock indices, currencies, U.S. Government securities and securities of foreign governments and other commodities and financial instruments, (B) swaps, options, warrants, caps, collars, floors and forward rate agreements and other derivatives and (C) agreements relating to or securing such transactions; (x) equipment lease certificates and equipment trust certificates; (xi) accounts and notes receivable and payable held by trade or other creditors; (xii) trade acceptances; (xiii) contract and other claims; (xiv) executory contracts; (xv) participations in Financial Instruments; (xvi) repurchase agreements; and (xvii) certificates of deposit, banker's acceptances, trust receipts and other obligations and instruments or evidences of indebtedness of whatever kind or nature; in any such case: (i) issued by any Person, and (ii) regardless of whether such Financial Instruments are privately or publicly held, acquired in public transactions or private placements, exchange-listed (or otherwise publicly traded) or not, or readily marketable and freely transferable or not.

"FINRA" means the Financial Industry Regulatory Authority, Inc.

"FINRA Rules" is defined in Section 5.4.

"Fiscal Quarter" means a fiscal quarter of the Company determined in accordance with Section 1.6(b).

"Fiscal Year" means the fiscal year of the Company determined in accordance with Section 1.6(a).

"GAAP" is defined in Section 1.6(d).

"Governmental Entity" means any federal, state, local or foreign government (or political subdivision, department, instrumentality, body or agency thereof).

"Indemnification Obligation" means an obligation of the Company to indemnify an Indemnitee or advance expenses of an Indemnitee, as the case may be, pursuant to Section 2.3(d), but only if and to the extent allowed by the laws of Kentucky, which may limit KRS to be subject to personal indemnification obligations or to provide indemnification to any Person.

"Indemnitee" is defined in Section 2.3(d).

"Intermediate Feeder Entity" is defined in Section 2.11(a)(ii).

"Interest" means the Interest of KRS or of Manager, as the context requires. The "Interest" of KRS at any particular time means KRS's interest, rights, powers and authority in and with respect to the Company at such time as determined in accordance with this Agreement. Such rights include (i) KRS's share of the profits and losses of the Company, and KRS's right to receive distributions and to withdraw assets from the Company, pursuant to this Agreement and (ii) KRS's other rights, powers and authority in respect of the Company under this Agreement and applicable law. The "Interest" of Manager (and "Special Member's Interest") at any particular time means the Manager's interest, rights, powers and authority in and with respect to the Company at such time as determined in accordance with this

Agreement; such rights include Manager's right to receive profits of the Company in the amount specified in Article V, and Manager's right to receive redemption of its Interest upon selection of a substitute Manager.

"Investment Guidelines" is defined in Section 2.12.

"KRS" is defined in the preamble to this Agreement.

"KRS Associate" means KRS, each Person who controls, is controlled by or is under common control with KRS within the meaning of Section 15 of the Securities Act, and each manager, director, officer, employee or agent of KRS or any such controlling or controlled person.

"Liabilities" means (i) all of the Company's bills and accounts payable; (ii) all of the Company's accrued or payable expenses; (iii) the current market value of all of the Company's short sale obligations after accounting for or reflecting any hedge or other offsetting positions; and (iv) all of the Company's other liabilities, present or future, including Reserves.

"Liquidator" is defined in Section 8.2.

"Managed Account" means an account established by the Company with a Portfolio Manager pursuant to an investment management or similar agreement under which such Portfolio Manager agrees to invest and reinvest such portion of the Assets as the Manager from time to time commits to such Portfolio Manager's investment discretion.

"Management Fee" is defined in **ANNEX B**.

"Manager" is defined in the preamble to this Agreement.

"Manager Affiliate(s)" means the Manager, each Person who controls, is controlled by or is under common control with the Manager within the meaning of Section 15 of the Securities Act, and each director, officer or employee of the Manager or any such controlling or controlled person.

"Manager Confidential Information" means: (i) this Agreement; (ii) any document or report provided by the Manager, the Company or any of their respective agents to KRS pursuant to this Agreement; (iii) any document or report provided by the Manager, the Company or any of their respective agents to KRS upon KRS's request or that is marked as "confidential" or "proprietary"; (iv) any information or data contained in any of the foregoing, including, without limitation, any client information and information with respect to the Manager's investment process, systems and procedures; and (v) any oral information or data provided to KRS by the Manager, the Company or any of their respective agents; provided, however, that Manager Confidential Information shall not be deemed to include any data or information that: (A) KRS obtains from the Company or from a third party who lawfully possesses and discloses such information to KRS or to the Company; (B) is publicly available other than by reason of a breach by KRS of the provisions of Section 7.4; or (C) was in KRS's lawful possession on a non-confidential basis prior to disclosure to KRS by the Manager.

"Member Confidential Information" means any information provided by KRS to the Manager or the Company that can be used to identify KRS as an investor in the Company or as otherwise having a direct or indirect investment management relationship with the Manager or any of its Affiliates.

"Net Asset Value" at particular time means the total value of the Assets at such time (taking into account realized and unrealized appreciation and depreciation attributable to the Assets), less the total

amount of the Liabilities at such time, in each case determined in accordance with this Agreement and GAAP, except as otherwise expressly provided in this Agreement.

"Net Profits" is defined in Section 5.2.

"Net Losses" is defined in Section 5.2.

"Official Entity" means any US or non-US government (or any political subdivision, department, instrumentality, body or agency thereof), any securities or commodities exchange or any self-regulatory organization or association.

"ORA" is defined in Section 7.4(e)(iv).

"Person(s)" means any natural person, whether acting in an individual or representative capacity, or any Entity.

"Pooled Investment Vehicle" is defined in Section 1.3(a).

"Portfolio Manager" means the general partner, investment advisor or other managing entity of a Pooled Investment Vehicle.

"Reserves" is defined in Section 7.2(d).

"Securities and Commodities Laws" means any one or more of the Advisers Act, the Securities Act of 1933, as amended, the Securities Exchange Act of 1934, as amended, the Investment Company Act of 1940, as amended, and the Commodity Exchange Act, as amended, to the extent each is applicable to the Manager or the Company.

"Special Member's Interest": See "Interest."

"Subscription Agreements": is defined in Section 2.3(c).

"Transfer" of KRS's Interest or an interest therein means (i) any transaction in which KRS assigns or purports to assign the Interest, or an interest therein, to another Person, and includes: (A) any transfer, sale, assignment, gift, exchange, pledge, mortgage or hypothecation of the Interest, or any interest therein; (B) the creation or granting of a security interest, lien or encumbrance in, on or against the Interest, or any interest therein; or (C) any other conveyance or disposition of the Interest, or an interest therein, whether voluntary, involuntary or by operation of law; and (ii) any agreement, including a structured note or swap transaction, under which KRS agrees to: (y) grant any other Person an economic interest in KRS's Capital Account or (z) pay any Person an amount determined in whole or in substantial part by reference to the change in value of the Capital Account or to the performance of the Company.

IN WITNESS WHEREOF, the undersigned have executed this Agreement as of the date first written above.

**MANAGER:**

**PRISMA CAPITAL PARTNERS LP**

By: _____
Name: Francis J. Conroy
Title: Chief Operating Officer

**SPECIAL MEMBER:**

**PRISMA CAPITAL PARTNERS LLC**

By: _____
Name: Francis J. Conroy
Title: Chief Operating Officer

**KRS:**

**KENTUCKY RETIREMENT SYSTEMS**
**(Pension Fund)**

By: _____
Name:
Title:

**KENTUCKY RETIREMENT SYSTEMS**
**(Insurance Fund)**

By: _____
Name:
Title:

**ANNEX A**

**DANIEL BOONE FUND LLC**

**SUMMARY OF INVESTMENT TERMS**
**RE: [Fund Name]**

Date: _____, 2011

This Summary of Investment Terms has been prepared by Prisma Capital Partners LP (the "Manager"), the Manager of Daniel Boone Fund LLC (the "Company"), to reflect the final terms negotiated by the Manager with respect to the Company's proposed capital commitment of $_____ as a [Limited Partner] [Shareholder] in [Fund Name] (the "Pooled Investment Vehicle").

Based on our review and information provided by the Pooled Investment Vehicle, except as noted below, we believe that this proposed investment complies with the Investment Objectives, Investment Strategy and Approach, Performance Objectives and Portfolio Constraints outlined in Annex C of the Operating Agreement of the Company (the "Investment Guidelines"). The terms governing the Pooled Investment Vehicle and other summary information are as follows:

| | |
|---|---|
| Pooled Investment Vehicle Manager | |
| Pooled Investment Vehicle | |
| Most recently available AUM ($millions) | |
| Maximum size of the Fund | |
| Lock-up provisions (Hard/Soft) | |
| Liquidity provisions | |
| Use of Side Pockets | |
| Management Fee | |
| Incentive Fee and hurdle rate | |
| High Water Mark | |
| Disclosed preferential terms given to other investors, including principals or affiliates of the manager | |

*Does not include terms applicable to other outstanding classes of shares/limited partnership interests.

The following exceptions to the Investment Guidelines outlined in Annex C of the Operating Agreement of the Company were identified in our review:

_____

_____

_____

_____

# ANNEX B

## COMPENSATION TO MANAGER

### Management Fee

The Company shall pay to the Manager on the first day of each fiscal quarter a fee for management services (the "Management Fee") equal to 0.175% (0.70% per annum) of the beginning Net Asset Value of each Capital Account of a member. The Management Fee shall be calculated and paid in advance but shall be amortized monthly by the Company over the quarter for which such Management Fee is paid.

The Management Fee shall be prorated for any Capital Contribution or withdrawal by a member that is effective other than as of the first day of a quarter. In the event of a withdrawal by a member other than as of the last day of a quarter, the Manager shall pay to the Company an amount equal to the *pro rata* portion of the Management Fee, based on the actual number of days remaining in such quarter, and the Company shall distribute such amount to the withdrawing member.

In consideration for the Management Fee, the Manager will provide the Company with office space, utilities and secretarial, clerical and other personnel. The Manager will bear the costs of providing such goods and services, and all of its own overhead costs and expenses.

### Incentive Fee

The Company shall also pay the Manager an incentive fee (the "Incentive Fee"), generally on an annual basis, equal to 5% of the excess of the Incentive Fee Net Capital Appreciation (as defined below) of each Capital Account for the respective year (appropriately adjusted for contributions and withdrawals during such year and the accrual of the Incentive Fee) over the Threshold Return (as defined below); provided, however, that the Incentive Fee Net Capital Appreciation upon which the calculation of the Incentive Fee is based shall be reduced to the extent of any unrecovered balance remaining in the Loss Recovery Account (as defined below) maintained on the books and records of the Company for such Capital Account as of the beginning of the fiscal year (as described below).

The "Threshold Return" is the appreciation that the portion of a Capital Account would have yielded in a fiscal year if such portion of such Capital Account achieved an aggregate (but not compounded) rate of return for such year (adjusted for Capital Accounts established during such fiscal year) equal to the 13-week U.S. Treasury Bill rate. The Threshold Return will be calculated through the end of each calendar quarter, based on a 360-day year. The 13-week U.S. Treasury Bill rate used for this purpose will be the "High Rate" of interest rate bids accepted in the last regular U.S. Treasury auction of 13-week Treasury Bills of the calendar quarter preceding the quarter in respect to which such calculation is made as reported by the U.S. Treasury Department Bureau of Public Debt.[1] The Threshold Return is not cumulative from year to year. Accordingly, if the Threshold Return is not achieved in a year with respect to a Capital Account, the shortfall is not carried forward into subsequent years and the calculation of the Threshold Return for the then-following year shall be based on the balance of such Capital Account as of the beginning of such following year (after giving effect to subscriptions and withdrawals for such year).

[1] http://www.publicdebt.treas.gov/AI/AIGateway

If this Agreement is terminated at any time other than at the end of a fiscal year of the Company, or the effective date of a partial or complete withdrawal from a Capital Account is other than the last day of a fiscal year, the Manager shall receive any Incentive Fee that has accrued as of the date of termination or the date of such withdrawal, as applicable; provided, however, that an Incentive Fee paid in respect of a partial withdrawal shall be made on that portion of the Incentive Fee Net Capital Appreciation over that portion of any unrecovered balance in the Loss Recovery Account attributable to the withdrawn amount, each such portion being equal to the product obtained by multiplying each of (A) the Incentive Fee Net Capital Appreciation (determined for the period described above) and, (B) the Loss Recovery Account with respect to such Capital Account by the percentage of the Capital Account balance being withdrawn. Notwithstanding anything to the contrary herein, to the extent an Incentive Fee is paid in connection with a partial withdrawal by a member occurring other than at the end of a fiscal year, in computing any subsequent Incentive Fee with respect to such Capital Account for such fiscal year, the amount of Incentive Fee Net Capital Appreciation on which any previous Incentive Fee was paid during such fiscal year shall be deducted from the Incentive Fee Net Capital Appreciation determined in connection with such subsequent Incentive Fee.

There shall be established on the books of the Company for each Capital Account a memorandum account (the "Loss Recovery Account"), the opening balance of which shall be zero. At the end of each fiscal year or at such other date during a fiscal year as the calculation of an Incentive Fee is required to be made for a Capital Account, the balance in such Capital Account's Loss Recovery Account shall be adjusted as follows: (i) if there has been, in the aggregate, Incentive Fee Net Capital Depreciation (as defined below and as adjusted pursuant to the last sentence of this paragraph (b)) with respect to such Capital Account since the immediately preceding date as of which a calculation of an Incentive Fee was made (or if no calculation has yet been made with respect to such Capital Account, since the making of the Capital Contribution pursuant to which such Capital Account was established), an amount equal to such Incentive Fee Net Capital Depreciation shall be credited to such Capital Account's Loss Recovery Account, and (ii) if there has been, in the aggregate, Incentive Fee Net Capital Appreciation (as defined below and as adjusted pursuant to the last sentence of this paragraph (b)) with respect to such Capital Account since the immediately preceding date as of which a calculation of an Incentive Fee was made, an amount equal to such Incentive Fee Net Capital Appreciation, before any Incentive Fee, shall be debited to and reduce any unrecovered balance in such Capital Account's Loss Recovery Account, but not below zero. Solely for purposes of this paragraph, in determining a Capital Account's Loss Recovery Account, Incentive Fee Net Capital Appreciation and Incentive Fee Net Capital Depreciation for any applicable period shall be calculated by taking into account the amount of the Management Fee, if any, debited to such Capital Account for such period. Additional Capital Contributions shall not affect any Capital Account's Loss Recovery Account.

For the avoidance of doubt, the Loss Recovery Account shall function as a "high water mark" mechanism.

The term "Incentive Fee Net Capital Appreciation" shall mean, with respect to any fiscal year or other period used to determine the Incentive Fee, the excess, if any, of the Incentive Fee Ending Value over the Incentive Fee Beginning Value.

The term "Incentive Fee Net Capital Depreciation" shall mean, with respect to any fiscal year or other period used to determine the Incentive Fee, the excess, if any, of the Incentive Fee Beginning Value over the Incentive Fee Ending Value.

The term "Incentive Fee Beginning Value" shall mean, with respect to any fiscal year or other period used to determine the Incentive Fee, the value of a Capital Account at the beginning of such fiscal year or other period used to determine the Incentive Fee (after giving effect to Capital Contributions as of such date).

The term "Incentive Fee Ending Value" shall mean, with respect to any fiscal year or other period used to determine the Incentive Fee, the value of a Capital Account at the end of such fiscal year or other period used to determine the Incentive Fee (disregarding any accrual for the Incentive Fee and any withdrawal from a Capital Account as of the end of such fiscal year or other period used to determine the Incentive Fee).

In the event that this Agreement is terminated other than at the end of a fiscal year, then for purposes of determining the Incentive Fee payable to the Manager at that time, Net Capital Appreciation and the Threshold Return shall each be determined through the termination date.

# ANNEX C

## INVESTMENT GUIDELINES

### Daniel Boone Fund LLC (the "Company")

**Objective**

The investment objective of the Company is to achieve long-term capital appreciation over a rolling three-year period in excess of the return of 13-week U.S. Treasury Bills plus 300 to 500 basis points per annum. The targeted volatility of the Company as measured by the annualized standard deviation is 4% to 8% over such rolling three-year periods.

**Investment Restrictions**

At any time, the Company shall be invested in 25 to 45 Pooled Investment Vehicles principally pursuing one or more of the following strategies as reasonably determined by the Manager:

1. Convertible Arbitrage;
2. Credit/Distressed;
3. Dedicated Short Bias;
4. Emerging Markets;
5. Equity Market Neutral;
6. Event-Driven: Multi-Strategy;
7. Event-Driven: Risk Arbitrage;
8. Fixed Income Arbitrage;
9. Global Macro;
10. Long/Short Equity;
11. Managed Futures; and
12. Niche Strategies

The maximum allocation to a single strategy will not exceed 35% of the value of the Company as measured at the time of investment.

The maximum allocation to a single Pooled Investment Vehicle will not exceed 8% of the value of the Company and the maximum allocation to a single Portfolio Manager will not exceed 10% of the value of the Company, in each case as measured at the time of investment.

The Investment Manager will monitor these levels on an on-going quarterly basis relative to the then-current Net Asset Value of the Company and will notify KRS in the event a guideline is exceeded as of a quarter-end and seek corrective action as deemed appropriate in consultation with KRS.

**Credit Facility**

The Manager shall be permitted to utilize a credit facility or other borrowing in order to bridge redemptions from and subscriptions to Pooled Investment Vehicles in an effort to keep the Company as fully invested as the Manager deems appropriate in its reasonable judgment. It is anticipated that the credit facility shall be used for short-term borrowing and that it shall not exceed 10% of the Net Asset Value of the Company.

**Portfolio liquidity:**

| Hard Lockup | Min % of Portfolio |
|---|---|
| 1 year or less | 30% |
| 25 months or less | 85% |
| 3 years or less | 100% |

| Stated Liquidity After Initial Lockup | Min % of Portfolio |
|---|---|
| Quarterly or Better | 25% |
| Annual or Better | 85% |
| Every 2 years or better | 95% |
| Every 3 years or better | 100% |

Liquidity will be reviewed on a quarterly basis and appropriate correction will be taken as described below. This analysis will be based on the liquidity of the Pooled Investment Vehicles as stated in their governing documents.

For purposes of these guidelines, the lockup periods mentioned above shall not include the period between the expiration of a lockup and the next available redemption date. For example, it is permissible to invest in a Pooled Investment Vehicle with a stated one-year lockup and quarterly redemptions, even if such investment is not redeemable for up to fourteen months due to the investment being made in a non quarter-end month. The Company may not, without the prior written approval of KRS, allocate any of its capital to Pooled Investment Vehicles that impose lockups (measured either from the time the Fund first invests in such a Pooled Investment Vehicle or on an investment-by-investment basis in such a Pooled Investment Vehicle, as applicable) of more than 36 months.

In making determinations under this paragraph, any illiquid securities held by a Pooled Investment Vehicle in a "side pocket" account and any restrictions on liquidity imposed by a Pooled Investment Vehicle on the amount of withdrawals at any given withdrawal date due to the aggregate amount of withdrawal requests made by its investors (e.g., a withdrawal "gate" or similar limitation on withdrawals such as a suspension of withdrawals) will be ignored.

In the event that a Pooled Investment Vehicle permits an election to participate in side pocket investments, the Manager shall make such election based on its evaluation of such side pocket investments and the overall liquidity of the Company.

**Pooled Investment Vehicle Considerations**

The Manager acknowledges that KRS is a tax exempt entity under United States federal, state and local laws, has never been subject to, and is unlikely to be subject to, any tax withholding requirements of a United States federal, state or local taxing authority, and is not currently subject to unrelated business taxable income ("UBTI"). The Manager shall not consider potential UBTI as a factor in managing the Company unless otherwise direct by KRS. When given a choice between a Portfolio Manager's domestic and foreign Pooled Investment Vehicles, the Manager shall, when possible and all other considerations being equal, elect to utilize domestic Pooled Investment Vehicles.

The Manager shall take the following factors into consideration in evaluating Pooled Investment Vehicles and Portfolio Managers. To the extent any of the following is inaccurate with respect to a particular

Pooled Investment Vehicle, the Manager shall note such exception on the Fund Summary Form provided in connection with that Pooled Investment Vehicle.

- There is currently no material litigation or non-routine governmental investigations pending against the Pooled Investment Vehicle or its Portfolio Manager and the Portfolio Manager has agreed to provide notice of future material litigation or non-routine governmental investigations)

- No placement fees or finder's fees, or anything of value has been paid by the Pooled Investment Vehicle or its Portfolio Manager (or its representatives/agents) to the Manager, KRS or any of their respective Affiliates

- The Pooled Investment Vehicle's operational documents (including any side letter entered into between the Company and the Pooled Investment Vehicle or its Portfolio Manager) contain a Most Favored Nation provision

- The Pooled Investment Vehicle or its Portfolio Manager has agreed to provide assistance with respect to any tax withholding issues that may arise

- The Pooled Investment Vehicle's operational documents (including any side letter entered into between the Company and the Pooled Investment Vehicle or its Portfolio Manager) provide that the Company's liability to the Pooled Investment Vehicle is limited to the amount of its investment (all of which is funded at the time of closing)

- The Pooled Investment Vehicle or the Portfolio Manager has agreed to permit KRS to disclose top-level information regarding the Pooled Investment Vehicle (i.e., name, amounts contributed and withdrawn, IRR) in connection with a request under ORA

- The Pooled Investment Vehicle has agreed:

    - to permit the Company to assign its interest to KRS if KRS so requests (i.e., if the Manager is terminated or resigns), or

    - not to require the redemption of the Company's interest in the event the Manager is terminated or resigns

- Side letter terms, if any, are expressly assignable to KRS in the event that all or part of the ownership in the Pooled Investment Vehicle is assigned to KRS

- The Pooled Investment Vehicle has appropriate anti-money laundering policies and procedures in place

# ANNEX D

## WITHDRAWALS AND DISTRIBUTIONS

Unless otherwise defined in this **ANNEX D**, all defined terms shall have the meanings set forth in the Amended and Restated Limited Liability Company Agreement to which this **ANNEX E** is attached (the "Agreement").

1. Voluntary Withdrawals

KRS may request a withdrawal from its Capital Account by delivering written notice of such request to the Manager. The withdrawal shall be subject to the liquidity, redemption and notice provisions of the Pooled Investment Vehicles, Financial Instruments or Portfolio Managers in which the Company is invested and the additional considerations summarized in Section 2 and 3 below.

2. Payment of Withdrawal Proceeds

The Manager will cause the Company to pay out the full proceeds of a requested Capital Withdrawal as provided in Section 6.1. The amounts subject to withdrawal request shall continue at the risk of the Company's business until payment of such withdrawal proceeds occurs.

3. Form of Distributions and Withdrawal Payments

All distributions made pursuant to any provision of the Agreement may be made in cash or other property, or any combination thereof, as may be determined by the Manager (or by the Liquidator, if applicable); provided, however, that any distributions of property other than cash ("Non-Cash Assets") will not be made without the prior consent of KRS. The Manager (or the Liquidator) shall use its reasonable best efforts to cause the Company to make all distributions in the form of cash, unless there is a compelling reason to do otherwise (e.g., based on the Manager's (or the Liquidator's) assessment of the activity and condition of the relevant market and general financial and economic conditions).

The Manager will as soon as reasonably practicable provide notice to KRS with respect to the Manager's plan for fulfilling KRS's withdrawal request and with respect to the schedule by which the Manager anticipates the Company will (i) be able to effect withdrawals from the Pooled Investment Vehicles, Financial Instruments or Portfolio Managers, (ii) receive withdrawal proceeds from the Pooled Investment Vehicles, Financial Instruments or Portfolio Managers and (iii) pay those withdrawal proceeds to KRS in satisfaction of KRS's withdrawal request. If withdrawals will not be effected, or withdrawal proceeds will not be paid, within a timeframe acceptable to KRS, KRS has the option to elect to receive illiquid investments distributed in kind, if applicable; it being understood that the mechanics of liquidations and withdrawals at the Intermediate Entities are described in Section 1.3(b).

If at any time the Manager determines, in its sole discretion, that the withdrawal/redemption requests previously submitted to Pooled Investment Vehicles with respect to a particular withdrawal date are insufficient to satisfy such outstanding withdrawal requests, the Manager shall, to the extent practicable, submit additional withdrawal/redemption requests to one or more Pooled Investment Vehicles that the Manager determines in its sole discretion is appropriate to satisfy such withdrawal requests.

# ANNEX E

## Reporting Requirements

The Manager shall or shall cause the Administrator to adhere to the following reporting requirements:

**Monthly**

1. Provide a report setting forth the estimated performance of the Company, net of all fees, for the prior month and year-to-date periods, annualized portfolio statistics (beginning with the 12 month anniversary of the Company), performance commentary for the prior month, allocation, return and attribution of the Company by Pooled Investment Vehicle and strategy, and year-to-date performance of each Pooled Investment Vehicle within seven business days of the relevant month-end.
2. Provide a statement setting forth the expenses of the Company.
3. Provide a statement setting forth the balance of the member's Capital Account, as finally determined by the Administrator.
4. Conduct a telephonic meeting to review the performance of the Company.

**Quarterly**

1. Provide a report setting forth the estimated performance of the Company, net of all fees, and that of relevant market indices for various periods, attribution of the Company by strategy, performance commentary for the best and worst performing Pooled Investment Vehicles, risk characteristics of the Company, allocations and redemptions from Pooled Investment Vehicles, look-through exposures of the Company to various asset classes and industry/sector exposures, and the liquidity of the Company.

**Annually**

1. Meet with KRS at a location as mutually agreed, for a formal Company review.

**Periodically**

1. Advise KRS of any material changes in the ownership, organizational structure or key personnel of the Manager.
2. Advise KRS of any material reduction by key personnel in the amount of their investments in funds managed by the Manager.
3. Advise KRS of any fees payable to third-party placement agents with respect to the Company's investment in a Pooled Investment Vehicle, provided that the Manager has been advised of such fees by the relevant Portfolio Manager.
4. Provide such further information as KRS may reasonably request.

**ANNEX F**

**STATEMENT OF**
**INVESTMENT OBJECTIVES, POLICIES, AND GUIDELINES**
**OF KENTUCKY RETIREMENT SYSTEMS**

[TO BE ATTACHED]

## ANNEX G

## INSURANCE COVERAGE FOR THE MANAGER

1. Financial Institution Bond (Fidelity Coverage): $5,000,000, subject to a $100,000 deductible for each and every loss.

2. Fiduciary Liability Insurance: $2,000,000, subject to $1,000 deductible for non-indemnifiable losses and $25,000 for indemnifiable losses.

# Exhibit D

# DANIEL BOONE FUND LLC

## Subscription Documents

**Manager:**
**Prisma Capital Partners LP**
**One Penn Plaza**
**Suite 3515**
**New York, New York 10119**

**Administrator:**
**101 Barclay Street**
**20W**
**New York, New York 10286**

## INVESTMENT PROCEDURES

Prospective investors should read the Limited Liability Company Agreement of Daniel Boone Fund LLC (the "**Company**"), as well as this booklet (including the Investor Profile Form) prior to subscribing to the Company.

If you are interested in purchasing an Interest (as defined herein), please:

1. complete and execute all applicable pages of this Subscription Agreement, including the Investor Profile Form (pages S-1 to S-3);
2. provide the following Anti-Money Laundering documentation: a copy of the entity's organizational documents (e.g., a certificate of limited partnership or incorporation), the trust indenture or agreement, or other evidence of its formation, as applicable;
3. fax or e-mail one copy of the executed Subscription Agreement, the Limited Liability Company Agreement Signature Page, the Investor Profile Form and the Form W-9 to: Prisma Capital Partners LP, Attn: Investor Relations, Telephone No.: (212) 590-0800, Facsimile No.: (319) 355-7296; e-mail: investor-relations@primsapartners.com; and
4. fax or e-mail one copy of the executed Subscription Agreement and the Investor Profile Form, and mail the originals by overnight courier to: Daniel Boone Fund LLC c/o BNY Mellon Alternative Investment Services, 101 Barclay Street, 20W New York, NY 10286 Facsimile No.: 732-893-5133; email: ais-prisma-ny-is@bnymellon.com.

## PAYMENT INSTRUCTIONS

At least two business days prior to the proposed purchase date, you must wire the payment for the Interests from an account maintained in your name to the Company's escrow account noted below:

The Bank of New York Mellon
1 Wall Street, New York, NY
ABA 021000018
F/A/O The Bank of New York Mellon FBO Daniel Boone Fund LLC
Acct. # 8901084786
Ref: [Investor Name]

If your payment does not originate from a bank located in an Approved Country*, you must contact the Administrator for further instructions prior to wiring your payment, which may result in a delay in your subscription.

**Important**

1. Please have your bank identify your name on the wire transfer.
2. We recommend that your bank charge its wiring fees separately to insure that the Company receives the full amount that you have elected to invest.

**CLEARED FUNDS MUST BE IN THE COMPANY'S ACCOUNT TWO BUSINESS DAYS PRIOR TO THE DATE ON WHICH THE INVESTOR IS ADMITTED TO THE COMPANY**

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* As of the date hereof, countries that are members of the Financial Action Task Force on Money Laundering (each, an "Approved FATF Country") are: Argentina, Australia, Austria, Belgium, Brazil, Canada, Denmark, Finland, France, Germany, Greece, Hong Kong, Iceland, Ireland, Italy, Japan, Luxembourg, Mexico, Kingdom of the Netherlands, New Zealand, Norway, Portugal, Singapore, South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom and the United States.

# SUBSCRIPTION AGREEMENT

Daniel Boone Fund LLC
c/o BNY Mellon Alternative Investment Services
101 Barclay Street
20W
New York, NY 10286
Attn.: Alternative Investor Services

Re: Daniel Boone Fund LLC — Issuance of Interests

The undersigned (the "**Investor**") wishes to become a member of Daniel Boone Fund LLC (the "**Company**"), a Delaware limited liability company, and to purchase a limited liability interest (an "**Interest**") in the Company upon the terms and conditions set forth herein and in the Limited Liability Company Agreement of the Company, as the same may be amended from time to time (the "**Company Agreement**"). Capitalized terms used herein but not defined herein shall have the meanings assigned to them in the Company Agreement.

Accordingly, the Investor agrees as follows:

## 1. Subscription for an Interest

**(A)** The Investor agrees to become a member of the Company (a "**Member**") and, in connection therewith, subscribes for and agrees to purchase an Interest in and to make a capital contribution (a "**Capital Contribution**") to the Company for a total consideration of $335,000,000.00. Payment in cleared funds for the Interest must be received prior to the closing date established by the Company for the subscription (the "**Closing Date**"). Subject to any legal or regulatory restrictions before the Closing Date, the Investor's payment (the "**Payment**") will be held by the Company in a non-interest bearing account until the issuance of the Interest to the Investor or the rejection of the Investor's subscription.

**(B)** The Investor understands and agrees that the Company reserves the right to reject this subscription for an Interest for any reason or no reason, in whole or in part, and at any time prior to its acceptance. If the subscription is rejected, the Payment will be returned promptly to the Investor, without interest, and this subscription agreement (the "**Subscription Agreement**") shall have no force or effect. Upon acceptance of this subscription by the Company, the Investor shall become a Member of the Company.

## 2. Representations, Warranties, Agreements and Undertakings of the Investor

**(A)** The Investor will not sell or otherwise transfer the Interest without registration under the Securities Act of 1933, as amended (the "**Securities Act**"), or an exemption therefrom. The Investor understands and agrees that it must bear the economic risk of its investment for an indefinite period of time (subject to limited rights of withdrawal provided in the Company Agreement) because, among other reasons, the Interest has not been registered under the Securities Act or under the securities laws of certain states and, therefore, cannot be resold, pledged, assigned or otherwise disposed of unless it is so registered or an exemption from registration is available. The Investor understands that the Company is under no obligation to register the Interest on its behalf or to assist it in complying with any exemption from registration under the Securities Act. Furthermore, the Interest can only be transferred in accordance with the Company Agreement.

**(B)** The Investor has received, carefully read and understands the Company Agreement. The Investor acknowledges receipt of Part 2 of Form ADV of the Manager at least 48 hours prior to the date of this Subscription Agreement set forth below. The Investor acknowledges that it has made an independent decision to invest in the Company and that, in making its decision to subscribe for an Interest, the Investor has relied solely upon the Company Agreement and independent investigations made by the Investor. The Investor is not relying on the Company, Prisma Capital Partners LP (the "**Manager**"), BNY Mellon Alternative Investment Services (the "**Administrator**") or any other person or entity with respect to the legal, tax and other economic considerations involved in this investment other than the Investor's own advisers. The Investor's investment in the Interest is consistent with the investment purposes, objectives and cash flow requirements of the Investor and will not adversely affect the Investor's overall need for diversification and liquidity.

The Investor acknowledges that it is not subscribing pursuant hereto for an Interest as a result of, or pursuant to: (i) any advertisement, article, notice or other communication published in any newspaper, magazine or similar media (including any internet site whose information about the Company is not password protected) or broadcast over television or radio; or (ii) any seminar or meeting whose attendees, including the Investor, had been invited as a result of, or pursuant to, any of the foregoing.

The Investor has been provided an opportunity to obtain any additional information concerning the offering and the Company to the extent the Company or the Manager possesses such information or can acquire it without unreasonable effort or expense, and has been given the opportunity to ask questions of, and receive answers from, the Manager concerning the terms and conditions of the offering and other matters pertaining to this investment.

**(C)** The Investor acknowledges that it has reviewed Sec. 7.4 of the Company Agreement and that it understands the restrictions contained therein on the use and disclosure of Confidential Information. The Investor has not reproduced, duplicated or delivered and undertakes not to reproduce, duplicate or deliver in the future, the Company Agreement, this Subscription Agreement or any other Confidential Material to any other person, except professional advisers to the Investor or as instructed by the Manager, or except as in accordance with Sec. 7.4 of the Company Agreement. Notwithstanding anything to the contrary herein, the Investor (and each employee, representative or other agent of the Investor) may disclose to any and all persons, without limitation of any kind, the tax treatment and tax structure of (i) the Company and (ii) any of the Company's transactions, and all materials of any kind (including, without limitation, opinions or other tax analyses) that are provided to the Investor relating to such tax treatment and tax structure, it being understood that "tax treatment" and "tax structure" do not include the name or the identifying information of the Company or a transaction.

**(D)** The Investor has such knowledge and experience in financial and business matters that the Investor is capable of evaluating the merits and risks of the Investor's investment in the Company and is able to bear such risks, and has obtained, in the Investor's judgment, sufficient information from the Manager to evaluate the merits and risks of such investment. The Investor has evaluated the risks of investing in the Company, understands there are substantial risks of loss incidental to the purchase of an Interest and has determined that the Interest is a suitable investment for the Investor.

**(E)** The Investor is aware of the limited provisions for transferability and withdrawal from the Company and has read Articles VI and IX, and Annex D of the Company Agreement. The Investor has no need for liquidity in this investment, can afford a complete loss of the investment in the Interest and can afford to hold the investment for an indefinite period of time. The Investor acknowledges that distributions, including, without limitation, the proceeds of withdrawals, may be paid in cash or in kind.

**(F)** The Investor is acquiring the Interest for its own account, for investment purposes only and not with a view toward distributing or reselling the Interest in whole or in part.

**(G)** The Investor understands the method of compensation under the Company Agreement between the Company and the Manager and understands the Incentive Fee (as defined in the Company Agreement) and its risks including that: (i) the Incentive Fee may create an incentive for the Manager to cause the Company to make investments that are riskier or more speculative than would be the case in the absence of such arrangement; and (ii) the Manager may receive increased compensation since the Incentive Fee will be calculated on a basis which includes realized and unrealized appreciation.

**(H)** The Investor understands that: (i) past performance of the Manager or its members, partners, employees or entities with which they have been associated is not necessarily an indication of future performance results; (ii) no federal or state agency has passed upon the Interests or made any findings or determination as to the fairness of this investment; and (iii) the representations, warranties, agreements, undertakings and acknowledgments made by the Investor in this Subscription Agreement: (a) will be relied upon by the Company, the Manager and the Administrator in determining the Investor's suitability as a purchaser of an Interest and the Company's compliance with federal and state securities laws; and (b) shall survive the Investor's admission as a Member.

**(I)** The Investor has all requisite power, authority and capacity to acquire and hold the Interest and to execute, deliver and comply with the terms of each of the instruments required to be executed and delivered by the Investor in connection with the Investor's subscription for the Interest, including, without limitation, this Subscription Agreement, and such execution, delivery and compliance does not, and will not, conflict with, or constitute a default under, or a violation of, any instruments governing the Investor, or any law, rule, regulation, judgment, order, decree or agreement to which the Investor is a party or by which the Investor may be bound. The person executing and delivering each of such instruments on behalf of the Investor has all requisite power, authority and capacity, and has been duly authorized, to execute and deliver such instruments, and, upon request by the Company, the Manager or the Administrator, will furnish to the Company true and correct copies of any instruments governing the Investor, including all amendments to any such instruments and all authorizations. This Subscription Agreement constitutes a legal, valid and binding obligation of the Investor, enforceable in accordance with its terms.

**(J)** All information which the Investor has provided to the Company, the Manager or the Administrator concerning the Investor and the Investor's status, and the knowledge and experience of financial, tax and business matters of the person making the investment decision on behalf of such entity, is correct and complete as of the date set forth herein.

**(K)** The Investor understands that the value of a Member's capital account and withdrawals therefrom under the Company Agreement, and the performance of the Company, may be based on unaudited and, in some cases, estimated, data and that valuations provided in an Investor's account statement may be unaudited, estimated valuations.

**(L)** The Investor understands that the Company will not register as an investment company under the Investment Company Act of 1940, as amended (the "**Company Act**"), nor will it make a public offering of its securities within the United States. The Investor understands that the Company complies with Section 3(c)(7) of the Company Act, which permits private investment companies (such as the Company) to sell their interests, on a private placement basis, to an unlimited number of investors that are "qualified purchasers" under the Company Act. The Investor represents that: (i) it was not formed for the purpose of investing in the Company; (ii) it does not invest more than 40% of its total assets in the Company; (iii) each of its beneficial owners

participates in investments made by the Investor *pro rata* in accordance with its interest in the Investor and, accordingly, its beneficial owners cannot opt-in or opt-out of investments made by the Investor; and (iv) its beneficial owners did not and will not contribute additional capital (other than previously committed capital) for the purpose of purchasing the Interest.

**(M)** The Investor understands that Schulte Roth & Zabel LLP acts as counsel to the Company, the Manager, and their respective affiliates. The Investor also understands that, in connection with this offering of Interests and ongoing advice to the Company, the Manager, and their respective affiliates, Schulte Roth & Zabel LLP will not be representing investors in the Company, including the Investor, and no independent counsel has been retained to represent investors in the Company.

Schulte Roth & Zabel LLP's representation of the Company, the Manager, and their respective affiliates is limited to specific matters as to which it has been consulted by the Company, the Manager, and/or their respective affiliates. There may exist other matters which could have a bearing on the Company, the Manager, or their respective affiliates as to which it has not been consulted. In addition, Schulte Roth & Zabel LLP does not undertake (nor does it intend) to monitor the compliance of the Manager, and their respective affiliates with the investment program, valuation procedures and other guidelines set forth in the Company Agreement, nor does it monitor compliance with applicable laws.

**(N)** The Investor understands and agrees that, although the Company, the Manager, and the Administrator will use their reasonable efforts to keep the information provided in the answers to this Subscription Agreement strictly confidential, the Company, the Manager, and the Administrator may present this Subscription Agreement and disclose information provided herein to such parties (*e.g.*, affiliates, attorneys, auditors, administrators, brokers and regulators) as they deem necessary or advisable to facilitate the acceptance and management of the Investor's Capital Contributions and/or the management of the Company's affairs, including, but not limited to: (i) in connection with anti-money laundering and similar laws; (ii) if called upon to establish the availability under any applicable law of an exemption from registration of the Interests or the compliance with applicable law and any relevant exemptions thereto by the Company, the Manager, the Administrator or any of their respective affiliates; (iii) if the contents thereof are relevant to any issue in any action, suit or proceeding to which the Company, the Manager, the Administrator or any of their respective affiliates are a party or by which they are or may be bound; or (iv) if the information is required to facilitate the Company's investments. The Company may also release information about the Investor if directed to do so by the Investor, if compelled to do so by law, or in connection with any government or self-regulatory organization request or investigation, or if the Company and/or the Manager, each, in its sole discretion, deems it necessary or advisable to reduce or eliminate withholding or other taxes on the Company, its partners or the Manager.

**3. Anti-Money Laundering Representations and Covenants**

**Please refer to the website of the U.S. Treasury Department's Office of Foreign Assets Control ("OFAC") at <http://www.treas.gov/ofac> before making the following representations and warranties.**

**(A)** The Investor represents and warrants that the amounts contributed by it to the Company were not and are not directly or indirectly derived from activities that may contravene applicable federal, state or international laws and regulations, including anti-money laundering laws and regulations.

United States federal regulations and executive orders administered by OFAC prohibit, among other things, the engagement in transactions with, and the provision of services to, certain foreign countries, territories, entities and individuals.[1] The lists of OFAC prohibited countries, territories, persons and entities can be found on the OFAC website at <http://www.treas.gov/ofac>. In addition, the programs administered by OFAC ("**OFAC Programs**") prohibit dealing with individuals or entities in certain countries regardless of whether such individuals or entities appear on the OFAC lists.

The Investor represents and warrants that, to the best of its knowledge, none of:

(1) the Investor;
(2) any person controlling or controlled by the Investor;
(3) if the Investor is a privately held entity, any person having a beneficial interest in the Investor; or
(4) any person for whom the Investor is acting as agent or nominee in connection with this investment

is any of the following: (i) a country, territory, individual or entity named on an OFAC list; (ii) a person or entity prohibited under the OFAC Programs; (iii) a senior foreign political figure;[2] or (iv) an immediate family member[3] or close associate[4] of a senior foreign political figure.

Please be advised that the Company may not accept any amounts from a prospective investor if it cannot make the representations set forth in the preceding paragraph. If an existing Member cannot make these representations, the Company may require the withdrawal of such Member's Interest or take such other action as may be required under applicable law.

**(B)** The Investor agrees to notify the Company promptly in writing should the Investor become aware of any change in the information set forth in these representations. The Investor is advised that, by law, the Company may be obligated to "freeze the account" of such Investor, either by prohibiting additional investments from the Investor, declining any withdrawal requests and/or segregating the assets in the account in compliance with governmental regulations, and the Company may also be required to report such action and to disclose the Investor's identity to OFAC or other applicable governmental or regulatory authorities. The Investor further acknowledges that the Manager and/or the Administrator may, by written notice to the Investor, suspend the payment of withdrawal proceeds payable to the Investor if the Manager and/or the Administrator reasonably deems it necessary to do so to comply with anti-money laundering laws and regulations applicable to the Company, the Manager, the Administrator or any of the Company's other service providers.

**(C)** The Investor is wiring payment for an Interest from the following account maintained in its name by a Bank located in an Approved Country[5]:

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1 These individuals include specially designated nationals, specially designated narcotics traffickers and other parties subject to OFAC sanctions and embargo programs.

2 A "**senior foreign political figure**" is defined as a senior official in the executive, legislative, administrative, military or judicial branches of a non-U.S. government (whether elected or not), a senior official of a major non-U.S. political party, a senior executive of a non-U.S. government-owned corporation, or any corporation, business or other entity that has been formed by, or for the benefit of, a senior foreign political figure. For purposes of this definition, a "senior official" or "senior executive" means an individual with substantial authority over policy, operations, or the use of government-owned resources.

3 An "**immediate family member**" of a senior foreign political figure means spouses, parents, siblings, children and a spouse's parents and siblings.

4 A "**close associate**" of a senior foreign political figure is a person who is widely and publicly known to maintain an unusually close relationship with the senior foreign political figure, and includes, but is not limited to, a person who is in a position to conduct substantial U.S. and non-U.S. financial transactions on behalf of the senior foreign political figure.

| | |
|---|---|
| Bank Name: | The Northern Trust Company |
| Bank Address: | 801 South Canal St. Chicago, IL 60607 |
| ABA/SWIFT Code: | 071-000-152 |
| Account Name: | Master Trust Incoming Wire Account |
| Account number: | 518-606-1000 |
| For Further Credit: | KRS PEN Prisma Capital Partners |
| Sub-account number: | 26-74534 |

The Investor understands and agrees that any withdrawal proceeds paid to it will be paid to the same account from which the Investor's investment in the Company was originally remitted, unless the Manager and the Administrator, in their sole discretion, agree otherwise; however, the account must be in the name of the Investor.

**If the Investor cannot make the representations in this section, please contact the Company for further instructions, which may result in a delay in the investment.**

**(D)** The Investor agrees that, upon the request of the Company, the Manager or the Administrator, it will provide such information as the Company, the Manager or the Administrator requires to satisfy applicable anti-money laundering laws and regulations, including, without limitation, the Investor's anti-money laundering policies and procedures, background documentation relating to its directors, trustees, settlors and beneficial owners, and audited financial statements, if any.

**(E)** The Company and the Manager acknowledge that notwithstanding anything herein to the contrary, Investor is a public pension plan for the Commonwealth of Kentucky and all representations, warranties and covenants herein, including but not limited to those set forth in this Section 3, shall not be applicable with respect to Investor's plan beneficiaries, members or retirees.

## 4. General

**(A)** The Investor (i) acknowledges that the Company and Manager are relying on the representations, warranties and acknowledgments of the Investor contained herein, and (ii) agrees to reimburse each of them against any and all claims, demands, losses, damages, costs and expenses whatsoever arising directly as a result of any material breach by the Investor of any such, representations, warranties or acknowledgments; provided, however, that Investor's obligations to provide such reimbursement shall be further subject to limitations imposed upon Investor under the Constitution of the Commonwealth of Kentucky and subsequent judicial interpretation of Kentucky laws. Notwithstanding the foregoing, the Company and Manager shall have no right to set-off reimbursement claims against Investor's pro rata share of the Company's existing investments.

**(B)** The Investor hereby acknowledges that the Manager, the Administrator and each officer of the Company are entitled to be indemnified out of the assets of the Company as provided in the Company Agreement.

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[5] As of the date hereof, "Approved Countries" that are members of the Financial Action Task Force on Money Laundering (each, an "**Approved Country**") are: Argentina, Australia, Austria, Belgium, Brazil, Canada, Denmark, Finland, France, Germany, Greece, Hong Kong, Iceland, Ireland, Italy, Japan, Luxembourg, Mexico, Kingdom of the Netherlands, New Zealand, Norway, Portugal, Singapore, South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom and the United States.

**(C)** Any and all actions or controversies arising out of this Subscription Agreement, including, without limitation, tort claims, shall be construed and enforced in accordance with the internal laws of the State of Delaware, without regard to the choice of law principles thereof.

**(D)** If any provision of this Subscription Agreement is invalid or unenforceable under any applicable law, then such provision shall be deemed inoperative to the extent that it may conflict therewith. Such invalidity or unenforceability shall not affect the validity or enforceability of any other provisions hereof, and to this extent the provisions hereof shall be severable.

**(E)** The Investor hereby authorizes and instructs the Company, the Manager and the Administrator to accept and execute any instructions (including, without limitation, withdrawal requests) in respect of the Interest to which this Subscription Agreement relates given by the Investor in written form, by facsimile or by other electronic means. If instructions are given by the Investor by facsimile or by other electronic means, the Investor undertakes to send the original letter of instructions to the Administrator with a copy to the Manager and agrees to keep each of the Company, the Manager and the Administrator indemnified against any loss of any nature whatsoever arising to any of them as a result of any of them acting upon instructions submitted by facsimile or by other electronic means. The Company, the Manager and the Administrator may rely conclusively upon such instructions and shall incur no liability in respect of any loss arising from (i) the non-receipt of any instructions relating to the Interest of the Investor delivered by facsimile or other electronic means or (ii) any action taken upon any notice, consent, request, instructions or other instrument believed in good faith to be genuine or to be signed by properly authorized persons on behalf of the Investor.

## 5. Electronic Communications

The Investor acknowledges and consents to the policies and procedures set forth below with respect to Company communications to investors.

**(A)** The Company, the Manager, and the Administrator will send correspondence and documents and otherwise communicate with Members using a variety of means including, but not limited to, telephone, e-mail (including delivery of documents by sending an e-mail that contains a copy of the documents), password protected Internet website (upon prior notice to Members), regular mail and facsimile. The Company, in its sole discretion, will choose which method of delivery it uses with respect to any and all such communications.

**(B)** This consent applies to monthly and annual financial reports, offering documents and materials, compliance documents and all other documents that the Company, the Manager, and the Administrator will send to Members; *provided, however,* that the Company will only send documents required to be delivered to Members under the Investment Advisers Act of 1940, as amended, to each Member's mailing address as indicated in the Company's records. Many of the documents will contain confidential information that is specific to a Member's personal financial matters.

**(C)** The Company, the Manager, and the Administrator will take reasonable precautions to ensure the integrity, confidentiality and security of the documents, but will not be liable for any interception.

**(D)** The Company, the Manager, and the Administrator will use the Investor's e-mail and regular mail addresses and the telephone and facsimile numbers provided in this document or otherwise communicated in writing to the Company, the Manager, and the Administrator. This consent will take effect immediately and will remain in effect as long as the Investor maintains an investment with the Company or until the Investor otherwise notifies the Company in writing.

**The Company does not impose any additional charge for electronic delivery, but the Investor may incur charges from the Investor's Internet service provider and telephone company or other Internet access provider. In addition, there are risks, such as systems outages, that are associated with electronic delivery.**

**6. General Eligibility Representations**

**(A)** The Investor represents and warrants that it is an "accredited investor" under Regulation D promulgated under the Securities Act and a "qualified purchaser" under the Company Act.

**(B)** The Investor represents that it is not a Benefit Plan Investor (as defined below). If the Investor becomes a Benefit Plan Investor, the Investor shall promptly disclose to the Manager promptly in writing such fact and also the percentage of such Investor's equity interests held by Benefit Plan Investors. For these purposes, a "**Benefit Plan Investor**," as defined under Section 3(42) of the Employee Retirement Income Security Act of 1974, as amended ("**ERISA**"), and any regulations promulgated thereunder, includes: (i) an "employee benefit plan" that is subject to Title I of ERISA; (ii) a "plan" that is not subject to the provisions of Title I of ERISA, but that is subject to the prohibited transaction provisions of Section 4975 of the Internal Revenue Code, such as individual retirement accounts and certain retirement plans for self-employed individuals; and (iii) a pooled investment fund whose assets are treated as "plan assets" under Section 3(42) of ERISA and any regulations promulgated thereunder because "employee benefit plans" or "plans" hold 25% or more of any class of equity interests in such pooled investment fund.

**(C)** The Investor acknowledges that the Company may invest in "new issue" securities, as defined in Financial Industry Regulatory Authority, Inc. Rule 5130, and represents that it is not a "restricted person" for purposes of Financial Industry Regulatory Authority, Inc. Rules 5130 or 5131.

**7. Additional Information and Subsequent Changes in the Foregoing Representations and Warranties**

**(A)** The Company, the Manager or the Administrator may request from the Investor such additional information as it may deem necessary to evaluate the eligibility of the Investor to acquire an Interest, and may request from time to time such information as it may deem necessary to determine the eligibility of the Investor to hold an Interest or to enable the Company to determine the Company's, the Manager's, or the Administrator's compliance with applicable regulatory requirements or the Company's tax status, and the Investor agrees to provide promptly such information as may reasonably be requested.

**(B)** The Investor agrees to notify the Manager promptly in writing if there is any change with respect to any of the information or representations or warranties made herein and to provide promptly the Manager with such further information as the Manager may reasonably require.

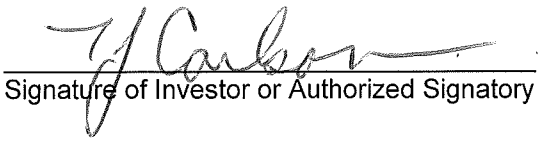
**(C)** This Subscription Agreement may be executed through the use of separate signature pages or in any number of counterparts. The counterparts shall, for all purposes, constitute one and the same instrument binding on all the parties, notwithstanding that all parties do not execute the same counterpart.

## 8. EXECUTION

The undersigned hereby represents and warrants that: (a) the undersigned has carefully read and is familiar with this Subscription Agreement and the Company Agreement; (b) the information contained herein and in the Investor Profile Form attached hereto is complete and accurate and may be relied upon; and (c) the undersigned agrees that the execution of this signature page constitutes the execution and receipt of this Subscription Agreement.

IN WITNESS WHEREOF, the undersigned has executed this Subscription Agreement this 23rd day of August, 2011.

Subscription Amount: $335,000,000.00



Signature of Investor or Authorized Signatory

TJ Carlson
Name of Authorized Signatory

Chief Investment Officer
Title of Authorized Signatory:

# DANIEL BOONE FUND LLC

## INVESTOR PROFILE FORM

### GENERAL INFORMATION
(Please print or type all information)

Name of Investor: Kentucky Retirement Systems Pension Fund

Type of Investor
- ☐ Partnership
- ☐ Corporation
- ☐ Limited Liability Company
- ☐ Trust
- ☒ Other: Governmental Plan Sponsor

Tax I.D. Number: 61-6027950

Principal Office Address:
1260 Louisville Rd.
Frankfort, KY 40601
ATTN: Investments Division

Mailing Address, if different:

Primary contact: Tom Masthay

Telephone number: 502-696-8850

Fax number: 502-696-8805

E-mail address: Thomas.masthay@kyret.ky.gov

### AUTHORIZED SIGNATORIES

Please enter below the names of persons authorized by the Investor to give and receive instructions between the Company, the Manager or the Administrator and the Investor, together with their respective signatures. The persons listed below are the only persons so authorized until further written notice is provided to the Company, the Manager or the Administrator signed by one or more of such persons.

| Name | Signature |
|---|---|
| TJ Carlson | |
| Tom Masthay | |
| | |
| | |

## INTERESTED PARTIES

If additional persons should receive copies of all correspondence, please provide their identification and contact information below. The Company shall not take instructions from these persons in connection with the Investor's Interest. If additional space is needed, please attach an additional sheet.

**Interested Party #1**

Name: The Northern Trust Company - Corp LP Dept.

Address: 801 S. Canal St.
Chicago, IL

Telephone number: KRS Account Manager Claudiu Besoaga:
312-557-4049

Fax number: 312-557-2710

E-mail address: corplp@ntrs.com

**Interested Party #2**

Name: _____

Address: _____

Telephone number: _____

Fax number: _____

E-mail address: _____

**Interested Party #3**

Name: _____

Address: _____

Telephone number: _____

Fax number: _____

E-mail address: _____

## BENEFICIAL OWNERSHIP INFORMATION
## (ENTITIES ONLY)

Please provide the name, address and citizenship of: (a) all directors, general partners, trustees, beneficiaries or members, as applicable; and (b) every person who is directly or indirectly through intermediaries, the beneficial owner of 25% or more of any voting or non-voting class of equity interests of the Investor (if the intermediary's shareholders or partners are not individuals, continue up the chain of ownership listing their 25% or more equity interest holders until individuals are listed). If there are no 25% beneficial owners, please write "None."

| Full Name/Address | Status (Director, General Partner, etc.) | Citizenship/ Principal Place of Business |
|---|---|---|
| Jennifer L. Elliott | Trustee | United States of America |
| Thomas K. Elliott | Trustee | United States of America |
| Bobby D. Henson | Trustee | United States of America |
| Vince Lang | Trustee | United States of America |
| Timothy Longmeyer | Trustee | United States of America |
| Randy Overstreet | Trustee | United States of America |
| Susan Smith | Trustee | United States of America |
| Christopher Tobe | Trustee | United States of America |
| Robert Wilcher | Trustee | United States of America |
| | | |
| | | |
| | | |
| | | |

# DANIEL BOONE FUND LLC

## REQUEST FOR TAXPAYER IDENTIFICATION NUMBER AND CERTIFICATION (INTERNAL REVENUE SERVICE FORM W-9)

See attached form

Form **W-9**
(Rev. October 2007)
Department of the Treasury
Internal Revenue Service

# Request for Taxpayer Identification Number and Certification

**Give form to the requester. Do not send to the IRS.**

Print or type
See Specific Instructions on page 2.

Name (as shown on your income tax return)
**Kentucky Retirement Systems**

Business name, if different from above

Check appropriate box: ☐ Individual/Sole proprietor ☐ Corporation ☐ Partnership
☐ Limited liability company. Enter the tax classification (D=disregarded entity, C=corporation, P=partnership) ▶ ____
☑ Other (see instructions) ▶ **Governmental Retiree Plan Sponsor**

☑ Exempt payee

Address (number, street, and apt. or suite no.)
**1260 Louisville Rd.**

Requester's name and address (optional)

City, state, and ZIP code
**Frankfort, KY 40601**

List account number(s) here (optional)

## Part I Taxpayer Identification Number (TIN)

Enter your TIN in the appropriate box. The TIN provided must match the name given on Line 1 to avoid backup withholding. For individuals, this is your social security number (SSN). However, for a resident alien, sole proprietor, or disregarded entity, see the Part I instructions on page 3. For other entities, it is your employer identification number (EIN). If you do not have a number, see *How to get a TIN* on page 3.

**Note.** If the account is in more than one name, see the chart on page 4 for guidelines on whose number to enter.

**Social security number**

or

**Employer identification number**
61 6027950

## Part II Certification

Under penalties of perjury, I certify that:

1. The number shown on this form is my correct taxpayer identification number (or I am waiting for a number to be issued to me), and
2. I am not subject to backup withholding because: (a) I am exempt from backup withholding, or (b) I have not been notified by the Internal Revenue Service (IRS) that I am subject to backup withholding as a result of a failure to report all interest or dividends, or (c) the IRS has notified me that I am no longer subject to backup withholding, and
3. I am a U.S. citizen or other U.S. person (defined below).

**Certification instructions.** You must cross out item 2 above if you have been notified by the IRS that you are currently subject to backup withholding because you have failed to report all interest and dividends on your tax return. For real estate transactions, item 2 does not apply. For mortgage interest paid, acquisition or abandonment of secured property, cancellation of debt, contributions to an individual retirement arrangement (IRA), and generally, payments other than interest and dividends, you are not required to sign the Certification, but you must provide your correct TIN. See the instructions on page 4.

**Sign Here** Signature of U.S. person ▶ T Carlson Date ▶ 8-23-11

## General Instructions

Section references are to the Internal Revenue Code unless otherwise noted.

### Purpose of Form

A person who is required to file an information return with the IRS must obtain your correct taxpayer identification number (TIN) to report, for example, income paid to you, real estate transactions, mortgage interest you paid, acquisition or abandonment of secured property, cancellation of debt, or contributions you made to an IRA.

Use Form W-9 only if you are a U.S. person (including a resident alien), to provide your correct TIN to the person requesting it (the requester) and, when applicable, to:

1. Certify that the TIN you are giving is correct (or you are waiting for a number to be issued),

2. Certify that you are not subject to backup withholding, or

3. Claim exemption from backup withholding if you are a U.S. exempt payee. If applicable, you are also certifying that as a U.S. person, your allocable share of any partnership income from a U.S. trade or business is not subject to the withholding tax on foreign partners' share of effectively connected income.

**Note.** If a requester gives you a form other than Form W-9 to request your TIN, you must use the requester's form if it is substantially similar to this Form W-9.

**Definition of a U.S. person.** For federal tax purposes, you are considered a U.S. person if you are:

- An individual who is a U.S. citizen or U.S. resident alien,
- A partnership, corporation, company, or association created or organized in the United States or under the laws of the United States,
- An estate (other than a foreign estate), or
- A domestic trust (as defined in Regulations section 301.7701-7).

**Special rules for partnerships.** Partnerships that conduct a trade or business in the United States are generally required to pay a withholding tax on any foreign partners' share of income from such business. Further, in certain cases where a Form W-9 has not been received, a partnership is required to presume that a partner is a foreign person, and pay the withholding tax. Therefore, if you are a U.S. person that is a partner in a partnership conducting a trade or business in the United States, provide Form W-9 to the partnership to establish your U.S. status and avoid withholding on your share of partnership income.

The person who gives Form W-9 to the partnership for purposes of establishing its U.S. status and avoiding withholding on its allocable share of net income from the partnership conducting a trade or business in the United States is in the following cases:

- The U.S. owner of a disregarded entity and not the entity,

- The U.S. grantor or other owner of a grantor trust and not the trust, and
- The U.S. trust (other than a grantor trust) and not the beneficiaries of the trust.

**Foreign person.** If you are a foreign person, do not use Form W-9. Instead, use the appropriate Form W-8 (see Publication 515, Withholding of Tax on Nonresident Aliens and Foreign Entities).

**Nonresident alien who becomes a resident alien.** Generally, only a nonresident alien individual may use the terms of a tax treaty to reduce or eliminate U.S. tax on certain types of income. However, most tax treaties contain a provision known as a "saving clause." Exceptions specified in the saving clause may permit an exemption from tax to continue for certain types of income even after the payee has otherwise become a U.S. resident alien for tax purposes.

If you are a U.S. resident alien who is relying on an exception contained in the saving clause of a tax treaty to claim an exemption from U.S. tax on certain types of income, you must attach a statement to Form W-9 that specifies the following five items:

1. The treaty country. Generally, this must be the same treaty under which you claimed exemption from tax as a nonresident alien.

2. The treaty article addressing the income.

3. The article number (or location) in the tax treaty that contains the saving clause and its exceptions.

4. The type and amount of income that qualifies for the exemption from tax.

5. Sufficient facts to justify the exemption from tax under the terms of the treaty article.

***Example.*** Article 20 of the U.S.-China income tax treaty allows an exemption from tax for scholarship income received by a Chinese student temporarily present in the United States. Under U.S. law, this student will become a resident alien for tax purposes if his or her stay in the United States exceeds 5 calendar years. However, paragraph 2 of the first Protocol to the U.S.-China treaty (dated April 30, 1984) allows the provisions of Article 20 to continue to apply even after the Chinese student becomes a resident alien of the United States. A Chinese student who qualifies for this exception (under paragraph 2 of the first protocol) and is relying on this exception to claim an exemption from tax on his or her scholarship or fellowship income would attach to Form W-9 a statement that includes the information described above to support that exemption.

If you are a nonresident alien or a foreign entity not subject to backup withholding, give the requester the appropriate completed Form W-8.

**What is backup withholding?** Persons making certain payments to you must under certain conditions withhold and pay to the IRS 28% of such payments. This is called "backup withholding." Payments that may be subject to backup withholding include interest, tax-exempt interest, dividends, broker and barter exchange transactions, rents, royalties, nonemployee pay, and certain payments from fishing boat operators. Real estate transactions are not subject to backup withholding.

You will not be subject to backup withholding on payments you receive if you give the requester your correct TIN, make the proper certifications, and report all your taxable interest and dividends on your tax return.

**Payments you receive will be subject to backup withholding if:**

1. You do not furnish your TIN to the requester,

2. You do not certify your TIN when required (see the Part II instructions on page 3 for details),

3. The IRS tells the requester that you furnished an incorrect TIN,

4. The IRS tells you that you are subject to backup withholding because you did not report all your interest and dividends on your tax return (for reportable interest and dividends only), or

5. You do not certify to the requester that you are not subject to backup withholding under 4 above (for reportable interest and dividend accounts opened after 1983 only).

Certain payees and payments are exempt from backup withholding. See the instructions below and the separate Instructions for the Requester of Form W-9.

Also see *Special rules for partnerships* on page 1.

## Penalties

**Failure to furnish TIN.** If you fail to furnish your correct TIN to a requester, you are subject to a penalty of $50 for each such failure unless your failure is due to reasonable cause and not to willful neglect.

**Civil penalty for false information with respect to withholding.** If you make a false statement with no reasonable basis that results in no backup withholding, you are subject to a $500 penalty.

**Criminal penalty for falsifying information.** Willfully falsifying certifications or affirmations may subject you to criminal penalties including fines and/or imprisonment.

**Misuse of TINs.** If the requester discloses or uses TINs in violation of federal law, the requester may be subject to civil and criminal penalties.

# Specific Instructions

## Name

If you are an individual, you must generally enter the name shown on your income tax return. However, if you have changed your last name, for instance, due to marriage without informing the Social Security Administration of the name change, enter your first name, the last name shown on your social security card, and your new last name.

If the account is in joint names, list first, and then circle, the name of the person or entity whose number you entered in Part I of the form.

**Sole proprietor.** Enter your individual name as shown on your income tax return on the "Name" line. You may enter your business, trade, or "doing business as (DBA)" name on the "Business name" line.

**Limited liability company (LLC).** Check the "Limited liability company" box only and enter the appropriate code for the tax classification ("D" for disregarded entity, "C" for corporation, "P" for partnership) in the space provided.

For a single-member LLC (including a foreign LLC with a domestic owner) that is disregarded as an entity separate from its owner under Regulations section 301.7701-3, enter the owner's name on the "Name" line. Enter the LLC's name on the "Business name" line.

For an LLC classified as a partnership or a corporation, enter the LLC's name on the "Name" line and any business, trade, or DBA name on the "Business name" line.

**Other entities.** Enter your business name as shown on required federal tax documents on the "Name" line. This name should match the name shown on the charter or other legal document creating the entity. You may enter any business, trade, or DBA name on the "Business name" line.

**Note.** You are requested to check the appropriate box for your status (individual/sole proprietor, corporation, etc.).

## Exempt Payee

If you are exempt from backup withholding, enter your name as described above and check the appropriate box for your status, then check the "Exempt payee" box in the line following the business name, sign and date the form.

Generally, individuals (including sole proprietors) are not exempt from backup withholding. Corporations are exempt from backup withholding for certain payments, such as interest and dividends.

**Note.** If you are exempt from backup withholding, you should still complete this form to avoid possible erroneous backup withholding.

The following payees are exempt from backup withholding:

1. An organization exempt from tax under section 501(a), any IRA, or a custodial account under section 403(b)(7) if the account satisfies the requirements of section 401(f)(2),

2. The United States or any of its agencies or instrumentalities,

3. A state, the District of Columbia, a possession of the United States, or any of their political subdivisions or instrumentalities,

4. A foreign government or any of its political subdivisions, agencies, or instrumentalities, or

5. An international organization or any of its agencies or instrumentalities.

Other payees that may be exempt from backup withholding include:

6. A corporation,

7. A foreign central bank of issue,

8. A dealer in securities or commodities required to register in the United States, the District of Columbia, or a possession of the United States,

9. A futures commission merchant registered with the Commodity Futures Trading Commission,

10. A real estate investment trust,

11. An entity registered at all times during the tax year under the Investment Company Act of 1940,

12. A common trust fund operated by a bank under section 584(a),

13. A financial institution,

14. A middleman known in the investment community as a nominee or custodian, or

15. A trust exempt from tax under section 664 or described in section 4947.

The chart below shows types of payments that may be exempt from backup withholding. The chart applies to the exempt payees listed above, 1 through 15.

| IF the payment is for . . . | THEN the payment is exempt for . . . |
|---|---|
| Interest and dividend payments | All exempt payees except for 9 |
| Broker transactions | Exempt payees 1 through 13. Also, a person registered under the Investment Advisers Act of 1940 who regularly acts as a broker |
| Barter exchange transactions and patronage dividends | Exempt payees 1 through 5 |
| Payments over $600 required to be reported and direct sales over $5,000[1] | Generally, exempt payees 1 through 7[2] |

[1] See Form 1099-MISC, Miscellaneous Income, and its instructions.

[2] However, the following payments made to a corporation (including gross proceeds paid to an attorney under section 6045(f), even if the attorney is a corporation) and reportable on Form 1099-MISC are not exempt from backup withholding: medical and health care payments, attorneys' fees, and payments for services paid by a federal executive agency.

## Part I. Taxpayer Identification Number (TIN)

**Enter your TIN in the appropriate box.** If you are a resident alien and you do not have and are not eligible to get an SSN, your TIN is your IRS individual taxpayer identification number (ITIN). Enter it in the social security number box. If you do not have an ITIN, see *How to get a TIN* below.

If you are a sole proprietor and you have an EIN, you may enter either your SSN or EIN. However, the IRS prefers that you use your SSN.

If you are a single-member LLC that is disregarded as an entity separate from its owner (see *Limited liability company (LLC)* on page 2), enter the owner's SSN (or EIN, if the owner has one). Do not enter the disregarded entity's EIN. If the LLC is classified as a corporation or partnership, enter the entity's EIN.

**Note.** See the chart on page 4 for further clarification of name and TIN combinations.

**How to get a TIN.** If you do not have a TIN, apply for one immediately. To apply for an SSN, get Form SS-5, Application for a Social Security Card, from your local Social Security Administration office or get this form online at *www.ssa.gov*. You may also get this form by calling 1-800-772-1213. Use Form W-7, Application for IRS Individual Taxpayer Identification Number, to apply for an ITIN, or Form SS-4, Application for Employer Identification Number, to apply for an EIN. You can apply for an EIN online by accessing the IRS website at *www.irs.gov/businesses* and clicking on Employer Identification Number (EIN) under Starting a Business. You can get Forms W-7 and SS-4 from the IRS by visiting *www.irs.gov* or by calling 1-800-TAX-FORM (1-800-829-3676).

If you are asked to complete Form W-9 but do not have a TIN, write "Applied For" in the space for the TIN, sign and date the form, and give it to the requester. For interest and dividend payments, and certain payments made with respect to readily tradable instruments, generally you will have 60 days to get a TIN and give it to the requester before you are subject to backup withholding on payments. The 60-day rule does not apply to other types of payments. You will be subject to backup withholding on all such payments until you provide your TIN to the requester.

**Note.** Entering "Applied For" means that you have already applied for a TIN or that you intend to apply for one soon.

**Caution:** *A disregarded domestic entity that has a foreign owner must use the appropriate Form W-8.*

## Part II. Certification

To establish to the withholding agent that you are a U.S. person, or resident alien, sign Form W-9. You may be requested to sign by the withholding agent even if items 1, 4, and 5 below indicate otherwise.

For a joint account, only the person whose TIN is shown in Part I should sign (when required). Exempt payees, see *Exempt Payee* on page 2.

**Signature requirements.** Complete the certification as indicated in 1 through 5 below.

**1. Interest, dividend, and barter exchange accounts opened before 1984 and broker accounts considered active during 1983.** You must give your correct TIN, but you do not have to sign the certification.

**2. Interest, dividend, broker, and barter exchange accounts opened after 1983 and broker accounts considered inactive during 1983.** You must sign the certification or backup withholding will apply. If you are subject to backup withholding and you are merely providing your correct TIN to the requester, you must cross out item 2 in the certification before signing the form.

**3. Real estate transactions.** You must sign the certification. You may cross out item 2 of the certification.

**4. Other payments.** You must give your correct TIN, but you do not have to sign the certification unless you have been notified that you have previously given an incorrect TIN. "Other payments" include payments made in the course of the requester's trade or business for rents, royalties, goods (other than bills for merchandise), medical and health care services (including payments to corporations), payments to a nonemployee for services, payments to certain fishing boat crew members and fishermen, and gross proceeds paid to attorneys (including payments to corporations).

**5. Mortgage interest paid by you, acquisition or abandonment of secured property, cancellation of debt, qualified tuition program payments (under section 529), IRA, Coverdell ESA, Archer MSA or HSA contributions or distributions, and pension distributions.** You must give your correct TIN, but you do not have to sign the certification.

## What Name and Number To Give the Requester

| For this type of account: | Give name and SSN of: |
|---|---|
| 1. Individual | The individual |
| 2. Two or more individuals (joint account) | The actual owner of the account or, if combined funds, the first individual on the account [1] |
| 3. Custodian account of a minor (Uniform Gift to Minors Act) | The minor [2] |
| 4. a. The usual revocable savings trust (grantor is also trustee) | The grantor-trustee [1] |
| b. So-called trust account that is not a legal or valid trust under state law | The actual owner [1] |
| 5. Sole proprietorship or disregarded entity owned by an individual | The owner [3] |
| **For this type of account:** | **Give name and EIN of:** |
| 6. Disregarded entity not owned by an individual | The owner |
| 7. A valid trust, estate, or pension trust | Legal entity [4] |
| 8. Corporate or LLC electing corporate status on Form 8832 | The corporation |
| 9. Association, club, religious, charitable, educational, or other tax-exempt organization | The organization |
| 10. Partnership or multi-member LLC | The partnership |
| 11. A broker or registered nominee | The broker or nominee |
| 12. Account with the Department of Agriculture in the name of a public entity (such as a state or local government, school district, or prison) that receives agricultural program payments | The public entity |

[1] List first and circle the name of the person whose number you furnish. If only one person on a joint account has an SSN, that person's number must be furnished.

[2] Circle the minor's name and furnish the minor's SSN.

[3] You must show your individual name and you may also enter your business or "DBA" name on the second name line. You may use either your SSN or EIN (if you have one), but the IRS encourages you to use your SSN.

[4] List first and circle the name of the trust, estate, or pension trust. (Do not furnish the TIN of the personal representative or trustee unless the legal entity itself is not designated in the account title.) Also see *Special rules for partnerships* on page 1.

**Note.** If no name is circled when more than one name is listed, the number will be considered to be that of the first name listed.

## Secure Your Tax Records from Identity Theft

Identity theft occurs when someone uses your personal information such as your name, social security number (SSN), or other identifying information, without your permission, to commit fraud or other crimes. An identity thief may use your SSN to get a job or may file a tax return using your SSN to receive a refund.

To reduce your risk:

- Protect your SSN,
- Ensure your employer is protecting your SSN, and
- Be careful when choosing a tax preparer.

Call the IRS at 1-800-829-1040 if you think your identity has been used inappropriately for tax purposes.

Victims of identity theft who are experiencing economic harm or a system problem, or are seeking help in resolving tax problems that have not been resolved through normal channels, may be eligible for Taxpayer Advocate Service (TAS) assistance. You can reach TAS by calling the TAS toll-free case intake line at 1-877-777-4778 or TTY/TDD 1-800-829-4059.

**Protect yourself from suspicious emails or phishing schemes.** Phishing is the creation and use of email and websites designed to mimic legitimate business emails and websites. The most common act is sending an email to a user falsely claiming to be an established legitimate enterprise in an attempt to scam the user into surrendering private information that will be used for identity theft.

The IRS does not initiate contacts with taxpayers via emails. Also, the IRS does not request personal detailed information through email or ask taxpayers for the PIN numbers, passwords, or similar secret access information for their credit card, bank, or other financial accounts.

If you receive an unsolicited email claiming to be from the IRS, forward this message to *phishing@irs.gov*. You may also report misuse of the IRS name, logo, or other IRS personal property to the Treasury Inspector General for Tax Administration at 1-800-366-4484. You can forward suspicious emails to the Federal Trade Commission at: *spam@uce.gov* or contact them at *www.consumer.gov/idtheft* or 1-877-IDTHEFT(438-4338).

Visit the IRS website at *www.irs.gov* to learn more about identity theft and how to reduce your risk.

## Privacy Act Notice

Section 6109 of the Internal Revenue Code requires you to provide your correct TIN to persons who must file information returns with the IRS to report interest, dividends, and certain other income paid to you, mortgage interest you paid, the acquisition or abandonment of secured property, cancellation of debt, or contributions you made to an IRA, or Archer MSA or HSA. The IRS uses the numbers for identification purposes and to help verify the accuracy of your tax return. The IRS may also provide this information to the Department of Justice for civil and criminal litigation, and to cities, states, the District of Columbia, and U.S. possessions to carry out their tax laws. We may also disclose this information to other countries under a tax treaty, to federal and state agencies to enforce federal nontax criminal laws, or to federal law enforcement and intelligence agencies to combat terrorism.

You must provide your TIN whether or not you are required to file a tax return. Payers must generally withhold 28% of taxable interest, dividend, and certain other payments to a payee who does not give a TIN to a payer. Certain penalties may also apply.

# Exhibit E

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

JEFFREY C. MAYBERRY, et al. PLAINTIFFS

V.

KKR & CO., L.P., ET AL. DEFENDANTS

TRANSCRIPT OF HEARING
ZOOM CALL RECORDING
JANUARY 11, 2021
BEFORE THE HONORABLE PHILLIP J. SHEPHERD

THE COURT: Okay. Good morning, ladies and gentlemen. We are here in Franklin Circuit Court for a Zoom call and -- on our motion hour docket on Monday, January the 11th, 2021. We are on the record, and we've got one motion before the Court here to discuss in 17-CI-1348. Jeffrey Mayberry v. KKR and others. We've got a large array here, it looks like, of participants on the call, and so let me just say I think rather -- rather than everyone enter their appearances, we'll have a record of that with the call.

So let me just make a few preliminary remarks, and then we can have a little bit of discussion. I think, primarily we will be -- I'm going to limit the discussion here today to scheduling matters. We do have a motion before the Court, and I know there's been an objection to hearing on the merits of that motion, and there are some -- some other matters I think the Court needs to take into consideration before we figure out exactly how to proceed on all of those things.

So let me just kind of lay the groundwork, and then I will open the floor, and I'll ask initially from Ms. Lerach to -- let me ask, who is representing the Attorney General's office here? Mr. Maddox, I see. So --

MR. MADDOX: That's right, Your Honor. I'm sorry, I was on mute.

THE COURT: Okay. And that's fine. And it probably is helpful if people would remain on mute unless

you're going to speak. I'll just ask everybody to stay muted unless you want to speak, and if you do when you come on, on board, if you would just identify yourself and your client, and then we'll avoid the lengthy entrances of appearance.

So what we've got before the Court this morning is the motion filed by the Tier 3 plaintiffs who have attempted to previously bring some new claims into the case, and the Court denied the initial requests to have those claims brought before the Court. And what we've got now is essentially a new motion seeking to assert claims on behalf of some named Tier 3 plaintiffs or plaintiffs who joined the system after it changed from the defined benefit to a defined contribution plan.

So there have been some objections. I think, really, all the defendants have objected to hearing that on the merits, and I would agree it's not really right to consider the merits. We're going to have to obviously do some briefing, but I -- but the Court's also aware that from the prior motion practice here that the Attorney General's office has indicated they're planning to file an amended complaint. So I think the Court, you know, needs to -- needs to know what the amended complaint is going to be, and then we're also going to need to figure out how to address those issues.

So I would say my initial review of the motion filed by Ms. Lerach on behalf of the plaintiffs and the proposed new claims that they're seeking to raise that it is

something that we really -- it may not be right to address now. It does seem to me that we need to see what the Attorney General's intervening complaint is, and at that point after that has been filed, then if there are parties not -- if there are nonparties who want to intervene in the case then they need to file a motion to intervene under Rule 24, and we can evaluate any claims that they would attempt to assert under, you know, the civil rules for intervention because, you know, obviously, it's impossible for the Court to determine what kind of an interest they've got and whether that interest is adequately represented by the Attorney General's office until we see whatever amended complaint the Attorney General may come forward with.

So let me first ask Mr. Maddox what -- what the Attorney General's position is on those issues and if the Attorney General is intending to come forward with an amended complaint.

MR. MADDOX: Thank you, Your Honor. Let me just mention before I do that I'm getting a signal that my bandwidth is low and that my connection is unstable. You've been freezing up on my screen. I think it's because -- I'm not sure why, but in the event that I lose this connection, I'll dial back in or try to --

THE COURT: Okay.

MR. MADDOX: We do intend -- the office does

intend to file an amended complaint, Your Honor, as we've indicated in the past. We're working on that, you know, with all deliberate speed. Obviously, your order came down over the holidays. We started working on that as soon as we could after we got back to full staff.

The recent averments of the -- I guess we're calling them Tier 3 group, you know, raised some new wrinkles. Obviously, there are things that we need to evaluate in light of that. I think Your Honor's suggestion that it would be appropriate to see what exactly is in our amended complaint is appropriate because it's probably highly relevant to a motion to intervene if that's what Your Honor treated their motion as.

So we're working on that. I mean, there are allegations in their filings of conflicts of interest that, you know, we will be exploring in detail and to the extent that it's appropriate addressing those in whatever we file. I'm not able to tell you exactly when that will happen, but I can tell you that we plan to do it, you know, at our first opportunity.

THE COURT: Okay. All right. Okay. Well, let me hear, then, from Ms. Lerach on behalf of the Tier 3 movants here and get your perspective on where we are and how we ought to proceed.

MR. BASKIN: Morning, Your Honor. It's awfully early here in California, so excuse me for that. I'm Jamie Baskin. Michelle Lerach and Albert Chang are here generally

with me and have socially distanced in an appropriate kind of way. We're all in this large room together.

We took Your Honor literally and seriously when Your Honor suggested the Tier 3 dismissal was without -- dismissed with the denial that the motion to amend was without prejudice, and we took that as a sign that we should amend; although, we did say in the brief that intervention was something we could do, as well.

Our main concern is to get moving with as much speed, expedition as we possibly can. If the Court moves a briefing schedule, we're certainly happy to do that. I think that there's going to be a place at the table for the Tier 3 plaintiffs, whatever the Attorney General does. As I read the statutes, the Attorney General does not supplant persons who would bring statutory claims against KRS trustees or the analogous common law claims against other KRS fiduciaries. So we plan to do that, and we will stand back and listen to what the Court has in mind in terms of when and how.

THE COURT: Okay. And we did have a kind of a preliminary objection that was filed jointly, I think, by most, if not all, of the defendants that Ms. Edelman submitted to the Court. So let me ask her if she wants to give the Court her perspective of those defendants or her clients, and then anybody who joined in that is welcome to also add anything they would think is relevant. So, Ms. Edelman.

MS. EDELMAN: Yes. Thank you, Your Honor.

I think the Court has captured what our points were, and I don't think that I really need to add much of anything. I think it goes without saying that we want an opportunity to not only fully respond to the motion, but as we pointed out and as the Court has pointed out, it makes the most sense to wait and see exactly what the Attorney General's position is going to be in the amended complaint.

The only other thing I would add, Your Honor, is just to be certain, and this is just an oral statement that I'm making on the record, the nonparties who are moving to amend made a reference, as it's been mentioned here, to this being some type of motion to intervene, and as the Court I'm sure is well aware, that triggers a 10-day response from us if, in fact, it was a motion to intervene. I just want to be sure on the record, we're objecting, we don't know that that was really that type of motion.

THE COURT: Right.

MS. EDELMAN: -- the Court's going to allow us to address all of it more fully without --

THE COURT: Sure. Yeah.

MS. EDELMAN: -- in due course. Thank you, Your Honor.

THE COURT: Okay. All right. Let me ask, is there anybody else who had any perspective they wanted to offer

to the Court on these kind of preliminary matters and scheduling matters?

Okay. Well, let me tell you what I think, you know, we need to do to kind of move forward here. And I'm going to have to just call on Mr. Maddox again because I think we do need to get kind of a deadline for the Attorney General to file the amended complaint. And I guess I also, frankly, I need you all to refresh my recollection. My recollection is that -- well, I'm not really sure if -- I know we had a round of vigorous litigation on motions to dismiss the initial and amended complaints. I'm not sure -- I think some if not all of the defendants have filed answers. So we probably -- the Attorney General will hopefully need to file that motion to amend, but, again, I'm not really clear on that.

It says the Attorney General's claims are, you know, kind of new claims. I'm not really positive they need to file a motion to amend or not. So let me ask Mr. Maddox what their understanding is. Do you all intend to -- to just tender an amended complaint as a matter of right or file a motion to amend?

MR. MADDOX: I was not aware of an answer having been filed, Your Honor. I -- if that's the case, then we'll certainly --

THE COURT: Actually, yeah. Actually, I guess, what I'm thinking of is, historically, the answer to the

original complaints of the plaintiffs whose claims were dismissed. So there -- I don't -- I think you're correct there has not been any answers that I'm aware of to the complaint that was -- that the Court allowed to be filed here recently. So looks to me like you all can probably file an amended complaint as a matter of right.

So the timing, I guess, is the question, and I don't want to be unreasonable, but I do want to give you all, you know, a deadline for the filing of the amended complaint and would like to get your perspective on what's reasonable.

MR. MADDOX: It's hard for me to say at this point, Your Honor. I mean, I think, you know, we're talking certainly not before a couple of weeks, and there's a pretty significant review process, and we're still doing some research. I understand that, you know, there are some new provisions being drafted. I'd like an opportunity, you know, to consult with the team before making any kind of firm commitment.

THE COURT: Yeah. Okay. And then I would feel confident that when an amended complaint is filed that we'll also get the motions to dismiss whenever an amended pleading is set forward. So I think what we'll do at this point is simply --

MR. BASKIN: Your Honor, Your Honor, if I might. It's Jamie Baskin again for the Tier 3 plaintiffs. It would

seem to make sense to have motions to dismiss, the Attorney General's complaint, and the Tier 3 complaint running parallel.

THE COURT: Well, I will just say that I, you know, at this point I don't think we -- I think what we need to do is to let the Attorney General file the amended complaint, and then I think the Tier 3 parties or the Tier 3 movants here need to file a motion to intervene because, you know, until the Court knows the scope of the claims the Attorney General is going to pursue, I can't really evaluate whether the interests of those persons are adequately represented, all the other factors that the Court needs to consider in deciding whether they should be allowed to participate.

So I'm going to ask the Attorney General to file the amended complaint within 20 days, and then I'm going to hold the motion of these Tier 3 parties in abeyance, and I'm going to allow the Tier 3 movants that brought this motion before the Court to file any motion to intervene, I'm going to say within 30 days. So within ten days after the amended complaint is filed, these Tier 3 movants will need to file a motion to intervene, and I'm going to treat their initial motion as a part of that. And I would expect that that would need to be supplemented and fleshed out and that these Tier 3 persons who want to participate will need to follow the requirements of Rule 24 and tender a pleading. And then we'll let everyone respond to any motion that is filed as provided in

the rules.

So I think that's probably what we need to do. And then, you know, frankly, we're probably going to -- what I would suggest is we'll have another status conference here after the amended -- after the amended complaint is filed and any motion to intervene is filed. Then we'll have another status conference to set a briefing schedule on further motions, motions to dismiss or objections to the intervention, and then I can consider all those together.

So I think it's a little bit premature to set a schedule on any of that because we don't really know what the scope of the Attorney General's amended pleading to be, nor do we know the Tier 3 claims that will be set forth in a tendered intervening complaint.

So I would suggest let's just get the amended complaint before the Court, then we'll allow the Tier 3 persons to file a motion to intervene, and then we'll have another status conference sometime in the probably week to ten days thereafter. So that will give the Attorney General 20 days to file an amended complaint. Ten days thereafter we will allow a motion to intervene to be filed by any parties who want to intervene. There may be other parties that want to intervene for all I know.

So we'll do that, and then after the amended complaint and the motions to intervene have been filed, we'll

suspend the requirement to respond to those motions and to the amended complaint until we've set a schedule. That gives everybody the opportunity to brief the issues and we'll need to do another scheduling conference then after the amended complaint and those motions have been filed. Okay?

Okay. Are there any other issues or scheduling matters that we need to address here today?

MS. EDELMAN: Your Honor, Barbara Edelman. Just, and I'm repeating, I think, the obvious, but just to be clear, that that -- you are indicating that any requirement on behalf of the defendants to respond, that that is going to be held in abeyance pending setting our schedule --

THE COURT: Our next scheduling conference, yes.

MS. EDELMAN: Which would include the 10-day objection rule. I just want to be --

THE COURT: Correct.

MS. EDELMAN: -- we hadn't agreed to that, but --

THE COURT: Yeah, yeah, yeah. Absolutely. Okay. So we'll schedule another status conference sometime after the running of that 30-day period. The next probably week to ten days following that period, we'll set another scheduling hearing and move forward from there. So, okay. Anything else we need to address? I hope Mr. Maddox got that.

MR. MADDOX: I did, Your Honor.

THE COURT: We've been freezing up, I think, maybe for some of the participants in the call. And I will say, Mr. Maddox, that's the first time I've ever heard anyone accuse you of having lack of bandwidth.

MR. MADDOX: I'll take that for what it's worth, Your Honor. Thank you.

THE COURT: Okay. Exactly. All right. Okay. Well, thank you very much. I'll get an order out that will put this all in writing so everybody -- so there won't be any confusion about our filing deadlines, and then we'll move forward and get these issues ready to be submitted for argument and decision. So thank you all very much, and the Court will stand in recess.

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(End of Recording of Zoom Call)

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CERTIFICATE

STATE OF KENTUCKY

COUNTY OF FRANKLIN

I, KATHRYN E. MARSHALL, a Notary Public in and for the state and county aforesaid, do hereby certify that the foregoing pages are a transcript of the hearing recorded by Zoom taken on January 11, 2021, transcribed to the best of my ability. I was not present during the hearing.

Given under my hand as notary public aforesaid, this 25th day of January 2021.

/s/Kathryn Marshall
Notary Public
STATE OF KENTUCKY AT LARGE

My Commission Expires:
8/4/23

# Exhibit F

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

JEFFREY C. MAYBERRY, et al. PLAINTIFFS

V.

KKR & CO., L.P., ET AL. DEFENDANTS

TRANSCRIPT OF HEARING
February 8, 2021
BEFORE THE HONORABLE PHILLIP J. SHEPHERD

THE COURT: ...everybody entered their appearances. I think we will have a record of who is on the call, but we have two motions before the Court that are somewhat interconnected, so we've got the Attorney General's motion for an extension of time and we've got the Tier 3 plaintiffs' motion to intervene. So I think, probably, it would be best to start out with the Attorney General's motions. So let me ask who's going to speak on behalf of the Attorney General's office today?

MR. MADDOX: Morning, Your Honor. Victor Maddox.

THE COURT: All right. So why don't -- we'll start with the Attorney General's motion, and I'll let Mr. Maddox address that, and then we'll open the floor and let anyone who wants to respond to that and, obviously, the Tier 3 movants here have got some issues they want the Court to consider. So we'll -- I'll allow them to be heard on this, as well.

So but let's start out with Mr. Maddox.

MR. MADDOX: Thank you, Your Honor. As you recall, of course, we were here in January, and Your Honor issued an order directing us to file an amended complaint by February 1, and then other filings and hearings would follow from that in due course. We determined as we went through the process that for a variety of reasons that we've laid out in our motion it would be better for the Commonwealth

and ultimately for all the parties if that filing were delayed. Obviously, there are a lot of complex issues. Your Honor may or may not be aware that there are other cases related to this litigation pending in other jurisdictions. You know, there are issues concerning the strategy and the legal implications of some of those cases that are constitutional issues. And as important, as we pointed out in our motion, Kentucky Retirement Systems has issued a not to exceed $1.2 million contract with a New York law firm to provide it independent investigative services to determine if there were any improper or illegal activities in connection with the events and relating to KRS's investment activities that are the subject of the litigation. We think that that work will be important and highly relevant to the filing that we ultimately make, and we think that KRS has an integral arm of Kentucky state government, one over which, you know, ultimately, the Attorney General's office is the chief law enforcement officer of the Commonwealth. It is appropriate that our office wait and see the results of that investigation.

It's not clear that the actual report provided to the KRS board will be public, but the contract does provide for the preparation of a public summary of the report, and we would anticipate receiving that when that report is made available.

So given that a $1.2 million contract by an independent outside firm is a significant undertaking that we believe will inform both the parties and the Court to some extent, it's appropriate that the litigation which has been, you know, as Your Honor knows, delayed for sometime now be paused for another, you know, six weeks or so.

THE COURT: Let me ask you, it seems like the primary reason that you all are suggesting that we delay the requirement for the filing of the amended complaint is the undertaking of this third party review on behalf of the Retirement Systems, and it appears to me, at least from public reports, that that review is going to take probably at least nine or ten months. So I'm not quite sure what we will accomplish if we just, you know, if we delay this for six weeks, and then we cut back that as an ongoing process. And I'm a little uncomfortable, I guess, with an open-ended --

MR. MADDOX: Yeah. Your Honor, my understanding from reviewing the contract was that the record date of the contract was November 25th, 2020, and the contractor anticipated providing its report within four months from the beginning of the investigation. And I don't know when that investigation actually began, but I have not heard of nine or ten months. I've heard something closer to March 31st.

MS. BISHOP: If I could interject. This is Sarah

Bishop for the Retirement Systems.

THE COURT: All right, Ms. Bishop.

MS. BISHOP: I don't want to interject much, but just to shed a little light on the contract. It is a 4-month contract by its terms. So that contract is publicly available and the investigation should -- we expect to be done in the 4-month time span of the contract, and based on when the contract was formalized, we expect -- late March is when we expect --

THE COURT: Late March.

MS. BISHOP: -- from the independent investigation.

THE COURT: So you all anticipate getting at least a report in late March. Okay. So that's somewhat on the timeframe that Mr. Maddox is suggesting. Okay. Anything else, Mr. Maddox?

MR. MADDOX: No, Your Honor. I think that's really it.

THE COURT: All right. Let me kind of open the floor. I know Mr. Kelly, I think, has filed a response or has indicated some issues that he wants to raise with the Court. So let's start with Mr. Kelly.

MR. KELLY: Thank you, Your Honor, and just -- and we have in the past defendants are trying to speak as one. Obviously, if others have issues, they will raise it, but I will speak on behalf of the defendants.

THE COURT: Sure.

MR. KELLY: It's the defendants' belief that it's in the best interest of all the parties to proceed in an objective, logical, and rational process. As we discussed at the hearing on January 11th that necessarily means allowing time for the AG to file a complaint so the parties and the Court know the nature and extent and scope of the claims that are going to be asserted.

We don't believe that anything has changed in the last three weeks. The AG believes that these four times we really don't take a position on that, we don't oppose it. Our belief is, though, that the Court set a process in place that made sense and that it's improper for us to establish some independent time schedule for nonparty Tier 3 members' motions to intervene. As Your Honor recognized in its order of just three weeks ago that the claim cannot be evaluated in a vacuum and the viability of those claims must be tested against the claims that the office of the Attorney General is going to bring.

So we believe the Court should establish a reasonable deadline for the Attorney General to amend its complaint. That is up to the Court. But that is before allow any party who seeks to intervene ten days to file a motion. And a week or so after that set a schedule, set a brief -- a hearing for us to set a briefing schedule on both

the Attorney General's amended complaint and any then pending motions to intervene so that this matter moves forward in some orderly process.

What we do not believe is appropriate is a piecemeal litigation where we are arguing motions to intervene or the merits of substance of that independent of the AG's motion to -- independent the AG's amended complaint, and as the Court is probably aware there is also a separate case that has landed in front of Your Honor filed by the Tier 3 members which is identical to the intervening complaint. Service is moving forward on that case. We don't believe that we should be briefing issues in both this case and that case independently of each other. So what we suggest, Your Honor, is that the Court defer -- we defer to the Court as to the appropriate timeframe going forward but believe that the process that you entered in your January 12 order makes sense, and whenever the Court sets a timeline for filing the amended complaint by the AG that the same timelines be followed moving forward and we will move on in some logical fashion to the various pending complaints.

THE COURT: Okay. All right. Let me ask if -- who's going to speak on behalf of the Tier 3 movants here today?

MS. LERACH: I am, Your Honor. It's Michelle Lerach.

THE COURT: Okay. Ms. Lerach, I'll let you.

MS. LERACH: Can you hear me?

THE COURT: Yes, uh-huh. I'll be happy to hear your perspective on this. Early morning out in California, I guess.

MS. LERACH: We had to add a little extra light here. Good morning.

Well, look, from our perspective there is simply no reason to delay request by the Attorney General. He volunteered to intervene in this litigation with much fanfare, copied our complaint more than six months ago. The Court has given the Attorney General the opportunity to amend, and he didn't take it. The Court has the Attorney General's pleading, the intervening complaint, and can assess our intervention against that pleading and not -- not being evaluated in a vacuum, as Mr. Kelly suggests, but rather against the complaint that is on file.

This case is at a crossroads, Your Honor. The Attorney General, defendants, and apparently now KRS want to put it on ice. Our vision is completely different and yet the same as it has always been: To litigate the case aggressively, on the merits, to achieve the best possible result. And frankly that's the choice the Court is presented today. The idea of a new, secret investigation by KRS is no reason to stall.

Derivative plaintiffs filed this complaint, this verified complaint, three years ago. KRS investigated then. There was investment committee consideration. There was full board review. They were represented by independent counsel, Stoll Keenon, and it resulted in a joint notice to this Court that the claims were good and valuable and should be prosecuted.

KRS issued a press release, and I'm going to read a part -- a portion of that to the Court, and this was dated on April 20, 2018. 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 actually demonstrate plaintiffs' commitment and that of their counsel to represent the best interest of KRS in pursuing these claims.

There's no question there's serious wrongdoing alleged here. The plaintiffs' companion memorandums who are opposition to the motions to dismiss sometime ago lays that out with accompanying factual detail. And this Court's opinion concurred indicating that the complaint alleges severe fiduciary misconduct. So why spend a million plus to do in secret what is the function and purview of this Court.

There's no attorney/client privilege in stockholder derivative trust and fiduciary litigation as this Court has already has already ruled. The exception is in fact the rule. In the derivative context there's Garner v. Wolfinbarger; in the trust context, there's Riggs National Bank, etc., etc. It's really too late for an after the fact investigation under the leadership of an alleged wrongdoer to stall this case further.

If the Attorney General doesn't have the staff to investigate and prosecute, then why intervene? If the Attorney General is not ready to go forward, the derivative plaintiffs are and have been. There's no question these plaintiffs have standing and there's no good faith basis to oppose, and no one has. Under a representative case law they should be permitted to amend, but whether by amendment or intervention, they are ready to proceed. The judicial process has been triggered here. It's not for KRS or the Attorney General to stop it. It's independent and should go forward. For three years this case has been pending and we're still at the pleading stage. The Courts exist for a fair, open, adversarial process on the merits. Public interest and equity require this case to proceed. And since it's abundantly clear that these Tier 3 plaintiffs have standing and for whatever reason the Attorney General didn't file an amendment, the plaintiffs want to move forward and

prosecute their case. These claims were substantively valid when filed three years ago. They were ready to be prosecuted vigorously when they were stopped by a technicality. It's not that the plaintiffs didn't have standing when the case was pleaded, rather the rules changed in the interim. Regardless, that's been cured. That technical non substantive defect has been corrected and it's time for this case to move forward and be adjudicated on the merits.

At the February 22nd status conference the plaintiffs will move for pretrial order number 1, immediate -- seeking immediate commencement of expedited discovery and to consolidate the related cases that Mr. Kelly mentioned to push forward this case as the public interest and equity and justice require to complete the autopsy while the patient is still on life support. The Attorney General may obviously move the Commonwealth's claims at its own pace, but that shouldn't create additional delay in proceeding to the merit phase of the derivative plaintiffs' claims.

The Tier 3 intervention should be granted. The motion was timely filed. There's been no opposition. The legal authority's been briefed two times, it's correct on the merit, and defendants have failed to protest.

I'm not here to here to argue that motion. My colleague, Mr. Baskin, will in a second. But I simply want

to point that out, Your Honor, we simply want to move forward. Enough is enough. It's time to get the merits. Thank you.

MS. BISHOP: Your Honor, may I respond quickly for KRS --

THE COURT: All right, Ms. Bishop.

MS. BISHOP: -- of the joint notice and the investigation just so that we're clear. KRS entered into a joint notice with the prior plaintiffs, so different plaintiffs, different claims, and they did so under the belief that those plaintiffs had standing. The Supreme Court has now told us they do not -- they did not have standing, and as such KRS put out an RFP for investigation for any potential claims that may exist. So that's what we expect to be completed by the end of March.

THE COURT: Yeah. Okay. All right. Anybody else want to --

MR. MADDOX: Your Honor, if I could just, briefly. Ms. Lerach was careful to refer to her clients as the derivative plaintiffs, but, in fact, she cannot claim that standing, that status, before Your Honor confers it, and Your Honor has not conferred it. The truth is the Supreme Court in the Overstreet opinion, made some pronouncements that suggest that the Tier 3 group will not eventually obtain derivative status. I think it's inappropriate for

her to try to cloak her clients in that -- in that status when there is a serious question concerning whether and to what extent that is possible given that Your Honor has already granted representative status to -- to the Attorney General's office.

I would just refer Your Honor to the concluding paragraphs of the Overstreet opinion where it made clear that where the plaintiffs were seeking damages from third parties for tort damages allegedly suffered by all Kentucky taxpayers, there is no authority for such a novel theory. And further, there is no support for the ability of those plaintiffs to claim derivative status.

Now, the only thing that's changed is that Ms. Lerach has found a new group of plaintiffs who are called the Tier 3 group, but as Your Honor knows in the filings she has made, that same group claims to invoke all of the standing of the Mayberry group and to assert all of the claims in a derivative status that the Supreme Court said could not be asserted in the Overstreet opinion. So at the appropriate time, you know, we'll be filing a response to the motion, but I just think it's important to keep that in mind.

THE COURT: All right. Anybody else want to be heard on that?

MS. LERACH: May I respond?

THE COURT: Ms. Lerach?

MS. LERACH: I'm raising my hand. I guess that's not -- appreciate the comments from KRS and the Attorney General, but with respect, these are not different claims. These are the shame claims. And quite frankly not at all uncommon in representative actions to substitute one plaintiff in for another when one plaintiff, a representative plaintiff, who's there to represent the interest of another entity is found to be deficient in some manner.

I would say that the motions are still pending before this Court. They are correct. But I don't believe that means that these plaintiffs have no standing.

Moreover, the portion of the Overstreet opinion that the Attorney General was quoting has to do with the claims for the Commonwealth, the taxpayer claims, the very claims that the derivative plaintiffs are no longer asserting and which the Attorney General is asserting. Thank you.

THE COURT: Okay. All right. Anybody else on the Attorney General's motion for an extension of time?

MS. EDELMAN: Your Honor, Barbara Edelman. I just want to make a quick comment. One, I know the Court is aware and I think perhaps even hinted at it when we started, but, of course, the Tier 3 plaintiffs are not in our case

yet, and I know you said you wanted to let Ms. Lerach speak because some -- her issues would be intertwined in some way, but --

THE COURT: Yeah.

MS. EDELMAN: -- the folks that are in this case don't include the purported Tier 3 plaintiffs. Having said that, just one comment, Ms. Lerach made a comment about her motion to intervene. No one has opposed it, and I think the Court is aware that we were not required to oppose it, and if they had even waited to timely file, which they didn't, they went ahead and jumped ahead of the Court's schedule, the Court had already given us time and said that you would set a briefing schedule later. And that's why we didn't oppose it. I don't want to --

THE COURT: I understand.

MS. EDELMAN: -- confusion on that front. Thank you.

THE COURT: Okay. All right. Well, let's, also, we've kind of -- these issues as I indicated at the outset kind of overlap, but -- but let me hear any additional arguments that the Tier 3 movants want to make with regard to their motion to intervene because it is certainly kind of intertwined with the Attorney General's motion. I guess I still kind of need to figure out, you know, the appropriate relationship between these two motions and how to best

address those and what in terms of, you know, getting this litigation in the proper -- on the proper footing to, you know, to move forward toward resolution of the issues, and it appears to be kind of a treacherous path to the Court at this point. But I would like to hear if there's anything else the Tier 3 plaintiffs wanted to add with regard to their motion, because I'd be happy to hear anything else they want to offer at this time.

MS. EDELMAN: Excuse me, Your Honor.

MS. LERACH: Thank you, Judge. Mr. Baskin will argue for the plaintiff. Sorry.

THE COURT: Ms. Edelman, did you have something else?

MS. EDELMAN: Yes. I'm so sorry, Your Honor, to interrupt, but our understanding was that this -- are you actually asking that the motion to intervene be heard on the merits at this time?

THE COURT: Well, I just want to hear what -- before the Court rules on that, I'm going to give you all the opportunity to file briefs on this. But, again, I guess my question is do the Tier 3 -- I want to get an understanding of what the Tier 3 movants are requesting of the Court, and it appears to me that at this point they're asking the Court to go ahead and move forward on their motion to intervene instead of waiting until the Attorney

General's amended complaint is filed. So I guess it's what I want to get a better understanding of. If we do move forward on the motion to intervene, I'm going to give everybody the opportunity to brief that issue.

So -- so let's go ahead and let me hear what the Tier 3 movants are -- what their position is on that.

MR. BASKIN: Good morning, Your Honor. Jamie Baskin. I'm going to argue this part of it.

THE COURT: Yeah.

MR. BASKIN: Argue is that the... Attorney General the opportunity to amend. He chose not to amend. So Your Honor has an operative complaint before the Court against which you can assess our intervention. That complaint does not ask for damages for KRS. It asks for damages for the Commonwealth. He copied our first amended complaint largely, but took out some language in the first paragraph and in the prayers about relief for KRS.

Even if he said that he was representing KRS, and this goes to the heart of it, it wouldn't adequately represent the Tier 3 folks. They're situated differently than the Tier 1 or 2. They don't have a viable contract. They have an upside sharing right with a 5-year lookback meaning that from the beginning of the Tier 3 status, new Tier 3 employees, they've got a 5-year lookback to get the geometric average return rate, and so you have to go back

five years, establish damages on a plan year by plan year basis in order to reload the sharing percentages that have been very much decimated by conduct of these defendants.

It is -- it appears -- Your Honor, I'm seeing a bandwidth is low message. Are you hearing me?

THE COURT: Yeah, I'm hearing you, Mr. Baskin.

MR. BASKIN: All right. I'm sorry. So the Attorney General that way does not represent the Tier 3 interest. Of course, the Attorney General recovery goes to the state treasury, not to the trust fund, and it certainly doesn't go back to a series of plan years for distribution.

There is a structural inadequacy, too, if I may say so. The Attorney General will either have to prosecute this case with his own staff or with contract lawyers on one year contracts at either relatively modest hourly rates or with a capped contingent fee. This is not the kind of case in terms of size, complexity or the like that can really adequately be prosecuted that way. It's just a structural difficulty for the Attorney General in terms of actually being put forth the effort and the resources, do the case that way.

We have conflicts in our papers to the Court between the Attorney General and KRS. I could go further, but if we're going to brief it, I'll leave it to that, but it's just time to get the case moving, Your Honor. That's

our real message.

THE COURT: I mean, your all's -- it's pretty clear to the Court that your all's position, again, whether the Court accepts it or not, is an open question, but your all's position is regardless of what the Attorney General alleges in the forthcoming amended intervening complaint, it's going to be your all's position that the Attorney General doesn't adequately represent the interest of your clients. Is that fair to say?

MR. BASKIN: That is absolutely fair to say, Your Honor.

THE COURT: And some that -- at least some of those reasons are really independent what the nature of the claims that the Attorney General chooses to pursue they have to do with the Attorney General status and what you view as potential conflicts and also the kind of relief that the Attorney General is authorized to pursue that in your view would not adequately protect the Tier 3 retirees.

So you all are going to -- pursue those arguments regardless of -- alleged. Okay.

MR. BASKIN: Absolutely correct. In addition, there may well be defenses that the Attorney General faces that derivative plaintiffs would not or at least not anything like --

THE COURT: And let me ask you, you know, again,

there's been some continued references to these Tier 3 plaintiffs as derivative plaintiffs, and at this point, have your clients made a formalized demand on the -- on the Retirement Systems board of --

MR. BASKIN: We have not. It was unnecessary for a number of reasons, earlier --

THE COURT: Yeah, okay. But, again, we have kind of new plaintiffs and new claims. So but there still hasn't been a formalized demand on the Retirement System board from these movements. Correct?

MR. BASKIN: That is correct. If we need to brief the demand excused demand futility issues we'll certainly do so.

THE COURT: Okay.

MR. BASKIN: They're not in place, by the way. We -- just like the Attorney General copied our own complaint and then added the 2015-2016 allegations which I think the Court ought to focus on just a little bit because they bring in Mr. Eger as a direct actor, and that's one of the reasons why the demand, in our view, would be futile. You're going up against the executive director of the agency.

THE COURT: Okay. All right. Again, I'm going to try to sort this out. I guess we have -- as we've all noted, I guess we have a companion case which has been filed again in this court but to some degree replicates claims of

the three movants. And I guess we have a motion and that case was set for a week from today to talk about --

MR. BASKIN: Your Honor?

THE COURT: Yes.

MR. BASKIN: If we could make a suggestion. Nobody ever called us and said can we have a, you know, an extension and the Court's going to grant it, not an open ended, but an extension. If we're still going to have a status conference on the 22nd, I very much think we should, it would make sense to me to bump the hearing next week over to the following week, hear it all on the 22nd. We love watching the sunrise with you, but --

THE COURT: Okay. All right. Let me -- I'll take that into consideration, and then I'll try to get an order out within the next couple of days, but we'll -- I'll give you all the Court's rulings on these pending motions, and I'm going to try to, again, find out what's the most fair and efficient way to get these matters moving toward resolution. And, obviously, there's going to be some adjustment of the Court's initial order on this case, and I am going to give the Attorney General some additional time. I'm not quite sure, you know, how to structure that or how much time would be fair and appropriate, but I'm going to allow for some additional time for the Attorney General to file that pleading -- may need to mute. Okay.

But I'll get you all an order within the next couple of days that will give you all the Court's ruling on that, and probably some adjustments will be made in the deadlines that are currently in place, and then we'll figure out how to move on from there. But I will get you all an order very shortly, and we'll have some kind of a followup with everybody represented here within the next couple of weeks to deal with any issues that arise in terms of how we're going to proceed forward. I just want to make sure everybody has the chance to be heard, and we've got some procedural issues that the Court needs to sort through. So I'll get you an order on those things. We'll probably have a status conference sometime in the near future, and then we'll proceed with briefing the things that need to be briefed and try to get this case moving forward. Okay?

MS. EDELMAN: Your Honor, just to be clear on our motion for extension of time which is noticed to be heard Monday, is your order going to deal with that in the context of the rest of these issues or --

THE COURT: Yeah, I think so, and, you know, I will probably -- I mean, I'll just -- certainly, I will -- when I get the order out from today, I'm going to ask you all to meet and confer, see if you can't reach at least a preliminary agreement, but obviously I'm going to give you all some more time and hopefully you all can work out a, at

least, a preliminary agreement as to an extension of time for the new case that was filed.

MS. EDELMAN: Thanks so much.

THE COURT: So, yeah, I will want you all to discuss that among yourselves. Okay?

All right. Thank you very much, and the Court will stand in recess.

- - -

(End of Recording)

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CERTIFICATE

STATE OF KENTUCKY

COUNTY OF FRANKLIN

I, KATHRYN E. MARSHALL, a Notary Public in and for the state and county aforesaid, do hereby certify that the foregoing pages are a transcript of the hearing taken on August 17, 2020, transcribed to the best of my ability.

Given under my hand as notary public aforesaid, this 1st day of March 2021.

/s/Kathryn Marshall
Notary Public
STATE OF KENTUCKY AT LARGE

My Commission Expires:
8/4/23

# Exhibit G

2006 WL 2787469
Only the Westlaw citation is currently available.

Unpublished opinion. See KY ST RCP Rule 76.28(4) before citing.

Court of Appeals of Kentucky.

Thomas G. WHITE, Derivatively on Behalf of Vencor, Inc., A Delaware Corporation, And Ventas, Inc., Formerly Vencor, Inc., Appellant.
v.
W. Bruce LUNSFORD; E. Earl Reed, III; Michael R. Barr; Thomas T. Ladt; Jill L. Force; James H. Gillenwarter, Jr; R. Gene Smith; Walter F. Beran; Ulysses L. Bridgeman; Elaine L. Chao; Donna R. Ecton; Greg D. Hudson; and William H. Lomica, Appellees.

No. 2005-CA-001775-MR.
|
Sept. 29, 2006.

Appeal from Jefferson Circuit Court, Action No. 98-CI-003669; Judith E. McDonald-Burkman, Judge.

**Attorneys and Law Firms**

P. Stephen Gordinier, Louisville, KY, Jeffrey R. Krinsk, Mark L. Knutson, San Diego, CA, for appellant.

David Tachau, John David Dyche, Louisville, KY, for appellees.

Before COMBS, Chief Judge; GUIDUGLI and JOHNSON, Judges.

**Opinion**

COMBS, Chief Judge.

***1** On behalf of Ventas, Inc., a Delaware corporation, Thomas G. White appeals from an order of the Jefferson Circuit Court dismissing this shareholder derivative action. We have reviewed the substantive requirements of Delaware law along with the arguments of counsel. We agree that the complaint fell short of the threshold requirement that there be a **specific showing** of impropriety on the part of the defendants. Under the relevant law, White bore the burden to demonstrate particularized facts that the defendants were tainted by self interest or that they failed to exercise sound business judgment in conducting the affairs of the corporation. Absent such particularity, relevant principles of corporate law justify dismissal of a complaint. We conclude that the court did not err in dismissing the complaint.

Ventas is a publicly traded real estate investment trust headquartered in Louisville. Prior to a corporate reorganization in 1998, the company was known as Vencor, Inc. It operated a national network of integrated healthcare facilities located on real estate that it owned and managed.

A Wisconsin resident and Ventas shareholder, Thomas White, filed suit in Jefferson Circuit Court in 1998 against ten members of the company's board of directors and three of its non-director officers. (He filed an amended complaint within a few days.) In the name of the interests of the corporation, White alleged that the defendants had violated their fiduciary duties to the company from February 10, 1997, through October 21, 1997. During that period, White alleged that the company's officers conspired to inflate the value of the corporation's stock and that they then dumped substantial portions of their holdings. He alleged that the directors were complicit in making false or misleading statements about the company's operations and its anticipated

  

performance. He also charged that they failed to properly oversee the management of the company, a dereliction that resulted in grave financial harm to Ventas.

In August 1998, the defendants filed a motion to dismiss the action. They relied on a substantive requirement of Delaware's corporate law known as the "demand rule." Under the demand rule, a stockholder can file a derivative action only after he has first made a demand upon the corporation's board of directors to take action in light of his allegation and it has refused to do so. He may be relieved or excused of making a pre-lawsuit demand on the directors only if he can demonstrate that the making of such a demand would be futile because the directors are clearly incapable of making an impartial decision regarding litigation. *Levine v. Smith,* 591 A.2d 194, 200 (Del.1991). When the action is based on the inability of the directors to act, the stockholder's complaint must state **with particularity** why a demand on the directors to assert a claim would have been futile. *Beam v. Stewart,* 845 A.2d 1040 (Del.2004).

In their motion to dismiss, the defendants contended that prior to filing the derivative action, White failed to make a demand of the company to pursue the alleged claims involving corporate affairs or that he failed to properly plead in his complaint that such a demand would have been futile. They alleged that both omissions were fatal. Before the court could consider the motion of the defendant, the proceedings were stayed for various reasons over a prolonged period of time. At long last, on July 26, 2005, an order was entered dismissing the action.

***2** Twenty-two days after this dismissal, White filed two post-judgment motions. Procedurally, he sought permission of the court to file motions out of time based on an inadvertent mistake of counsel. Substantively, he sought to have the judgment set aside in order that he might file a second amended complaint "more concisely setting forth the facts." On August 24, 2005, the trial court summarily denied White's post-judgment motions. This appeal followed.

White raises two alternative issues for our consideration on appeal. He first argues that the trial court erred in concluding that the complaint was deficient; namely, that it failed to charge that a demand on the company's board of directors would have been futile. In the alternative, White contends that the trial court erred by refusing to permit him to file a second amended complaint. We disagree with both of his arguments.

The parties agree that Delaware law governs the substantive issues on appeal and that the demand rule is dispositive. White acknowledged his failure to demand that the company's board of directors take action against the alleged wrongful conduct. Accordingly, he bore the burden to demonstrate in detail (*i.e.,* with "factual particularity") that any demand on the corporation would have been futile.

Delaware's stringent requirement for factual particularity is based on streamlining and expediting discovery. It is intended to prevent a stockholder from causing a corporation "to expend money and resources in discovery and trial in the stockholder's quixotic pursuit of a purported corporate claim based solely on conclusions, opinion or speculation." *Brehm v. Eisner,* 746 A.2d 244, 255 (Del.2000). The requirement for factual specificity means that a complaint must be dismissed-regardless of the strength of the claim as alleged on its merits-if that specificity as to underlying facts has not been established.

In cases where a complaining shareholder alleges that a demand upon a company's board of directors would have been futile, Delaware courts have established two separate (yet overlapping) lines of inquiry. If the shareholder's complaint challenges a specific event or transaction approved by a board of directors, Delaware courts apply a two-prong test set forth by the Delaware Supreme Court in *Aronson v. Lewis,* 473 A.2d 805 (Del.1984) (the *Aronson* test). If no specific action undertaken by the board is challenged, however, Delaware courts apply a single-step inquiry set forth in *Rales v. Blasband,* 634 A.2d 927 (Del.1993) (the *Rales* test). White's complaint implicates both tests.

White alleged numerous facts in his complaint, which the trial court accepted as true in ruling on the motion to dismiss. He claimed that company executives made overly positive and optimistic statements to market analysts and others during a February 1997 conference call. He believed that these statements affected Wall Street's quarterly earnings projections for the

company, causing brokerage firms to reiterate their "buy" or "strong buy" recommendations for the stock. He also criticized the corporation's annual report to shareholders (issued in March 1997) for failing to caution against the sector's possibly harmful exposure to proposed Medicare reforms being considered by Congress at that time.

***3** White alleged that management once again misled analysts following the release of its first quarter earnings results in April 1997. He claimed that the favorable, forward-looking statements affected the corporation's stock price, driving it upward to the benefit of its executives and directors. Despite a clear need to warn its stockholders, White believed that management continued to downplay the potential impact of reduced federal healthcare spending, emphasizing instead only robust growth projections.

White alleged that executives misled analysts and stockholders in press releases filed in May 1997 concerning the corporation's acquisition of Transitional Hospital Corporation for $639 million dollars. He charged that management's excessively optimistic predictions concerning this asset continued through early July, causing analysts to reiterate or to enhance their ratings of the stock that resulted in a boost to share prices. White claimed that the company's officers and directors sold more than 118,600 shares of stock at an average price of $42.55 per share at or near this time. One brokerage firm actually had a $51.00 per share price tag on the stock.

At the end of July 1997, the corporation announced its second quarter earnings results, which matched analysts' expectations. According to White, management continued to make rosy, forward-looking projections and to minimize the risks associated with changing federal budget demands. On September 5, 1997, R. Gene Smith, a member of the board of directors, sold 16,876 shares of stock.

According to White, the corporation routinely and repeatedly made positive representations about operating trends and growth opportunities at industry conferences, in press releases, and in conference calls. On September 18, 1997, he alleged that Jill L. Force, a senior vice-president and the company's general counsel, sold 39% of her holdings. At the same time, Earl Reed, the company's chief financial officer, sold 28% of his holdings.

On October 22, 1997, the company revised its fourth quarter guidance. Its announcement indicated that earnings per share would fall considerably short of analysts' expectations. The predicted shortfall was attributed by the company to the negative impact of federal budget changes related to Medicare reimbursement. The company's stock price plunged 28% during the trading day, and analysts quickly began to lose confidence in the company's growth prospects.

White alleged that throughout the entire period at issue, the company's officers and directors knew that the corporation was being grossly mismanaged and that federal budget changes would inevitably have a severely negative impact on the company's growth and earnings. Nevertheless, the officers and directors continued to mislead the market analysts and the investing public about the company's performance and prospects. He also claimed that the company had paid too much when it purchased Transitional Hospital Corporation. He believed that it had over-compensated W. Bruce Lunsford, the company's chief executive officer; W. Earl Reed, the chief financial officer; and Michael R. Barr, the chief operating officer. He contended that company insiders sold $9.5 million in stock at artificially inflated prices. Finally, he charged that the managers and directors exposed the company to a multi-million dollar federal securities class action and that they otherwise damaged the company's finances and reputation.

***4** For purposes of our discussion, the numerous allegations contained in White's complaint can be grouped into the following three categories:

1. *The disclosure counts:* the false, irrationally optimistic, and misleading forward-looking statements about the financial condition, good management, and growth opportunities of the company (subject to the *Rales* test);

2. *The waste counts:* the cost of acquiring Transitional Hospital Corporation and the excessive compensation packages of the three top executives (subject to the *Aronson* test);

3. *The insider-trading counts:* insider trading and the proceeds realized from that trading (subject to the *Rales* test).

Only the waste counts appear to challenge specific and direct board action; *i.e.,* board approval for the acquisition of Transitional Hospital Corporation and approval for the compensation packages offered to three executives.

In analyzing the charges contained in the complaint, we apply the Delaware court's two-part *Aronson* test to determine whether White has asserted particularized facts sufficient to demonstrate why a demand upon the board would have been futile as to the waste counts. Since the disclosure counts and insider-trading counts do not challenge specific or direct action undertaken by the board as a whole, they will be analyzed under the *Rales* test. We shall examine the categories individually, beginning our discussion with the waste counts.

**The Waste Counts (The *Aronson* Test)**

In order to avoid dismissal under the demand rule, *Aronson* requires that a plaintiff's allegations raise a reasonable doubt by satisfying either of two criteria: (1) that a majority of the directors were not disinterested and independent and (2) that the challenged transaction was not the result of a valid exercise of sound business judgment. *Aronson,* 473 A.2d at 814. To assess the requisite disinterestedness and independence of directors, we consider whether the plaintiff has pleaded particularized facts that demonstrate that the directors were motivated by personal interest, domination, or control. If so, their personal interests would have prevented them from objectively evaluating a demand-if made-that the board pursue the best interests of the corporation. *Brehm, supra.* To assess whether the transaction was undertaken as part of the board's exercise of its business judgment, we consider whether the directors were proper persons to conduct litigation on behalf of the corporation.

White named ten of the company's directors as defendants in the derivative action. Of these, six (Beran, Bridgeman, Chao, Ecton, Hudson, and Lomica) were neither officers nor employees of the company. White alleged no particularized facts to suggest that any of these "outside directors" would have been unable to act independently or disinterestedly if he had he demanded action of them. Instead, White relied on the second *Aronson* test by claiming that the challenged transactions (*i.e.,* the excessive executive compensation packages and the huge consideration paid by Ventas to acquire Transitional Hospital Corporation)-constituted corporate waste and that they were not the product of a valid exercise of the board's business judgment.

***5** Corporate directors enjoy substantial deference in exercising their business judgment on behalf of a corporation. Delaware law presumes that a corporation's directors make business decisions on an informed basis, in good faith, and in the honest belief that the action taken was in the best interest of the company. *Aronson,* 473 A.2d at 812. This presumption of regularity is commonly referred to as the "business judgment rule."

Under the business judgment rule, directors exercise very broad discretion in making decisions relating to executive compensation. See *Brehm,* 746 A.2d 244. The standard for determining corporate waste is also rigorous and requires proof that directors irrationally squandered or gave away corporate assets. *Id.*

The waste counts of White's complaint essentially consisted of conclusory allegations. He was quite clear in articulating his personal disagreement with the board's judgment as to the value of retaining top executives and of acquiring Transitional Hospital Corporation. However, he did not allege that the board failed to review and to consider available and relevant information concerning either decision. He did not allege an absence of adequate or substantial consideration inuring to Ventas in exchange for the corporate assets paid to compensate the executives and for the asset represented by the acquisition of Transitional Hospital Corporation. On balance, the allegations were insufficient to overcome the presumption of regularity or to raise a reasonable doubt that the directors validly exercised sound business judgment with respect to both issues.

**The Disclosure Counts and the Insider-Trading Counts (The *Rales* Test)**

  

We shall next address the disclosure counts and the insider-trading counts of White's complaint. In these counts, White did not complain of any specific transaction or enterprise undertaken by the board as a whole. Nor did he allege that the board members had an affirmative duty to act in a particular manner and that they disregarded that duty. Rather, he claimed in general terms that the board was complicit in the challenged conduct and that it was lax in its management of the affairs of the company. Under these circumstances, the allegations of the complaint are analyzed under the *Rales* standard.

Under *Rales, supra,* a court essentially applies the first prong of the *Aronson* test to determine whether the complaint asserted particularized facts sufficient to create "a reasonable doubt that ... the board of directors could have properly exercised its independent and disinterested business judgment in responding to a stockholder's a demand for action." 634 A.2d at 934. Under this inquiry, the court then asks whether any of the directors was rendered "interested" by the conduct at issue and, if so, whether the disinterested (impartial) directors were nonetheless capable of acting independently from those interested (partial) directors. *Id.* A director is considered "interested" if he or she: (1) received from the challenged conduct or transaction a personal financial benefit that was not equally shared by the other stockholders; (2) might have suffered "a materially detrimental impact" from the proposed legal action; or (3) was "incapable, due to domination and control, of objectively evaluating a demand, if made, that the board assert the corporation's claims." *Rales* 634 A.2d at 936.

***6** Pursuant to subsection (1) of the *Rales* test, White's complaint does not contain factual allegations sufficiently particularized to raise a reasonable doubt as to whether the Ventas board of directors could have-or would have-properly exercised its independent, disinterested business judgment in responding to a demand for action if he had posed such a demand prior to filing suit. White did not allege that the outside directors, who comprised a majority of the board, received any personal benefit (in the sense of self-dealing) from any of the challenged transactions so as to render those directors incapable of properly responding to the concerns of a shareholder.

Additionally, pursuant to subsection (2) of the *Rales* standard, White did not sufficiently plead that any of the outside directors would have been unwilling to act on behalf of the company because they would have been subject to "a substantial likelihood" of liability stemming from legal action.

The complaint's bare and unsubstantiated allegation that the outside directors participated in the challenged conduct falls far short of meeting the strict pleading requirement. In *Gagliardi v. TriFoods Int'l, Inc.,* 683 A.2d 1049, 1055 (Del.Ch.1996), the Delaware court observed that:

> the simple expedient of naming a majority of otherwise disinterested and well-motivated directors as defendants and charging them with laxity or conspiracy etc., will not itself satisfy the standards for permitting a shareholder to be excused from demand.

Finally, pursuant to subsection (3) of the *Rales* rule, we note that White did allege that the outside directors were so motivated by improper influences as to be arguably dominated by-or beholden to-Lundsford, Reed, and Barr (the company's chief executive officer, chief financial officer, and chief operating officer, respectively). However, that bare allegation was insufficient to meet the strict requirement of particularity. The Delaware courts have consistently held that an unsupported, conclusory allegation of "domination" does not excuse demand. *Aronson,* 473 A.2d at 815. Instead, the plaintiff must allege specific facts that would demonstrate that the challenged directors were controlled by the offending directors through personal or other relationships. *Id.* White failed to make such a demonstration.

In addition to falling short of demonstrating bias or self-interest, While also failed to allege facts sufficient to cast doubt as to whether the Ventas board of directors court have properly exercised its independent, disinterested business judgment in responding to a shareholder demand for action. The trial court did not err by concluding that these counts of the complaint were also subject to dismissal under the strict requirements of Delaware's demand rule.

Although he believes that the court erred in dismissing his complaint for insufficiency, White nonetheless argues in the alternative that the trial court erred by failing to permit him leave to amend. We observe that White's post-judgment motion for relief was filed out of time. Regardless of this procedural shortcoming, we would still decline to reverse the court's refusal to permit the second amendment of his complaint.

***7** Kentucky Rule of Civil Procedure (CR) 15.01 provides that a plaintiff may file one amended complaint prior to the filing of a responsive pleading but that "[o]therwise a party may amend his pleading **only by leave of court** or by written consent of the adverse party...." (Emphasis added.) Although leave to amend shall be freely given when justice so requires, that decision remains within the sound discretion of the trial court. *Lambert v. Franklin Real Estate Co.,* Ky.App., 37 S.W.3d 770 (2000).

We shall recapitulate the sequence of procedural events in this case:

July 1998-White filed the complaint (followed within a few days by a first amended complaint);

January 2000-the appellees filed a motion to dismiss;

July 26, 2005-the court dismissed the complaint;

22 days later, White filed two post-judgment motions, including a motion to file the second amended complaint;

August 24, 2005-the court denied the motions.

In their motion to dismiss in January 2000, the appellees cited unmistakably fatal flaws in White's complaint and relied on an established and well developed body of law. More than five years then elapsed until July 26, 2005, when the trial court dismissed White's complaint. During that considerable interval, White did nothing to attempt to remedy or to supplement the deficiencies of which he had been made aware. We cannot conclude that justice required the court to permit White to file an amended complaint more than seven years after the original complaint had been filed. The trial court did not abuse its discretion by refusing to grant White's motion.

We affirm the order of the Jefferson Circuit Court.

ALL CONCUR.

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Edward MANNATO, Derivatively, on Behalf of SunTrust Banks, Inc., Plaintiff,
v.
James M. WELLS, III, et al., Defendants,
and
SunTrust Banks, Inc., a Georgia Corporation, Nominal Defendant.

1:11-cv-4402-WSD
|
Signed 05/06/2013

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## OPINION AND ORDER

WILLIAM S. DUFFEY, JR., UNITED STATES DISTRICT JUDGE

***1** This matter is before the Court on a Motion to Publish Notice to SunTrust Banks, Inc. Shareholders ("Motion to Publish") [31]. The motion was filed by Robbins Arroyo LLP ("Robbins Arroyo"), on behalf of Plaintiff Edward Mannato ("Mannato" or "Plaintiff"), who is recently deceased. [1]

[1] To the extent Defendants argue that Robbins Arroyo lacks standing to move for publication, it is well-established that class counsel owe a fiduciary duty to all members of the class, not only a named plaintiff. See, e.g., In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 801 (3d Cir. 1995) ("Beyond their ethical obligations to their clients, class attorneys, purporting to represent a class, also owe the entire class a fiduciary duty once the class complaint is filed."). The Third Circuit has explained that "[n]ot the least important of the fiduciary duties shared by counsel and the court is their duty to ensure that absentee class members have knowledge of proceedings in which a final judgment may directly affect their interests." Greenfield v. Villager Indus., Inc., 483 F.2d 824, 832 (3d Cir. 1973). Here, while Robbins Arroyo's authority to act on behalf of Plaintiff ceased upon his death, by moving for publication it is not seeking to assert Plaintiff's rights posthumously or continue this action in its own name. See, e.g., Kasting v. Am. Family Mut. Ins. Co., 196 F.R.D. 595, 598 (D. Kan. 2000); In re Fantome, S.A., No. 99-961-CIV, 2005 WL 6215569, at *1 n.1 (S.D. Fla. Mar. 28, 2005). Robbins Arroyo seeks to advise nonparty shareholders of the potential dismissal and its effect on their rights and those of the corporation. Even if Robbins Arroyo lacked standing to move for publication, notice would still be required because the Court "must undertake its own independent review of the dismissal to ensure that the interests of shareholders not directly involved in the action are protected." First Hartford Corp. Pension Plan v. United States, 54 Fed. Cl. 298, 303 (Fed. Cl. 2002); see also Malcom v. Cities Serv. Co., 2 F.R.D. 405 (D. Del. 1942) (notice required where action subject to dismissal *sua sponte* for failure to prosecute); Grima v. Applied Devices Corp., 78 F.R.D. 431 (E.D.N.Y. 1978) (declining to approve dismissal, even without prejudice to nonparty shareholders, without first issuing

  

notice); cf. Ehrheart v. Verizon Wireless, 609 F.3d 590, 593 (3d Cir. 2010) ("Under Rule 23(e), a district court acts as a fiduciary, guarding the claims and rights of the absent class members.").

## I. BACKGROUND

On December 19, 2011, Plaintiff filed his Complaint [1, 1.1, 1. 2] in this shareholder derivative action. The Complaint asserts claims for breach of fiduciary duty (Counts I, II), waste of corporate assets (Count III), and unjust enrichment (Count IV) against certain current and former officers and directors ("Defendants") of SunTrust Banks, Inc. ("SunTrust"), in connection with SunTrust's alleged failure to disclose and properly mitigate risks before, and during, the recent economic downturn. [2]

[2] The allegations in the Complaint are based on SunTrust's exposure to losses in mortgage-backed assets held by off-balance sheet SunTrust affiliates and impaired on-balance sheet mortgages, HELOCs, and mortgage-backed securities, from February 28, 2006 through July 22, 2009.

***2** On June 27, 2012, Plaintiff died. (Am. Statement [28] at 1). On September 5, 2012, James E. Mannato was appointed the personal representative of Plaintiff's estate. (Id. at 1-2). At some point, Plaintiff's shares of SunTrust stock were transferred to James E. Mannato and Ana Edwards, who sold the SunTrust shares on October 1 and October 15, 2012, respectively. (Id. at 2).

Four months later, on October 26, 2012, Robbins Arroyo learned of Plaintiff's death and informed Defendants. (Id. at 1; Smith Decl. [31.2] ¶ 2).

On November 2, 2012, Defendants filed an Amended Statement Noting Death of Plaintiff Edward Mannato ("Amended Statement") [28], and mailed copies to James E. Mannato and Ana Edwards. [3] (Am. Statement at 4). Defendants personally served the Amended Statement on Ana Edwards on February 13, 2013 [32.5], and on James E. Mannato on February 14, 2013 [32.4].

[3] Defendants amended their original Statement Noting Death of Plaintiff Edward Mannato [27] to correct the name of Ana Edwards, who had been improperly identified as Ana Mannato.

On February 4, 2013, Robbins Arroyo moved to issue notice to SunTrust shareholders that this action may be dismissed, and the claims alleged in the Complaint subsequently barred by the statute of limitations, unless a shareholder with standing to pursue the claims moves to intervene as a plaintiff. Robbins Arroyo argues that notice of the possible dismissal of this action is necessary to afford one or more SunTrust shareholders the opportunity to intervene and preserve SunTrust's interest in the claims asserted in this case.

## II. DISCUSSION

A. Motion to Publish Notice

Rule 23.1 of the Federal Rules of Civil Procedure provides that "[a] derivative action may be settled, voluntarily dismissed, or compromised only with the court's approval. Notice of a proposed settlement, voluntary dismissal, or compromise must be given to shareholders or members in the manner that the court orders." Fed. R. Civ. P. 23.1(c).

The plaintiff shareholder in a derivative action asserts claims on behalf of a corporation. In light of these representative responsibilities, the "[n]otice [required by Rule 23.1] is essential to ensure that the dismissal of the derivative action comports with the best interests of the corporation and its shareholders." Cramer v. Gen. Tel. & Elec. Corp., 582 F.2d 259, 268-69 (3d Cir. 1978). "The notice requirement is an essential part of protecting the corporation and the shareholders' interest in the litigation[, and] [t]his is particularly the case where the statute of limitations likely would bar the initiation of a new action." First Hartford Corp. Pension Plan v. United States, 54 Fed. Cl. 298, 303 (Fed. Cl. 2002) (citing 7C Wright, Miller & Kane, Federal Practice and Procedure § 1839 at 177 (2d ed. 1986)); [4] see also Papilsky v. Berndt, 466 F.2d 251, 255-256 (2d

Cir. 1972). "[N]otice [also] enables other stockholders to intervene to protect the corporate claim and to continue the litigation if that seems advisable." Papilsky, 466 F.2d at 258.

[4] In applying Rule 23.1 of the Rules of the Court of Federal Claims, the court in First Hartford looked to cases involving Federal Rule of Civil Procedure 23.1, which contained the same language. First Hartford, 54 Fed. Cl. at 302 n.3, 303 n.9.

Consistent with this purpose of notice under Rule 23.1, courts have held the notice requirement applies to more than voluntary dismissals under Rule 41(a)(1) and have required notice to nonparty shareholders when a corporate claim has not been adjudicated on the merits and dismissal could preclude a nonparty shareholder from reasserting the claim on behalf of the corporation. See, e.g., Phillips v. Tobin, 548 F.2d 408, 415 (2d Cir. 1976) (where *pro se* plaintiff, ordered to obtain counsel to prosecute derivative action, refuses to comply with court order or decides not to proceed with action, because statute of limitations has expired, district court may dismiss complaint only after notice to other shareholders and failure of any other shareholder to proceed with action); Papilsky, 466 F.2d 251 (notice required where action dismissed for failure to answer interrogatories; notice protects against a plaintiff who, for reasons unrelated to the merits of the corporate claim, chooses not to comply with discovery order); Certain-Teed Prod. Corp. v. Topping, 171 F.2d 241 (2d Cir. 1948) (plaintiff's consent to entry of summary judgment against plaintiff required notice to nonparty shareholders before dismissal); [5] Haberman v. Tobin, 480 F. Supp. 425, 427 (S.D.N.Y. 1979) (on motion to dismiss for failure to comply with court order to post bond as required under state law, "notice is particularly desirable in this case, since, due to applicable statutes of limitation, dismissal of this action could well preclude non-party stockholders from asserting the state claims presented here"); see also 7C Wright, Miller & Kane, Federal Practice and Procedure § 1839 at 215 (3d ed. 2007). [6]

[5] Prior to 1966, notice and court approval were required for dismissal of both class actions and derivative suits under Rule 23(c). In 1966, derivative actions were accorded separate treatment under Rule 23.1. Cases involving derivative actions prior to 1966 thus are authoritative for purposes of applying the notice requirements of Rule 23.1. See Papilsky, 466 F.2d at 257 n.7; 7C Wright, Miller & Kane, Federal Practice and Procedure § 1839 at 195 (3d ed. 2007).

[6] To the extent Defendant argues that notice is not required because Rule 23.1 explicitly applies to a "voluntary dismissal," prior to the 2007 Amendments to the Federal Rules of Civil Procedure, Rule 23.1 stated that "[t]he action shall not be *dismissed or compromised* without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs." Fed. R. Civ. P. 23.1 (2006) (emphasis added). The 2007 Amendments were "intended to be stylistic only." Fed. R. Civ. P. 23.1, Advisory Committee Note, 2007 Amendments.

***3** Notice, thus, is required in a variety of circumstances to protect and, in some cases, preserve the claims asserted on a corporation's behalf. For example, Grima v. Applied Devices Corp., 78 F.R.D. 431 (E.D.N.Y. 1978), presented notice issues similar to those presented in this case. In Grima, the plaintiff sought to dismiss an action after determining that further litigation would be "fruitless." The court declined to allow dismissal, even without prejudice, without notice to other shareholders because dismissal "might well foreclose any other shareholder from pursuing the claim asserted in th[e] case." 78 F.R.D. at 432. The court explained that, "[w]hile *res judicata* would not bar further litigation by other shareholders if th[e] action were dismissed without notice to them since the dismissal here sought would be without prejudice ... such other shareholders may well face an insurmountable statute of limitations hurdle if they commenced a new action since the challenged agreement was entered into by [the corporation four years prior]." Id. While the court respected the plaintiff's decision regarding the success of his claim, "other shareholders should, if they reach a different conclusion, have an opportunity to proceed." Id.

The Court is not aware of any case considering whether notice to nonparty shareholders is required where the plaintiff shareholder dies and his or her heirs are not shareholders with standing to continue the action. The cases discussing the requirement of notice to nonparty shareholders, however, teach that a decision, or the circumstances, of a named shareholder class plaintiff that could result in the dismissal of derivative claims requires that notice be given to other shareholders to afford one or more of them to weigh in before dismissal and, in appropriate cases, to allow a substitute plaintiff to prosecute the

claims asserted. Notice is especially important where dismissal may result in a later action being barred because the statute of limitations has run.

Here, the statute of limitations for the claims asserted in the Complaint has expired. See O.C.G.A. § 14-2-831(b); Br. in Supp. of Mot. Publish at 6; Defs' Br. in Opp'n at 18-19. [7] Because James E. Mannato and Ana Edwards sold Plaintiff's SunTrust shares, even if they moved to be substituted as plaintiffs, they do not have standing to maintain the action. See Fed. R. Civ. P. 23.1(b) (plaintiff must have been a shareholder at the time of transaction complained of, or plaintiff's shares later devolved on him by operation of law); Fed. R. Civ. P. 25(a) (if a party dies and claim is not extinguished, court may order substitution of "proper party"); Hantz v. Belyew, 194 Fed.Appx. 897, 898 (11th Cir. 2006) (per curiam) (plaintiff bringing a shareholder derivative suit must be a shareholder when action was brought and throughout the course of the litigation) (citing Schilling v. Belcher, 582 F.2d 995, 999-1000 (5th Cir. 1978)). [8] Without a plaintiff with standing, this action likely would "no longer present[ ] a live case or controversy, and the [Court may be required to] dismiss the case for lack of subject matter jurisdiction." Fla. Wildlife Fed'n, Inc. v. S. Fla. Water Mgmt. Dist., 647 F.3d 1296, 1302 (11th Cir. 2011).

7 Defendants argue that the statute of limitations expired before Mannato filed his Complaint, and that the claims in this litigation likely are precluded by the dismissal of similar claims asserted in a separate state court action. Here, the Court must first determine whether there is a shareholder who will volunteer to prosecute this action.

8 In Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the Former Fifth Circuit issued before the close of business on September 30, 1981.

Here, Plaintiff's heirs sold their SunTrust shares. It is undisputed that the statute of limitations would prevent another shareholder from reasserting these claims in a subsequent action, and, as a result, Rule 23.1 requires that nonparty SunTrust shareholders receive notice and an opportunity to intervene before this action is dismissed. See Philips, 548 F.2d at 415 (because statute of limitations had run, district court could dismiss action for failure to comply with court order only after notice and opportunity to intervene); Haberman, 480 F. Supp. at 427; see also Lewis v. Knutson, 699 F.2d 230, 240 (5th Cir. 1983) (where plaintiff sold his stock while derivative action was pending, district court properly required notice to nonparty shareholders before dismissing action for lack of standing; "[s]ince a voluntary sale of stock leads to a dismissal of the suit, notice was required" and was "necessary to protect the interests of both the corporation and its shareholders."); Beaver Assoc. v. Cannon, 59 F.R.D. 508, 511-512 (S.D.N.Y. 1973) (notice required where dismissal might result in loss to corporation of its only forum for considering the merits of its claim; plaintiff, though an unwilling litigant, must be kept in suit as fiduciary for corporate interest until other shareholders have opportunity to continue litigation or at least determine whether corporate interest so requires). The inescapable conclusion is that notice must, in this case, be given to nonparty SunTrust shareholders before this action may be dismissed.

B. Notice to Shareholders

***4** "Notice of a proposed settlement, voluntary dismissal, or compromise must be given to shareholders or members in the manner that the court orders." Fed. R. Civ. P. 23.1(c). Notice to nonparty shareholders of a potential dismissal "must provide sufficient information to allow the members to make an informed choice regarding whether to intervene to challenge the proposed disposition of the litigation." Kanaka Indus. Projects, LLC v. Golden State Biofuels, LLC, No. 11-00553, 2011 U.S. Dist. LEXIS 144276, at *3 (D. Haw. Dec. 14, 2011) (quoting 5 Moore's Federal Practice § 23.1.10[1][b] (Matthew Bender 3d ed.)) (citing Bell Atl. Corp. v. Bolger, 2 F.3d 1304, 1317-18 (3d Cir. 1993)); see also Maher v. Zapata Corp., 714 F.2d 436, 451 (5th Cir. 1983) (purpose of notice, with regard to shareholders' due process rights, is "to fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them"); cf. Miller v. Repub. Nat. Life Ins. Co., 559 F.2d 426, 429 (5th Cir. 1977) (in class action, notice must present fair recital of subject matter and of proposed terms, and must give class members opportunity to be heard).

The notice here should inform the shareholders of the claims and defenses involved in the action, the possibility of dismissal and the grounds upon which dismissal would be made, and that the case may continue only if a plaintiff with standing is substituted for Plaintiff Mannato. See, e.g., Bell Atl. Corp., 2 F.3d at 1307 (notice adequate where it advised shareholders of the date of

hearing on approval, summarized the litigation, procedural history, parties' contentions, issues involved, reasons each party recommended settlement and terms of settlement agreement, and advised shareholders of their right to object, consequences of not doing so, and how to obtain further information); Maher, 714 F.2d at 451 (same); In re Gen. Tire & Rubber Co. Secs. Litig., 726 F.2d 1075 (6th Cir. 1984) (notice not an abuse of discretion where it described terms of settlement, reasons independent director sought dismissal of derivative action, legal effect of settlement and shareholders' rights to assert their objections); Kanaka Indus., 2011 U.S. Dist. LEXIS 144276, at *4 (notice not sufficient where it failed to describe action or reasons for dismissal, and did not inform nonparty shareholders of their rights or ability to obtain further information); cf. Miller, 559 F.2d at 429 (applying similar criteria to evaluate notice in class action). The Court will consider the notices proposed by the parties to determine the content of the notice to be given. [9] The next question is how notice should be given.

9 The notice will be provided to counsel for their review and comment before it is finalized.

Robbins Arroyo urges that notice be published on the Investor Relations page of SunTrust's website. Defendants do not oppose website publication and that is an appropriate place for the notice to appear. The Court finds, however, that under the circumstances presented here, notice on the webpage alone is not enough. Notice by publication also is necessary to advise nonparty shareholders of their rights in this action. See, e.g., Arace v. Thompson, No. 08 Civ. 7905(DC), 2011 WL 3627715, at *4 (S.D.N.Y. Aug. 17, 2011); In re PMC-Sierra, Inc. Derivative Litig., No. C-06-05330-RS, 2010 U.S. Dist. LEXIS 5818, at *4 (N.D. Cal. Jan. 26, 2010) (approving notice to absent shareholders by publication in the national edition of Investor's Business Daily and posted on company's website). Based on the Court's experience, shareholders do not customarily access a corporation's investor relations page and thus posting of the notice on it would reach only a limited number of shareholders. The Court notes further that the consequences of dismissal here could result in a statute of limitations bar of the claims asserted in the case. These considerations compel broader dissemination of the notice by publication in print and online formats of a publication with a national distribution. The Court thus finds that the notice, in the form approved by the Court, also is required to be published at least twice in The Wall Street Journal, with each publication being ten (10) calendar days apart.

***5** Robbins Arroyo also urges that the issuance of a press release, rather than publication, is sufficient. The Court disagrees. The purpose of the notice is to give shareholders appropriate and complete information about the consequences of Mannato's death on the litigation. A press release, by its nature, allows a person or organization that picks up the release to report and interpret the context of the release in the manner they elect, increasing the potential for incomplete or inaccurate information being communicated to shareholders. [10]

10 The Court acknowledges there is a possibility that the notice as it appears on SunTrust's website and in The Wall Street Journal may not be reported accurately or completely. There will, however, be two sources for the complete notice and it is likely any reports on the notice will point investors to these sources.

**III. CONCLUSION**

For the foregoing reasons,

**IT IS HEREBY ORDERED** that Robbins Arroyo's Motion to Publish Notice to SunTrust Banks, Inc. Shareholders [31] is **GRANTED IN PART** and **DENIED IN PART.** Within 10 days of approval of the notice, SunTrust shall publish the notice on its Investor Relations website where it shall appear until the date for shareholder response, which shall be set at July 31, 2013. Robbins Arroyo shall cause the notice to be published in The Wall Street Journal within 10 days of approval of the notice, and on a second occasion ten days later.

**IT IS FURTHER ORDERED** that Robbins Arroyo's request for approval of its proposed press release is **DENIED**.

**SO ORDERED** this 6th day of May, 2013.

**All Citations**

Not Reported in Fed. Supp., 2013 WL 12101909

**End of Document**

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Only the Westlaw citation is currently available.

Unpublished opinion. See KY ST RCP Rule 76.28(4) before citing.

NOT TO BE PUBLISHED
Court of Appeals of Kentucky.

FARMERS AND TRADERS BANK, Appellant
v.
April ASHBROOK and Richard Ashbrook, Appellees.

No. 2010–CA–002213–MR.
|
March 23, 2012.

Appeal from Wolfe Circuit Court, Action No. 08–CI–00102; Larry Miller, Judge.

**Attorneys and Law Firms**

David H. Steele, Florence, KY, for appellant.

Melissa C. Howard, Jackson, KY, for appellee April Ashbrook.

Before CLAYTON, MOORE, and NICKELL, Judges.

*OPINION*

MOORE, Judge.

***1** April and Richard Ashbrook filed this action in Wolfe Family Court on April 17, 2008, to dissolve their marriage. During the pendency of this action, Farmers and Traders Bank filed a motion to intervene in an attempt to assert a lien over all of the Ashbrooks' real, personal, marital and non-marital property. As its basis for intervening, Farmers asserted that it had obtained a judgment against Richard in Powell Circuit Court relating to a loan it had given Richard for the purchase of an airplane and that it anticipated that a sale of its collateral for that loan—the airplane—might not satisfy the entire balance of its judgment. Therefore, Farmers might be entitled to a deficiency judgment and lien against any other property that the Ashbrooks held.

No party contested Farmers' assertion that it had obtained a judgment against Richard in Powell Circuit Court, but Farmers produced nothing below demonstrating the substance, nature, or amount of its judgment. Moreover, the Ashbrooks both argued that Farmers' purported judgment only entitled Farmers to execute a lien against Richard's property in the event that Farmers sold Richard's airplane, credited its judgment against Richard with the proceeds, and filed an affidavit with the Powell Circuit Court reciting the amount of that credit and the remaining balance due. Farmers did not contest the Ashbrooks' argument or indicate that it had complied with those terms.

After considering these arguments, the family court determined that allowing Farmers to intervene would prejudice the interests of the parties. It entered the following order, stating in relevant part:

> Farmers and Traders Bank's motion to intervene is denied. The bank may proceed to sell the airplane pursuant to the order entered in Powell Circuit Court case No. 09–CI–336 to see if it satisfies the lien/judgment.

  

Thereafter, Farmers timely appealed.

An order denying a motion to intervene as a matter of right is immediately appealable. *Carter v. Smith,* 170 S.W.3d 402, 407 (Ky.App.2004). Our standard of review as to whether intervention should have been granted is a clearly erroneous standard. *Id.* at 409 (citing *Gayner v. Packaging Serv. Corp. of Ky.,* 636 S.W.2d 658, 660 (Ky.App.1982)).

The rule governing intervention as a matter of right is Kentucky Rule of Civil Procedure (CR) 24.01. Subsection (1) of that Rule, which is relevant to the case at bar, states:

> Upon timely application anyone shall be permitted to intervene in an action (a) when a statute confers an unconditional right to intervene, or (b) when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless that interest is adequately represented by existing parties.

On appeal, Farmers does not claim that it had a statutory right to intervene in the Ashbrooks' dissolution under subsection (1)(a), but instead claims a right to intervene under subsection (1)(b). In *Carter,* 170 S.W.3d at 407, we noted that CR 24.01(1)(b) requires the petitioner to meet four factors in order to intervene as a matter of right: (1) its motion must be timely; (2) the petitioner must have an interest relating to the subject of the action; (3) the petitioner's ability to protect its interest may be impaired or impeded, and (4) none of the existing parties could adequately represent the petitioner's interests. Importantly, it is the burden of the petitioner to prove each of these requirements. *Id.* at 409.

***2** Here, our analysis begins and ends with the second of these factors. It was Farmers' burden to prove that it had a present and substantial interest relating to the subject of the Ashbrooks' dissolution action. To that effect, it has produced nothing demonstrating the substance, nature, or amount of its judgment against Richard; it does not disagree with or attempt to disprove the Ashbrooks' representation that Farmers' judgment precludes it from asserting any lien over Richard's property unless and until the proceeds realized from a prospective sale of Richard's airplane fail to satisfy its purported judgment; nor, for that matter, does Farmers represent that it has filed an affidavit with the Powell Circuit Court reflecting the outstanding balance of Richard's judgment credited against the value of the airplane. Therefore, Farmers' interest in any of Richard's property is, at best, contingent. And, a petitioner with only a contingent interest in property is not entitled, per CR 24.01(1)(b), to intervene in an action. *See Baker v. Webb,* 127 S.W.3d 622, 624 (Ky.2004) (citing *Gayner,* 636 S.W.2d at 659)). For this reason, the Judgment of the Wolfe Family Court is hereby AFFIRMED.

ALL CONCUR.

**All Citations**

Not Reported in S.W.3d, 2012 WL 996687

**End of Document**

2021 WL 630453
Only the Westlaw citation is currently available.
United States Court of Appeals, First Circuit.

VICTIM RIGHTS LAW CENTER; Equal Rights Advocates; Legal Voice; Chicago Alliance Against Sexual Exploitation; Jane Doe, an individual by and through her mother and next friend Melissa White; Anne Doe; Sobia Doe; Susan Doe; Jill Doe; Nancy Doe; Lisa Doe, Plaintiffs, Appellees,

v.

Phil ROSENFELT, in his official capacity as Acting Secretary of Education, [*] Suzanne Goldberg, in her official capacity as Acting Assistant Secretary for Civil Rights, [**] United States Department of Education, Defendants, Appellees.
Foundation for Individual Rights in Education, Independent Women's Law Center, Speech First, Inc., Putative Intervenors, Appellants.

[*] Pursuant to Fed. R. App. P. 43(c)(2), Acting Secretary of Education Phil Rosenfelt has been substituted for former Secretary of Education Elisabeth DeVos.

[**] Pursuant to Fed. R. App. P. 43(c)(2), Acting Assistant Secretary for Civil Rights Suzanne Goldberg has been substituted for former Assistant Secretary for Civil Rights Kenneth Marcus.

No. 20-1748
|
February 18, 2021

**Synopsis**

**Background:** Sexual abuse victims' advocacy groups and others brought action challenging Department of Education regulation that set standard for "sexual harassment" to be used in administrative enforcement of Title IX and provided additional procedural protections to students accused of sexual harassment, alleging violations of the Administrative Procedure Act (APA) and the Equal Protection Clause. The United States District Court for the District of Massachusetts, William G. Young, J., denied motion to intervene filed by putative intervenors, free speech advocacy groups and others. Putative intervenors filed interlocutory appeal.

**[Holding:]** The Court of Appeals, Laplante, District Judge, sitting by designation, held that neither intervention as of right nor permissive intervention was warranted.

Affirmed.

**Procedural Posture(s):** Interlocutory Appeal; Motion to Intervene.

West Headnotes (16)

**[1] Federal Courts**

District court's denial of motion to intervene as of right is reviewed through abuse of discretion lens. Fed. R. Civ. P. 24(a).

**[2] Federal Courts**

Appellate review of the district court's denial of a motion for permissive intervention is for abuse of discretion. Fed. R. Civ. P. 24(b).

**[3] Federal Courts**

Abuse of discretion standard of appellate review is not monolith: within it, abstract legal rulings are scrutinized de novo, factual findings are assayed for clear error, and degree of deference afforded to issues of law application waxes or wanes depending on particular circumstances.

**[4] Federal Courts**

Order denying motion to intervene is immediately appealable.

**[5] Federal Civil Procedure**

Failure to satisfy any single requirement for intervention as of right, such as showing inadequate representation by existing parties, is sufficient grounds to deny a motion for intervention as of right. Fed. R. Civ. P. 24(a)(2).

**[6] Federal Civil Procedure**

Generally, a movant seeking to intervene as of right need only make minimal showing that representation afforded by existing parties likely will prove inadequate. Fed. R. Civ. P. 24(a)(2).

**[7] Federal Civil Procedure**

A movant that seeks to intervene as of right must produce some tangible basis to support a claim of purported inadequacy of representation by existing parties. Fed. R. Civ. P. 24(a)(2).

**[8] Federal Civil Procedure**

The burden of persuasion for a motion to intervene as of right is ratcheted upward when the movant seeks to intervene as defendant alongside a government entity. Fed. R. Civ. P. 24(a).

**[9] Federal Civil Procedure**

When a movant seeks to intervene as of right as a defendant alongside a government entity, the court starts with a rebuttable presumption that the government entity will defend adequately its action; successful rebuttal of that presumption requires strong affirmative showing that government entity or its members is not fairly representing the movant's interests. Fed. R. Civ. P. 24(a).

**[10] Education**

  

Neither intervention as of right nor permissive intervention by putative intervenors, who were free speech and other advocacy groups, was warranted, in action brought by sexual abuse victims' advocacy groups and others challenging Department regulation that set standard for "sexual harassment" to be used in administrative enforcement of Title IX and provided additional procedural protections to students accused of sexual harassment, and alleging Administrative Procedure Act (APA) and Equal Protection violations; putative intervenors failed to show that Department of Education officials as existing defendants would not adequately protect their interests and amicus procedure provided sufficient opportunity for putative intervenors to present their arguments. U.S. Const. Amend. 1, 5; 5 U.S.C.A. § 551 et seq.; Education Amendments of 1972 § 901, 20 U.S.C.A. § 1681(a); Fed. R. Civ. P. 24(a).

**[11] Federal Civil Procedure**

A movant-intervenor's interest in making an additional constitutional argument in defense of a government action does not render the government's representation as an existing defendant inadequate, as required to support motion to intervene as of right. Fed. R. Civ. P. 24(a).

**[12] Federal Civil Procedure**

Perfect identity of motivational interests between the movant-intervenor and the government as existing defendant is not necessary to a finding of adequate representation by government, as will support denial of motion to intervene as of right. Fed. R. Civ. P. 24(a).

**[13] Constitutional Law**

Courts are obliged to avoid rulings on constitutional questions when non-constitutional grounds will suffice to resolve an issue.

**[14] Federal Courts**

The Court of Appeals may affirm a district court's ruling on a motion to intervene for any reason supported by the record, even in the context of review for abuse of discretion, as the Court of Appeals offers deference to the district court's decisionmaking to the extent its findings or reasons can be reasonably inferred. Fed. R. Civ. P. 24(a), 24(b).

**[15] Federal Courts**

To the extent the district court's reasons for denying a motion to intervene are not stated or cannot be reasonably inferred, abuse-of-discretion review simply becomes less deferential because there is nothing to which to give deference. Fed. R. Civ. P. 24(a), 24(b).

**[16] Federal Courts**

District court should not consider arguments raised by amici that go beyond issues properly raised by parties.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, [Hon. William G. Young, U.S. District Judge]

**Attorneys and Law Firms**

Alexa R. Baltes, with whom Charles J. Cooper, Brian W. Barnes, Washington, DC, Cameron T. Norris, Arlington, VA, Tiffany H. Bates, Patrick Strawbridge, Arlington, VA, Cooper & Kirk, PLLC, and Consovoy McCarthy PLLC were on brief, for appellants.

Michael F. Qian, with whom Natalie A. Fleming Nolen, David A. Newman, James R. Sigel, Emily Martin, Neena Chaudhry, Sunu Chandy, Shiwali G. Patel, Elizabeth Tang, Diane L. Rosenfeld, and Morrison & Foerster LLP were on brief, for appellees.

Before Lynch and Selya, Circuit Judges, and Laplante, *** District Judge.

*** Of the District of New Hampshire, sitting by designation.

**Opinion**

Laplante, District Judge.

***1** The question in this interlocutory appeal is whether the district court abused its discretion in denying both intervention as of right and permissive intervention to the Foundation for Individual Rights in Education, Independent Women's Law Center, and Speech First, Inc. (collectively, the "movants" or "movant-intervenors") under Federal Rule of Civil Procedure 24(a)(2) and (b)(1)(B).

The suit underlying the appeal involves a challenge to the U.S. Department of Education's recent promulgation of a regulation that sets the standard for actionable sexual harassment for administrative enforcement of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a), and provides additional procedural protections to students accused of sexual harassment. The plaintiffs are appellees here defending the district court's decision. Acting Secretary Rosenfelt, Acting Assistant Secretary Goldberg, and the Department of Education (collectively, "the government") are the named defendants in the suit. The government has taken no position on the issue of intervention and did not participate in either the briefing or the oral argument in this appeal.

The Foundation for Individual Rights in Education, Independent Women's Law Center, and Speech First, Inc. moved to intervene for the purpose of arguing that the First Amendment requires a standard for actionable "sexual harassment" that is at least as narrow as the definition provided in the new regulation and that the Fifth Amendment's Due Process Clause mandates the additional procedural protections. The district court denied the motion in a summary order, finding that the movant-intervenors had failed to show that the government would not adequately protect their rights. On appeal, the movant-intervenors contend that the district court abused its discretion by denying the motion to intervene. We affirm.

## I. Applicable Standard of Review

**[1] [2] [3]** A district court's denial of a motion to intervene as of right under Rule 24(a) is reviewed "through an abuse-of-discretion lens." T-Mobile Ne. LLC v. Town of Barnstable, 969 F.3d 33, 38 (1st Cir. 2020). The same "lens" is used for reviewing the denial of a motion for permissive intervention under Rule 24(b). Id. But "the abuse-of-discretion standard is not a monolith: within it, abstract legal rulings are scrutinized de novo, factual findings are assayed for clear error, and the degree of deference afforded to issues of law application waxes or wanes depending on the particular circumstances." Id.

## II. Background

The regulation challenged by the plaintiffs is entitled "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," 85 Fed. Reg. 30,026 (May 19, 2020) (codified at 34 C.F.R. § 106) (the "Rule"). It sets standards for how educational institutions that receive federal financial assistance must handle student allegations of sexual harassment. As relevant here, the Rule defines the standard for "sexual harassment" to be used in administrative

  

enforcement of Title IX to be generally the same as the standard set by Davis v. Monroe County Board of Education, 526 U.S. 629, 651, 119 S.Ct. 1661, 143 L.Ed.2d 839 (1999), for private Title IX suits. See 34 C.F.R. § 106.30(a)(2); 85 Fed. Reg. at 30,033 (explaining the reasoning for adopting the Davis standard). The Rule also requires that schools provide additional procedural protections to students accused of sexual harassment. 85 Fed. Reg. at 30,046-55.

***2** In June 2020, the plaintiffs filed this suit challenging various portions of the Rule and its promulgation under the Administrative Procedure Act ("APA") and the Fifth Amendment's Equal Protection guarantees. [1] They seek an injunction declaring the Rule invalid and enjoining its implementation. [2] The government has opposed the relief sought by the plaintiffs and has challenged the plaintiffs' standing, asserted various APA defenses as to each claim, and argued that there was no Equal Protection violation.

1 The plaintiffs' Equal Protection claim is premised on allegations that former Secretary of Education DeVos and other members of the Department of Education held discriminatory and stereotypical beliefs about women and accordingly singled out women for excessively onerous procedures and standards in establishing sexual harassment.

2 Similar suits about the Rule have proceeded in the Southern District of New York, the District of Maryland, and the District of Columbia. New York v. U.S. Dep't of Educ., No. 1:20-cv-4260 (S.D.N.Y); Know Your IX v. DeVos, No. 1:20-cv-1224 (D. Md.); Pennsylvania v. DeVos, No. 1:20-cv-1468 (D.D.C.). The movants asked to intervene in all three cases. The Southern District of New York denied intervention. In the District of Maryland, the motion to intervene was denied as moot after the case was dismissed without prejudice for lack of standing. The District Court for the District of Columbia granted permissive intervention.

The movant-intervenors disagree with the government's strategic and policy choice not to argue that the First Amendment requires the use of a standard for actionable sexual harassment that is at least as narrow as the standard set by Davis and that the additional procedural protections for students accused of sexual harassment provided by the Rule are required by the Fifth Amendment's Due Process Clause. The movant-intervenors thus requested intervention for the purpose of presenting those constitutional arguments in addition to the government's non-constitutional defenses. In their motion, the movants argued that they were entitled to intervene as of right under Rule 24(a) and by the court's permission under Rule 24(b).

Before either the plaintiffs or the government filed any responses or objections, the district court denied the motion to intervene in a summary electronic order. The order stated, in full:

> The motion to intervene is denied as there is no adequate showing that the government will not adequately protect the proposed intervenors[']rights. The Court will, of course, welcome a brief amicus curiae from the proposed intervenors.

**[4]** This interlocutory appeal followed. [3] We held oral argument on January 5, 2021. [4]

3 An order denying a motion to intervene is immediately appealable. Pub. Serv. Co. of N.H. v. Patch, 136 F.3d 197, 204 (1st Cir. 1998).

4 Between the filing of this appeal and the issuance of this opinion, the district court tried the case. The movant-intervenors did not file any motion in the district court for leave to file an amicus brief raising their legal theory. The district court granted every motion for leave to file an amicus brief that was presented to it, accepting nine briefs from various amici.

## III. Discussion

> On timely motion, the court must permit anyone to intervene who ... claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

***3** Fed. R. Civ. P. 24(a)(2). Failure to satisfy any single requirement for intervention as of right under Rule 24(a) – such as showing inadequate representation by existing parties – is sufficient grounds to deny a request for "intervention as of right." See id.

**[5]** If the requirements of Rule 24(a)(2) are not met, "[o]n timely motion, the court may permit anyone to intervene who ... has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). Intervention under Rule 24(b) is known as "permissive intervention." Id.

The movant-intervenors contend that the district court abused its discretion by denying their motion to intervene as of right on the ground that the government will adequately represent their interests. They also argue that the district court abused its discretion by failing to adequately explain its denial of permissive intervention, preventing this court from conducting a meaningful appellate review. The plaintiffs respond that the district court correctly reasoned that the government will adequately represent the movant-intervenors' interests and that this serves as sufficient reason to deny both intervention as of right and permissive intervention.

A. Intervention as of Right

**[6]** **[7]** In denying the motion to intervene, the district court found that the movant-intervenors failed to show that the existing defendants, namely, the government, would not adequately represent their claimed interests. [5] Generally, "an applicant for intervention need only make a minimal showing that the representation afforded by existing parties likely will prove inadequate." Patch, 136 F.3d at 207. But, in any case, "[a] party that seeks to intervene as of right must produce some tangible basis to support a claim of purported inadequacy." Id.

5 Because we may affirm solely on the ground that the government adequately represents whatever interests the movants may have in the subject matter of this case, we do not express any opinion as to whether the movants have shown that they have an interest sufficient to warrant intervention under Rule 24(a).

**[8]** **[9]** Furthermore, "the burden of persuasion is ratcheted upward" when the movant seeks to intervene as a defendant alongside a government entity. See id. In those circumstances, "this court and a number of others start with a rebuttable presumption that the government will defend adequately its action[.]" Cotter v. Mass. Ass'n of Minority L. Enf't Officers, 219 F.3d 31, 35 (1st Cir. 2000). A successful rebuttal "requires 'a strong affirmative showing' that the agency (or its members) is not fairly representing the applicants' interests." Patch, 136 F.3d at 207 (quoting United States v. Hooker Chems. & Plastics Corp., 749 F.2d 968, 985 (2d Cir. 1984)).

**[10]** The movant-intervenors attempt to make that showing by identifying their "interests and goals" purportedly not shared by the government. They contend that while they want to secure broad First Amendment and due process rights on college and university campuses, the government wants to minimize legal challenges and maintain regulatory flexibility. The movant-intervenors assert that these divergent motivations have led them to pursue different legal strategies than those pursued by the government. Specifically, the movant-intervenors say that the government has failed to make constitutional arguments that they would make, and they suggest that the government has made an argument (that the plaintiffs lack standing) that they would not. Consequently, the movant-intervenors contend, the government's representation is inadequate.

***4** **[11]** **[12]** We reject the movant-intervenors' claim. As explained in Massachusetts Food Association v. Massachusetts Alcoholic Beverages Control Commission, a movant-intervenors' interest in making an additional constitutional argument in defense of government action does not render the government's representation inadequate. 197 F.3d 560, 567 (1st Cir. 1999) (rejecting movant-intervenors' argument that the state's representation was inadequate because of their intent to make

an argument under the Twenty-First Amendment that was not pursued by the state); see also T-Mobile Ne., 969 F.3d at 39 ("[T]he presumption that a governmental entity defending official acts adequately represents the interests of its citizens applies full-bore, given the Town's vigorous, no-holds-barred defense of its refusal to grant a variance or other regulatory relief to T-Mobile."); Maine v. Dir., U.S. Fish & Wildlife Serv., 262 F.3d 13, 19-20 (1st Cir. 2001) (rejecting argument that movants were entitled to intervention where government could make "several obvious, more direct arguments ... in which the [movant and government had] a common interest"); Daggett v. Comm'n on Governmental Ethics & Election Practices, 172 F.3d 104, 112-13 (1st Cir. 1999). Nor is perfect identity of motivational interests between the movant-intervenor and the government necessary to a finding of adequate representation. See Mass. Food Ass'n, 197 F.3d at 567. And the government's putative interests in "regulatory flexibility" and minimizing future legal challenges do not create a sufficient case-specific conflict to render the district court's denial of intervention an abuse of discretion.

For example, in Cotter the court held that the City of Boston's defense of its use of racial criteria in promotions for law enforcement officers was sufficiently inadequate as to the movant minority police officers because the City's interests and likely defenses were in conflict with the minority officers' interests and proposed defense that racial criteria were appropriate given "alleged deficiencies in its current" promotional exams. 219 F.3d at 32-33, 35-36 (emphasis omitted). Similarly, in Conservation Law Foundation of New England, Inc. v. Mosbacher, the court held that a state agency's representation of movant fishing groups was inadequate when the agency raised no defense to the suit and agreed to a settlement that subjected the movants to more stringent rules than had previously been in effect. 966 F.2d 39, 44 (1st Cir. 1992). In contrast, here, the government has raised several defenses to the suit that would uphold the Rule, while the movant-intervenors would only raise extra constitutional theories not in conflict with the government's defenses nor requiring additional evidentiary development.

The movants point to International Paper Co. v. Inhabitants of the Town of Jay for the supposition that "the adverse impact of stare decisis standing alone may be sufficient to satisfy the [practical impairment] requirement." 887 F.2d 338, 344 (1st Cir. 1989) (alteration in original) (quoting 3B J. Moore, Moore's Federal Practice ¶ 24.07[3], at 24-65 (2d ed. 1987)). From this, the movants infer that the district court abused its discretion in denying intervention because the judgment they seek would set precedent on their preferred constitutional theories while the judgment sought by the government would not. International Paper Co. does not render the district court's decision an abuse of discretion, as the government's success in defending the Rule would not foreclose the movants from presenting their constitutional arguments in a later and appropriate case. See id. ("[I]t was not unreasonable for the district court to conclude that a refusal to let Maine intervene would not impair or impede Maine's ability to protect its interest in the interpretation of its environmental laws.").

**[13]** Moreover, the movants' proposition that the government's avoidance of constitutional issues renders inadequate its representation of their interest in having those issues addressed is inconsistent with the principle of constitutional avoidance. Courts are obliged to avoid rulings on constitutional questions when non-constitutional grounds will suffice to resolve an issue. Sony BMG Music Ent. v. Tenenbaum, 660 F.3d 487, 511 (1st Cir. 2011) (discussing the myriad problems that are likely to arise if a court fails to observe the principle of constitutional avoidance and vacating district court's avoidable ruling on constitutional issue). Consistent with that principle, the government made a strategic and policy choice to defend the Rule's promulgation on non-constitutional grounds. The movants' putative interest in having certain constitutional issues addressed now rather than later does not obviate the principle of constitutional avoidance. Indeed, it would be inconsistent with the principle of constitutional avoidance to conclude that the district court abused its discretion in denying an intervention sought to expedite a judgment on constitutional questions that could have been avoided by limiting the case to the issues as framed by the plaintiffs and government. Accordingly, the district court did not abuse its discretion in denying intervention as of right. See Fed. R. Civ. P. 24(a)(2). [6]

6 To the extent the movants contend that the district court abused its discretion by summarily disposing of the motion for intervention as of right, that argument is foreclosed by T-Mobile Northeast. 969 F.3d at 38.

B. Permissive Intervention

***5** The movant-intervenors assert that, even if they are not entitled to intervene as of right, the district court should have permitted them to intervene under Rule 24(b). They argue that the district court failed to adequately explain its reasoning for denying the motion to intervene, such that this court cannot meaningfully review the order. [7]

[7] The movants also reiterate their belief that the district court erred in finding that the government will adequately represent their interests, and they contend that the district court therefore abused its discretion if it relied on that ground to deny permissive intervention.

**[14]** **[15]** This court's precedents foreclose the movants' position. The court may affirm a district court's ruling for any reason supported by the record. Miles v. Great N. Ins. Co., 634 F.3d 61, 65 n.5 (1st Cir. 2011). That holds true even in the context of review for abuse of discretion, as this court offers deference to the district court's decisionmaking to the extent its "findings or reasons can be reasonably inferred." Cotter, 219 F.3d at 34; see also Ungar v. Arafat, 634 F.3d 46, 51 (1st Cir. 2011) ("The district court denied the motion to intervene in a bench decision. It did not subdivide its analysis into discrete silos. Nevertheless, its findings and reasoning can easily be inferred from the record."). And, to the extent the district court's reasons are not stated or cannot be reasonably inferred, "abuse-of-discretion review simply becomes less deferential because there is nothing to which to give deference." See T-Mobile Ne., 969 F.3d at 38 (internal quotation marks omitted). But even if "the district court summarily denies a motion to intervene, the court of appeals must review the record as a whole to ascertain whether, on the facts at hand, the denial was within the compass of the district court's discretion." Id. (affirming summary order denying motion to intervene).

**[16]** T-Mobile Northeast forecloses the movants' suggestion that the district court abused its discretion by not adequately considering their arguments for permissive intervention or by summarily denying the motion. Id. Moreover, to conclude that the district court did not abuse its discretion in denying the motion, we need not go beyond the express reasons the district court gave for denying intervention. Though its order was terse, the district court's reasoning need not be divined: the movant-intervenors did not show that the government would not adequately protect their interests and the amicus procedure provides sufficient opportunity for them to present their view. [8] That reasoning, which as discussed above supports denial of intervention as of right, is also sufficient on this record to sustain the district court's discretion as to permissive intervention. See id. at 41 ("To begin, a district court considering requests for permissive intervention should ordinarily give weight to whether the original parties to the action adequately represent the interests of the putative intervenors."); Mass. Food Ass'n, 197 F.3d at 568 (affirming denial of motion for permissive intervention when "[t]he district court reasonably concluded that the Commonwealth was adequately representing the interests of everyone concerned to defend the statute and that any variations of legal argument could adequately be presented in amicus briefs").

[8] Of course, a district court should not consider arguments raised by amici that go beyond the issues properly raised by the parties. E.g., Sindi v. El-Moslimany, 896 F.3d 1, 31 n.12 (1st Cir. 2018). And, as we noted, the principle of constitutional avoidance requires courts to avoid ruling on constitutional questions if the issues can be resolved on non-constitutional grounds. Sony BMG Music Ent., 660 F.3d at 511.

## IV. Conclusion

***6** The district court's order denying the Foundation for Individual Rights in Education, Independent Women's Law Center, and Speech First, Inc.'s motion to intervene is AFFIRMED.

### All Citations

--- F.3d ----, 2021 WL 630453

End of Document

2010 WL 3927793
Only the Westlaw citation is currently available.

Unpublished opinion. See KY ST RCP Rule 76.28(4) before citing.

NOT TO BE PUBLISHED
Court of Appeals of Kentucky.

John ROBERTS, George Mcarthur King, George Michael King, and Joseph Anthony King, Appellants

v.

The ESTATE OF Lahoma Salyer BRAMBLE, Joan Agonese, Anaconda Drilling of KY, LLC, Michael R. Anselm, Bernice Bailey, Netta Lynn Bailey, Lavaria Bedingfield, Henrietta Berry, Ruth Brock, John D. Carty, Beaureda Williams Colley, Community Trust Bank, Country Gas, LLC, Wandda Lee Cox, Amelia Craft, Charles V. Craft, Conroy Craft, Maxine Craft, Opel Sue Craft, Judy Down Crockett, Betty Dobson, Doug Downs, Sandy Downs, Carolyn Dykhuizen, Vanessa W. Eason Equitable Production Company, Estate Of Dorsey Claxton McCarty, Estate of Evalee Blaylock Edwards, Fast Flow Group, LLC, Mary Fifield, Lillian F. Whitaker Floyd, Gwendolyn R. Forge, Maxine French, Pauline Fritts, Mielang Gambele, Jerry B. Gibbs, Melynde Hartman, Ronald Hartwell, Myrtle Howard, Pam Howard, Mayola Humes, Jerry Ingram, Otto Ingram, J.D. Carty Resources, LLC, Jefferson Gas, LLC, Gail Kahley, Linda Krontz, Ky-Az Transmission, LLC, Neva Louise Lovely, Roger Lovely, Harold Lovely, Karen L. Lyon, Lilly May Madison, Cathy Sue Maggard, Mark Manning, Oneda Marchetti, David Martin, James McCarthy, Allen McCarty, Beatrice Mccarty, Betty McCarty, Carolle E. McCarty, Danny McCarty, Kevin McCarty, Randall Mccarty, Raymond MCcarty, Robert McCarty, Robin McCarty, Ronnie McCarty, Kimberly D. McCord, Melanie M. Miller, Minion Energy, LLC (and Northern Coal & Coke), Audrey Minix, Earnestine Minix, Lillian Minix, James Phares, James R. Phares (Jamie), Jason Phares, Cheryl L. Piper, Ina Salyer Pyles, R & R Energy, LLC, Mollie W. Richardson, Wanda Gaye Rokosz, Randall Rudd, Verla M. Salyer Russell, Bill Salyer, Cora Salyer, David R. Salyer, Donna Salyer, Dwayne Salyer, Emory Cain Salyer, Ford Salyer, Gemalia Salyer, Glen Salyer, Happy Salyer, Harry Salyer, James Salyer, Kelly Salyer, Kevin G. Salyer, Lahoma Salyer, Larry Salyer, Larry Keith Salyer, Mark Steven Salyer, Mary E. Salyer, Maxine Salyer, Patchell Salyer, Ramey Salyer, Jr., Randy Salyer, Robert E. Salyer, Rothel Salyer, Roy Salyer, Timothy O'Dell Salyer, Tracey Salyer, Vena Salyer, Wisemond Salyer, Gary Slayer, Lavinia W. Smith, Barbara Stalbaum, Sue Stalbaum, Brenda Stanley, Anna M. Stephnes, Jami M. Taylor, Daniel E. Whitaker, Caryl Lawrence Whitaker, Jack Whitaker, Karen J. Whitaker, Marvin Whitaker, Jamie Whitwort, Darrel G. Williams, Den Delbert Williams, Gary Williams, Geraldine Williams, Glen Albert Williams, Greg Williams, Randall Williams, Karen Wortman, and Sandy G. Zimmerman, Appellees.

No. 2009-CA-001233-MR.
|
Oct. 8, 2010.
|
As Modified Nov. 5, 2010.

West KeySummary

1 **Parties** Grounds

  

Members of gas company could not intervene under Kentucky law in trespass action brought by property owners against well drillers, natural resources company, and gas company because the existing parties could represent members' interests. Gas company had previously filed suit against well drillers and natural resources company and the suit was pending. Although members argued gas company's previous counsel acted adversely to the company's interests and had numerous conflicts of interest, the putative conflict of interest resulting from the joint representation of gas company, well driller, and natural resources company was largely abated in light of the fact that the entities had separate counsel. Rules Civ.Proc., Rule 24.01(1):(1).

Appeal from Magoffin Circuit Court, Action No. 07-CI-00006; Kimberley Childers, Judge.

**Attorneys and Law Firms**

H. Kent Hendrickson, Harlan, KY, for Appellants.

Michael Dean, Irvine, KY, for Appellees, The Estate of Lahoma Salyer; et al.

Thomas M. Smith, Prestonsburg, KY, Appellees, Betty McCarty, Robert J. McCarty, Ronald McCarty and Randall McCarty.

R. Burl McCoy, Lexington, KY, for Appellee, Equitable Production Company.

Before CLAYTON and KELLER, Judges; BUCKINGHAM, [1] Senior Judge.

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

*OPINION*

BUCKINGHAM, Senior Judge.

***1** Appellants appeal from an order of the Magoffin Circuit Court denying their motion to intervene in an action for trespass to mineral property. We affirm.

Appellees filed suit against J.D. Carty Resources, LLC ("JDCR") and Anaconda Drilling of Kentucky, LLC in the Magoffin Circuit Court for trespass, claiming that the defendants drilled a well and produced natural gas from mineral property owned by Appellees. Appellants, as members of Country Gas, LLC holding four membership interests out of a total of 160 outstanding units, had previously filed suit against J.D. Carty, individually, as well as JDCR and Anaconda in the Harlan Circuit Court for breach of contract and securities fraud. *John D. Roberts, et al. v. J.D. Carty Resources, et al.,* Harlan Circuit Court, Civil Action No. 06-CI-00237. That case remains pending at this time. Appellants filed a *lis pendens* notice of the Harlan County suit with the Magoffin County Court Clerk on March 29, 2007, detailing their claimed interest in the wells in the Country Gas package.

Attorney Gordon Long answered the complaint filed in the Magoffin Circuit Court on behalf of the defendants, defending in part by alleging that the Magoffin plaintiffs had failed to join all indispensable parties, including Country Gas. The allegation was that JDCR had assigned 12 oil and gas leases and 25 gas wells to Country Gas, including the Claxton McCarty Well # 2, which was the primary subject of the trespass action.

Thereafter, the trial court ordered that Appellees file an amended complaint joining Country Gas, and Country Gas was made a defendant by an amended complaint dated July 30, 2007. After having brought Country Gas into the suit, Long answered

the First Amended Complaint as the attorney for Country Gas, as well as the attorney for the original defendants, JDCR and Anaconda.

On March 12, 2008, the trial court entered partial summary judgment on liability for trespass against JDCR, Anaconda, and Country Gas, and the matter was set for trial on the issue of damages. However, before trial, the court entered an order and judgment on December 17, 2008, confirming a settlement agreement between the parties and finding that JDCR and Country Gas were to pay $628,000 to the plaintiffs. Appellees subsequently filed several orders of garnishment against banks with which JDCR and Country Gas had accounts, as well as with creditors of JDCR and Country Gas.

On April 1, 2009, Appellants moved to intervene, which motion was denied. This appeal followed.

After the filing of this appeal, Country Gas filed a motion for relief from the court's December 17, 2008 judgment confirming the settlement on July 6, 2009. This motion was filed by Attorneys Stephen W. Switzer and Joseph A. Tarantelli. Additionally, Attorney Susan C. Lawson filed a notice of entry of appearance as counsel for Country Gas on January 7, 2010.

An order denying a motion to intervene as a matter of right is immediately appealable. *Carter v. Smith,* 170 S.W.3d 402, 407 (Ky.App.2004). Our standard of review as to whether intervention should have been granted is a clearly erroneous standard. *Id.* at 409 (citing *Gayner v. Packaging Serv. Corp. of Ky.,* 636 S.W.2d 658, 660 (Ky.App.1982)).

***2** The primary issue in this appeal concerns whether Appellants can intervene pursuant to Kentucky Rules of Civil Procedure (CR) 24.01(1). An applicant must meet a four-prong test before being entitled to intervene in a lawsuit pursuant to CR 24.01(1): (1) the motion must be timely; (2) the applicant must have an interest relating to the subject of the action; (3) the applicant's ability to protect his interest may be impaired or impeded, and (4) none of the existing parties could adequately represent the applicant's interests. CR 24.01(1)(b); *Carter,* 170 S.W.3d at 407. The burden of proof in proving each of these requirements rests with the party desiring to intervene. *Carter,* 170 S.W.3d at 409.

Here, assuming, without deciding, that Appellants have met the first three prongs of the test in CR 24.01, Appellants have failed to meet the fourth prong of the test. Appellants' interests in the underlying lawsuit, which are avoiding or reducing Country Gas's liability for trespass to property, are the same as those of Country Gas, and therefore Country Gas could adequately represent Appellants' interests. *See Donald v. City of Glenview,* 723 S.W.2d 861, 862 (Ky.App.1986) (city's interest adequately represented by resident who contested incorporation).

Appellants argue that they could not be adequately represented because Country Gas has not been adequately defended in this matter thus far. Appellants allege that Country Gas's previous counsel acted adversely to the company's interests and had numerous conflicts of interest. However, the linchpin supporting intervention, namely, the putative conflict of interest resulting from the joint representation of Country Gas, J.D. Carty, and JDCR, has now largely abated in light of the entities having separate counsel. Thus, Appellants do not meet all four prongs of the test for intervention as of right under CR 24.01, and the trial court's decision denying Appellants' motion to intervene was not clearly erroneous.

Appellants next argue that they have a right to intervene because they are indispensable parties of record pursuant to CR 19.01 and are necessary parties under the Declaratory Judgment Act under KRS 418.075. We disagree. "[KRS 418.075 and CR 19.01] can be invoked only by parties, not by a person who seeks to become a party." *Murphy v. Lexington-Fayette County Airport Bd.,* 472 S.W.2d 688, 690 (Ky.1971). "Thus, only CR 24.01 governs the determination of the question of [Appellants'] right to intervene." *Id.* at 690.

The order of the Magoffin Circuit Court is affirmed.

ALL CONCUR.

2010 WL 3927793

**All Citations**

Not Reported in S.W.3d, 2010 WL 3927793

**End of Document**

2010 WL 2670853
Only the Westlaw citation is currently available.
United States District Court,
S.D. Ohio,
Eastern Division.

COMTIDE HOLDINGS, LLC, Plaintiff,
v.
BOOTH CREEK MANAGEMENT CORP., Defendant.

No. 2:07–cv–1190.
|
June 29, 2010.

**Attorneys and Law Firms**

Michael Hiram Carpenter, Katheryn M. Lloyd, Nathan G. Johnson, Carpenter Lipps & Leland LLP, Thomas J. Rocco, Shayne Nichols, LLC, Columbus, OH, for Plaintiff.

Geoffrey J. Moul, Murray Murphy Moul & Basil, Columbus, OH, Brook R. Long, Winston & Strawn LLP, Hicago, IL, Norman K. Beck, Stephanie R. Dykeman, Timothy J. Rivelli, Winston & Strawn LLP, Chicago, IL, for Defendant.

***OPINION AND ORDER***

ALGENON L. MARBLEY, District Judge.

***1** This case is before the Court for consideration of a motion to intervene filed by Michael F. Creque, an individual who claims a financial interest in plaintiff Comtide Holdings, LLC. The motion is fully briefed, with both Comtide and defendant Booth Creek Management Corp. having opposed the motion. For the following reasons, the motion to intervene will be denied.

**I.**

Only a brief recitation of the background of this case is needed here. As the Court stated in its Opinion and Order of May 22, 2008, the case involves Comtide's claim for a brokerage fee arising out of Booth Creek's August 1, 2007, purchase of Berlin City, a New England auto dealership. Comtide alleges that it introduced the parties to each other while a contract between Comtide's principal, J. Daniel Schmidt, and Booth Creek was in effect, and that even though Booth Creek did not buy Berlin City until after that contract expired, Comtide (as the assignee of Mr. Schmidt's interest in the brokerage contract) is entitled to a commission on the sale.

According to the motion to intervene, the proposed intervenor, Michael Creque, was hired by Mr. Schmidt almost twenty years ago to manage one of Mr. Schmidt's auto dealerships. In the ensuing years, he and Mr. Schmidt became business partners in a number of auto dealerships as well as other business ventures. Eventually, when Comtide Holdings, LLC, was formed, Mr. Creque was made a 25% owner of that company.

The proposed intervenor's complaint alleges that Mr. Schmidt developed a plan over time to oust Mr. Creque from the parties' joint business ventures. Part of that plan was the termination of Mr. Creque from his position as Vice–President, Treasurer, and Chief Operating Officer of Comtide. There is separate litigation contesting the legality of that action, but it has been stayed by

  

virtue of Comtide's receivership. According to Mr. Creque's proposed complaint, another part of that plan was Mr. Schmidt's misappropriation of the corporate opportunity represented by the brokerage agreement which is the subject of this case. Mr. Creque claims that Mr. Schmidt did not tell him about the deal so that Mr. Schmidt could retain the entire brokerage fee himself. The intervenor complaint asserts claims against both Comtide and Mr. Schmidt (who is identified in that complaint as a third-party defendant) for breach of fiduciary duty, self-dealing, fraudulent concealment, and common law fraud. It does not assert any claims against Booth Creek. The question before the Court is whether Mr. Creque should be allowed to intervene in this lawsuit for purposes of asserting these claims.

**II.**

Intervention is governed by Fed.R.Civ.P. 24, which states in pertinent part that:

> "(a) Intervention of Right
>
> Upon timely application anyone shall be permitted to intervene in an action: ... (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interests is adequately represented by existing parties.
>
> ***2** (b) Permissive Intervention
>
> Upon timely application anyone may be permitted to intervene in an action: ... (2) when an applicant's claim or defense and the main action have a question of law or fact in common.... In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

The leading case in this Circuit on both permissive intervention and intervention as of right is *Bradley v. Milliken,* 828 F.2d 1186 (6th Cir.1987). With respect to intervention as of right under Rule 24(a)(2), *Milliken* indicates that, first, the application must be timely. Whether an application for intervention is timely must be evaluated in light of the purpose for which intervention is sought, the length of time that the intervenor has known about the interest in the litigation, whether any of the original parties to the litigation would be prejudiced, and the stage to which the lawsuit has progressed when intervention is sought. *See also Michigan Association for Retarded Citizens v. Smith,* 657 F.2d 102, 105 (6th Cir.1981), holding that the stage to which a lawsuit has progressed is only one factor in the inquiry and is not dispositive, and that the court must also consider whether there are any "unusual circumstances" militating either in favor of or against intervention.

Second, in order to intervene as of right, a party must have an interest in the subject matter of the suit. *Milliken* indicates that this requirement must be liberally construed. *Id.* at 1192. However, the interest must be direct and substantial rather than peripheral or speculative. *Grubbs v. Norris,* 870 F.2d 343 (6th Cir.1989); *Meyer Goldberg, Inc. v. Goldberg,* 717 F.2d 290 (6th Cir.1983).

Next, the intervenor's ability to protect its interest must somehow be impaired by the disposition of the case. *Grubbs, supra; Triax Co. v. TRW, Inc.,* 724 F.2d 1224, 1227 (6th Cir.1984). Finally, the interest which the intervenor seeks to assert must not be adequately represented by the existing parties to the suit. *Milliken, supra,* at 1192. Ordinarily, where the intervenor and an existing party have the same ultimate objective in the litigation, the representation of the intervenor's interest by the existing party is presumed to be adequate, and the intervenor bears the burden of demonstrating the inadequacy of that party's representation of his interests. *Meyer Goldberg, Inc. v. Goldberg, supra,* at 293; *see also In re General Tire and Rubber Co. Securities Litigation,* 726 F.2d 1075, 1087 (6th Cir.), *cert. denied sub nom. Schreiber v. Gencorp. Inc.,* 469 U.S. 858, 105 S.Ct. 187, 83 L.Ed.2d 120 (1984). However, the burden is not a particularly heavy one, and is satisfied if the intervenor can show that there is substantial doubt about whether his interests are being adequately represented by an existing party to the case. *National Wildlife Federation v. Hodel,* 661 F.Supp. 473 (E.D.Ky.1987); *see Trbovich v. United Mine Workers,* 404 U.S. 528, 538 n. 10, 92 S.Ct. 630, 30 L.Ed.2d 686 (1972).

***3** *Milliken* indicates that the same timeliness inquiry must be made with respect to a motion for permissive intervention. Again, the timing of the application is only one factor to be considered, and it is critical to consider whether the intervention will bring about undue delay in the litigation or prejudice existing parties. *Meyer Goldberg, Inc. of Lorain v. Fisher Foods, Inc.,* 823 F.2d 159 (6th Cir.1987); *Arrow Petroleum Co. v. Texaco, Inc.,* 500 F.Supp. 684 (S.D.Ohio 1980). Even a timely application for permissive intervention should be denied where the intervenor has not established that a common question of law or fact exists between his proposed claim and the claim of one or more of the existing parties.

Finally, the Court is not required to evaluate an application for intervention under only one subsection of Rule 24. When a party has moved for intervention as of right, but the facts more appropriately suggest that permissive intervention might be granted, and there are no other obstacles such as jurisdictional considerations which would counsel against such an analysis, the Court is free to consider whether permissive intervention might be granted. *See Penick v. Columbus Education Ass'n,* 574 F.2d 889 (6th Cir.1978).

**III.**

Before turning to an element-by-element analysis of Rule 24(a) or Rule 24(b), it is helpful to explore exactly what type of interest Mr. Creque claims in the subject matter of this case. If his interest does not meet the requirements of Rule 24, it will be unnecessary to analyze the remaining factors outlined above.

In the prototypical situation where a party wishes to intervene as a plaintiff, that party claims a direct interest in the claim being asserted by the existing plaintiff against the defendant, usually by virtue of a subrogation agreement or some other statutory or common law right of subrogation or indemnity. *See, e.g., McDonald v. E.J. Lavino Co.,* 430 F.2d 1065 (5th Cir.1970). There, the courts have little difficulty concluding that the subrogee does have a legally-protectable interest in its share of any recovery. *See Maricco v. Meco Corp.,* 316 F.Supp.2d 524, 526 ("[t]he courts have consistently recognized that an insurer who has a right of subrogation and pays a portion of the insured's loss ... possesses a separate and distinct substantive right of recovery against the defendant tortfeasor who allegedly caused the loss"). Thus, the subrogated party simply joins with the existing plaintiff in asserting the same cause or causes of action against the defendant. Clearly, that is not the type of interest being advanced by Mr. Creque, because he claims no subrogation interest and has not indicated an intent to join in any of the claims being asserted against Booth Creek.

In a less common situation, a stockholder of a corporate plaintiff may seek to intervene in order to assert an indirect entitlement to any payment made by the defendant to the corporate plaintiff. Such intervention is not typically permitted. Ordinarily, a corporation is deemed to be an adequate representative of the interests of all its shareholders because its duty is to maximize their return, including securing the largest judgment or settlement possible on the claim being asserted against the defendant. *See, e.g., Pharmaceutical Research & Manufacturers of America v. Commissioner,* 201 F.R.D. 12, 14–15 (D.Me.2001) (noting the general rule that the "presumption that the corporation will adequately represent its shareholders' interests ... can ordinarily be rebutted only if the shareholder shows ... corporate disloyalty or carelessness" and that "a shareholder does not acquire a personal cause of action for injuries to the corporation").

***4** There is no dispute that Mr. Creque's interest in this lawsuit, if any, arises out of his purported status as a 25% shareholder in Comtide. However, he does not appear to be asserting that Comtide is acting disloyally or carelessly with respect to its pursuit of the brokerage fee claim which it has asserted against Booth Creek. Further, his proposed complaint in intervention does not allege that he has a separate entitlement, as a 25% shareholder of Comtide, to pursue that or any other claim against Booth Creek. Rather, although he apparently wishes to intervene as a plaintiff, it is for the sole purpose of asserting what amounts to a cross-claim against his fellow plaintiff, Comtide, and its other shareholder, Mr. Schmidt (who would then be added to the case not as a third-party defendant but as an additional cross-claim defendant). In essence, he is asserting theories under which he would become a creditor, in a sense, not of Booth Creek's, but of Comtide's, at least to the extent that as a minority shareholder

he would have some claim on Comtide's assets, and also a creditor of Mr. Schmidt's, to the extent that he could prove that Mr. Schmidt defrauded him. The question then becomes whether this type of interest, which is not an interest in the underlying claim being litigated, but an interest in establishing a particular legal relationship between Mr. Creque, on the one hand, and Comtide and Mr. Schmidt, on the other, is the type of legal interest that would support intervention under Rule 24.

*Vaughan v. Dickinson,* 19 F.R.D. 323 (W.D.Mich.1955), *aff'd* 237 F.2d 168 (6th Cir.1956), considered an analogous situation. There, the proposed intervenor was an actual creditor of one of the plaintiffs by virtue of a judgment obtained against the plaintiff in separate litigation. The case in which the creditor sought to intervene was an action to collect on a judgment, which, if successful, would have resulted in the payment of a sum of money to the plaintiff. The plaintiff's creditor sought to intervene simply in order to attempt to collect on his judgment. Like Mr. Creque, the creditor in *Vaughan* did not assert any specific interest in the subject of the underlying litigation beyond its potential to produce money for the existing plaintiff—money which could then be attached by the creditor.

The District Court, in a decision adopted and affirmed by the Sixth Circuit Court of Appeals, denied intervention. In language that is equally applicable here, the court considered it significant that the proposed intervenor "has no direct interest in the issues involved in the present action between the plaintiffs and the defendants" and that "[h]is rights under his judgment against [the plaintiff] will not in anywise be affected by and judgment or decision of the court as to the rights and liabilities of the parties to the present action." *Vaughan,* 19 F.R.D. at 328. Additionally, quoting *Pure Oil Co. v. Ross,* 170 F.2d 651, 653 (7th Cir.1948), the court noted that "to authorize an intervention, the intervenor must have an interest in the subject matter of the litigation of such a nature that he will gain or lose by the direct legal operation of the judgment." *Id.* Because that interest was lacking, intervention was not permitted. In addition to the fact that *Vaughan,* although venerable, is still good law in this Circuit, other courts have, in more recent decisions, reached similar results. *See, e.g., United States v. Alisal Water Corp.,* 370 F.3d 915, 920 (9th Cir.2004), where the court held that the potential impairment of a creditor's ability to collect a debt or collect on a judgment "does not give rise to any right of intervention" and that "[t]o hold otherwise would create an open invitation for virtually any creditor of a defendant to intervene in a lawsuit where damages might be awarded."

***5** There are some cases which have allowed creditors of the plaintiff to intervene to assert an entitlement to any funds the plaintiff might receive if the claims asserted against the defendant proved successful. However, such cases represent an exception to the general rule based on facts not present here. For example, in *Intercontinental Electronics S.p.A. v. Roosen,* 2006 WL 846763 (E.D.Mich.2006), the court allowed a creditor of the plaintiff to intervene only because the judgment obtained by that creditor arose of the same dispute that was being litigated between the parties in the case in which intervention was sought-that is, that "the subject matter of the current action is directly related to the litigation resulting in the judgment in favor of [the intervenor]." *Id.* at *2.

That same relationship does not exist here. Although the circumstances under which Mr. Schmidt contracted with Booth Creek may have some evidentiary value with respect to Mr. Creque's claims against Mr. Schmidt and Comtide, those circumstances are not the subject of the present case. This case is concerned with whether Booth Creek breached some legal duty to Mr. Schmidt by not paying him (or his assignee, Comtide) a commission on the Berlin City deal, and not with the question of whether Mr. Schmidt breached some duty to either Comtide or Mr. Creque by keeping the commission contract quiet. That issue is raised solely by Mr. Creque's proposed complaint. Otherwise, Mr. Creque is actually a step removed from the judgment creditors who were denied intervention in *Vaughan* and *Alisal Water.* He does not yet have a judgment which either deems him a current shareholder of Comtide or someone who is entitled to damages against Mr. Schmidt. Thus, he is attempting to use the vehicle of intervention in order to establish a right to collect money from either Comtide or Mr. Schmidt, and then to assert that right in order to obtain some of the proceeds of any judgment which might be entered against Booth Creek. The Court finds that this type of contingent interest is so far removed from an interest in the subject matter of the case that it will not satisfy even the "rather expansive notion of the interest sufficient to invoke intervention of right" which prevails in this Circuit. *See Michigan State AFL–CIO v. Miller,* 103 F.3d 1240, 1245 (6th Cir.1997).

If this factor alone is not sufficiently dispositive, the Court makes the following further observations. It is not at all clear that Comtide would not adequately represent Mr. Creque's interests here. Both it and he are best served if Comtide proves its claim against Booth Creek, reduces it to judgment, and collects on that judgment. There is no suggestion that Comtide would jeopardize its own interest in a substantial recovery simply in order to make itself less collectible should Mr. Creque ultimately obtain some right to Comtide's assets. Additionally, it is difficult to see how any judgment in this case would impair Mr. Creque's ability to pursue his claims against Comtide and Mr. Schmidt elsewhere; in fact, he has apparently attempted to do that, but the obstacle he faces is unrelated to anything that has happened or will happen here. Rather, the state court receivership proceeding has temporarily halted his efforts. Further, to the extent that there are any issues of fact or law in common between the claims contained in Mr. Creque's proposed complaint and the claims which Comtide has asserted against Booth Creek, those issues are few and far between. This case will focus on Booth Creek's conduct and the legal issues surrounding its failure to pay a commission. About the only fact which would be common to both claims would be the execution of the contract itself, and that is not a fact which is in dispute. The balance of Mr. Creque's claims about the contract would center around why Mr. Schmidt did not disclose its existence to Mr. Creque, and whether he had some obligation to do so, but those are not factual or legal issues which would be germane to the question of Booth Creek's liability, if any, to Comtide.

***6** For all of these reasons, the Court concludes that Mr. Creque has not shown an entitlement to intervene under Rule 24(a), nor has he shown that it would be a sound exercise of the Court's discretion to permit him to intervene under Rule 24(b). Therefore, his motion for leave to intervene will be denied.

## IV.

For the reasons stated in this Opinion and Order, the motion of proposed intervenor Michael F. Creque to intervene (# 42) is DENIED.

**IT IS SO ORDERED.**

### All Citations

Not Reported in F.Supp.2d, 2010 WL 2670853

United States Court of Appeals,
Third Circuit.

ACRA TURF CLUB, LLC, A New Jersey Limited Liability Company; Freehold Raceway Off Track, LLC, A New Jersey Limited Liability Company
v.
Francesco ZANZUCCKI, Executive Director of the New Jersey Racing Commission.
[*] New Jersey Thoroughbred Horsemen's Association, Inc., Appellant.

[*] (Pursuant to Fed. R. App. P. 12(a)).

No. 13–1634.
|
Submitted Under Third Circuit LAR 34.1(a) Jan. 10, 2014.
|
Filed: March 31, 2014.

**Synopsis**

**Background:** Holders of permits for off-track wagering (OTW) facilities commenced action against Executive Director of New Jersey Racing Commission, asserting that amendments to New Jersey's Off'Track and Account Wagering Act violated their constitutional rights. Organization dedicated to fostering and promoting the breeding and ownership of Thoroughbred horses moved to intervene. The United States District Court for the District of New Jersey, Michael A. Shipp, J., 2013 WL 776236, denied motion. Organization appealed.

**Holdings:** The Court of Appeals held that:

it was within district court's discretion to deny organization's motion to intervene as of right, and

it was within district court's discretion to deny organization's motion for permissive intervention.

Affirmed.

See also, 748 F.3d 127, 2014 WL 1272859.

***220** On Appeal from the United States District Court for the District of New Jersey, District Court No. 3–12–cv–02775, District Judge: The Honorable Michael A. Shipp.

**Attorneys and Law Firms**

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Michael J. Fasano, Esq., Christina V. Harvey, Esq., Michael D. Schottland, Esq., ***221** Lomurro, Davison, Eastman & Munoz, Freehold, NJ, for Appellant.

Before: SMITH, SHWARTZ, and SCIRICA, Circuit Judges.

OPINION

PER CURIAM.

The New Jersey Thoroughbred Horsemen's Association, Inc. ("NJTHA") appeals the denial of its motion to intervene in this federal action. For the reasons that follow, we will affirm.

ACRA Turf Club, LLC ("ACRA") and Freehold Raceway Off Track, LLC ("Freehold") (collectively, "Plaintiffs") filed this suit pursuant to 42 U.S.C. §§ 1983 and 1988, against Francesco Zanzuccki ("Zanzuccki"), Executive Director of the New Jersey Racing Commission (the "Commission"), asserting that certain amendments to New Jersey's Off–Track and Account Wagering Act violate their rights under the United States Constitution. [1] On July 27, 2012, NJTHA filed a motion to intervene in Plaintiffs' federal suit and to dismiss the complaint. [2] The Magistrate Judge struck as premature the part of the motion that sought to dismiss the Complaint, and NJTHA filed an appeal of that order, which we dismissed for

lack of jurisdiction. The District Court thereafter denied the motions to intervene, finding that the proposed intervenors failed to demonstrate that their interests were not adequately represented by Zanzucchi. NJTHA timely appealed. [3]

1 The District Court dismissed Plaintiffs' case on *Younger* abstention grounds, and Plaintiffs filed an appeal, which was docketed as No. 13–3064, and consolidated with this appeal for disposition only. We resolve that appeal in a separate opinion issued concurrently with this one. Because most of the facts and procedural history are set out in that opinion, and because here we write principally for the parties, we recite only those facts essential to our disposition of this appeal.

2 On August 7, 2012, the Standardbred Breeders and Owners Association also filed a motion to intervene and to dismiss, but has not participated in this appeal.

3 The District Court had jurisdiction pursuant to 28 U.S.C. § 1331. We exercise jurisdiction pursuant to 28 U.S.C. § 1291.

We "review a denial of a motion to intervene as of right for abuse of discretion, although this review is 'more stringent' than the abuse of discretion review we apply to a denial of a motion for permissive intervention." *Brody v. Spang,* 957 F.2d 1108, 1115 (3d Cir.1992) (quoting *Harris v. Pernsley,* 820 F.2d 592, 597 (3d Cir.1987)). When reviewing the denial of intervention as of right, we "will reverse a district court's determination only if the court has applied an improper legal standard or reached a decision that we are confident is incorrect." *Mountain Top Condo. Ass'n v. Dave Stabbert Master Builder, Inc.,* 72 F.3d 361, 365 (3d Cir.1995) (internal quotation marks omitted). We are, however, "more reluctant to intrude into the highly discretionary decision of whether to grant permissive intervention." *Brody,* 957 F.2d at 1115. The District Court denied NJTHA's request to intervene as a party defendant as of right and for permissive intervention under Fed.R.Civ.P. 24.

Rule 24(a) intervention as of right covers any proposed intervenor who, by timely motion, "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." ***222** Fed.R.Civ.P. 24(a)(2). Thus, an applicant may intervene as of right if:

> (1) the application for intervention is timely; (2) the applicant has a sufficient interest in the litigation; (3) the interest may be affected or impaired, as a practical matter by the disposition of the action; and (4) the interest is not adequately represented by an existing party in the litigation.

*Harris,* 820 F.2d at 596. In denying the motion, the District Court concluded that the fourth prong was not met because NJTHA's interest was adequately represented by the New Jersey Attorney General as counsel for Zanzucchi.

We agree. The Attorney General is charged with defending the constitutionality of state statutes, N.J. Stat. Ann. § 52:17A–4, and there is no indication here that the Attorney General, as representative of the Commission, has not actively fulfilled his statutory role and vigorously defended the Amendments. In this situation, "a presumption of adequate representation generally arises when the representative is a governmental body or officer charged by law with representing the interests of the absentee." *Commonwealth of Pa. v. Rizzo,* 530 F.2d 501, 505 (3d Cir.1976). Moreover, NJTHA and the Commission here have aligned interests: they both want the Amendments to be upheld and the off track wagering programs to succeed. [4] Therefore, the District Court applied the correct legal standard and did not abuse its discretion in denying NJTHA's Rule 24 motion to intervene as of right.

4 For this reason, NJTHA's reliance on *Kleissler v. U.S. Forest Service,* 157 F.3d 964 (3d Cir.1998), is misplaced. In *Kleissler,* the proposed intervenor was a private entity with an interest in the logging industry. In that case, the presumption of adequate representation was overcome "when an agency's views are necessarily colored by its view of the public welfare rather than the more parochial views of a proposed intervenor whose interest is personal to it." *Id.* at 972. Here,

> both the Commission and NJTHA are interested in defending the Amendments and allowing off track wagering to grow.

We turn next to the claim that the District Court abused its discretion by not allowing permissive intervention under Rule 24(b). Permissive intervention is available upon timely motion when the movant "has a claim or defense that shares with the main action a common question of law or fact," Fed.R.Civ.P. 24(b)(1)(B), and the intervention will not unduly delay the proceedings or prejudice the original parties. Fed.R.Civ.P. 24(b)(3). In denying permissive intervention, the District Court relied in part on the fact that the interests of NJTHA were already adequately represented and that its interjection of unrelated new claims would delay the proceedings. The District Court had good reason to deny permissive intervention. "[W]here, as here, the interests of the applicant in every manner match those of an existing party and the party's representation is deemed adequate, the district court is well within its discretion in deciding that the applicant's contributions to the proceedings would be superfluous and that any resulting delay would be 'undue.' " *Hoots v. Commonwealth of Pa.*, 672 F.2d 1133, 1136 (3d Cir.1982). The District Court appropriately exercised its discretion when it concluded that the proposed intervenor's interests are aligned with those of the Attorney General and its unrelated claims would delay the proceeding.

Finally, we turn to NJTHA's argument that the District Court misapplied the indispensible party doctrine by not allowing NJTHA to be joined under Rule 19(a). Without deciding whether or not it is procedurally proper for a non-party to move for joinder under Rule 19, we agree ***223** with the District Court that a movant who may meet the joinder requirements of Rule 19 does not automatically qualify to intervene as of right, as "[t]hat interpretation would read the 'adequacy of representation' requirement out of Rule 24(a)(2) by creating a backdoor into the litigation through the less restrictive inquiry of Rule 19(a)(2)(I)." *Liberty Mut. Ins. Co. v. Treesdale, Inc.*, 419 F.3d 216, 230 (3d Cir.2005). Thus, the District Court properly found that NJTHA's Rule 19 argument did not provide a basis for intervention.

For the foregoing reasons, we will affirm the denial of the motion to intervene.

**All Citations**

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NOT TO BE PUBLISHED
Court of Appeals of Kentucky.

William PORTER and Barbara Porter, Appellants
v.
SHELBYVILLE CEMETERY COMPANY aka Grove Hill Cemetery Company; Charles T. Long; J. Robert Walters; Guthrie Goodman, III; Ann Kinsolving; Ellen Topmiller; and Edgar Vaughn, III, Appellees.

No. 2007-CA-002545-MR.
|
March 20, 2009.

West KeySummary

1 **Corporations and Business Organizations** Persons entitled to sue or defend; standing

A director of a nonprofit corporation did not have standing to sue on the corporation's behalf. Statute specifically stated that only a shareholder of a corporation at the time of the complained of transaction could file suit on behalf of the corporation. Further, the director could not obtain standing by becoming a shareholder after the fact and retroactively apply it to the time of the transaction. KRS Chapter 271B.

Appeal from Shelby Circuit Court, Action No. 06-CI-00702; Charles J. Hickman, Judge.

**Attorneys and Law Firms**

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C. Gilmore Dutton, III, Shelbyville, KY, for Appellees.

Before COMBS, Chief Judge; CAPERTON and CLAYTON, Judges.

*OPINION*

COMBS, Chief Judge.

***1** William Porter and Barbara Porter appeal from an opinion and order of the Shelby Circuit Court that dismissed their complaint against Shelbyville Cemetery Company (d/b/a Grove Hill Cemetery Company) and six members of its board of trustees. At the time they filed the complaint, Appellant Barbara Porter was acting as a *de facto* trustee of Grove Hill, but neither of the Porters was a member of the nonprofit corporation. Nevertheless, the Porters filed a derivative action on behalf of Grove Hill alleging numerous breaches of the articles of incorporation by Barbara's fellow board members.

The sole issue properly before us is the argument raised by the Porters in the trial court: that Barbara's role as a corporate fiduciary entitles her to the same standing that a stockholder of a private business corporation would have to bring a derivative action to enforce the rights of the corporation. The trial court was not persuaded and dismissed the complaint. After our review, we affirm.

Shelbyville Cemetery Company is a nonprofit corporation governed by the provisions of Kentucky Revised Statutes (KRS) Chapter 273. It was chartered by the Commonwealth on March 1, 1854. At that time, the Kentucky Constitution of 1850 was in effect. The General Assembly amended the cemetery's articles of incorporation in 1871 to provide for corporate governance by nine trustees, each of whom had to own at least one burial plot in the cemetery. Pursuant to the 1871 amendment, three of these trustees were to be elected annually by the plot owners. The amendment also provided that Grove Hill:

> shall be constituted and composed only of those persons who have heretofore purchased and paid, and who may hereafter purchase and pay for lots, and have received certificates of ownership therefor in the cemetery

> grounds owned and held by said corporation.

1871 Ky. Acts, Ch. 1547 §§ 3-4. Finally, the articles provided for the board of trustees to retain an accountant to audit the company's accounts at least once per year.

When Kentucky's current Constitution was adopted in 1891, the Constitution of 1850 was effectively repealed. At Section 59(17), the new Constitution prohibited the General Assembly from chartering private corporations. All existing corporations were statutorily mandated to amend their charters to comply with Chapter 32 of the Kentucky Statutes, which established Kentucky's first uniform corporate code. All corporations pre-dating the 1891 Constitution were also required to adopt a corporate resolution accepting the new Constitution and to designate a registered agent in the office of the Secretary of State.

Grove Hill failed to comply with any of the requirements of Chapter 32 and accordingly suffered the revocation of its corporate charter in 1897. As appellant's brief aptly observes, Grove Hill has operated as a de-chartered corporation continually since 1897-neither *de jure* nor *de facto* as a matter of law. Appellant's brief at p. 4, citing 19 Am.Jur.2d, *Corporations,* § 2885 (1986).

***2** When Grove Hill was originally incorporated in 1854, its charter recited that it was a "body politic and corporate...." Section 1, Charter of 1854. As noted during oral arguments, Grove Hill attempted to amend its charter in 1910-the same charter that had been revoked in 1897 and which has never been brought into conformity with the laws under the present Constitution.

Grove Hill has continued to operate regardless of its actual corporate status. It has often functioned as a matter of actual practice rather than in conformity with its by-laws as originally chartered and amended over the years. Grove Hill contends that it is a private, not-for-profit corporation. Barbara contends that it is a public-or at least a quasi-public-corporation.

Since 1959, it has been the practice of the board to appoint trustees rather than to elect them as provided in its original articles of incorporation. In March 1975, the board voted to amend the by-laws to reduce the number of trustees from nine to seven. As of the time that the record in this case was complied, none of the board members has been duly elected by the lot owners since 1959. Pursuant to the appointment process, Barbara Porter was appointed trustee by the board in October 1998.

In 2005, the board decided to condemn a portion of the Porters' property for expansion of the cemetery.[1] The Porters objected to this decision. In an action contesting the cemetery's condemnation proceedings, the Porters asked the trial court to order the *de facto* members of the board to announce and to conduct a proper election of trustees. Presumably, the Porters anticipated that a re-constituted board might reconsider the decision to condemn the Porters' property. However, the court declined to consider the Porters' motion and held that issues related to the composition and administration of the board were not matters to be considered in conjunction with the condemnation action. The Porters did not pursue an appeal as to the *de facto* composition of the Grove Hill board in the context of the condemnation proceedings but instead have filed this separate lawsuit on behalf of the corporation.

In their complaint, the Porters alleged that none of the trustees has been validly elected to serve on the board. They also charged that the board has ignored their demand for it to schedule and conduct a valid election of its trustees. As a consequence, they sought to have the *de facto* board members immediately removed from office and a proper election held under the supervision of the court. In addition, they sought a court order compelling the board to submit to an annual audit and to prepare and to publish an annual report. At a meeting of the board held on January 16, 2007, Barbara Porter was removed from office.

On January 22, 2007, Grove Hill filed a motion to dismiss the complaint for lack of standing. The board contended that Barbara Porter was estopped from attacking the validity of its makeup because she had been appointed pursuant to the same process that she was now challenging and because she had served for ten years **without complaint** in her capacity as board member without the benefit of an election. Furthermore, Grove Hill argued that since she had been duly removed from office, she could no longer claim **any** judicially recognizable interest in the subject of the action. With respect to William Porter, the board reiterated that he was neither a board member nor a property owner and that he had **never** had any judicially recognizable interest in the board or its composition.

***3** On February 5, 2007, the Porters filed a motion requesting the court to rescind the board's decision to remove Barbara from office. Additionally, with respect to the board's motion to dismiss, they explained that "in an effort to get past the issue of standing," they had each tried to become members of the corporation by purchasing cemetery plots. The board refused to sell them the requested plots. The Porters argued that this refusal amounted to yet another instance of wrongdoing. They then requested the court to compel the cemetery to sell two burial plots to them, arguing that its status as a public corporation precluded the decision to refuse to sell burial plots to them.

In an order entered February 28, 2007, the trial court dismissed the Porters' action. With respect to William Porter, the trial court concluded that he had no standing whatsoever to pursue an action on behalf of the corporation. As to Barbara Porter, the court held that she, too, lacked a judicially recognizable interest sufficient to invoke the court's jurisdiction.

In a carefully reasoned analysis, the court concluded that the precisely circumscribed, statutory authority of *de facto* board members to act on behalf of a corporation was insufficient to serve as a basis for a derivative action brought to enforce the rights of a corporation. Although there is well accepted authority that a *de facto* trustee binds a corporation in its transactions with innocent third-parties, the trial court reasoned that a *de facto* trustee had no legal relationship whatsoever with the corporation itself. According to the trial court, Barbara was never a member of the corporation because of her failure to own a burial plot; she was no longer a trustee either in law or in fact. Therefore, she lacked the necessary present, substantial, and judicially recognizable interest in the action to invoke jurisdiction and to maintain this action. Finally, the court observed that the Porters could not be affected personally by any judgment that the court might arguably pronounce. Since neither of them could cast a vote with respect to any issue concerning the cemetery and neither of them could lawfully serve on its board, the court's decision-regardless of its outcome-was legally irrelevant to them. Thus, the court concluded that the Porters were **legal strangers to the corporation** who could not invoke the court's jurisdiction. Accordingly, their action was dismissed. This appeal followed.

On appeal, the Porters contend that the trial court erred by concluding that Barbara lacked standing to bring a civil action to enforce Grove Hill's corporate rights. They argue that Barbara's status as a *de facto* trustee alone is an interest sufficient to justify their maintaining an action. They contest the common law's limitations on the authority of *de facto* directors to act and contend that the circumstances surrounding her inappropriate appointment to the board are not relevant. The Porters contend that as long as the interests of the public and third persons are involved, any and all of Barbara's actions as *de facto* trustee are authorized by law, and the court must redress their grievances.

***4** The Porters contend that Grove Hill's *de facto* trustees "long ago shut off any measure of accountability to [the corporation's] burial lot owners." Appellants' Brief at 17. They allege that the *de facto* trustees "have kept the lot owners in the dark for many years" and that the board's chairman has been permitted to "establish his fiefdom over Grove Hill which he has ruled with an iron fist." *Id.* The Porters argue that Barbara is a suitable advocate to enforce the interests of Grove Hill's shareholders. They contend that Barbara is the only person who has shown any concern for the best interests of the cemetery's plot owners. Invoking public policy and equitable principles, they urge this court to hold that a board member has the right to bring a derivative action for the same reasons that stockholders of a for-profit corporation are authorized to do so.

Since the court's judgment in this case involves a question of law, we review the decision *de novo.* We agree with the trial court that the power of *de facto* directors to act on behalf of a corporation is much more narrowly limited than the Porters acknowledge. However, we do not believe that an exhaustive discussion on that point is necessary. Rather, we believe it is sufficient to say that even if she were a duly elected, *de jure* director of Grove Hill, Barbara Porter would nevertheless lack the standing necessary to pursue the derivative claims that she has asserted on behalf of the corporation.

In order to invoke the jurisdiction of the court to enforce a claim, the plaintiffs must show that they have standing to do so. *J.N.R. v. O'Reilly,* 264 S.W.3d 587 (Ky.2008). Standing to bring an action requires a personal interest, often referred to as a "substantial" interest in the subject matter of the litigation as distinguished from a "mere expectancy." *Housing Authority of Louisville v. Service Employment International Union,* 885 S.W.2d 962, 965 (Ky.1994).

The issue of standing is concerned only with the question of **who** is entitled to mount a legal challenge rather than with

the merits of the subject matter of the controversy. *Flast v. Cohen,* 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). It is a concept utilized to determine whether a party has shown a personal stake in the outcome sufficient to insure that a justiciable controversy is adequately presented to the court. *Black's Law Dictionary* 1405 (6th ed.1990). State courts apply the concept of standing as a matter of self-restraint to avoid rendering advisory opinions on matters instigated by parties who are merely "intermeddlers." 59 Am.Jur.2d *Parties* § 36 (2002). Since the jurisdiction of the court is a prerequisite to commencement of any action, standing must exist **at the time the action is filed.** *Id.* at § 37.

Standing for shareholders of private business corporations in derivative actions evolved from equitable principles. 19 Am.Jur.2d *Corporations* § 1948 (2004). Where a corporation possessed a cause of action that it either refused or was unable to assert, equity permitted a stockholder to sue in his own name for the benefit of the corporation. *Id.* at § 1946. The shareholder was authorized to pursue the action for the purpose of preventing injustice when it was apparent that the corporation's rights would not be protected otherwise. *Id.* However, derivative actions have not been traditionally favored in the law, and eventually state legislatures began to enact various statutory requirements in order to regulate recourse to derivative actions as a remedy. *Id.* at § 1959.

***5** The General Assembly expressly provided in KRS Chapter 271B for derivative proceedings **by shareholders** against their **for-profit** corporations:

> [a] person **shall not** commence a proceeding in the right of a domestic or foreign corporation **unless he was a shareholder of the corporation when the transaction complained of occurred** or unless he became a shareholder through transfer by operation of law from one who was a shareholder at that time. (Emphasis added.)

However, nothing in KRS Chapter 273 governing **nonprofit corporations** expressly authorizes derivative actions by either members or directors.

Nevertheless, the Porters argue that the court should recognize Barbara's right to sue since she is in the best position to know the facts and to be able to make allegations against the board. Regardless of any arguably equitable merit in their conviction, the fact remains that the General Assembly has spoken clearly and has exercised its plenary power over the issue. In light of the specific limitations enacted by our legislature, this court has no authority to recognize the right of a corporate director-acting in that capacity-to invoke the jurisdiction of the court by bringing an action on behalf of the nonprofit corporation in the name of or for the sake of its member. In two cases, *Willis v. Davis,* 323 S.W.2d 847 (Ky.1959) and *Hollis v. Edmonds,* 616 S.W.2d 80 (Ky.App.1981), our Supreme Court held that an action for injunctive relief is the proper remedy by which to enforce duties owed by officers of a nonprofit corporation to its members.

In light of disposition of this appeal, we refrain from analyzing the Porters' other contentions except to address a matter emphasized during oral argument. The Porters protest Grove Hill's refusal to sell cemetery plots to them so that they could "get past the issue of standing." They contend that Grove Hill is a public corporation and that, therefore, its refusal to sell them plots is arbitrary and illegal, thereby compelling a reversal of the trial court's decision that they lacked standing to pursue the derivative action.

The public *versus* private status of Grove Hill is not at all dispositive of (albeit decidedly distracting from) the heart of the standing issue. Nonetheless, we have carefully analyzed the few Kentucky cases that discuss the public or private characterizations of cemeteries, and they are contradictory and internally divided.

Both Grove Hill Cemetery in Louisville and the Lexington Cemetery were incorporated by a special act of the General Assembly in 1848-as was Grove Hill in Shelbyville in 1854. All three cemetery charters recited that they were "a body politic and corporate." Their character as a public *versus* private entity, however, cannot be readily ascertained from language that on its face would seem to indicate more of a public purpose.

The two Kentucky cases construing these issues both involved the taxable nature of funds dedicated to cemetery maintenance and embellishment. Under Section 170 of our current Constitution, a private entity can be taxed while its public counterpart is exempt from taxation. The courts

have been clearly divided as to whether burial of the dead constitutes a public or private purpose.

***6** In *Commonwealth v. Lexington Cemetery,* 114 Ky. 165, 70 S.W. 280 (Ky.1902), our former Court of Appeals declined to equate the obviously public need to bury the dead with a purely public purpose. In finding the Lexington Cemetery to be a private entity subject to taxation, it reasoned as follows in a 5-2 decision:

> Whilst we fully appreciate and approve the well-nigh universal sentiment that the graves of the dead should be decently and tenderly cared for, there can be no escape from the conclusion that appellee is not an institution of purely public charity, as contemplated by the constitution and statute.

*Id.* at 281.

The opposite result was reached in *Cave Hill Cemetery Company v. Scent,* 352 S.W.2d 61 (Ky.1961), in which the Court rendered a 4-3 decision declaring the language "body politic and corporate" to indicate a public corporation having a public purpose.

> In creating Cave Hill Cemetery Company as a "body politic," the Legislature recognized the public nature of the Cemetery, recognized it public purpose, authorized its maintenance and development by the financial means mentioned, and retained **unto itself the legislative power to alter or modify the legal structure as the public interest may require,** even to the point of authorizing the levy of taxes for its preservation and maintenance in case the presently established methods of financing the Cemetery prove inadequate. In the peculiar factual situation before us for consideration, it seems to us that permitting the collection of an ad valorem tax by the Department of Revenue on any of the funds involved **would tend to thwart the obvious purpose of the Legislature-to make this public cemetery self-sustaining, and thus avoid the need of granting it support from public taxation.** For these reasons we conclude that the funds involved are public property used for a public purpose within the meaning of Section 170 of the Constitution, and therefore exempt from taxation. (Emphasis added.)

*Id.* at 64.

Thus, the more recent judicial pronouncement on this issue would indicate that the operation of a cemetery is a public purpose regardless of how the cemetery itself characterizes its activity. Barbara urges that the public nature of Grove Hill requires that it sell a plot to her or to anyone demanding a sale. After reviewing the reasoning of the trial court, we agree that there is no precedent requiring a cemetery to sell a plot to an individual-with the clear *caveat* that "a public cemetery may not refuse to sell a plot on the basis of racial discrimination or discrimination of another protected class. *Terry, et al. v. Elmwood Cemetery,* 307 F.Supp. 369 (D.C.Ala.1969)." Opinion of the trial court at p. 7.

Thus, Barbara cannot compel Grove Hill to confer upon her standing to sue by forcing it to sell her a burial plot. However, even if she could leverage such an outcome, she still would not have standing at present to bring the action currently before us. Standing cannot be later acquired and then applied retrospectively to validate a cause of action originally lacking justiciabilty because of the absence of standing. The trial court expressed this concept more succinctly as follows: "Standing is required to bring a law suit and can not be acquired midstream to create a present and substantial interest in the subject matter of the suit." Opinion of the trial court at p. 9.

***7** We affirm the judgment of the Shelby Circuit Court.

ALL CONCUR.

**All Citations**

Not Reported in S.W.3d, 2009 WL 722995

## Footnotes

1 The Porters note that by exercising the power of eminent domain in the condemnation action, Grove Hill is demonstrating its “quasi-public”-if not public-status.