

COMMONWEALTH OF KENTUCKY  
FRANKLIN CIRCUIT COURT  
DIVISION I  
CIVIL ACTION NO. NO. 17-CI-1348

JEFFREY C. MAYBERRY, et al.,

PLAINTIFFS

v.

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

DEFENDANTS

**Response in Opposition to the Non-Party Preservation Motion**

Nominal Defendant Kentucky Public Pension Authority (“KPPA”),<sup>1</sup> by counsel, submits this response to the non-party preservation motion filed by the applicant Tier 3 Individuals (the “Individuals”).

**Introduction**

The Individuals do not have standing to obtain the relief they seek. They are not parties to this action (“Action”). Even if they were, the Motion is unnecessary. The Individuals demand what amounts to a litigation hold and the right to examine a copy of the forthcoming investigation report (“Investigation Report”). But Kentucky law already obligates KPPA and its representatives to preserve information related to this Action and the underlying claims, so there is no need for the litigation hold. Likewise, Kentucky’s Open Records Act obligates KPPA to permit public examination of non-exempt records, such as the Investigation Report, so there is no need for an order here either. This leads to the assumption that the requested relief is a decoy. The Individuals’ Motion is seemingly a disingenuous attempt to discredit and scandalize KPPA’s

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<sup>1</sup> Kentucky Retirement Systems in now part of the Kentucky Public Pension Authority pursuant to KRS 61.505.

investigation and to pressure the Court into granting their motion to intervene in this Action. This is improper. The Court should, therefore, deny the Motion.

**I. Non-Parties Cannot Obtain Relief.**

The Individuals are not parties to this Action. They can move to intervene, which is exactly what they have done. *See* Individuals’ Motion to Intervene; CR 24.01; CR 24.02. But that motion remains pending. And unless it is granted, the Individuals cannot seek relief of any kind in this Action. Kentucky law is clear on this point: “[a]pplicants for intervention are not parties to an action and do not present claims for relief in an action *unless and until* they are permitted to intervene.” *Ashland Pub. Library Bd. of Trs. v. Scott*, 610 S.W.2d 895, 896 (Ky. 1981) (emphasis added). The Court must, therefore, deny the Individuals’ Motion for lack of standing.

**II. The Motion is Unnecessary and Improper.**

Regardless, the relief sought in the Individuals’ Motion is unnecessary. They demand an order instructing KPPA and its representatives to “preserve all documents” related to the Investigation Report. (Memo. in Support, p. 1.) But KPPA and its representatives already have a duty to preserve information relevant to this litigation. *See Norton Healthcare, Inc. v. Disselkamp*, 600 S.W.3d 696, 733 (Ky. 2020). This includes the underlying investigation, so KPPA is already obligated to preserve all documents related to the Investigation Report. *See id.*

The Individuals also seek an order ensuring that they receive copies of the Investigation Report. This, too, is unneeded. KPPA is subject to the Open Records Act. *See* KRS 61.871. Kentucky law requires it to make all non-exempt records available for “free and open examination” by the public. *See id.* Although the Individuals do not have standing in this Action, they are members of

the public and can make an Open Records Act request for examination like everyone else.<sup>2</sup> There is a specific statutory procedure for this, and the Motion is nothing more than an improper end-run around this procedure. *See* KRS 61.872.<sup>3</sup>

### **III. KPPA Complied with the Kentucky Model Procurement Code.**

The majority of the Individuals' thirty-two-page Motion is an unfounded and disparaging diatribe against KPPA and its representatives. KPPA has no interest in accepting this mud-slinging invitation. But the meritless insinuations regarding the procurement process underlying the Investigation Report are worth addressing because they highlight the Individuals' complete lack of credibility.

The Individuals contend that KPPA's "award and implementation" of the contract to Calcaterra Pollack PLLC for the underlying investigation "raise questions." (Memo. in Support, p. 25.) What they do not say is that the Kentucky Procurement Code answers these questions. For example, the Individuals take issue with the Commonwealth's solicitation process. (*See* Memo. in Support, pp. 26-27). But this is a matter of statute. KRS 45A.080 and 45A.085 lay out the requirements for competitive sealed bidding and competitive negotiations, respectively. KRS 45A.080(3) instructs that "[a]dequate public notice of the invitation for bids . . . shall be given a sufficient time prior to the date set forth for the opening of bids." The provision goes on: "[t]he notice may include posting on the Internet . . . not less than seven (7) days before the date set for the opening of the bids." *Id.* In this instance, the Legal Investigative Services Request For

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<sup>2</sup> KPPA reserves all rights available to it with respect to any such Open Records Act request. This includes, but is not limited to, the exemptions for preliminary records, attorney-client communications, and attorney work-product. *See* KRS 61.878(1)(i) & (j); KRE 503; CR 26.02.

<sup>3</sup> The procedure for making an Open Records Act request with the KPPA is available on its website. *See* KPPA, *Open Records*, WWW.KYRET.KY.GOV, <https://kyret.ky.gov/Contact/Pages/Open-Records.aspx> (last visited May 6, 2021).

Proposals (“RFP”) was publicly posted for three weeks in order to allow any potential bidders sufficient time to respond to the invitation, a timeframe well in excess of the statute’s minimum requirements. *See id.* The vendor self-service system is publicly available. Any person or entity that wishes to review a solicitation, including the Individuals, can read it. Here, vendors were also given the opportunity to submit questions to KPPA regarding the RFP, and answers to those questions were posted publicly as well.

The Individuals also ask—“[w]ere there other bidders?”—and insinuate that KPPA may have given Calcaterra Pollack LLP an “inside track.” (Memo. in Support, p. 29.) This question is dishonest at best. In accordance with KRS 45A.080(4), any bids for this particular RFP were “opened publicly” and “[e]ach written . . . bid, together with the name of the bidder” was “recorded and [] open to public inspection” and remains so. That the Individuals failed to review this public information, or intentionally ignored it, only serves to highlight the impropriety of their instant Motion and its implications.

KPPA at all times complied with the Procurement Code and the Motion’s arguments to the contrary are utterly baseless and disproven by publicly available documents.

### **CONCLUSION**

The Court should deny the Motion. As stated above, the Individuals do not have standing to obtain the relief they seek because they are not a part of this Action. Even if they did have standing, however, the Motion is unnecessary because it seeks to impose obligations that already exist under Kentucky law.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and accurate copy of the foregoing was electronically filed on May 7, 2021, and thereby served via the Court's ECF system upon all parties of record:

A handwritten signature in black ink, appearing to be 'J. P. ...', written above a horizontal line.

*Counsel for KPPA*