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

JEFFREY C. MAYBERRY, *et al*. PLAINTIFFS

v.

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

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

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Representative Plaintiffs Jeffrey C. Mayberry, Hon. Brandy O. Brown, Martha M. Miller, Teresa M. Stewart, Steve Roberts Ashley Hall-Nagy, Tia Taylor and Bobby Estes (the "Mayberry Plaintiffs")[1] respectfully submit this Reply Memorandum in further support of their motion, filed on August 4, 2020, for an order appointing Lead Plaintiff, Lead Counsel, and Liaison Counsel (the "Leadership Motion"), in response to the Opposition to Lerach Group's Motion for Lead/Liaison Counsel filed by Ann B. Oldfather ("Oldfather") on August 4, 2020 (the "Oldfather Opp.").

PRELIMINARY STATEMENT

I. Oldfather's Let's-Wait-and-See "Opposition"

Styled as an "Opposition" to the Mayberry Plaintiffs' pending Leadership Motion, Oldfather's response is in substance little more than a plea to delay, to defer ruling until some unspecified something else happens, at which time it "***may*** become ripe for the Court to establish roles and procedures," notwithstanding her principal (and erroneous) argument that the Court has "no authority" to do so. Oldfather Opp. at 1, 6.[2] Delay, however, is not a strategy for success; nor is it consistent with the best interests of the Plaintiffs or the case. But it appears Oldfather is willing to ignore the interests of her own clients by advancing the erroneous view that the intervention of the Attorney General necessarily precludes any further action by any derivative plaintiff. At bottom, the Oldfather Opposition in and of itself demonstrates why the Court should designate the Mayberry Plaintiffs as lead plaintiffs and their attorneys as lead counsel – it is the *only* way to ensure aggressive and ***independent*** prosecution of the derivative claims on

[1] Mayberry, Brown, Miller, Roberts and Stewart (the "Mayberry Five") are plaintiffs who brought this action in December 2017 and the named plaintiffs in the January 17, 2018 first amended verified complaint ("FAC"). They also filed the earlier second amended complaint, referred to herein as "PSAC."

[2] Unless otherwise noted, all emphases are added.

KRS's behalf that this Court has already held to have legal merit, and that the Supreme Court has recognized to plead "substantial misconduct."[3] *See Mayberry* Opinion at 36.[4]

The Oldfather Opposition is dead wrong on several key points.

First, Oldfather incorrectly asserts that this Court has "no authority under Kentucky law" to appoint lead plaintiffs or lead counsel in a case like this one. Under Kentucky law, a court has the "inherent power to do all things reasonably necessary to the administration of justice in the case before it." *Smothers v. Lewis*, 672 S.W.2d 62, 64 (Ky. 1984).

Second, Oldfather (deliberately or not) misconceives and therefore misstates the case management structure the Mayberry Plaintiffs urge the Court to adopt. The Mayberry Plaintiffs do *not* seek to "supplant … the Attorney General" or to assert "leadership and control over … the Attorney General." The Mayberry Plaintiffs explicitly laid out a case management proposal for "concurrent private and public enforcement of the claims set out in Plaintiffs' FAC (now adopted by the Attorney General) and the additional claims pleaded in the Mayberry Plaintiffs' proposed SAC" through "co-counseling arrangements in which both parties [*i.e.,* the Attorney General and the Mayberry Plaintiffs] collaborate as equals and fund their own efforts ... to ensure access to justice for the public interest." Mayberry Plaintiffs' Leadership Motion at 2-3.[5] The

[3] Oldfather never understood that a derivative plaintiff's fiduciary obligation to act in the best interests of the nominal defendant for whose interests the case has been filed – here, KRS – does *not* mean acting for or at the direction of that entity's *management*, and may require raising allegations implicating current management if that is where the facts lead. That's what happened here, which helps explain why Oldfather fought so hard to prevent the filing of the PSAC's allegations about the misconduct of KKR Prisma, and KRS management, during 2015-16, now contained in the Mayberry Plaintiffs' proposed SAC. *See* SAC ¶¶ 302 *et seq*.

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

[5] A revised proposed order has been submitted to make this crystal clear. *See* Revised Proposed Order (attached hereto). The Mayberry Plaintiffs apologize for any ambiguity in the proposed order submitted on August 4, 2020.

Mayberry Plaintiffs seek an order establishing leadership only of the "private" leg of the public-private co-enforcement structure that, the Mayberry Plaintiffs suggest, will most likely produce the optimal results in this case.[6]

Third, Oldfather's statement that she "was the only lawyer who actively worked on the Complaint through dozens of drafts before its filing" is not only belied by the facts – it is incredible in the most literal sense. The statement is both untrue and misleading. *See*, Declaration of Michelle Ciccarelli Lerach ("MCL Decl.") ¶¶ 5-19 and pages 12-13 *infra* for a detailed recitation of the actual facts. Oldfather was *not* the creative force behind the case, or anything like the "only lawyer" who worked on the original complaint pre-filing. Her refusal to follow the facts concerning the wrongdoing in 2015-16, her failure to take any action to preserve the derivative claims after the Supreme Court's decision, and her apparent inclination to invite KRS (through the Attorney General) to supplant the derivative plaintiffs (despite the clear conflicts of interest) disable her from leadership of the derivative case, which should proceed alongside the Attorney General's case on behalf of the Commonwealth. She can't, because her only three clients have been found by the Supreme Court not to have standing, and neither they nor she has taken any step in furtherance of establishing standing. In fact, the Oldfather's clients

[6] In this connection, the Oldfather Opposition suggests, incorrectly, that the Attorney General's intervention necessarily preempts or displaces the derivative claims. But, the Commonwealth of Kentucky's Intervening Complaint reflects that the Attorney General seeks intervention on behalf of the Commonwealth – not on behalf of KRS. While the Attorney General "may act as legal adviser and attorney for the [KRS] board" [§ 61.645(11)], there is no indication that the Attorney General is doing so here. The intervention of the Attorney General on behalf of the Commonwealth is not the same thing as the appearance of KRS through the Attorney General as its counsel to represent KRS and litigate its claims. The Legislature has granted KRS the rights and privileges of a corporation, including to sue or be sued in its corporate name, which contemplates derivative claims on its behalf. Moreover, Kentucky's pension scheme provides for independent private enforcement of fiduciary duties owed to KRS, which does not supplant, and is not supplanted by, the Attorney General's enforcement action – in other words, a public-private co-enforcement scheme. *See* KY REV. STAT. § 61.645(15)(f).

have not filed any verified pleading demonstrating their injuries in fact and thus have no role in the case as it currently stands.

Something Oldfather ***didn't even mention*** is as important as what she did say in her Opposition. The Mayberry Plaintiffs' proposed SAC contains explosive new allegations about the unholy (and unlawful) alliance between KKR/Prisma and KRS's top executives – ***a Trojan Horse arrangement by which KKR/Prisma was handed over KRS's entire $1.6 billion hedge fund portfolio***, ***and allowed through a secret agreement to use this control position to self-deal with KRS assets, and to do so without any accountability whatsoever***. *See* SAC ¶¶ 56-60, 128-130, 131-135, 302-329. But, for whatever reason, ***Oldfather*** – ***and the Attorney General*** – ***entirely ignore these allegations***.

This concrete example of the fruits of the vigorous prosecution of the derivative claims whereby the Mayberry Plaintiffs' counsel unearthed this corrupt insider-assisted takeover and abuse of the $1.6 billion KRS Absolute Return (*i.e.,* hedge fund) portfolio by KKR/Prisma in 2015-16, demonstrating why they should lead the prosecution of the derivative claims. These allegations were first made in the original PSAC filed by the Mayberry Five in July 2019, were refined and expanded in the current SAC. Ignored now (and indeed, strongly resisted then) by Oldfather and unknown to the "wholly uninvolved" Office of the Attorney General, which had not yet begun "investigating the claims," this exposé of blatant self-dealing increased the value of the KRS compensatory damages claims and also substantially increased KRR/Prisma's punitive damages exposure.

This feast of self-dealing by KKR/Prisma occurred in just a few months in 2015-16 before Cook, KKR/Prisma, Rudzik, Peden and others got caught by certain new, honest trustees, and the Absolute Return misadventure was terminated.

- Between December 2015-August 2016 Cook, Peden and Rudzik arranged for the publicly announced so-called "***Strategic Partnership***" between KKR/Prisma and KRS, which was implemented by a secret ***Advisory Services Agreement*** ("ASA") which turned over control of KRS's entire $1.6 billion Absolute Return portfolio to KKR/Prisma, and ***included a provision allowing KKR/Prisma to use KRS's assets to enhance its own business interests***;

- Working with Steve Pitt of the then-Governor's office, they got former KKR/Prisma partner Cook onto the KRS Board in June, while the secret ASA allowed Rudzik and other KKR/Prisma officials to operate inside KRS in violation of the conflict of interest prohibitions and to attend critical investment meetings and participate in internal KRS decisions.

- Now with former KKR/Prisma partner Cook on the KRS Board, Rudzik and his KKR/Prisma team operating inside KRS, and Peden pushing and pulling the necessary levers, in May-June 2016 one David Eager, a brand-new trustee with no known prior affiliation with KRS, ***at his very first Investment Committee and KRS Board meetings*** championed the approval of these obviously self-interested and conflicted deals.

- This resulted in KRS buying $300 million more of the biggest "loser" KKR/Prisma black box fund, and some $285 million more in tainted Absolute Return vehicles via KKR. These investments directly benefitted KKR/Prisma, coming at a time when pension funds nationwide were fleeing their catastrophic investments in hedge funds and swamping KKR/Prisma with redemptions.

See SAC ¶¶ 56-60, 128-135, 147, 302-329.

Then in August-October 2016, the conspirators got caught. Certain new trustees came on the KRS Board. They quickly discovered aspects of this just-approved self-dealing bonanza, as part of their discovery of the long-running misconduct. Eager had left the Board – having attended but one meeting – to become Executive Director of KRS, from which position he has attempted to obstruct this litigation while constantly criticizing it. SAC ¶¶ 147, 315-316. The new Board quickly terminated the Absolute Return Black Box hedge fund investments, unfortunately too late to prevent the damage of the May-June 2016 $585 million in tainted, self-dealing hedge fund investments engineered by Cook, Peden and Eager and approved by the then-Board. Peden was soon fired. Cook faded away. Steve Pitt, who helped engineer Cook's appointment to the KRS went to work for the Office of the Attorney General.

The Mayberry Plaintiffs argue in the Leadership Motion that their development and pleading of these new allegations – potentially worth hundreds of millions of dollars, and worthy of hundreds of millions more in punitive damages – should be viewed as a major factor in the lead plaintiff and lead counsel designation. These well-founded and important allegations must not be swept under the rug, but that may well be the result if anyone other than the Mayberry Plaintiffs is permitted to lead the derivative case (Oldfather seems to have ceded this position).

Oldfather has not asked that her clients be designated lead plaintiff/or she as lead counsel. Rather, she asks that the Mayberry Plaintiffs' leadership motion not be decided, *i.e.,* that it in effect be denied by deferring any action, leaving the current dysfunctional client schism to persist, at a critical point in this case. Oldfather's suggestion that the Court determine who has constitutional standing ***before*** the proposed SAC is filed is nonsensical. Whether one has standing depends on what is alleged in the complaint. Oldfather does not have a "live" complaint on file for her clients. Her clients have not sought leadership for themselves or for their lawyer, Oldfather. The roles of these "pleading-less" clients and Oldfather in the continued prosecution of the derivative claims is ill-defined, if not non-existent.[7]

Someone has to litigate the standing issues based on the Mayberry Plaintiffs' proposed SAC. And if the Mayberry Plaintiffs are successful, they will prosecute the derivative claims – in a cooperative fashion (as they hope to do) with the Attorney General. To assure that the clients and their lawyers who drafted that SAC (and have done the vast bulk of the work on the case to date) can do that without interference from or disruptions caused by persons who are not

[7] Oldfather's apparent desire to reinsert herself back into this case if and when "any individual plaintiffs … establish that they have constitutional standing to assert claims in this matter" should be seen for what it is: a parasitic attempt to latch on for the ride. She should not be permitted to hedge her bets in this fashion, to champion the claims of her derivative plaintiff clients if and only if the Mayberry Plaintiffs prove the value and staying power of those claims.

parties to the proposed SAC or lawyers acting for them, the requested leadership order should be entered. There is no reason for delay.

Whether as a stalking horse for KRS or the Attorney General, or as a disgruntled spoiler, Oldfather is unwanted and unwelcome. At the risk of being overly direct – but in the hope of being completely clear – the eight Mayberry Plaintiffs will *not* serve as representative plaintiffs absent a leadership structure that ensures that they, through their counsel, control the prosecution of the derivative claims. Nor will counsel for the Mayberry Plaintiffs finance the prosecution of claims they are not in day-to-day command of – and that includes their entire expert consulting team, including their consultant (*i.e.*, "No Bill, No Case"), who refuse to work without a structure in place to prevent the past disruptions and chaos.

II. The Attorney General's Attempt to "Control and Manage this Litigation"

The Attorney General asserts that his office is entitled to intervene in the action, "***investigate*** the claims and defenses being asserted and ***control and manage this litigation*** to the extent necessary to protect the Kentucky Retirement System." AG's Reply at 8. However, it is ***this Court's*** – not the Attorney General's – role to "control and manage this litigation." The Office of the Attorney General has had two and a half years to investigate the claims of KRS. But rather than do that, it did nothing, then copied the work product of the Mayberry Plaintiffs as the "Commonwealth of Kentucky's Intervening Complaint" seeking "***damages for the losses incurred by the Commonwealth***" and the "***greatly increased costs to the taxpayers***." AG's Compl. ¶ 1. It is not clear as to whether the Office of the Attorney General intends to try to actually "represent" KRS and its claims directly. What is clear is that the Office of the Attorney General has no ***exclusive right*** to represent KRS and, even if it attempts to, that representation cannot be ***exclusive***, foreclosing the Mayberry Plaintiffs' ***statutory right*** under Section 61.645(15)(e) and (f) to bring "***an action for monetary damages*** … ***suffered by the Kentucky***

Retirement Systems." KY. REV. STAT. § 61.645(15)(f). ***To protect KRS***, the Legislature expressly empowered "natural persons," *i.e.*, members of KRS like the Mayberry Plaintiffs, ***to sue to recover damages for KRS***. *See id.* § 61.510(30). Having sat on the sidelines for 32 months doing absolutely nothing, the Office of the Attorney General is estopped from ousting the Mayberry Plaintiffs and taking on the KRS claims.

The Attorney General can intervene in any litigation on behalf of the Commonwealth. However, by law, ***any recovery he might obtain*** in actions his office brings or intervenes in must be put in "***the State Treasury***" and the "***surplus account***" ***fund*** for Kentucky's elected officials or politicians to spend. *See id.* § 48.005(3). On the other hand, the assets of KRS – ***including the cash proceeds of any damage lawsuit on its behalf*** – are "***trust funds to be held and applied solely***" for the benefit of KRS and its members. *Id*. § 61.515(2). The Attorney General faces a statutory conflict. He cannot serve two competing principals with conflicting interests. He should not be permitted to turn control of the KRS damages claims into a raid on KRS's recovery to benefit the State Treasury.

The Mayberry Plaintiffs – ***not their lawyers*** – have decided what is best for their derivative claims, and for themselves as clients. They terminated Oldfather for the reasons detailed in their termination letter referred to in the Declarations of the Hon. Brandy O. Brown, Jefferey C. Mayberry, and MCL dated August 13, 2020. They retained the Honorable Jeffrey M. Walson to file their Leadership Motion and serve as Kentucky counsel. After the adverse Supreme Court decision, the Mayberry Plaintiffs directed their lawyers to file the proposed SAC to include allegations showing they had suffered injury in fact and thus have standing to sue, and to take steps to assure the independent prosecution of the derivative claims and to vigorously prosecute those claims, alongside the taxpayer claims asserted by the Attorney General.

ARGUMENT

I. The Court Should Appoint Leadership for the Derivative Claims

Before the Court is the leadership motion of the Mayberry Plaintiffs. There is no competing motion. The Mayberry Plaintiffs have proactively repleaded the case in the wake of the Supreme Court decision; Oldfather has not. The Mayberry Plaintiffs recognize the need for structure and leadership to pursue these claims – including through the inevitable motion to dismiss process and additional appellate proceedings if necessary; Oldfather does not. She has in effect abdicated by suggesting there is no active role for derivative plaintiffs, including apparently her own clients, at this point.

This is not a contest between counsel. The need for Court-appointed leadership arose from fundamental disagreements and an irreconcilable schism between clients – the representative plaintiffs – as to who should control the derivative claims, how aggressively they should be prosecuted, against whom, as well as by which counsel and prosecution team. The Court must resolve this dispute quickly because the motions to file a proposed SAC and its sufficiency must be argued. Since Oldfather had nothing to do with the preparation of the proposed SAC, she has nothing to say about that. Not only is there not a competing leadership motion on file, there is no proposed complaint on file naming Oldfather's "pleading-less" clients as representative plaintiffs.

If the Attorney General is permitted to intervene and the Mayberry Plaintiffs' proposed SAC is permitted to be filed and upheld (as was its predecessor), this is a huge and important case involving billions of dollars and could have a dramatic impact on the finances of KRS and the fiscal condition of the Commonwealth. It must be prosecuted in an organized manner. It has already suffered too long a delay. The derivative claims should be prosecuted in cooperation/consolidation with the Attorney General's taxpayer claims to create the largest

possible overall recovery, to be then allocated between them based on the merits of their respective claims as well as their proven or probable damages. But in any and all events, they must be vigorously and independently prosecuted. The competing KRS and taxpayer claims are not fungible.

Before the Court is a clear choice. The leadership offered by the Mayberry Plaintiffs or the delay proposed by Oldfather. For the good of all concerned, the issue must be decided now: (1) for the courts, to assure an orderly, efficient litigation going forward, avoiding duplication and competition that will lead to waste and chaos; (2) for the defendants and the Attorney General, so they will have a lead plaintiff/lead counsel on the derivative claims, who will speak with one authoritative voice, with whom they can deal and upon whom they can rely; and (3) for KRS so that the claims asserted derivatively on their behalf will be adequately financed and independently and aggressively prosecuted to achieve the largest possible recovery for those separate claims, as is the obligation of any derivative plaintiffs and their counsel.

II. The Court Has Ample Authority to Appoint Leadership for the Derivative Claims

Boldly – and incorrectly – Oldfather asserts this Court has "no authority" to grant the Mayberry Plaintiffs' leadership motion. But of course, the Court has inherent authority to enter such orders and the wealth of federal and state authorities cited stand uncontradicted. As the Supreme Court held in *Smothers*, "a court … has, as an incidental to its constitutional grant of power, ***inherent power to do all things reasonably necessary to the administration of justice in the case before it***." *See* 672 S.W.2d at 64; *see also Craft v. Commonwealth*, 343 S.W.2d 150, 151 (Ky. Ct. App. 1961) ("it has generally been recognized that courts … ***have inherent power to prescribe rules to regulate their proceedings*** and to facilitate the administration of justice").

Likewise, the Manual for Complex Litigation – the so-called "Bible" for complex multi-party, multi-claim cases – instructs that, when the parties or plaintiffs cannot agree "the court

will need to institute procedures under which one or more of the attorneys are selected and authorized to act on behalf of other counsel and their clients." *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.221, at 24 (2018). Specifically, lead counsel is "[c]harged with formulating … and presenting positions on substantive and procedural issues":

> Typically they act for the group … in presenting written and oral arguments and suggestions to the court, working with opposing counsel in developing and implementing a litigation plan, initiating and organizing discovery requests and responses, conducting the principal examination of deponents, employing experts, arranging for support services, and seeing that schedules are met.

Id. at 26. "The court may [also] appoint … a liaison counsel," who is "[c]harged with essentially administrative matters, such as communications between the court and other counsel … and otherwise assisting in the coordination of activities and positions." *Id*. at 24. The Manual advises that the functions of lead or liaison counsel should be stated in a court order. *Id*. at 26.

On this point, the Court should reject Oldfather's baseless assertion that it lacks authority to appoint lead plaintiff and lead counsel in a complex representative action like this one. As demonstrated by the cases and treatise cited in the Mayberry Plaintiffs' motion, courts across the country routinely utilize lead-plaintiff appointment procedures to manage derivative or class action suits. *See id.* at 32-5; *see also*, *e.g*., *MacAlister v. Guterma*, 263 F.2d 65, 69 (2d Cir. 1958) (noting that establishing a leadership structure will result in "elimination of duplication and repetition and in effect the creation of a coordinator of diffuse plaintiffs through whom motions and discovery proceedings will be channeled"). In fact, the court in *Freeman v. Musk* appointed lead plaintiff and lead counsel where, as here, representative plaintiffs in a derivative action "disagree[d] over divergent viewpoints." *See* 324 F.R.D. 73, 79 (D. Del. 2018).

As to the claims the Mayberry Plaintiffs' lawyers are "self-aggrandizing" – to the extent claims of experience and achievement are made they are justified. And both Oldfather and her

defense firm sidekick Dobson not only know it, they have admitted it:

> "Bill – this victory is a testament to your vision, intellect and passion. Thank you for the privilege of working with you on this case. With respect, gratitude and appreciation." – Casey Dobson [Scott, Douglas & McConnico] Nov. 30, 2018 "Victory" email to William Lerach.
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> "I have defended you, your integrity, your honor, vision, intellect and courage … ***Bill Lerach is the most valuable asset the plaintiffs have in this case*** … "As I have said often, '***No Bill***, ***No Case***.'" – Casey Dobson [Scott, Douglas & McConnico] Dec. 20, 2018 email.

And as Oldfather stated on national TV in the PBS documentary "The Pension Gamble" in October 2018:

> ANN OLDFATHER:
> … ***Our team of lawyers are blessed to have as our consultant Bill Lerach***, who's a disbarred attorney, but indeed, an expert in pension fund analysis. And so we have somebody right there at our beck and call who has educated us about the breadth of this problem throughout the United States.…

In an unverified self-serving footnote (footnote 3), Oldfather tries to claim credit for the derivative claims – the conception of the case, the hard investigative work and drafting of the FAC – even asserting that she has been responsible for financing and prosecuting these claims. This is all false. The Declaration of Michele Ciccarelli Lerach (¶¶ 5-19, 49) puts the lie to Oldfather's bogus claims:[8]

- The draft complaint provided to Oldfather ***as local counsel*** in November 2017 was all but complete, and 148 pages long. When the complaint was being finalized in December 2017 Oldfather was AWOL – busy on other matters, away from Kentucky most of the time, too "pooped" to work on the draft,

[8] The Mayberry Plaintiffs' Leadership Motion was originally filed on September 9, 2019, and was supported by an extensive evidentiary record, including the Declarations of Michelle Ciccarelli Lerach ("MCL"), James D. Baskin ("JDB") and their consultant William S. Lerach ("WSL"), as well as initiating plaintiffs the Honorable Brandy Brown and Captain Jeffrey Mayberry. Updated, narrowly tailored versions of some of these filings are submitted herewith. The Mayberry Plaintiffs ask the prior declarations be deemed withdrawn, as they have been overtaken by events. Oldfather was served with these voluminous factual declarations nearly a year ago and was aware of them when she chose to rely only on her unverified assertions in footnote 3, and not submit any declaration from any of her clients.

saying "before the case Mayberry v. Whatever came along I was already booked solid for December." (MCL Decl. ¶¶ 14-16.)

- "Virtually all the substantive creative work in this case was generated by the combined efforts of attorneys MCL/JDB, and their consultant, WSL; all factual investigation, review, analysis and strategic application is the result of their work." (MCL Decl. ¶ 19.)

- "Most recently, [MCL] and [her] team did all the work on the second proposed Second Amended Complaint ("SAC"), its supporting memorandum and response to the Attorney General's motion to intervene, whereby [they] have suggested a means by which the related but potentially conflicting derivative and taxpayer claims can be co-prosecuted for the benefit of all concerned on the plaintiffs' side – and the Court that will oversee ongoing litigation. Finally, [MCL] alone ha[s] agreed to provide millions of dollars of funding for the case, no matter how long it takes – so long as the prosecution of the derivative claims is under the Mayberry Plaintiffs' leadership." (MCL Decl. ¶ 19.)

- "This Mayberry case depends entirely on MCL for its financing: no other law firm on Plaintiffs' side has offered the money to finance this case." (MCL Decl. ¶ 49.)

The Court should formalize a leadership structure here because it is impossible for the two divided groups of clients – the Mayberry Plaintiffs and Oldfather's clients – to work together. The Mayberry Five would not have terminated Oldfather or Dobson, joined with additional Tier 3 plaintiffs and filed their Leadership Motion, if there was any possibility of any other solution. There simply is not. There is no possibility of any dual-track for prosecuting the derivative claims. These plaintiffs cannot agree on a cohesive litigation strategy. Dual-track litigation of the derivative claims would result in conflict, duplication and competition among the two groups of plaintiffs and their separate counsel. It would also make it impossible for the Attorney General to know who to work with and reach binding agreement with. It would also make it impossible for defendants to know upon whom to rely to negotiate the hundreds of things that must be negotiated by counsel in a big complex case. And such a dual-track approach would at the same time create an opportunity for defendants to constantly exploit division by creating

"reverse auctions" – a race to the bottom in all things, from extensions of time, to discovery and ultimately to settlements. It is to avoid just these types of problems, disruptions and duplications that the lead-plaintiff procedure is normally used in representative litigations. It establishes authoritative client-driven control and leadership and prevents the chaotic uncertainties that dual-course competitive prosecution of the case inevitably brings about. Originally it was thought that such a structure was not necessary in this case. That proved to be wrong.[9] MCL Decl. ¶ 20, 50(I)(a), (J), 53; Brown Decl. ¶ 14; Mayberry Decl. ¶ 11.

All involved on the plaintiffs' side have acknowledged that an irreconcilable schism exists between two client groups and that it is causing severe dysfunction, thereby harming the prosecution of the derivative claims. That being so, it really does not matter who caused the schism, the dysfunction or even why it happened, although the Mayberry Plaintiffs have strong views on that subject. What matters is that a schism exists; it is terminal and must be resolved.

Oldfather wants to gain control of the derivative claims, not by making a proper motion supported by declarations showing their willingness and competence to serve as lead plaintiffs, or the expertise, experience or achievements of their lawyers in representative litigations, but rather to gain co-lead plaintiff/co-lead counsel by default, by challenging the work and motives of the competing lead plaintiffs, their counsel and prosecution team – the ones who started the case, are financing it, and have done the bulk of the work to prosecute it so far. Oldfather's position is absurd. If the Mayberry Plaintiffs' proposed SAC is filed and successful, she will then jump aboard the moving train, leaping to the assistance of the winner. That is following – not leading. Nothing like this has ever happened anywhere in the American legal system.

[9] *See In re NYSE Specialists Sec. Litig.*, 240 F.R.D. 128, 130 (S.D.N.Y. 2007) (disqualifying previously appointed lead plaintiff and re-appointing new lead plaintiff three years into the litigation).

The comparison between the Mayberry Plaintiffs and Oldfather's clients is not close. First, Plaintiff Brandy Brown was the originating plaintiff – the person who took the issue to her long-time friend and law school classmate MCL, whom she thought better equipped to analyze the facts and the law and determine whether legal relief for the failing pension plan was even a possibility. It was. Second, the combined experience and wisdom of the Mayberry Plaintiffs must be weighed. Third, the Mayberry Plaintiffs have demonstrated the willingness and ability to actually direct the litigation. *See* MCL Decl. ¶¶ 4-29, 50; Brown Decl. ¶¶ 5, 9, 13-16, 18-19, 21-22; Mayberry Decl. ¶¶ 21.

The named representative plaintiff in a derivative action may have no individual damages at stake ***but***, ***under the Mayberry Opinion***, ***they must have an injury in fact and take a personal interest***, *i.e.*, "***concrete stake***," in the litigation and claims asserted. That means they are not mere figureheads. Not at all. They bear important responsibilities. Representative plaintiffs are fiduciaries to the case they lead and represent. *See*, *e.g.*, *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 549 (1949) ("a stockholder who brings suit on a cause of action derived from the corporation assumes a position … of a fiduciary character"). They have a responsibility to pursue the "***largest possible recovery***" for the derivative entity. *See id.*; *In re Quintus Sec. Litig.*, 148 F. Supp. 2d 967, 971 (N.D. Cal. 2001) ("a lead plaintiff has an obligation to seek to ***maximize the … recovery***").[10]

> A lead plaintiff has a pretty big job …. He or she usually works very closely with the attorneys handling the case … and is often there in the courtroom or at the conference table at key points of the litigation, including during formal settlement talks. So, the class representative usually has to make a significant commitment to the case ….[11]

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[10] Geoffrey P. Miller, *Conflicts of Interest in Class Action Litigation: An Inquiry into the Appropriate Standard*, 203 UNIV. OF CHI. LEGAL FORUM 581, 604 (2003).

[11] "Who Can Be a Lead Plaintiff in a Class Action?", Lawyers.com (Updated Nov. 1, 2018), *available at* https://www. lawyers.com/legal-info/personal-injury/resolving-a-personal-injury-claim/anyone-want-to-be-lead-plaintiff.html (last visited Aug. 13, 2020).

As part of their fiduciary obligations, representative plaintiffs have other roles. This is a high-profile and politically sensitive case. As representative plaintiffs, they are the "face of the case" to the public and to the derivative entity and its members who are relying on them to try to help save the KRS pension funds, as well as in the courtroom. Because of the derivative nature of the claims the named representative plaintiffs have asserted on KRS's behalf, they are subject always to a continuing obligation to "adequately" represent KRS and its members. *See Allied Ready Mix Co. v. Allen*, 994 S.W.2d 4, 10 (Ky. Ct. App. 1998) (enforcing the rule that a derivative plaintiff must adequately represent the company and other shareholders).

These are not ceremonial duties or abstract concerns. Defendants in this case have shown their willingness to use brass-knuckle tactics. They are not going to roll over. KKR/Prisma has repeatedly accused plaintiffs and their counsel of improprieties, first here and later in the Supreme Court. The Plaintiffs who lead this case must be adequate for the ensuing struggle. The Mayberry Plaintiffs are. They are the only plaintiffs with a complaint on file pleading their individual injuries in fact. They are an attractive "face" of the case, and they will make great witnesses as they have actual knowledge of this case from its inception (particularly Brown and Mayberry) because they in fact initiated it.

III. The Mayberry Plaintiffs Have Selected the More Qualified and Experienced Counsel and Prosecution Team to Fund and Lead the Prosecution of the Derivative Claims in an Attempt to Achieve the Largest Possible Recovery for KRS

The qualifications of the proffered lead plaintiffs are important aspects of the analysis of who should be designated lead plaintiffs: who did they hire to investigate, evaluate and create the case; have they assembled a team to prosecute it; and have they made firm arrangements to finance its prosecution? In this way and to this extent, the lead plaintiffs' proposed lead counsel's prior experience, achievements, and ability to finance the case become critically relevant. In

evaluating competing lead-plaintiff groups (though in fact there is only one group), who they think ought to be the lawyers to prosecute the case and how they intend to prosecute and finance the case are very important for the court to focus on.

Here there is no comparison in terms of qualifications, experience and abilities of counsel and their willingness to put up the millions of dollars to finance a full-scale prosecution to achieve the "largest possible recovery." If Captain Mayberry and Judge Brown had wanted a local tort practitioner or Texas defense lawyers to investigate this case, try to figure it out and then draft the complaint, provide the financing and lead the prosecution of this case, they would have hired them to do that. *See* Brown Decl. ¶¶ 10-14; Mayberry Decl. ¶¶ 20-21. But, of course, that would have been a fool's errand. Oldfather has been practicing in Kentucky for years while the KRS disaster unfolded in front of her. She did nothing about it because she lacked the experience and special skill set needed to conceptualize and investigate the case, or conceive and draft the complaint, and the resources, financial and otherwise, to prosecute that kind of case. *See* MCL Decl. ¶¶ 4-20, 38-50, 52. ***In contrast MCL and her team have done all those things – several times – standing up for victims of fiduciary misconduct, including some of the largest and most important public pension funds in the world***. *See* MCL Decl. ¶¶ 30-48.

The most serious conflict between the Mayberry Plaintiffs and Oldfather involves litigation strategy. To put it bluntly, the Mayberry Five group favors a significantly more aggressive strategy than does Oldfather. The Mayberry Five's view, based upon their counsel's advice (developed over decades of experience in similar cases) is that an aggressive strategy is critical to the achievement of the greatest possible result, whether by trial or by settlement. Their vision for the case is simply different from Oldfather's (if indeed she has an articulable vision for the case).

Nowhere is the schism between the Mayberry Five's strategic vision, and Oldfather's, seen more starkly than in connection with the initial PSAC, which the Mayberry Five conceived, developed, and drafted – and which Oldfather, for whatever reason, blocked. The PSAC (and now SAC) focuses on the events of 2015-16, a story that is presented as a sort of second phase of the case and discussed in detail at pages 4-6, *supra*, as pleaded in paragraphs 56-60, 128-135, 147 and 302-329 of the SAC.

The Mayberry Five discovered and developed these allegations in January/February 2019. The Mayberry Five drafted the first PSAC in February – and continued to refine it thereafter, as the Plaintiffs' dysfunctional decision-making process dragged on, and as Oldfather slowed, watered down, and ultimately blocked the filing of this critical pleading. Oldfather never fully articulated her reasons for blocking the filing, but she mightily resisted identifying current KRS Executive Director David Eager – who in his former role as a KRS Trustee sponsored the motion to upsize KRS's investment in the KKR Prisma Daniel Boone Fund by $300 million, despite the fact that this fund had been the worst-performing of the three Black Boxes, the companion $285 million in tainted KKR/Prisma related Absolute Return vehicles, despite the complete absence in Committee or Board minutes or other KRS documents of any vetting or clearing of the multiple conflicts of interest. Indeed, Oldfather insisted that Eager's name not even appear in the PSAC.[12]

The Mayberry Plaintiffs will follow leads, and facts, where they go, even if and to the extent they lead to doors of power in Kentucky. Oldfather has demonstrated she will not. This is likely why she has not filed any proposed amended complaint for her clients. If Oldfather gains

[12] The Mayberry Five believe this was at the insistence of Oldfather's longtime colleague and friend, Steve Pitt, who was working with the Governor's office, Stoll Keenon Ogden PLLC ("SKO") and KRS at that time.

control of this case, it seems very unlikely that the KKR Self-Dealing Allegations in the SAC will be filed or prosecuted – or that other facts, yet to be discovered, will be pursued with anything like the vigor that the Mayberry Plaintiffs' chosen counsel/team, with their experience in *Enron* and other hotly contested mega-cases, will bring.

IV. The Previously "Wholly Uninvolved" Attorney General May Not Control and Manage the Entire Litigation, While Prosecuting Conflicting Claims

The Office of the Attorney General knew of this case when it was filed two and a half years ago. It was then offered a chance to join the case to prosecute the taxpayer claims as pleaded in the draft complaint. It was also free of course to join the case directly, seek to represent KRS, intervene or otherwise participate. The Office of the Attorney General refused to do so, indicating it could not afford the "***significant costs***" of prosecuting the litigation and lacked "***experience in securities law***." *See* Ex. A.[13] In the next two and a half years, the Office of the Attorney General did not once try to advance the lawsuit. It never appeared in court. It never filed a brief. It did nothing. It was "wholly uninvolved," in the words of Chief Justice Minton. *Mayberry* Opinion at 35. Now, the only change has been an intervening election and new office holder, not a sudden and enormous infusion of money and expertise in securities law or derivative litigation.

A. The Attorney General and KRS Are Estopped

The doctrine of judicial estoppel is an equitable principle designed to protect the integrity of the judicial process by preventing a party from taking inconsistent positions in separate judicial proceedings. *Mefford v. Norton Hosps., Inc*., 507 S.W.3d 580, 584 (Ky. Ct. App. 2016) (citing *Colston Inv. Co. v. Home Supply Co*., 74 S.W.3d 759, 763 (Ky. Ct. App. 2001)). It

[13] A true and correct copy of the letter, dated December 20, 2017, of the Office of the Attorney General to the Mayberry Plaintiffs' counsel is attached as Exhibit A.

generally prevents a party from asserting a claim in a legal proceeding that is contrary to a claim asserted by that party in a prior proceeding. *Hisle v. Lexington-Fayette Urban Cnty. Gov't*, 258 S.W.3d 422, 434 (Ky. Ct. App. 2008). Generally, courts consider three factors when deciding whether to apply judicial estoppel: "(1) whether the party's later position is clearly inconsistent with its earlier position; (2) whether the party succeeded in persuading a court to accept the earlier position; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* at 434-5.

"Equitable estoppel can be invoked against a governmental entity in unique circumstances; a court must find that exceptional and extraordinary equities are involved to invoke the doctrine." *Spalding v. Marion Cnty. Bd. of Educ.*, 452 S.W.3d 611, 615 (Ky. Ct. App. 2014). "Estoppel is a question of fact to be determined by the circumstances of each case." *Id*. Here, the doctrine should be applied against both KRS and the Attorney General if either seeks at this late date to displace or supplant the derivative claims brought by the Mayberry Plaintiffs. First, as to them both because of the Joint Notice, and second, as to the Office of the Attorney General because it was expressly offered a role in this litigation and could have intervened or otherwise participated at the outset, but declined and chose to remain "***wholly uninvolved in the litigation***" for 32 months as the Mayberry Plaintiffs advanced the cause. Such delay, while others press on in reliance upon existing arrangements, commitments and circumstances, investing substantial time and money, is the stuff of which equitable estoppel is made.

Absent some extraordinary showing to contradict the Joint Notice, KRS and the Office of the Attorney General are estopped from litigating the derivative claims in this action, contrary to current arrangements. KRS also could have sought to "intervene" and/or "realign" as the party

plaintiff long ago when the case was first filed. It expressly declined to do so. Instead, as the Joint Notice explains, KRS went through an extensive formal Board review process, including Board presentations by the Mayberry Plaintiffs' counsel and MCL's expert team. They could have consulted and/or retained the Office of the Attorney General. They did not. The Attorney General was not included in that presentation at all and, to the Mayberry Plaintiffs' knowledge, has never advised KRS regarding the derivative claims. The Office of the Attorney General remained, as Chief Justice Minton noted, "***wholly uninvolved with the litigation***." *Mayberry* Opinion at 35 (emphases added).

B. The Attorney General Has Statutory and Other Conflicts

Given the recent history of KRS, the Office of the Attorney General and the Governor's office, and the interminable disputes between them, with which the Court is all too familiar, the Mayberry Plaintiffs urge the Court to be cautious regarding the Attorney General's late arrival on the scene and demand to ***"control and manage the litigation."*** Not only are there real existing conflicts between the KRS and Commonwealth's claims, there are also real and potential conflicts between the Attorney General and the Governor that may well engulf them (and the Court) in contentious litigation that could adversely impact the prosecution of the KRS derivative claims. The Mayberry Plaintiffs do not want such events to impact the prosecution of the separate derivative claims going forward.[14]

[14] When there was a Republican Governor and a Democratic Attorney General, they fought over KRS tooth and nail. Now shoes are on other feet. But it is the same conflict. Whether Beshear versus Bevin or Cameron versus Beshear, the KRS funds end up in the middle while political spitballs are thrown. Chris Williams, *Just Like Matt Bevin, as Governor, Andy Beshear Is Aggravated with a Capital 'AG,'* WHAS-TV, July 10, 2020. Already early on in the new administration, the disputes between the Attorney General and the Governor are headed to the Supreme Court of Kentucky. *See* Deborah Yetter, *Kentucky Supreme Court to Hear Dispute Next Month on Beshear's COVID-19 Executive Order*, COURIER JOURNAL, Aug. 7, 2020. There must be independent, separate representatives of KRS's interests.

The Attorney General seeks a recovery for the Commonwealth. Section 48.005 of the Kentucky Revised Statutes requires that whenever the Attorney General "has entered his appearance in a legal action on behalf of the Commonwealth of Kentucky … and a disposition of that action has resulted in the recovery of funds or assets … by judgment or settlement," "***those funds shall be deposited in the State Treasury and the funds or assets administered and disbursed by the Office of the Controller***." KY. REV. STAT. § 48.005(3); *see also id.* § 15.020. Not only that, the monies have to go into a "surplus account" fund (KY. REV. STAT. § 48.005(4)) – some sort of slush fund for elected officials, *i.e.*, politicians, to spend. On the other hand, the derivative damage claims asserted on behalf of KRS seeking to recover billions of dollars in cash are an ***asset of KRS*** that are "trust funds to be held and applied solely" for the benefit of KRS and its members. *See* SAC ¶¶ 124-7; KY. REV. STAT. § 61.515. Those litigating the derivative claims – as plaintiffs' lawyers – ***have a fiduciary duty to KRS to maximize the value***, ***i.e.***, ***recovery for the KRS funds and its beneficiaries***, ***not the*** "***surplus account***" ***of the Commonwealth***.

The Office of the Attorney General is in a conflict. It is required to take whatever recovery it can garner for the claims it asserts and ***turn the money over to the general fund where politicians can spend it as they please***. However, the KRS statute mandates its assets – and a lawsuit's recovery of damages is an asset (albeit a contingent one) – ***be held in trust by its trustees and used solely to benefit KRS*** – not for expenditures favored by politicians.

The Attorney General can do as he sees fit with his taxpayers' claim. But he must not pollute or damage KRS's claims with politics, or arrogate these claims for the State Treasury for politicians to feast on, or even simply use a recovery to fund Kentucky's exploding fiscal deficit. ***KRS's claims are trust assets that belong solely – exclusively – to KRS***. ***They do not belong to***

the Commonwealth's taxpayers.

The Attorney General seems to assume that, because KRS is a state agency, he automatically has the exclusive power to represent it. That assumption is incorrect. He has no such exclusive power. KRS is an independent legal entity:

> There is hereby created and established:
>
> (1) A retirement system for employees to be known as the "Kentucky Employees Retirement System" by and in which name it shall, pursuant to the provisions of KRS 61.510 to 61.705, transact all its business and shall have the powers and privileges of a corporation[.]

KY. REV. STAT. § 61.515(1). And KRS's board is "granted the powers and privileges of a corporation," including the power "[t]o conduct the business and promote the purposes for which it was formed." *Id*. § 61.645(2). ***Derivative suits exist to protect the assets of corporate entities like KRS from loss or damage due to failures of their fiduciaries or those who assist or conspire with them to damage the corporate entity***. *See* Ex. B at 4-7.[15] And the Legislature made sure that such remedy would exist to protect KRS by expressly authorizing members of KRS to sue to recover damages on behalf of KRS. *See id.* § 61.645(15)(e)-(f). Both Houses of the Kentucky Legislature unequivocally endorsed the merits and importance of the prosecution of the derivative claims, and how private enforcement of those claims under KY. REV. STAT. § 61.645(15) was consistent with the Legislature's intent and the public interest. *See* Ex. C at 1-2, 11-12.[16]

Nowhere is the Attorney General expressly given the power to represent KRS in litigation – certainly not to the preclusion of other authorized causes of action. The Attorney

[15] A true and correct copy of the Law Professors' *Amicus Curiae* Brief, filed in the Supreme Court on June 12, 2019, is attached as Exhibit B. This brief explained in detail the role and importance of derivative suits in remedying failed governance and the propriety of the derivative claims asserted by the Mayberry Plaintiffs in the context of the KRS system.

[16] A true and correct copy of the Kentucky Legislature's *Amicus Curiae* Brief, filed in the Supreme Court on June 12, 2019, is attached as Exhibit C.

General's powers are circumscribed in that regard:

> *The Attorney General*, *or an assistant designated by him or her*, may attend each meeting of the board and may receive the agenda, board minutes, and other information distributed to trustees of the board upon request. *The Attorney General may act as legal adviser and attorney for the board*, and the board may contract for legal services, notwithstanding the limitations of KRS Chapter 12 or 13B.

See id. § 61.645(11).

To the Mayberry Plaintiffs' knowledge, KRS has not retained the Attorney General to pursue any claims on its behalf. Traditionally, KRS has been represented by outside counsel, most often SKO, long identified as KRS's "General Counsel" in its reports, but also long ago prevented by its own conflicts from representing KRS in this litigation, given their earlier involvement in matters relevant to the breach of duty claims. While the Mayberry Plaintiffs are not 100% certain, it does not appear that the Attorney General ever represents KRS in litigation. Here, due to the derivative nature of the claims, KRS never "retained" outside counsel or the Attorney General. Rather they chose to endorse the Mayberry Plaintiffs' prosecution of KRS's claims ***via the court-filed*** "***Joint Notice***."

Unlike the Attorney General, the Mayberry Plaintiffs ***are expressly authorized to sue and to recover damages for KRS*** caused by breaches of the duties of care of its trustees, and those who conspired with or aided and abetted them, *i.e.*, the advisors and hedge fund sellers:

> (e) Any action taken as a trustee, or any failure to take any action as a trustee, ***shall not be the basis for monetary damages or injunctive relief unless***:
>
> > 1. The trustee has breached or failed to perform the duties of the trustee's office in compliance with this section; and
> >
> > 2. In the case of an action for monetary damages, the breach or failure to perform constitutes ***willful misconduct or wanton or reckless disregard for human rights***, ***safety***, ***or property***.
>
> (f) ***A person bringing an action for monetary damages under this section shall have the burden of proving by clear and convincing evidence the provisions of***

> ***paragraph (e)1. and 2. of this subsection, and the burden of proving that the breach or failure to perform was the legal cause of damages suffered by the Kentucky Retirement Systems***.

See KY. REV. STAT. § 61.645(15)(e)-(f). "Person" as used in Section 61.645(15)(e) means a natural person – a human being – not the "Office of the Attorney General," which institution has been "***wholly uninvolved in the litigation***" since its inception (*Mayberry* Opinion at 35). *See* KY. REV. STAT. § 61.510(30) ("Person means a natural person").

The Mayberry Plaintiffs do not dispute the right of the Attorney General's office to intervene. They do object to any attempt by the Attorney General's office to take over the prosecution of the derivative claims. KRS's assets – including its legal claims for damages – are separate from the Commonwealth and belong to KRS, not the taxpayers. They are trust funds to be used exclusively for KRS trust purposes. KRS and the Commonwealth have a common interest in creating as big a pot as possible but a conflicting interest as to how to divide that pot. And they have many other potential conflicts as well.

When the Mayberry Plaintiffs filed the FAC, ***they were very cognizant of the conflict between the KRS and taxpayer claims and were careful to alert the Court to their existence and how to deal with that conflict if the Mayberry Plaintiffs were to end up prosecuting both sets of claims concurrently***. Thus, the Prayer for Relief in the Mayberry Plaintiffs' FAC asks for the following relief, in addition to damages for KRS and the taxpayers:

> 1. Declaring that Plaintiffs may maintain this action on behalf of KRS and that Plaintiffs are appropriate representatives;
>
> * * *
>
> 8. Granting such relief as later specifically requested or found proper pursuant to Ky. Rev. Stat. §386B.10-010 which provides "Remedies for Breach of Trust," ***including appointing a Special Fiduciary to oversee and safeguard any net recovery obtained via this action for KRS or the Commonwealth of Kentucky to assure any recovery … is used solely to benefit KRS and its Pension Funds*** …[.]

FAC at 150-151.

While the Attorney General's office copied over a hundred pages of the Mayberry Plaintiffs' FAC's factual and substantive allegations and legal theories ***verbatim***, someone took the time to eliminate the above items from the prayer for relief. Why? The Attorney General does not ask to be declared an appropriate representative of KRS, and he does not ask for relief assuring the recovery he seeks is used ***solely*** to benefit KRS. He does not represent KRS, and he is precluded by Section 48.005(3) from asking that any recovery obtained benefit KRS "***solely***." Any recovery he obtains must go ***solely*** to the State Treasury surplus account for politicians to dispose of. Under these circumstances, separate representation of KRS is mandatory.

CONCLUSION

The Mayberry Plaintiffs have made their Leadership Motion in a timely fashion to seek needed relief in light of the impending resumption of proceedings in this Court. The motion has been supported by a substantial evidentiary showing – including declarations of Judge Brown and Captain Mayberry as well as that of MCL. All involved counsel have conceded that the dysfunctional schism exists and cannot otherwise be remedied. The urgency of the situation requires a prompt resolution, and the KRS derivative claims deserve independent representation.

Dated: August 13, 2020

Respectfully submitted,

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