COMMONWEALTH OF KENTUCKY
COUNTY OF FRANKLIN CIRCUIT COURT
DIVISION I
CASE NO. 21-CI-00645

TIA TAYLOR, *et al.*, as Members and Beneficiaries of Trust Funds of the KENTUCKY RETIREMENT SYSTEMS, Its Pension and Insurance Trusts for the Benefit of Those Trusts — PLAINTIFFS

vs.

THE TIER 3 TRUST PLAINTIFFS' NOTICE OF MOTION AND MOTION TO OPEN DISCOVERY AND TO RENEW MOTION FOR OPEN PROCEEDINGS

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

ELECTRONICALLY FILED

* * * * * * * *

PLEASE TAKE NOTICE that, on May 16, 2022, at the conclusion of the motion hour docket (9:00 a.m.),[1] or as soon thereafter as counsel may be heard, Tia Taylor, Ashley Hall-Nagy, Bobby Estes and Jacob Walson (the "Tier 3 Trust Plaintiffs") will, and hereby do, move the Court, before the Honorable Phillip J. Shepherd, at the Franklin County Courthouse, located at 222 St. Clair Street, Frankfort, Kentucky 40601, for entry of the accompanying proposed order requiring commencement of discovery in this action and permitting the Tier 3 Trust Plaintiffs to renew their August 31, 2021 Motion for Order Directing That No Protective Order Be Entered and That Complete Public Access to All Proceedings, Including Discovery, Will Be Allowed (the "Motion for Open Proceedings") and, upon renewal, for entry of an order requiring:

- the proceedings in this action be open to the public in all respects;

[1] The Court has set a hearing for May 16, 2022, at 2:00 p.m. on related discovery issues in *Commonwealth v. KKR & Co. Inc.*, Case No. 17-CI-1348 (the "*Mayberry* Action"). Consideration of efficiency and judicial economy weighs in favor of hearing this motion to renew at the same time as the discovery issues in the *Mayberry* Action.

- no protective order regarding the confidentiality of any discovery materials be entered;
- absent specific court approval, no document, including documents produced in discovery, shall be filed under seal or with restricted access; and
- parties and counsel be permitted to share documents obtained via discovery with members, the press, regulators, legislators and prosecutors.

The Tier 3 Trust Plaintiffs further request that the Court grant such other and further relief as the Court deems just and proper.

The Tier 3 Trust Plaintiffs expect that the hearing time will exceed ten minutes.

In support of this motion, the Tier 3 Trust Plaintiffs submit the accompanying memorandum, together with Exhibit A (the August 31, 2021 Motion for Open Proceedings) and Exhibit B (April 6, 2022 Supplemental Submission), and the accompanying proposed order, and rely on all papers and proceedings in this action.

Dated: May 9, 2022

Respectfully submitted,

s/ Michelle Ciccarelli Lerach

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vs.

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MEMORANDUM IN SUPPORT OF MOTION TO OPEN DISCOVERY AND TO RENEW MOTION FOR OPEN PROCEEDINGS

ELECTRONICALLY FILED

* * * * * * * *

Plaintiffs Tia Taylor, Ashley Hall-Nagy, Bobby Estes and Jacob Walson (the "Tier 3 Trust Plaintiffs") respectfully request an order opening discovery in this case and, in that connection, renew their Motion for Open Proceedings.[1] The Motion for Open Proceedings, originally filed on August 31, 2021, asked that no protective order be entered and for complete public access to all proceedings, including discovery, in this breach-of-trust case involving a public pension fund.

Recent developments in the related *Mayberry* Action (now captioned *Commonwealth v. KKR & Co. Inc.*, Case No. 17-CI-1348) necessitate this motion.

Even though the Court has not decided the motions to dismiss filed in *Commonwealth v. KKR*, the Attorney General, the Hedge Fund Seller Defendants and KRS/KPPA are now actively exchanging discovery materials and, in the process, seeking discovery orders from the Court. At the same time, the Hedge Fund Sellers have refused

[1] The title of the August 31, 2021 motion was "Motion for Order Directing That No Protective Order Be Entered and That Complete Public Access to All Proceedings, Including Discovery, Will Be Allowed."

to respond to discovery requests in this case, asserting that discovery must be delayed until their motions to dismiss in this case have been fully resolved.[2] At bottom, this refusal traces to their argument that the Tier 3 Trust Plaintiffs are not entitled to proceed because the Attorney General has "occupied the field" — meaning that the Attorney General has pre-emptively taken control of claims that would otherwise belong to the Tier 3 Trust Plaintiffs. But that argument, once unspooled, is simply untenable.

The thrust of the *Commonwealth v. KKR* case is that certain former KRS trustees and officers breached duties owed to KRS and that the third-party defendants aided and abetted these faithless trustees and officers, resulting in damage to KRS. In other words, that KRS was the *innocent victim* of breaches of trust committed by others. The Attorney General intervened in the *Mayberry* Action on the side of KRS, asserting his right to "attend to the legal business of Kentucky Retirement Systems" and noting that he was "empowered to act as legal adviser and attorney for the Board of the Kentucky Retirement Systems." *See* Commonwealth's Reply in Support of Its Motion to Intervene, filed Aug. 10, 2020, in *Mayberry* (Case No. 17-CI-1348).

This breach-of-trust case, in contrast, asserts that the KRS Board, acting corporately in its role as sole Trustee of the KRS trusts, is *guilty* of breach of trust — that it was a *perpetrator*, not a victim, of breaches of trust in which Defendants knowingly participated.[3]

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[2] Thus, as before, the Hedge Fund Defendants seek to choose which plaintiff they prefer to deal with.

[3] The right of trust beneficiaries to bring a direct action where the trustee is guilty of breach of trust is one of the well-recognized *exceptions* to the general rule that only the trustee can sue for damage to the trust property. *See, e.g.*, *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 68 Cal. App. 4th 445 (1998).

These two case theories are not only different; they are divergent and incompatible and cannot be simultaneously championed by the same party or attorney. The Attorney General cannot "occupy" *both* "fields." That much has been obvious for some time.

But now that the Attorney General has announced that his office does not represent KRS/KPPA and apparently is no longer intent on "attend[ing] to [its] legal business," he is not in a position to recover the "trust damages."[4] Because the Attorney General does not represent the Trustee (*i.e.*, the KRS Board) and cannot pre-emptively represent the trust beneficiaries — whose right to sue springs from the malfeasance of a branch of state government — his ability to recover the trust damages is at the very least highly questionable. That is in part because **trusts such as the KRS Trusts are not separate legal persons**, **not distinct entities**, **and as such are not entitled to sue in their own name or retain their own counsel**. *See, e.g.*, *Raymond Loubier Irrevocable Trust v. Loubier*, 858 F.3d 719, 731 (2d Cir. 2017) ("[traditional trusts] have no distinct juridical identity allowing them to sue or to be sued in their own names").

All of this is to say that the lynchpin of the Hedge Fund Sellers' rationale for refusing discovery in this case, while actively providing discovery in the *Commonwealth v. KKR* case, is dead on arrival. Under the circumstances, discovery in this case should be declared to be open.

Once discovery has been declared opened, it should be fully *open* — permitting access to the discovery materials to all. But the complex and convoluted protective order

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[4] *See* Plaintiffs' Supplemental Submission Regarding New Development filed herein on April 6, 2022 (attached as Exhibit B), in which we discuss the effects of the Attorney General's announcement that his office does not represent KRS/KPPA, including the substantial probability that the Attorney General will not be able to recover damages to the trust corpus, *i.e.*, "trust damages." Significantly, no party has attempted to dispute this conclusion.

offered up by the Attorney General in the *Mayberry* Action is inconsistent with the prior expressions of this Court of a presumption of openness and public access to all filings and discovery materials in these cases. *See* Nov. 1, 2021 Order ("The Court will require … transparent proceedings and will determine, upon motion and hearing, whether any party seeking a protective order can carry its burden to restrict public access to documents on a case-by-case basis.")

While the motions to dismiss in both the *Mayberry* Action and the Tier 3 Trust Plaintiffs' present action remain pending, if those motions are denied, discovery will begin apace. The Tier 3 Trust Plaintiffs have served discovery on all defendants. But defendants have refused to produce any documents to the Tier 3 Trust Plaintiffs. In the *Mayberry* Action, however, defendants are voluntarily producing documents to the AG, and have secured a commitment that those materials can be kept secret by designating them "Confidential," "Sensitive" or "Trade Secret."

The Tier 3 Trust Plaintiffs do not agree with the approach outlined in the protective order agreed to by the AG in the *Mayberry* Action, and wish to preserve their position regarding public access to all materials in this breach-of-trust action.

In light of these circumstances, the Tier 3 Trust Plaintiffs respectfully renew their motion seeking to assure maximum public access to all materials in this case. Attached as Exhibit A is a copy set of the Motion for Open Proceedings. While this motion to renew is noticed for hearing on May 16, 2022, at the 9:00 a.m. motion hour as required by the rules, the Tier 3 Trust Plaintiffs respectfully request that this motion to renew be heard at the same time and date as the AG's request for approval of the Proposed Protective Order in the *Mayberry* Action.

For the reasons set forth above, the Tier 3 Trust Plaintiffs respectfully request that the Court enter the accompanying proposed order granting their motion to open discovery and to renew and, upon renewal, granting their Motion for Open Proceedings.

Dated: May 9, 2022

Respectfully submitted,

s/ Michelle Ciccarelli Lerach

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EXHIBIT A

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vs.

THE TIER 3 TRUST PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR ORDER DIRECTING THAT NO PROTECTIVE ORDER BE ENTERED AND THAT COMPLETE PUBLIC ACCESS TO ALL PROCEEDINGS, INCLUDING DISCOVERY, WILL BE ALLOWED

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

ELECTRONICALLY FILED

* * * * * * * *

PLEASE TAKE NOTICE that, on October 13, 2021, at the conclusion of the motion hour docket (9:00 a.m. Eastern Time), or as soon thereafter as counsel may be heard, Tia Taylor, Ashley Hall-Nagy, Bobby Estes and Jacob Walson (the "Tier 3 Trust Plaintiffs") will, and hereby do, move the Court, before the Honorable Phillip J. Shepherd, at the Franklin County Courthouse, located at 222 St. Clair Street, Frankfort, Kentucky 40601, for entry of the accompanying proposed order requiring that:

- the proceedings in this action be open to the public in all respects;
- no protective order regarding the confidentiality of any discovery materials be entered;
- absent specific court approval, no document, including documents produced in discovery, shall be filed under seal or with restricted access; and
- parties and counsel be permitted to share documents obtained via discovery with members, the press, regulators, legislators and prosecutors.

The Tier 3 Trust Plaintiffs further request that the Court grant such other and further relief as the Court deems just and proper.

The Tier 3 Trust Plaintiffs expect that the hearing time will exceed ten minutes.

In support of this motion, the Tier 3 Trust Plaintiffs submit the accompanying memorandum, together with Exhibits 1 and 2, and the accompanying proposed order, and rely on all papers and proceedings in this action.

Dated: August 31, 2021

Respectfully submitted,

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I. INTRODUCTION

Like in every other court proceeding, the public has an interest in open pre-trial discovery:

> The parties to a lawsuit are not the only people who have a legitimate interest in the record compiled in a legal proceeding … ***the public at large*** pays for the courts and therefore ***has an interest in what goes on at all stages of a judicial proceeding***. … The judge is the primary representative of the public interest in the judicial process. …

Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co., 178 F.3d 943, 944–45 (7th Cir. 1999).[1] Here, the public has a significant, substantial interest in this action — seeking damages for all Kentucky Retirement Systems ("KRS") trusts against defendants, based on their active participation in breaches of trust and related wrongs. To protect such interest, the Tier 3 Trust Plaintiffs[2] move for an order requiring that:

- the proceedings in this action be open to the public ***in all respects***;
- no protective order be entered;
- absent specific court approval, ***no document — including documents produced in discovery — shall be filed under seal or with restricted access***, ***or stamped as*** "***confidential***," "***trade secret***," "***proprietary***" or "***privileged***"; and
- parties and counsel be permitted to share documents obtained via discovery with KRS members, the press, regulators, legislators and prosecutors — all of

[1] Unless otherwise noted, all emphases are added and all internal citations are omitted.

[2] The Tier 3 Trust Plaintiffs are Tia Taylor, Ashley Hall-Nagy, Bobby Estes and Jacob Walson, members of the KRS Tier 3 trusts who filed the August 20, 2021 complaint (the "Complaint") in this action. The allegations of this breach-of-trust Complaint are cited as "¶ ___."

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whom have substantial interests in this lawsuit.

In all, there must be full public access to these proceedings and the discovery they yield.[3]

Earlier, in the related "derivative" litigation on behalf of KRS initiated in December 2017 by the *Mayberry* Plaintiffs, their counsel[4] — who are also counsel for the Tier 3 Trust Plaintiffs in this case — served discovery requests on the Hedge Fund Sellers and filed an "open proceedings" motion. The Hedge Fund Sellers produced no documents. Instead, they sought an extremely overbroad protective order — ***a seal-and-keep-everything-secret regime*** — that would have permitted them to keep secret ***all evidentiary documents***, ***while hamstringing the plaintiffs' ability to efficiently and effectively prosecute the claims***. Those issues were briefed and argued, but never ruled upon.

The Tier 3 Trust Plaintiffs have now filed a breach-of-trust complaint on behalf of the KRS trusts, to recover damages for the trusts. *See, e.g.*, ¶¶ 1–11, 373–400. They have also filed a motion seeking an accounting of the hedge fund fees. They have initiated, and will quickly complete serving, comprehensive discovery requests on Defendants, who will no doubt seek a protective order similar to what they sought in the *Mayberry* Action. Thus, the Tier 3 Trust Plaintiffs file this motion for "open proceedings/no protective

[3] Material required by law to be confidential, such as social security numbers, personal identifiers and other truly personal data of KRS members, can be redacted. No protective order is needed to accomplish that.

[4] The *Mayberry* Plaintiffs, including Jeffrey C. Mayberry, Hon. Brandy O. Brown, Martha M. Miller, Teresa M. Stewart, and Steve Roberts (collectively, the "Mayberry 5"), are eight members of the KRS who commenced *Mayberry v. KKR & Co., L.P.*, No. 17-CI-1348 (Ky. Cir. Ct. Franklin Cnty.) (the "*Mayberry* Action"), by filing the December 27, 2017 initial complaint asserting claims on KRS's behalf in a derivative format.

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order" to pre-empt that filing or at least frame the issues seeking such a protective order would raise, so that document production may be expedited and public access assured.

The issue here is whether ***any*** document in this case should be sealed and kept secret. The correct answer is none should be. This is a breach-of-trust action involving the Commonwealth's public employee pension plan. Secrecy in judicial proceedings is always disfavored. The public has a right to know what goes on in cases in its court rooms. KRS members and trust beneficiaries and Kentucky taxpayers have a right to know what goes on in lawsuits involving themselves or institutions they help fund. Plaintiffs also have a right to develop and prosecute their claims without complex — indeed oppressive — administrative restrictions imposed by the whim of their opponents. These principles are of utmost importance in this case involving gross breaches of duty in dealing with public trust, public funds and public employees' pension savings — where the underlying breaches have damaged the Tier 3 trust beneficiaries, while pushing KRS into a "death spiral" that caused a fiscal crisis for the Commonwealth.

The Kentucky Supreme Court recognized the *Mayberry* First Amended Complaint ("FAC") (drafted by the same counsel representing the Tier 3 Trust Plaintiffs here) ***alleged*** "***significant misconduct***," ***leaving undisturbed this Court's November 30, 2018 decision upholding the pleading of all that FAC's substantive claims*** (asserted in ***a derivative context there***). *See Overstreet v. Mayberry*, 603 S.W.3d 244, 266 (Ky. 2020). This Court later characterized that FAC as alleging "***extremely serious***" violations of fiduciary duties by KRS Board members, KRS's advisors, ***and the Hedge Fund Sellers***. *See Mayberry v. KKR & Co., L.P.*, No. 17-CI-1348, slip op. at 15 (Ky. Cir. Ct. Franklin Cnty. Dec. 28, 2020) (Shepherd, J.) ("Dec. 28, 2020 Order"). The allegations in the *Mayberry* Action — expanded upon in this

breach-of-trust action — alleged "***severe misconduct and breaches of fiduciary duty***" involving "***self-dealing***, ***exorbitant fees***, ***conflicts of interest***" ***causing*** "***staggering losses of public funds***." *Id*. at 15, 17. Finally, this Court stated "any party that breached its fiduciary duties and engaged in reckless conduct, conflicts of interest or self-dealing should be held accountable under the law," and that "***principles of equity and public interest require that the factual allegations in the case … should be adjudicated on the merits***." *See id*. at 16–17; *see also Mayberry v. KKR & Co., L.P.*, No. 17-CI-1348, slip op. at 19–21 (Ky. Cir. Ct. Franklin Cnty. Nov. 30, 2018) (Shepherd, J.) ("Nov. 30, 2018 Opinion & Order"). This breach-of-trust action seeks to do just that and to do it in the open.

This Court has made plain its commitment to open proceedings on January 24, 2018, when it first addressed the *Mayberry* Plaintiffs' "Open Proceedings" Motion, noting that "proceedings are open," and that "all court filings are public records" unless good cause is otherwise shown "and the Court authorizes" the sealing of filings. The Court expressed a presumption of openness of discovery materials on March 5, 2018:

> My philosophy is that, you know, ***once we get into discovery***, ***there's a presumption that the documents that are produced in discovery under the rules of court are presumed to be open***.

Mar. 5, 2018 H'rg Tr. in *Mayberry* Action at 53:7–11. Before any order was entered, Defendants obtained appellate relief on a technical "standing" issue, halting the *Mayberry* Plaintiffs' prosecution. The Attorney General ("AG") has now been entrusted with prosecuting those claims.

Circumstances have changed since when these issues were argued. ***What was a strong case for transparency then***, ***has become an absolute one***. ***All*** the state-

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law claims pleaded by the Tier 3 Trust Plaintiffs now in this breach-of-trust action — previously pleaded by the *Mayberry* Plaintiffs earlier in a "derivative" context — have been ***upheld in the Court's Nov. 30, 2018 Opinion & Order***.[5] Now, the AG has through intervention, taken over the *Mayberry* derivative case (using the original *Mayberry* FAC and the later filed Tier 3 proposed complaint in intervention).

However, an alleged co-conspirator — KRS's current Chief Executive Officer/Executive Director David Eager — commissioned and participated in a supposedly "independent" investigation into prior investment misconduct at KRS — including his own conduct — and then participated in writing the report. *See* ¶¶ 326–351. ***The investigation and report were paid for with $1.2 million in public funds***. ¶¶ 11, 79. However, KRS and the AG are now trying to keep secret that investigative report into the investment misconduct at KRS — a central issue in these related litigations, both denying public documents requests and refusing to make the report public.

Since the core state law claims asserted in this Tier 3 breach-of-trust Complaint were already upheld when earlier asserted by the *Mayberry* Plaintiffs in a "derivative" context, it is time to end the long delay of the prosecution and adjudication of these claims on the merits. The facts are horrible for Defendants. ***The facts demand not only a remedy but public exposure of who did what, when and why — the "autopsy" this Court long ago said the* Mayberry *Action should result in, but has never occurred***. ***The AG, who originally refused to participate in the suit, has***

[5] The AG's current complaint — copied from the Tier 3 Plaintiffs' earlier-filed proposed Complaint in Intervention — has not been tested by motion practice, with briefing now scheduled to be completed on October 30, 2021.

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served no discovery since taking over the* Mayberry *claims. He has not filed any "open proceedings" motion or taken any steps to assure public access to discovery. He has not sought an accounting from the Hedge Fund Sellers. Instead, he copied the Mayberry 5 and Tier 3's prior complaints and then agreed to a months-long schedule to brief Defendants' motions to dismiss.

The attempts by KRS and the AG to keep secret this so-called "Calcaterra Report"[6] regarding improprieties in KRS's investment activities reinforces why there must be ***no secrecy*** in this litigation. There is a compelling public interest in this and the related litigations — and any order restricting secrecy and compelling publication should apply to all other related cases.[7] There have been prior inquiries into KRS by oversight boards[8] and an extensive independent investigation of KRS by PMF Consulting — at great expense to the taxpayers — that were made public and exposed falsification of assumptions and bad investments, indicating that the true condition of KRS Funds had been misrepresented for years.[9] ***KRS has been roundly criticized for the secrecy***

[6] KRS hired a New York-based law firm, Calcaterra Pollack LLP, to conduct the investigation and report its findings.

[7] *See*, *e.g.*, *Lowered Assumptions Result in Billions More in Pension Debt with More on the Horizon,* MYCN2.COM, KENTUCKY, May 18, 2017; Todd Dykes, *Kentucky Retirement Crisis: Public Pensions Underfunded by at Least $33 Billion*, WWW.WLWT.COM, KENTUCKY, Sept. 7, 2017; Tom Loftus, *Pension Plans Will Need Nearly $800 Million More Next Year, Kentucky Retirement System Says*, LOUISVILLE COURIER-JOURNAL, Dec. 7, 2017; Amy Whyte, *Kentucky Pension Recommits to Hedge Funds Amid Governance Turmoil*, WWW.AI-CIO.COM, May 20, 2016; Valarie Honeycutt Spears, *Kentucky: One of the Worst States for Cuts to Education Spending*, *Report Shows*, LEXINGTON HERALD-LEADER, Nov. 29, 2017.

[8] *See*, *e.g.*, Public Pension Oversight Board, Research Memoranda No. 523 (Dec. 2016), No. 519 (Dec. 2015), No. 518 (Dec. 2014); Report of the Task Force on Kentucky Public Pensions, Research Memo No. 512 (Dec. 7, 2012).

[9] *See*, *e.g.*, PFM Consulting Group Reports Dated May 22, 2017, August 28, 2017.

surrounding the "Black Box" fund of hedge funds investments involved in this case.[10] ***That secrecy must not be repeated during this litigation or the related litigations***. There is simply no legal or policy justification for secrecy in a case involving claims asserted for the benefit of the KRS trusts.

These related cases have far-reaching implications for pension funds, beneficiaries and taxpayers, policy-makers, legislators and government officials in Kentucky — and across the country. In light of the prominence and magnitude of KRS's scandalous funding collapse, and the widespread impact this debacle has and will continue to have not only upon the Tier 3 KRS members, but our nation's ongoing debate over the causes and impact of underfunded public pension liabilities, and how the Black Box hedge funds have been foisted on them by Wall Street banks, free public access to these proceedings and the evidence uncovered in the prosecution of this case is critical.

As pleaded in the breach-of-trust Complaint and elaborated on in the Tier 3 Trust Plaintiffs' Motion for an Accounting, the abuse of public pension plans by advisors and hedge fund sellers is widely recognized:

> The trillions of dollars held in pension plans are an enticing target for intermediaries and service providers who are opportunistic, desperate or just plain greedy.

Dana M. Muir, *Decentralized Enforcement to Combat Financial Wrongdoing in Pensions: What Type of Watchdogs Are Necessary to Keep the Foxes out of the Henhouses*, 53 AM. BUS. L.J. 33, 34 (2016). A Roosevelt Institute study detailed the abuse

[10] James McNair, *Kentucky Pensions Fees Much Higher Than Previously Reported*, WFPL.ORG, KENTUCKY, Sept. 15, 2015; John Cheves, *Kentucky Retirement Systems Pays Millions in Fees to Money Managers But Keeps the Details Secret*, LEXINGTON HERALD-LEADER, June 14, 2014; James McNair, *When It Comes to Investments Kentucky Keeps Pension Holders in the Dark*, KYCIR.ORG, KENTUCKY, July 24, 2014.

suffered by eleven public pension funds when hedge fund sellers profited by the billions at the expense of those public funds — selling them at unsuitably high-fee, high-risk Black Box hedge fund/fund of hedge funds vehicles.[11] Its bottom line: the hedge funds sold to those eleven public funds cost the funds $8 billion in lost investment income and $7 billion in excessive fees — for every $1 of returns the fees were an astounding $.57 — and provided no protection (or hedge) against downside loss. One of the central issues in this case is the $1.5–1.8 billion in ultra-risky, illiquid and super expensive "Black Boxes," including their specific investments,[12] performance and amount of fees that have been hidden from even the KRS Trustees who recklessly trusted the Wall Street Hedge Fund Sellers, who in turn profited from taking advantage of them and plundering KRS. The Tier 3 Trust Plaintiffs have moved for an accounting so this information can be made public.

The Tier 3 breach-of-trust Complaint presents the most detailed exposition of the Hedge Fund Sellers predation on the pension trusts administered by KRS to date. It now

[11] Elizabeth Parisian & Saqib Bhatti, *All That Glitters Is Not Gold: An Analysis of US Public Pension Investments in Hedge Funds* (Roosevelt Institute Nov. 16, 2015) *available at* https://www.aft.org/sites/default/files/allthatglittersisnotgold2015.pdf (last visited Aug. 31, 2021).

[12] As has been reported:

> Unbelievably, in many instances the trustees of the public pensions are not allowed to know what funds the "fund of funds" invest in. This makes due diligence impossible, and in one particularly egregious example it led the Kentucky Retirement Systems to unknowingly invest in SAC Capital despite the fact it was under SEC investigation at the time.

Plutocratic Class Warrior Stephen A. Schwarzman: Public Impoverishment When Such an Individual Gains the Economic and Political Upper Hand?, NOTICINGNEWYORK.BLOGSPOT.COM, Oct. 31, 2014, *available at* http://noticingnewyork.blogspot.com/2014/10/plutocratic-class-warrior-stephen.html (last visited Aug. 31, 2021).

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includes allegations of bribing KRS by KKR/Prisma via the Advisory Services Agreement. ¶¶ 11, 289–325. It also alleges a corrupt procurement process and a tainted report engineered by KRS's CEO/ED, Eager. ¶¶ 326–351. After all, it was the Governor of Kentucky who, ***based on still not public documents***, condemned what went on at KRS involving the Black Box hedge fund debacle as "***criminal***" and said the then KRS ED/CEO — a defendant in this case — who helped engineer it, "***should be in jail***." ¶¶ 5, 68.

The comprehensive discovery requests that the Tier 3 Trust Plaintiffs are serving in this action seek detailed information about the Hedge Fund Sellers, the $1.8 billion in Black Box hedge funds they foisted on KRS, and their ongoing predation on and bribing of KRS, as well as the corrupted procurement process and the tainted "independent" report by the Calcaterra Pollack firm. *See*, *e.g.*, ¶¶ 11, 289–351.

In 2017, this Commonwealth's ***highest elected officials*** laid bare the wrongdoing at KRS:

> The biggest cause of the shortfall was erroneous actuarial assumptions made by past members of the [B]oards..., which led to significant underfunding .... [P]ast assumptions were often ***manipulated*** by the prior pension [B]oards in order to minimize the "cost" of pensions to the state budget. Unreasonably high investment expectations were made and funding was based on ***false*** payroll numbers.
>
> The result was to provide a false sense of security .... ***This was a morally negligent and irresponsible thing to do***.

¶ 69. As reported by *Forbes* in 2018, the pension fund crisis in Kentucky was a product of, among other things, mismanagement and self-interested misconduct:

Kentucky Retirement Systems: A Case Study of Politicizing Pensions

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> Kentucky is in the midst of a financial crisis … and at least one recent headline said it succinctly: "***Unfunded Pensions Could Spell Disaster for Kentucky***."
>
> This is not new. The KRS Board of Trustees has been trying to deal with this looming pension crisis since the mid-2000s.
>
> ***
>
> Leaders of KRS are required through their fiduciary duty to provide "accurate and truthful information regarding KRS financial and actuarial condition." Trustees instead took the moral low-ground and mislead pensioners — ***all for the sake of politics***. ***By hiding the true status of the fund***, ***these officials were able to hold their offices and coerce the public into believing that they were acting in the best interest of the people***. ***In reality***, ***KRS leadership acted only in self-interest***, ***leaving future generations in the state to pay for their mistakes because of poor investment decisions***.
>
> ***This sort of irresponsible action must be stopped in American pension fund management*** ….

¶ 5 (quoting Christopher Burnham, *Kentucky Retirement Systems: a Case Study of Politicizing Pensions*, FORBES, June 28, 2018).

The seal-and-secret regime the Hedge Fund Defendants sought earlier — and will no doubt again seek in this case — can only compromise the integrity of the judicial process without ***any*** offsetting benefit. The absence of full, complete and accurate disclosure was undoubtedly a primary factor leading to the KRS fiasco, a mistake that should not be repeated in the administration of this litigation. The public's right to know includes the right to sort out the facts and circumstances, to determine what happened, why it happened, who did what, and the extent to which this Commonwealth's and federal laws were violated in the process, and whether the Kentucky legal and judicial systems are operating so as to assure fair access to justice for its citizens. This can only be accomplished by keeping these proceedings — and the discovery obtained — open to all. Any ruling on their motion should apply to the discovery in all these related cases.

II. ARGUMENT

A. Proceedings in Kentucky Courts Must Be Open — Public Access to Proceedings, Filings and Evidence Must Not Be Restricted

Whether based on Kentucky's open proceedings precedents, common law or constitutional jurisprudence, the rule is clear: ***this Commonwealth has strong jurisprudence mandating open courts***:

> The principle that justice cannot survive behind walls of silence is ... deeply imbedded in our Anglo-American judicial system .... One of the strongest demands of a democratic system is that the public should know what goes on in their courts.

Johnson v. Simpson, 433 S.W.2d 644, 646 (Ky. Ct. App. 1968).[13] This important public policy of judicial openness includes the public's right of access to court records:

> We recognize that the government belongs to the people, that its activities are subject to public scrutiny, and that the news media is a primary source of protecting the right of public access. This right includes the public's "right to inspect and copy public records and documents, including judicial records and documents." ... Basic principles have emerged to guide judicial discretion respecting public access to judicial proceedings. These principles apply as well to the determination of whether to permit access to information contained in court documents because court records often provide important, sometimes the only, bases or explanations for a court's decision.

[13] Kentucky's Constitution provides that "[a]ll courts shall be open." KY. CONST. § 14. Applying that provision, the court of appeals has held that "the courts shall be public, open, no hiding place about them." *Ashland Publ'g Co. v. Asbury*, 612 S.W.2d 749, 752 (Ky. Ct. App. 1980) (internal citations and quotation marks omitted). Notably, Kentucky was first in the nation to publish court proceedings on cable TV in 1981 when "the pioneer of court recordings," retired Madison Circuit Court Judge Chenault, (with whom Mayberry 5 Plaintiff Brandy Brown began her legal career as a law clerk) instituted videotape as the official court record. Cheryl Truman, *Uncommonwealth: Kentucky's Pioneer of Court Recordings Turns 90*, LEXINGTON HERALD-LEADER, May 5, 2013.

Courier-Journal & Louisville Times Co. v. Peers, 747 S.W.2d 125, 128 (Ky. 1988) ("*Peers*") (citing *Nixon v. Warner Commc'ns*, 435 U.S. 589, 597 (1978), and *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1177 (6th Cir. 1983)).[14]

This case involves the squandering — if not the theft of — huge amounts of public funds — taxpayer dollars and contributions of public employees to a retirement system and backstopped to some degree by a taxpayer-funded guarantee. In *Central Kentucky News-Journal v. George*, 306 S.W.3d 41 (Ky. 2010), the Supreme Court cast aside the parties' secrecy agreement regarding a settlement because public dollars were involved:

> [H]aving reviewed the agreements, we conclude that any contention that their disclosure would constitute a clearly unwarranted invasion of personal privacy is meritless. Rather, the agreements merely contain some scant personal identifiers that could have easily been redacted. Against such a minimal privacy interest lies, as we have discussed, a strong public interest in knowing how its tax money is being put to use by the state's agencies.

Id. at 47.

Public money compels public access, ***especially where***, ***as here***, ***public corruption is more than merely possible — it has been specifically alleged***. *Commonwealth v. Courier-Journal, Inc.*, 2019 Ky. App. Unpub. LEXIS 633 (Ky. Ct. App. May 17, 2019); *Frankfort News Media LLC v. Rick Rogers*, No. 19-CI-907, slip op. (Ky. Cir. Ct. Franklin Cnty. Sept. 2, 2020) (Shepherd, J.) ("[Publishing sealed report of investigations] ensures that investigations are handled competently and without favoritism. The taxpayers paid for this report … [and] have a right to review it in full.");

[14] From a federal perspective, the First Amendment commands that openness in the judicial process is essential to basic fairness and public confidence in the rule of law. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569–71 (1980); *see also Press-Enterprise Co. v. Super. Ct.*, 478 U.S. 1 (1986) (constitutional right of access applied to pre-trial hearing transcript).

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Peers, 747 S.W.2d at 130 (disclosure required because the information concerned "the expenditure of public funds").

Purdue Pharma L.P. v. Boston Globe Life Scis. Media. LLC, 2018 Ky. App. Unpub. LEXIS 989 (Ky. Ct. App. Dec. 14, 2018), involved access to deposition transcripts and exhibits in a suit by Kentucky over illegal sales of pharmaceuticals. ***The trial court overrode an agreed-to and court-approved protective order*** — and granted access. The Court of Appeals affirmed (*id*. at *6):

> … the circuit court found ***a common law right of public access to the pre-trial discovery materials previously sealed*** …. ***It held there is*** "***no higher value than the public*** (***via the media***) ***having access to these discovery materials so that the public can see the facts for themselves***."

The very nature of this suit, ***a direct action brought for the benefit of the KRS trusts***, further enforces the need for complete public access:

> The public's exercise of its common law access right in civil cases promotes public confidence in the judicial system by enhancing testimonial trustworthiness and the quality of justice dispensed by the court. As with other branches of government, the bright light cast upon the judicial process by public observation diminishes possibilities for injustice, incompetence, perjury, and fraud. Furthermore, the very openness of the process should provide the public with a more complete understanding of the judicial system and a better perception of its fairness.
>
> ***
>
> In addition, "access to civil proceedings and records promotes 'public respect for the judicial process' and helps assure that judges perform their duties in an honest and informed manner." …
>
> ***
>
> The right of public access is particularly compelling here, because many members of the "public" are also plaintiffs in the class action …. Protecting the access right in class actions "promotes [class members'] confidence" in the administration

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> of the case. … Additionally, the right of access diminishes the possibility that "injustice, incompetence, perjury, [or] fraud" will be perpetrated against those class members who have some stake in the case but are not at the forefront of the litigation. … Finally, openness of class actions provides class members with "a more complete understanding of the [class action process] and a better perception of its fairness." …

In re Cendant Corp., 260 F.3d 183, 192–93 (3d Cir. 2001).

This case is a trifecta plus — it's about a public agency, involves public officials and public monies, alleges corruption and is an action involving damage to the trusts holding the pension and insurance benefits of present and former KRS beneficiaries. As Justice Brandeis so aptly observed in 1914, "[p]ublicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." Louis D. Brandeis, *Other People's Money and How the Bankers Use It* (1914) (reprinted by Bedford Books of St. Martin's Press 1995). This important truth, *i.e.,* the necessity of exposing societal ills to the scrutiny of public attention, has endured throughout the years. *Doe v. Marsalis*, 202 F.R.D. 233, 238 (N.D. Ill. 2001) (granting a third party access to documents produced during discovery).

At the request of counsel for the Tier 3 Trust Plaintiffs in this case, the federal court in *In re Enron Corp. Securities Litigation*, No. 4:01-cv-03624 (S.D. Tex.), at the outset of discovery, granted the plaintiffs' motion to preclude the use of any "standard" protective order, starting "with a presumption that matters obtained through the discovery process are capable of being made public," and required defendants to make a particularized showing on each document they wanted protected. *See* Ex. 1 (Dec. 18, 2002 Order Granting Plaintiffs' Open Proceedings Motion). That case resulted in recovery exceeding $7 billion and led to substantial corporate governance and accounting reforms, when that wrongdoing was subjected to public exposure.

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B. Defendants' Previously Proposed Protective Order Was Grossly Overbroad and Oppressive, Shows Their Bad Faith and Justifies Not Entering Any Protective Order in This Case

In an earlier seeking of a ridiculously overbroad and oppressive protective order in the *Mayberry* derivative litigation, the Hedge Fund Sellers attempted to minimize the merits of transparency by casting it as no more than a desire by the *Mayberry* Plaintiffs to "***disparage and discredit***" them. But their own conduct has done that far beyond our poor power to add or detract.

After all, Kentucky's Governor condemned the alleged misconduct as "***criminal***" and said the KRS CEO/ED should be "***in jail***." This Court ***upheld the punitive damages claims against the Hedge Fund Sellers*** based on even less serious allegations of "fraud, malice or oppression" than those now made in this case, including the overt self-dealing during 2015–16 involving the ***current*** CEO/ED of KRS — violations of the federal racketeering statute, including bribery. There is little doubt that further disclosure of the details of their misconduct will embarrass them. It is not the Court's role to protect parties from negative publicity: "[s]imply showing that the information would harm the company's reputation is not sufficient to overcome the strong common law presumption in favor of public access to court proceedings and records." *Brown & Williamson*, 710 F.2d at 1179.

Defendants only want to seal-and-secret everything to cut off public access to any information regarding their predatory practices. They will use the oppressive and overly-broad protective order they previously sought to gain tactical advantage by using secrecy provisions to make it more difficult for the Tier 3 Trust Plaintiffs and their counsel to prosecute their claims. In a case involving the state's public pension fund, Defendants proffered the most draconian protective order imaginable. ***It required that every***

document be restricted from public view. It allowed virtually any document to be designated CONFIDENTIAL or ATTORNEYS' EYES ONLY, at the whim of defense counsel.[15] *See* Ex. 2.

The infirmities in that proposed protective order were legion. For example:

- Discovery Material cannot be used for any non-case purpose, including any "personal or other purpose," *id.* ¶ 2;
- Confidential Information is not only the document but the information in it, *id.* ¶ 3;
- Any party has the right to pick between broad categories bearing no resemblance to legal definitions of confidential or trade secrets, in designating produced materials as CONFIDENTIAL or ATTORNEYS' EYES ONLY, and for ATTORNEYS' EYES ONLY based on what he/she "believes [to be] … trade secret or other information … [which] would result in competitive or financial harm to that party or that party's personnel, clients or customers," *id.* ¶ 5 a–b;
- CONFIDENTIAL documents cannot be shown to clients, cannot be used by investigators, and cannot be shown to witnesses unless the witness had previously seen or had access to it, *id.* ¶ 7;
- ATTORNEYS' EYES ONLY documents are only available to attorneys and their employees and persons named in document, *id.* ¶ 8;
- Parties can even designate testimony at a hearing as confidential, *id.* ¶¶ 9–10;

[15] Defendants removed the Tier 3 class action lawsuit for the Tier 3 KRS members to federal court to try to keep that case away from this Court and prevent the Tier 3 Plaintiffs and their counsel from litigating those claims in this Court. *See Taylor v. KKR & Co., L.P.*, No. 21-cv-0029 GFVT (E.D. Ky.). The Tier 3 Plaintiffs are seeking expedited remand.

- Objections to designations, unlike the original designations, must be described with particularity, be done within 14 days, and with no ultimate burden of proof expressly on the designator, *id.* ¶ 11;
- Once designated, the document can only be filed under seal, *id.* ¶ 14; and
- Administrative requirements bring the proposed order to 10 pages and 19 paragraphs, or a total of 32 paragraphs including subparts.

"[P]roposed protective orders [like the above] defining categories of confidential information only with qualifiers such as 'private,' 'confidential,' or 'proprietary' fail to assure the court that the parties know what constitutes confidential information, 'whether and under what circumstances it may be sealed, or whether the parties will be making good faith and accurate designations of information.'" *Sims v. New Penn Fin. LLC*, 2017 U.S. Dist. LEXIS 121392, at *12 (N.D. Ind. Aug. 2, 2017) ("Defendant's proposed protective order fails to explicitly allow an interested member of the public to challenge the sealing of any of the documents identified by the parties as confidential.").

"[***T*]*he fruits of pretrial discovery are*, *in the absence of a court order to the contrary*, *presumptively public***." *San Jose Mercury News, Inc. v. U.S. Dist. Ct.*, 187 F.3d 1096, 1103 (9th Cir. 1999); *see also* Ex. 1 at 4. The notion that it is alright to unilaterally designate a "***this litigation only***" restriction ***on every single document — exhibits***, ***depositions***, "***or things***" (*see* Ex. 2 ¶ 1) — ***is chilling for any supporter of open courts***.

Defendants previously sought to bar the *Mayberry* Plaintiffs and their counsel from using every document produced, ***whether confidential or not***, "outside this litigation." *See* Ex. 2 ¶ 2. There is no basis for such a request. For example, should the Tier 3 Trust Plaintiffs choose to share this information with other plaintiffs, or use it in

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another case, there is certainly no prohibition in doing so. ***Regulators***, ***the legislature and federal law-enforcement officials should see this information as well***. ***So should the AG if his legal claims survive motion practice***.

There is constant litigation and legislation in Kentucky involving KRS. Kentucky encourages the sharing of evidence that is relevant in multiple proceedings. "That discovery might be useful in other litigation is actually a good thing because it furthers one of the driving forces behind the Civil Rules by allowing the cost of repeating the discovery process to be avoided and thereby encouraging the efficient administration of justice." *Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 814 (Ky. 2004); *see also Minnesota v. Phillip Morris, Inc.*, 606 N.W.2d 676, 687 (Minn. Ct. App. 2000); *Krahling v. Exec. Life Ins. Co.*, 959 P.2d 562, 568 (N.M. Ct. App. 1998). As the Kentucky Supreme Court in *Grange* recognized, the public "'has a right to every man's evidence.'" 151 S.W.3d at 814, n.36 (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950)).

C. Protective Orders May Not Be and Are Not "Routinely" Agreed to by Parties or Rubber-Stamped by Courts

Defendants claimed earlier in the *Mayberry* derivative case that court entry of an agreed protective order is "***standard***" in complex litigation. What lawyers do to make life easier for themselves in ordinary commercial cases is not the touchstone for the proper standard for this type of litigation. Many public interest groups[16] decry the public detriment from self-designating protective orders, since they provide a perfect solution to those who want to hide their actions from public scrutiny. As stated by the Sixth Circuit:

[16] For example, Public Justice has a project dedicated to fighting court secrecy, *see* Leslie Brueckner & Beth Terrell, *When It Comes to Sealing Court Records, the Presumption of Public Access Requires That You "Just Say No*," PUBLIC JUSTICE, July 6, 2017, *available at* https://www.publicjustice.net/comes-sealing-court-records-presumption-public-access-requires-just-say-no/ (last visited Aug. 31, 2021).

> Indeed, common sense tells us that the greater the motivation, a corporation has to shield its operations, the greater the public's need to know. In such cases, a court should not seal records unless public access would reveal legitimate trade secrets, a recognized exception to the right of public access to judicial records.

Brown & Williamson, 710 F.2d at 1180. Likewise, the Seventh Circuit noted:

> We are mindful of the school of thought that blanket protective orders ("umbrella orders"), entered by stipulation of the parties without judicial review and allowing each litigant to seal all documents that it produces in pretrial discovery, are unproblematic aids to the expeditious processing of complex commercial litigation .... The weight of authority, however, is to the contrary. Most cases endorse a presumption of public access to discovery materials, ... and therefore require the district court to make a determination of good cause before he may enter the order. ... Rule 26(c) would appear to require no less. And we note that both the First and Third Circuits, which used to endorse broad umbrella orders ..., have moved away from that position ....

Citizens First, 178 F.3d at 945–46.

The federal court presiding over the Comair crash litigation went to great pains to attempt to preempt discovery disputes with a "carefully crafted" early-stages protective order, only to have it backfire by Comair's over-zealous designations, with the result of that lesson being the court's acknowledgment of its duty to require a "by line and page number" designation to the court to claim any confidentiality, and every document not so listed was no longer subject to any protection but rather available for public view. *In re Air Crash at Lexington*, 2009 U.S. Dist. LEXIS 65974, at *37 (E.D. Ky. June 16, 2009).

The Court has an independent obligation to the public here. "The determination of good cause cannot be eluded by allowing the parties to seal whatever they want, for then the interest in publicity will go unprotected unless the media are interested in the case and move to unseal." *Citizens First*, 178 F.3d at 945 (citing Arthur

R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 492 (1991)). Thus, even where there is an agreement between the parties to secret documents via an agreed-upon protective order, "[t]he judge is the primary representative of the public interest in the judicial process and is duty-bound therefore to review any request to seal the record (or part of it) [and] may not rubber stamp a stipulation to seal the record." *Id*. (citing *In re Krynicki*, 983 F.2d 74 (7th Cir. 1992)). This is so because "[t]he parties to a lawsuit are not the only people who have a legitimate interest in the record compiled in a legal proceeding." *See id*. at 944. "The public at large pays for the courts and therefore has an interest in what goes on at all stages of a judicial proceeding." *Id*.

Thus, even where the parties agree (here, they never will), courts refuse to enter protective orders:

> Without an independent determination of good cause, the Court must not issue a protective order to prevent public disclosure of allegedly confidential information .... To do so would amount to an improper grant of carte blanche to the parties to seal or protect whatever they desire.

Sims, 2017 U.S. Dist. LEXIS 121392, at *11; *Taylor v. Hercules Tire & Rubber Co*., 2007 U.S. Dist. LEXIS 91836, at *2 (S.D. Ill. Dec. 12, 2007) ("[t]he proposed protective order and motion does not comport with Federal Rule of Civil Procedure 26(c), which provides that protective orders may be entered by the Court 'for good cause shown'"). Trial courts may not merely "rubber stamp" an agreed protective order even if the parties jointly seek such an order.

D. Defendants Cannot Carry Their Burden of Proof to Justify the Seal-and-Secret Regime the Protective Order They Previously Proposed Would Impose in This Case

Kentucky law and its Rules of Civil Procedure place the burden of proving trade secrets and the need for confidentiality on the party seeking protection. The party seeking confidentiality or claiming that a privilege applies to information sought in discovery bears the burden of proving that good cause exists for the documents' protection. *Grange*, 151 S.W.3d at 818. Under CR 26.03(1), a court may issue a protective order only "for good cause shown." Unsupported claims by counsel that there are trade secrets and confidential information is not sufficient to justify the extraordinary relief of keeping information from the public view — particularly in a case like this.

The law requires that a party from whom discovery is sought must support the "good cause" requirement with a ***particular and specific*** demonstration of fact, as distinguished from stereotyped and conclusory statements. *Grange*, 151 S.W.3d at 817. The case law is uniform in holding that the party seeking a protective order under CR 26.03 ***has the burden of proof in establishing all requisite factors and in making all necessary showings***. *See Wal-Mart Stores, Inc. v. Dickinson*, 29 S.W.3d 796, 800–01 (Ky. 2000) (denying a motion for a protective order because "Wal-Mart's ***general claims*** are not well taken and cannot serve to establish irreparable harm").

In order to show "good cause," the party resisting discovery must make a "specific showing of privilege." *Edwards v. Hickman*, 237 S.W.3d 183, 191 (Ky. 2007) (citing *Grange,* 151 S.W.3d at 816–17). "[A] general claim that all business and financial records are confidential simply is insufficient to defeat the proper discovery request." *Id.* at 192. ***Even where a document contains a trade secret or confidential information***, that fact, with nothing more, is insufficient to warrant non-disclosure of that document.

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There also must be proof of a specific, clearly defined harm to the Defendant resulting from its disclosure.[17]

Federal courts, which frequently handle high profile public interest cases like this one, agree that the party seeking protection bears a significant burden of proof to get any protective order. *Pansy v. Stroudsburg,* 23 F.3d 772 (3d Cir. 1994), stated:

> In the context of discovery, it is well-established that a party wishing to obtain an order of protection over discovery material must demonstrate that "good cause" exists for the order of protection. ...
>
> ***
>
> We therefore exercise our inherent supervisory power to conclude that whether an order of confidentiality is granted at the discovery stage or any other stage of litigation, including settlement, good cause must be demonstrated to justify the order. ...
>
> "***Good cause is established on a showing that disclosure will work a clearly defined and serious injury to the party seeking closure. The injury must be shown with specificity.***" ... "Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning," do not support a good cause showing. ... ***The burden of justifying the confidentiality of each and every document sought to be covered by a protective order remains on the party seeking the order.*** ...

In *Borum v. Smith*, the Court found that:

> "As a general rule, pre-trial discovery proceedings are conducted in public unless compelling reasons exist to deny access." ... Pursuant to Rule 26(c), the Court may enter a protective order "for good cause shown" to protect a party by requiring that confidential material not be revealed or be revealed only in a designated manner. ***When a business seeks protection of a trade secret or of commercial***

[17] *See also, e.g., Davis v. General Motors Corp.*, 64 F.R.D. 420 (N.D. Ill. 1974); *Cipollone v. Liggett Grp., Inc.*, 106 F.R.D. 573, 583 (D.N.J. 1985), *rev'd on other grounds by* 785 F.2d 1108 (3d Cir. 1986) (holding that party seeking protection of its documents bears the burden of showing ***both*** that the information sought requires protection under Rule 26 and that the disclosure will result in a clearly defined and serious injury).

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> ***information under Rule 26(c), it must show that disclosure would cause "clearly defined and very serious injury."*** ... "[V]ague and conclusory allegations of confidentiality and competitive harm are insufficient. ***The movant must make 'a particularized showing that the information sought is confidential' and come forth with 'specific examples' of competitive harm."***

2017 U.S. Dist. LEXIS 91127, at *3 (W.D. Ky. June 14, 2017).

In order to override the common law right of access, the party seeking the sealing of judicial records "bears the burden of showing that the material is the kind of information that courts will protect" and that "disclosure will work a clearly defined and serious injury to the party seeking closure." *Miller v. Indiana Hosp.*, 16 F.3d 549, 551 (3d Cir. 1994) (citing *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1071 (3d Cir. 1984)). In delineating the injury to be prevented, specificity is essential. *See Publicker*, 733 F.2d at 1071. Broad allegations of harm, bereft of specific examples or articulated reasoning, are insufficient.

"Purported trade secrets and other confidential commercial information enjoy no automatic protection from disclosure; [i]n order to show that certain designated information should be protected, [the party seeking a] protective order must show that the information rises to the level of a trade secret and that there is good cause to protect the information." *Turick by Turick v. Yamaha Motor Corp., USA*, 121 F.R.D. 32, 35 (S.D.N.Y. 1988). As with CR 26.03, "[t]he party seeking a protective order under Rule 26 [of the Federal Rules of Civil Procedure] bears the burden of demonstrating the "good cause" required to support issuing such an order." *Waelde v. Merck, Sharp & Dohme*, 94 F.R.D. 27, 28 (E.D. Mich. 1981). In order to show good cause, "the moving party must show 'that disclosure will work a clearly defined and serious injury.'" *Republic Servs. v. Liberty Mut. Ins. Co.*, 2006 U.S. Dist. LEXIS 38752, at *18 (E.D. Ky. June 9, 2006).

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The Court must require Defendants to establish the specific entitlement to a trade secret or other protected confidentiality on a particularized showing. And the determination of protection must be made on a case-by-case basis. *See Air Crash*, 2009 U.S. Dist. LEXIS 65974, at *37.

But beware. ***We already know something about Defendants' intentions*** here, due to what Blackstone said in its answer to the standard (and CR 26 — required) Interrogatory concerning its insurance coverage, when the *Mayberry* Plaintiffs sought discovery:

> **RESPONSE:** Blackstone Defendants object to this Request to the extent it seeks all "insurance policies that were in effect during the Relevant Period" on the grounds that it is overly broad, vague, ambiguous, and calls for information that is irrelevant and immaterial to the subject matter of the litigation and is not reasonably calculated to lead to the discovery of admissible evidence. Blackstone Defendants further object to this Request on the grounds that it seeks information that is a trade secret or other confidential or proprietary research, development, or commercial information. Subject to and without waiving the foregoing and General Objections, Blackstone Defendants will produce such information only after the entry of a suitable protective order.

This is nothing more than boilerplate Wall Street obstruction. Insurance coverage is not a trade secret and it is complete bad faith to claim it is. It is plain that the observations of Judge Forester in the *Comair* litigation when addressing confidentiality designations by defense counsel, apply here, "***Comair's designation could not possibly be based on a good faith belief of entitlement to protection***." *See Air Crash*, 2009 U.S. Dist. LEXIS 65974, at *35.

Defendants earlier made only blanket assertions that the requested documents and information now sought in this action were "confidential" or are "trade secrets" and failed

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to provide any specificity. Absent specificity, Defendants cannot meet their burden of showing "good cause" for withholding documents and information responsive to the Tier 3 Trust Plaintiffs' discovery requests. They have never produced even one example of how any of them would suffer a specific, clearly-defined harm as a result of the disclosure of the requested information and documents. "[V]ague and conclusory allegations of confidentiality and competitive harm are insufficient. The [party seeking a protective order] must make '***a particularized showing that the information sought is confidential*' *and come forth with specific examples of competitive harm***." *Waelde*, 94 F.R.D. at 28 (citation omitted). Here, Defendants cannot make a particularized showing that the information contained in the requested documents is confidential, and they have failed to show that they will suffer specific harm if that information is disclosed without a confidentiality order. Defendants failed to even produce an affidavit to corroborate the claim that the then-requested documents meet the strict requirements of trade secrets. *See Motto v. Corr. Med. Servs.*, 2009 U.S. Dist. LEXIS 9124, at **5–6 (S.D. W. Va. Feb. 9, 2009) (rejecting an argument for trade-secret protection because the "factual allegations" in the supporting affidavit were insufficient). Indeed, evidentiary support for the need of trade-secret protection must be specific and particularized:

> … [T]his Court can find nothing unique or distinctive about the safety procedures or methodologies outlined in the portions of Home Depot's SOPs at issue. Further, the Court cannot discern any competitive advantage to be gained by Home Depot related to safely stacking and displaying merchandize …. That other competitors may adopt Home Depot's safety policies without incurring the associated expenses does not constitute a "clearly defined and very serious injury."

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Mitchell v. Home Depot U.S.A., 2012 U.S. Dist. LEXIS 82562, at **14–15 (W.D. Ky. June 14, 2012) (quoting *Waelde*, 94 F.R.D. at 28).

Materials ***from several years ago*** cannot meet the trade secret test. Just considering this Motion from the viewpoint of the Hedge Fund Sellers, their fund-selection strategies, and their fees do not amount to trade secrets entitled to the extraordinary and secret regime they previously sought. Second, even if their fund-selection strategies are the "secret sauce" they imply, it is difficult to imagine how there could be any trade secrets when those strategies were employed — three or six or eight or more years ago — particularly when KRS's "Absolute Return" investments collectively have yielded a mere 3.73% since inception (while KRS's cash has returned 3.75% since inception). If that is a "trade secret," it is one with zero economic value. Indeed, it is far more likely that requested discovery — rather than eliciting any true "trade secrets" — will prove to be embarrassing for Defendants, but that is insufficient to outweigh the public right of access. Surely the gigantic obscenely large fees which we think exceeded what KRS got are not trade secrets, no matter how badly they don't want anyone to ever find out how massive — and massively unfair — they were. ***Any protective order that gives a party free rein to decide what portions of the record to be kept secret is invalid***. *Citizens First*, 178 F.3d at 944–45 (citing *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 227 (6th Cir. 1996)). The protective order offered up by Defendants earlier did that. ***We should not waste our time in repeating that fruitless exercise***. No protective order should be entered in this case. If a Defendant has a particular document — some extraordinary item somehow deserving protection, they can ask the Tier 3 Trust Plaintiffs' counsel to consent and absent consent seek an order sealing that document.

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E. As Fiduciaries to KRS and Its Members, Defendants Have No Attorney-Client Shield to Justify Any Seal-and-Secret Regime Like the One Previously Sought

The Court has previously upheld the allegations ***that each Defendant named in this action is a fiduciary based on the allegations in the Mayberry derivative complaint — repeated here in this breach-of-trust action by the counsel who drafted those allegations there***. As fiduciaries, their duties are of the highest order, specifically that they are to act ***solely*** in the interest of their beneficiaries even to the detriment of themselves. Transparency in all dealings with beneficiaries is the default rule. The Court has already ruled in the context of denying Ice Miller's Motion to Dismiss in its November 30, 2018 order that, due to the fiduciary nature of KRS's relationships with its members, there is no attorney client privilege. *See* Nov. 30, 2018 Opinion & Order. *Durand v. Hanover Ins. Grp., Inc.,* 244 F. Supp. 3d 594 (W.D. Ky. 2016), provides a comprehensive discussion of the fiduciary exemption in an ERISA litigation — *i.e.*, in pension fund fiduciary suits like these, there is no attorney-client privilege. This is consistent with a well-established body of law that there is no attorney-client privilege available in well-pleaded litigation involving fiduciaries' breaches. *See, e.g., Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970); *Wal-Mart Stores, Inc. v. Ind. Elec. Workers Pension Trust Fund*, 95 A.3d 1264, 1276–78 (Del. 2014); *NAMA Holdings, LLC v. Greenberg Traurig LLP*, 133 A.D.3d 46 (N.Y. App. Div. 1st Dep't 2015); *see also The Shareholders' Derivative Claim Exception to the Attorney Client Privilege*, 48 LAW & CONTEMPORARY PROBLEMS NO. 3 at 1999 (Duke Univ. 1985). The same fiduciary exception applies where, as here, beneficiaries of a trustee sue the trusts' and other fiduciaries for breach of fiduciary duties. The same rule applies in the context of trustee-beneficiary litigation. *Riggs Nat'l Bank v. Zimmer*, 355 A.2d 709 (Del. 1976); *In re Kipnis*

Section 3.4 Trust, 329 P.3d 1055 (Ariz. Ct. App. Div. 1 2014); RESTATEMENT (THIRD) OF TRUSTS § 82 (2005).[18]

III. CONCLUSION

The imperative of open court proceedings, as emphasized by Justice Oliver Wendell Holmes more than 130 years ago, is enduring:

> [I]t is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public, more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings.

Cowley v. Pulsifer, 137 Mass. 392, 394 (1884) (Holmes, J.) .

Now, as then, the public, KRS members and trust beneficiaries must be allowed to observe how the justice system works when their rights are at stake and the interest of the tax-paying public is implicated. ***This is all the more so where***, ***as here***, ***the attorney general prosecuting the case has been the beneficiary of political contributions from target defendants***. *See* Mayberry 5's Aug. 31, 2021 Motion to Intervene in Case No. 17-CI-1348 at 19–20. In light of the importance of the KRS funding collapse that underlies this litigation to all Kentuckians as well as the KRS trust beneficiaries, and the impact that this debacle has and will continue to have on this Commonwealth, the public interest of Kentucky's citizens in this case is paramount. The Court should grant the Tier 3 Trust Plaintiffs' motion.

[18] *See also* The Tier 3 Plaintiffs' Submission re: KRS $1.2 Million Secret Report; Need for Open Proceedings; and Limitations on Use of Secret Report Without Its Public Disclosure filed June 2, 2021 in the *Mayberry* Action at 13–21.

Dated: August 31, 2021

Respectfully submitted,

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The above signature certifies that, on August 31, 2021, the foregoing was served via email in accordance with any notice of electronic service or, in the absence of an electronic notification address, via email or mail as indicated below, to:

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EXHIBIT 1

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In Re ENRON CORPORATION SECURITIES LITIGATION	Civil Action No. 01-3624 (Consolidated)
	CLASS ACTION
MARK NEWBY, et al., Individually and on Behalf of All Others Similarly Situated, Plaintiffs, VS. ENRON CORP., et al., Defendants	
THE REGENTS OF THE UNIVERSITY Of CALIFORNIA, et al., individually and On Behalf of All Others Similarly Situated VS. KENNETH L. LAY, et al., Defendants.	

ORDER ON PLAINTIFFS' MOTION TO PRECLUDE THE FILING OR PRODUCTION OF DOCUMENTS SUBJECT TO A PROTECTIVE ORDER

#1192

Lead Plaintiff has filed a Motion to Preclude the Filing or Production of Documents Subject to a Protective Order. (Instrument No.1037). This motion has been filed before discovery has begun, and one of the arguments defendants make against it is that it is premature. Nevertheless, the defendants have made it clear that they want an umbrella or blanket protective order, shielding all forthcoming discovery from public gaze, pursuant to Rule 26(c).[1] There is a mountain of briefing on this motion, and the briefs make a variety of arguments about the discovery process, but the issue boils down to a simple one. Should the Court impose upon the parties a blanket protective order, shielding all discovery from public gaze unless a party shows it should not be so protected, or should the Court require the parties or individuals who wish their discovery shielded to show some reason for the protection.

Defendants point to a number of sample protective orders, all of which place the onus upon the party wishing to do away with the protective shield to show why the discovery should not be protected. All of these samples are protective orders

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[1]Rule 26(c) reads:
Protective Orders. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, ...

that have been agreed to by the parties. Of course, if the parties wish to agree to protect the discovery in a case, courts are almost always willing to accommodate their wishes by signing an agreed order, but these orders, and the fact that they are used extensively in litigation, are of no help to this Court in determining the issue raised.

Defendants also argue that it is easier, faster, and less costly for them to produce their documents, unexamined, to the document depository, and if they have to go through their documents to determine if there are any documents that are privileged or sensitive, then it is much more trouble for them to produce documents.

Defendants argue that many of the documents could contain trade secrets of the companies involved; they could contain attorney client communications that are privileged; they could contain sensitive and private personnel file information, tax returns, and information from third parties that should be kept secret by law or agreement. Moreover, these documents could prove annoying, embarrassing, or oppressive if they were made public. There has been no argument that these documents are not relevant to the case.[2] Indeed, there could not be such an argument made at this time because, except for a few sets of requests, discovery has not begun. Rather, the argument is that because some the documents may contain matters that

[2]"Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party. . . ." Rule 26(b)(2), Federal Rules of Civil Procedure.

should be the subject of a protective order, all documents produced should be protected.

Lead Plaintiff is desirous of sharing the discovery it receives from defendants with the public and the press by putting some of the discovery documents on its web site. It argues strenuously that it should not be forced to abide by a protective order that forbids dissemination of the documents it obtains, and that the public has a hunger for and right to the information contained in the documents of this highly publicized case. Although the defense responds that it is not the plaintiff's place to do so, lead plaintiff makes many of the argument for the news gathering organizations who have sought leave to file amicus briefs on the matter.

The Fifth Circuit held in 1985, "A party may generally do what it wants with material obtained through the discovery process, as long as it wants to do something legal." *Harris v. Amoco Production Co.*, 768 F.2d 669, 683-684 (5th Cir. 1985). There is no question, then, that in the Fifth Circuit we start with a presumption that matters obtained through the discovery process are capable of being made public, although the discovery process itself may be conducted in private. *Seattle Times Co. v. Rhinehart,* 467 U. S. 20, 33 (1984). Other Circuits are in accord. In *Citizens First National Bank of Princeton v. Cincinnati Insurance Company* 178 F.3d 943, 945 (7th Cir. 1999), Judge Posner summed it up:

> Most cases endorse a presumption of public access to discovery materials, *e.g., Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, [24 F.3d 893, 897 (7th Cir. 1994)]; *Beckman Industries, Inc. v. International Ins. Co.*, 966 F.2d 470,475-76 (9th Cir. 1992), *Public Citizen v. Liggett Group, Inc.*, [858 F.2d 775, 788-90 (1st Cir. 1988)]'; *Meyer Goldberg, Inc. v. Fisher Foods, Inc.*, 823 F.2d 159, 162-64 (6th Cir. 1987); *In re Agent Orange Product Liability Litigation*, [821 F.2d 139, 145-56 (1st Cir. 1987)], and therefore require the district court to make a determination of good cause before he may enter the order. . . . Rule 26(c) would appear to require no less.

Similarly, the Ninth Circuit held in *San Jose Mercury News, Inc. v. United States Dist. Ct.*, 187 F.3d 1096, 1103 (9th Cir. 1999), "[i]t is well-established that the fruits of pre-trial discovery are, in the absence of a court order to the contrary, presumptively public. Rule 26(c) authorizes a district court to override this presumption where 'good cause' is shown," *citing In re Agent Orange Product Liability Litig.*, 821 F.2d 139, 145.

The Rule 26(c), by its own language, and the case law, provide that the burden is on the party wishing to obtain a protective order to show that good cause exists for the order. To establish that good cause exists that "party must show that a specific prejudice or harm will result if no protective order is granted." *Phillips v. General Motors Corporation*, 37 F.3d 1206, 1210-11 (9th Cir. 2002); see also,

Beckman Indus. 966 F.2d 470, 476; *San Jose Mercury News, Inc.*, 187 F.3d 1096, 1102; *Citizen's First National Bank,* 178 F.3d 943,945.

Both *Phillips* and *Citizen's First National Bank* scolded the district or magistrate judge for failing to make a good cause analysis of the protective order. 307 F.3d 1206, 1211 and 178 F.3d 943, 945, respectively. Judge Posner reasoned

> the public at large pays for the courts and therefore has an interest in what goes on at all stages of a judicial proceeding. . . .That interest does not always trump the property and privacy interests of the litigants, but it can be overridden only if the latter interests predominate in the particular case, that is, only if there is good cause for sealing a part or the whole of the record in that case. . . . The judge is the primary representative of the public interest in the judicial process and is duty-bound therefore to review any request to seal the record (or part of it).

Citizens First National Bank, 178 F.3d 943, 945.

Judge Posner recognizes that in cases with large numbers of documents the district or magistrate judge is often not in a position to make the good cause determination on a document by document basis, but emphasizes that the party seeking protection must in good faith describe a "properly demarcated category of legitimately confidential information." *Citizens First National Bank*, 178 F.3d 943, 946.

This Court cannot, at this stage of the proceeding make a good cause analysis of any documents that have been or will be placed in the document

depository. It is incumbent upon the defendants in the case, if they want parts of their discovery protected, to move in good faith for a particularized protective order pursuant to Rule 26(c). Accordingly, it is hereby

ORDERED, ADJUDGED, and DECREED, that Plaintiffs' Motion to Preclude the Filing or Production of Documents Subject to a Protective Order is GRANTED to the extent that the Court will not impose a blanket protective order covering all discovery in this case.

Signed at Houston, Texas, this 18th day of December, 2002.

MELINDA HARMON
UNITED STATES DISTRICT JUDGE

EXHIBIT 2

EXHIBIT 2

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I

CIVIL ACTION NO. 17-CI-1348
Electronically Filed

JEFFREY C. MAYBERRY, ET AL. PLAINTIFFS

V.

KKR & CO. L.P., ET AL. DEFENDANTS

[PROPOSED] PROTECTIVE ORDER

This Matter is before the Court on the Motion for Protective Order by Defendants KKR & Co. L.P., Henry Kravis, George Roberts, Prisma Capital Partners L.P., Girish Reddy, The Blackstone Group, L.P., Blackstone Alternative Asset Management L.P., Stephen A. Schwarzman, J. Tomilson Hill, Pacific Alternative Asset Management Company, LLC, Jane Buchan, Ice Miller LLP, Cavanaugh Macdonald Consulting LLC, Thomas Cavanaugh, Todd Green, Alisa Bennett, R.V. Kuhns & Associates, Inc., Jim Voytko, and Rebecca Gratsinger. The Court being sufficiently advised, and for good cause shown, hereby **ORDERS** the following:

1. This Protective Order applies to all documents, information, tangible items, and testimony disclosed in this action by a party or third party ("Disclosing Party") to another party or parties ("Receiving Party"), including all portions of transcripts of depositions, exhibits, answers to interrogatories, responses to requests for admission, documents or things ("Discovery Material").

2. All Discovery Material shall be used solely for the preparation for, litigation of, and presentation of claims or defenses in this action and shall not be used for any business, commercial, competitive, personal, or other purpose.

3. "Confidential Information" is intended to mean nonpublic information of the type contemplated by Rule 26 of the Civil Rules, and which the Disclosing Party has designated pursuant to the provisions set forth below as "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY." Confidential Information as used in this Order shall refer to any so designated document, testimony or other Discovery Material and all copies thereof, and shall also refer to the information contained in such materials.

4. Confidential Information shall not be disseminated to anyone, nor made public, nor used, except as permitted by this Protective Order or by further order of the Court.

5. A Disclosing Party shall have the right to designate his, her or its Confidential Information as "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY" in accordance with the terms of this Order.

a. A Disclosing Party may designate as "CONFIDENTIAL" any Discovery Material that contains proprietary or other confidential information, including, but not limited to, confidential financial information or other proprietary business or technical information of the Disclosing Party or of a third party which the Disclosing Party is under a duty to maintain confidential, and confidential information subject to Kentucky Rules of Professional Conduct 1.6 and 1.9.

b. A Disclosing Party may designate as "ATTORNEYS' EYES ONLY" any Discovery Material the Disclosing Party reasonably and in good faith believes contains trade secrets or other information that the party reasonably believes would result in competitive, commercial or financial harm to the Disclosing Party or the Disclosing Party's personnel, clients or customers.

6. All documents containing Confidential Information shall be marked at the time that copies are produced to a Receiving Party with the legend "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY" stamped or labeled on each page in a manner so as not to interfere with the legibility thereof. Documents must be so designated at the time of delivery to a Receiving Party, although failure to designate such documents will not preclude a Disclosing Party from subsequently designating such material, in accordance with the terms of Paragraph 16 below.

7. Discovery Material designated as "CONFIDENTIAL" shall be maintained in confidence by each Receiving Party pursuant to the requirements of Paragraph 4 herein, and shall not be disclosed to any person except:

a. the Court and its officers;

b. counsel of record and employees of counsel of record who have been advised of their obligations hereunder;

c. in-house attorneys of the Plaintiffs or the Defendants and their support staff who have been advised of their obligations hereunder;

d. officers and employees of a Receiving Party whose assistance is reasonably necessary for the preparation for, litigation of, and presentation of claims or defenses in this action who have been advised of their obligations hereunder;

e. counsel for insurance companies that may provide insurance coverage to any Defendant for any claim asserted in this action;

f. trial and deposition witnesses, whether employed by the Plaintiff, the Defendant, or otherwise, in preparation for testimony, or during trial, a hearing, or at a

deposition, to the extent counsel has a good faith belief that the witness previously received or had access to the Discovery Material;

g. any officer before whom a deposition is taken, including stenographic reporters and any necessary secretarial, clerical or other personnel of such officer;

h. experts, consultants and/or mock jurors engaged by counsel or the parties to assist in this litigation and who have signed the Agreement To Be Bound By Protective Order (attached to this Order as Exhibit A); and

i. any other person the parties agree to in advance and in writing and who has signed the Agreement To Be Bound By Protective Order (Exhibit A).

Counsel of record for the appropriate Receiving Party shall maintain the original of each Agreement To Be Bound by Protective Order executed pursuant to subpart (h) or (i) of this Paragraph until 60 days after of final termination of this action, whether by settlement or exhaustion of all appeals (or such other amount of time on which counsel mutually agree).

8. Disclosure of Discovery Material designated "ATTORNEYS' EYES ONLY" shall be limited to the persons identified by Paragraphs 7(a), (b), (g), and (i); experts and consultants engaged by counsel or the parties in this litigation and who have signed the Agreement To Be Bound By Protective Order (Exhibit A); and any person indicated on the face of a document or accompanying cover letter, email, or other communication to be the author, addressee, or an actual or intended recipient of the document, or, in the case of meeting minutes and presentations, an attendee of the meeting, but shall not be assessed by or discussed with persons identified by Paragraph 7(d), i.e., the parties to this action or regularly employed employees, consultants and/or other representatives of a party to this case.

9. Specific testimony at a hearing or deposition may be designated as Confidential Information by making a statement to that effect on the record at the hearing or deposition. If testimony at a hearing or deposition is designated Confidential Information, only those persons who may have access to such Confidential Information, under the terms of this Order, may be in attendance to hear that testimony.

10. Within a 30-day period after receipt by the Disclosing Party of the deposition or hearing transcript, counsel for the Disclosing Party shall have the opportunity to review the transcript and correct any misdesignations and make any additional designations by page and line number believed in good faith to constitute Confidential Information. Counsel for the Disclosing Party shall notify the court reporter and each Receiving Party within such 30-day period of such corrections or additional designations. Prior to the expiration of the 30-day period, counsel for each Receiving Party shall retain and treat any non-designated portions of the transcript as Confidential Information (except that the witness deposed may be furnished with a copy of his or her transcript).

11. A Receiving Party may object in writing to any designation of Confidential Information if it believes that the designation is not warranted or justified in whole or in part. Such written objection shall describe the basis for the objection with particularity for each and every deposition transcript, exhibit, answer to interrogatories, response to request for admission, or other document to which the Receiving Party objects. Within 14 days of the written objection, the Disclosing Party or other designating party shall confer in good faith, in person or by telephone, with the objecting Receiving Party to reconsider the challenged designation. If after conferring the parties are unable to reach agreement as to the challenged designation(s), then the Disclosing Party shall file a motion for a determination by the Court in order to maintain the

challenged designation(s). To the extent a challenged designation involves the rights, contractual or otherwise, of a third party, that third party will be provided a reasonable opportunity to be heard on the motion. Until the Court rules on the motion, each Receiving Party shall continue to afford the Confidential Information in dispute the level of protection to which is entitled under this Order.

12. Nothing in this Order shall prohibit a Disclosing Party from using his, her or its own Confidential Information in his, her or its business, or from disclosing such documents or information to his, her or its own employees. Moreover, nothing in this Order shall prohibit disclosure to the author or copy recipient of any document containing Confidential Information.

13. Nothing in this Order shall preclude any person who is bound by this Order from utilizing information that was known to or possessed by the person outside of the discovery process in this action.

14. No Confidential Information designated in this action shall be filed in the public record of this action except as provided herein or otherwise pursuant to Court Order. All Confidential Material designated in accordance with the terms of this Order that is filed with the Court, and any pleadings, motions or other paper filed with the Court disclosing any such material, shall be filed under seal in accordance with this Court's procedures in a sealed envelope endorsed with the caption of this matter, an indication of the nature of the contents of the envelope, the identity of the party filing the materials, the designation "CONFIDENTIAL", and a statement in substantially the following form:

> This envelope contains documents that are subject to an Order governing discovery and the use of confidential material entered by the Court in this action. The envelope shall not be opened nor the contents thereof displayed or revealed except by Order of the Court.

In the event that briefs or other documents including Confidential Material are filed under seal, within five days of the original filing, the filing party shall file in the public record a redacted version of the filing that redacts all references to and disclosures of Confidential Material.

15. If Confidential Information is disclosed to any person other than in the manner authorized by this Order, the party responsible for the disclosure must immediately bring all pertinent facts relating to such disclosure to the attention of all counsel of record and, without prejudice to other rights and remedies of the Disclosing Party, make every effort to prevent further disclosure by it or by the person who was the recipient of such information, including requesting that the person sign the "Agreement To Be Bound by Protective Order" (Exhibit A).

16. The inadvertent or unintentional failure to designate discovery materials as Confidential Information shall not be deemed a waiver in whole or in part of a Disclosing Party's claim of confidential treatment under the terms of this Order. If a document, transcript, or thing is produced for which the designation Confidential Information is lacking but should have appeared, the Disclosing Party may designate such Confidential Information and restrict future disclosure of the document, transcript, or thing in accordance with this Order by notifying each Receiving Party in writing. Each Receiving Party shall then take reasonable steps to prevent any further disclosure of such newly designated Confidential Information, except as permitted by this Order.

17. Any person in possession of another party's Confidential Information who receives a subpoena (or other process) from any person (including natural persons, corporations, partnership, firms, governmental agencies, departments or bodies, boards, or associations) that is not a party to this Order seeking production or other disclosure of such Confidential Information shall, if not otherwise prohibited by law, give prompt written notice to counsel for the Disclosing

Party, identifying the material sought and enclosing a copy of the subpoena or other process. The party receiving the subpoena (or other process) shall reasonably cooperate with efforts by the Disclosing Party to oppose production pursuant to the subpoena or to condition production upon the imposition of conditions to protect against public disclosure of Confidential Information.

18. If a Disclosing Party inadvertently discloses information subject to a claim of attorney-client privilege or work product protection ("Inadvertently Disclosed Information"), such disclosure shall not constitute or be deemed a waiver or forfeiture of any claim of privilege or work product protection with respect to the Inadvertently Disclosed Information or its related subject matter in this litigation or in any other court or legal proceeding.

a. If, at any time prior to the trial of this action, the Disclosing Party discovers that it has disclosed Inadvertently Disclosed Information, it shall, as soon as practicable after learning that such information was inadvertently or mistakenly produced, notify each Receiving Party in writing of the inadvertent disclosure and identify all such Inadvertently Disclosed Information by Bates number. Upon notice of a claim of inadvertent disclosure, each Receiving Party shall, within 10 business days, return, destroy, sequester, or delete all copies of the Inadvertently Disclosed Information, and provide a certification of counsel that all such information has been returned, destroyed, sequestered, or deleted. Until the Court rules on the privileged or protected status of the Inadvertently Disclosed Information, the Receiving Party shall not review, use, disclose, or disseminate such information in any way (including, but not limited to, using the information at depositions or trial), and must take reasonable steps to retrieve the Inadvertently Disclosed Information if it was disseminated by the Receiving Party prior to such notification. The Disclosing Party must preserve the Inadvertently Disclosed Information until the privilege claim is resolved.

b. Within 10 business days of the notification that such Inadvertently Disclosed Information has been returned, destroyed, sequestered, or deleted, the Disclosing Party shall produce a privilege log with respect to the Inadvertently Disclosed Information. Within 10 business days after receiving the Disclosing Party's privilege log, any Receiving Party may notify the Disclosing Party in writing of an objection to a claim of privilege or work product protection with respect to the Inadvertently Disclosed Information. Within 10 business days of the receipt of such notification, the Disclosing Party and the objecting Receiving Party shall meet and confer in an effort to resolve any disagreement concerning the Disclosing Party's privilege or work product claim. If, for whatever reason, the parties do not resolve their disagreement after conducting the mandatory meet and confer, the Receiving Party may request a conference with the Court or move the Court for an order compelling production of the Inadvertently Disclosed Information. The motion shall not assert as a ground for entering such an order the fact or circumstances of the inadvertent production.

c. The Disclosing Party bears the burden of establishing the privileged or protected nature of any Inadvertently Disclosed Information. Nothing in this Order shall limit the right to request an in camera review of the Inadvertently Disclosed Information.

19. Within 60 days of final termination of this action, whether by settlement or exhaustion of all appeals (or such other amount of time on which counsel mutually agree), each Receiving Party shall be under obligation to assemble and return to the Disclosing Party, or alternatively, to destroy and provide a certificate of destruction of, all Discovery Material received, directly or indirectly from the Disclosing Party embodying Confidential Information, including all copies of such material which may have been made. Notwithstanding the foregoing,

the parties agree that an archival copy of the attorney's file, including work product, e-mails, evidence and briefs submitted in the course of the proceedings, may be retained.

SO ORDERED this ___ day of _____, 2018.

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

Tendered Filed 17-CI-01345 08/31/2021 Amy Feldman, Franklin Circuit Clerk

EXHIBIT A

Agreement To Be Bound By Protective Order

I have been informed that on _____, 2018, the Franklin Circuit Court for the Commonwealth of Kentucky entered a protective order in litigation captioned *Jeffrey C. Mayberry, et al. v. KKR & Co. L.P., et al.*, Civil Action No. 17-CI-1348 (the "Protective Order"). I have read the Protective Order and agree to abide by the obligations of the Protective Order as they apply to me. I acknowledge and agree that under Paragraph 4 of the Protective Order any Discovery Material disclosed to me in this action may be used solely for the preparation for, litigation of, and presentation of claims or defenses in this action and shall not be used for any business, commercial, competitive, personal, or other purpose.

I voluntarily submit to the jurisdiction of the Franklin Circuit Court for the Commonwealth of Kentucky for purposes of any proceeding related to the Protective Order, including my receipt or review of information that has been designated as "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY."

_____
(Signature)

_____
(Printed Named)

_____
(Title or Position)

_____
(Company)

Dated:_____

COMMONWEALTH OF KENTUCKY
COUNTY OF FRANKLIN CIRCUIT COURT
DIVISION I
CASE NO. 21-CI-00645

TIA TAYLOR, *et al.*, as Members and Beneficiaries of Trust Funds of the KENTUCKY RETIREMENT SYSTEMS, Its Pension and Insurance Trusts for the Benefit of Those Trusts — PLAINTIFFS

vs.

[PROPOSED] ORDER GRANTING THE TIER 3 TRUST PLAINTIFFS' MOTION FOR ORDER DIRECTING THAT NO PROTECTIVE ORDER BE ENTERED AND THAT COMPLETE PUBLIC ACCESS TO ALL PROCEEDINGS, INCLUDING DISCOVERY, WILL BE ALLOWED

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

Having considered the motion of Tia Taylor, Ashley Hall-Nagy, Bobby Estes and Jacob Walson for open proceedings, and good cause appearing, the Court grants the motion and orders that:

1. The proceedings in this action shall be open to the public in all respects;

2. No protective order regarding the confidentiality of discovery materials shall be entered;

3. Absent specific court approval, no document, including documents produced in discovery, shall be filed under seal or with restricted access; and

4. Parties and counsel shall be permitted to share documents obtained via discovery with members, the press, regulators, legislators and prosecutors.

So ORDERED this ____ day of October, 2021.

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

EXHIBIT B

EXHIBIT B

COMMONWEALTH OF KENTUCKY
COUNTY OF FRANKLIN CIRCUIT COURT
DIVISION ONE
CASE NO. 21-CI-00645

TIA TAYLOR, *et al.* PLAINTIFFS

vs. **Plaintiffs' Supplemental Submission Regarding New Development**

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

ELECTRONICALLY FILED

* * * * * * * *

During the discovery hearing conducted in *Commonwealth v. KKR & Co., L.P.*, Case No. 17-CI-01348, on March 10, 2022, counsel for the Office of the Attorney General ("OAG") definitively announced that **the OAG does not represent KRS**[1] in that case. This new development has important implications that should be brought to the attention of the Court, much as new authority would be.

One implication of the OAG's announcement is that the "field" that the OAG purports to "occupy" has shrunk — or at least its metes and bounds have become more apparent. The OAG remains well situated to recover damages for and on behalf of the state treasury. But **the OAG**, **now having disavowed representation of KRS**, **is not in a position to recover the** "**trust damages**."[2]

Only two avenues for recovery exist in the KRS/hedge fund cases: "trust

[1] We continue to refer to "KRS" as it existed prior to the KPPA reorganization.

[2] By "trust damages" we mean losses suffered by the KRS trust corpus, which we allege were caused by the sole Trustee's breaches of trust and/or the participation by the third-party defendants in those breaches of trust.

damages" and damages to the state treasury. There is **no third avenue**.

"Trust damages" may only be sought and recovered by the trustee (directly or derivatively) or, in cases such as this one where the trustee has committed breach of trust, by beneficiaries suing directly. There is **no third possibility**. That is because **a trust is not a separate entity**, **not a distinct legal person**, **and it cannot retain counsel or recover damages as a party in its own name**.[3]

The OAG has now unambiguously confirmed that it does not represent the sole Trustee. The OAG does not and cannot represent the Tier 3 beneficiaries,[4] private parties whose interests are different from and in conflict with the interests of the state treasury, *i.e.,* "the Commonwealth, the body politic," to which the OAG owes its "primary obligation."[5] And the OAG cannot, as a matter of legal metaphysics, represent the trust directly. So, it is now more apparent than ever that the part of the "field" where "trust damages" reside is *not* "occupied" by the OAG.[6]

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[3] *See* Plaintiffs' Omnibus Opposition to Defendants' Motions to Dismiss the Complaint (filed in this case on December 29, 2021) at 41–46.

[4] The OAG unequivocally stated in a prior hearing in Case No. 17-CI-01348 that it was not acting in a *parens patriae* capacity. Nor could it, for many reasons. How, for example, could the Commonwealth act as *parens patriae* to protect the interests of citizens who have been harmed by an arm of the Commonwealth — and who are already acting to protect their own interests?

[5] *See Commonwealth ex rel. Beshear v. Bevin*, 498 S.W.3d 355, 363 (Ky. 2016).

[6] Even if the AG decided to represent KRS, the field would not be pre-emptively occupied, as the OAG is without power to "take" private claims (*i.e.*, the Tier 3 claims) simply so he may take control over those private claims and prosecute them with his own contingent fee counsel. That would be an unconstitutional abuse of sovereign authority. Plus, KRS is subject to the *in pari delicto* defense and possibly others, whether represented by the AG or not — another reason to reject any assertion of pre-emptive occupation.

Dated: April 6, 2022

Respectfully submitted,

s/ Michelle Ciccarelli Lerach

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CERTIFICATE OF SERVICE

The above signature certifies that, on April 6, 2022, the foregoing was served via email in accordance with any notice of electronic service or, in the absence of an electronic notification address, via email or mail as indicated below, to:

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COMMONWEALTH OF KENTUCKY
COUNTY OF FRANKLIN CIRCUIT COURT
DIVISION I
CASE NO. 21-CI-00645

TIA TAYLOR, *et al.*, as Members and Beneficiaries of Trust Funds of the KENTUCKY RETIREMENT SYSTEMS, Its Pension and Insurance Trusts for the Benefit of Those Trusts — PLAINTIFFS

vs.

[PROPOSED] ORDER GRANTING THE TIER 3 TRUST PLAINTIFFS' MOTION TO OPEN DISCOVERY AND TO RENEW MOTION FOR OPEN PROCEEDINGS

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

Having considered the motions of Tia Taylor, Ashley Hall-Nagy, Bobby Estes and Jacob Walson to open discovery and to renew motion for open proceedings, and good cause appearing, the Court grants both motions and orders that:

1. Defendants shall respond to plaintiffs' discovery requests forthwith;

2. The proceedings in this action shall be open to the public in all respects;

3. No protective order regarding the confidentiality of discovery materials shall be entered;

4. Absent specific court approval, no document, including documents produced in discovery, shall be filed under seal or with restricted access; and

5. Parties and counsel shall be permitted to share documents obtained via discovery with members, the press, regulators, legislators and prosecutors.

So ORDERED this ____ day of May, 2022.

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