In light of all the facts *supra*, maintenance of a suit against KKR would not "offend traditional notions of fair play and substantial justice." Further, these facts vividly illustrate a course of business conduct over which it is imminently fair to subject KKR to Kentucky jurisdiction. Indeed, the Court cannot conceive of circumstances in which KKR should not have reasonably anticipated being subject to the jurisdiction of Kentucky courts. When KKR registered as a lobbyist with the Kentucky Ethics Commission and sought to influence Kentucky policymakers, it would have been reasonable to anticipate being haled into court in Kentucky and it is fair to do so. When KKR acquired substantial ownership interests in Louisville-based PharMerica and BrightSpring, implemented dramatic strategic and operational changes within them, placed four KKR partners/other personnel on their Board of Directors it should have understood it was subject to the jurisdiction of the Kentucky courts. When KKR is currently planning and directing the issuance of an initial public offering for BrightSpring, it is reasonable to anticipate being haled into court in Kentucky and it is fair to do so. When in 2012 KKR acquired Prisma, a firm with a Kentucky office and employees as well as a majority owner (and also a significant client) which was located in Kentucky, and then blended the names of the two firms, appeared to hold itself out as having a Louisville office, and represented that Kentucky-based employees, one of whom worked from a KRS office two weeks per month, and others who made a number of trips to Kentucky were "dual employees" of KKR, it is reasonable to anticipate being haled into court in Kentucky and it is fair to do so. For all of these reasons and reasons discussed *supra*, federal due process standards have been more than satisfied.

VI. SECTIONS 50 AND 177 OF THE KENTUCKY CONSTITUTION PROHIBIT INDEMNIFICATION UNDER THE SUBSCRIPTION AGREEMENT

A. Factual Background

1. Structure of FoHF Investments

In order to invest in the Prisma, PAAMCO, and BAAM FoHF arrangements, KRS was required to purchase interests in limited liability companies ("LLCs") that had been organized under agreements between KRS and Prisma, PAAMCO, and BAAM, respectively. (Specific provisions of these LLC agreements will be detailed in Section VII, *infra*). In every instance in which KRS made an investment of capital in each Defendant's HoHF, it was treated as purchasing a "subscription for an interest" in each FoHF LLC. As such, the agreement executed by KRS each time it invested capital in the Prisma, PAAMCO, and BAAM FoHF LLCs was referred to as a "Subscription Agreement."

2. Subscription Agreements

Each Subscription Agreement included what would typically be referred to as "indemnification" language (*i.e.*, language under which one party agrees to compensate another for certain losses). The actual word "indemnify," however, is not used in any of the Subscription Agreements. Instead, the words "reimburse" (for Prisma and BAAM) and "compensate and hold harmless" (for PAAMCO) are used. Critically, each FoHF provision also includes explicit language raising potential limits on enforceability under the Kentucky Constitution.

- Prisma/KRS Subscription Agreement (executed August 23, 2011), Section 4(A):

  > [KRS] (i) acknowledges that the [LLC] and [Prisma] are relying on the representations, warranties and acknowledgments of [KRS] contained herein, and (ii) agrees to reimburse each of them against any and all claims, demands, losses, damages, costs and expenses whatsoever arising directly as a result of any material breach by [KRS] of any such, representations, warranties or acknowledgments; provided, however, that <u>[KRS's] obligations to provide such reimbursement shall be further subject to limitations imposed upon [KRS] under the Constitution of the Commonwealth of Kentucky and subsequent judicial interpretation of Kentucky laws</u>. (emphasis supplied)

- PAAMCO/KRS Subscription Agreement (executed August 29, 2011), Section VII(A):

> To the extent permitted by applicable law, including any limitations imposed upon [KRS] under the Constitution of the Commonwealth of Kentucky and subsequent judicial interpretation of Kentucky laws, [KRS] agrees to compensate and hold harmless the [LLC], [PAAMCO], their respective officers, directors, managers, employees, agents and shareholders, and each other person, if any, who controls or is controlled by any thereof, within the meaning of Section 15 of the Securities Act (collectively, "Compensated Parties"), for and against any and all loss, liability, claim, damage, cost and expense whatsoever (including, but not limited to, legal fees and disbursements and any and all other expenses whatsoever incurred in investigating, preparing for or defending against any litigation, arbitration proceeding, or other action or proceeding, commenced or threatened, or any claim whatsoever) arising out of or in connection with, or based upon or resulting from, any false representation or warranty or breach or failure by [KRS] to comply with any covenant or agreement made by [KRS] to any of the foregoing in connection with this transaction. (emphasis supplied)

- BAAM/KRS Subscription Agreement (executed August 29, 2011), Section IV(A):

> [KRS] (i) acknowledges that the [LLC] and [BAAM] are relying on the representations, warranties and acknowledgments of [KRS] contained herein, and (ii) agrees to reimburse each of them against any and all claims, demands, losses, damages, costs and expenses whatsoever arising directly as a result of any material breach by [KRS] of any such, representations, warranties or acknowledgments; provided, however, that [KRS's] obligations to provide such reimbursement shall be further subject to limitations imposed upon [KRS] under the Constitution of the Commonwealth of Kentucky and subsequent judicial interpretation of Kentucky laws. (emphasis supplied, except for "provided, however," which is underlined in original)

3. Extrinsic Information

KRS was advised throughout the negotiation of the HoHF arrangements by outside legal counsel Reinhart Boerner Van Deuren s.c. ("Reinhart"). Prisma Complaint, Delaware Court of Chancery (April 9, 2021) ¶ 16. Referencing these negotiations, BAAM provides an August 19, 2011 email from Nathan Wautier at Reinhart to Kerri Clark, BAAM's counsel. BAAM Motion to Dismiss (September 7, 2022) (the "BAAM Motion"), Exhibit C. In that email, Mr. Wautier details specific concerns relating to indemnification, specifically:

> While KRS can indemnify the [Blackstone Henry Clay Fund] and Manager (but not third parties not party to this agreement) for damages

> arising from material inaccuracies in KRS's representations in the subscription documents, the broad indemnification provisions in Section IV need to be deleted. Additionally, it should be clear that the Manager cannot offset indemnification claims against KRS assets. Lastly, KRS prefers that the term "indemnify" not be used but is fine with the concept.

Id.

4. Severability Clauses

Each of the Subscription Agreements includes a severability clause allowing for enforceability of the remainder of the contract to the extent any one provision is found invalid. The severability clause for the Prisma Subscription Agreement is included at Section 4(D).[96] The severability clause for the PAAMCO Subscription Agreement is included at Section VII(E).[97] The severability clause for the BAAM Subscription Agreement is included at Section 4(B).[98]

B. Legal Analysis

The Commonwealth has asked the Court to ascertain whether the "reimbursement" or "compensation" provisions in KRS's Subscription Agreements with Prisma, PAAMCO, and BAAM are enforceable. This analysis must begin by looking to the plain language of the contracts. To the extent the contract language is unambiguous, then the Court must apply it according to its terms. Here, such application will require the Court to determine whether KRS

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

[97] If any provision of this Subscription Agreement is invalid or unenforceable under any applicable law, then such provision shall be deemed inoperative to the extent that it may conflict therewith and shall be deemed modified to conform with such applicable law. Any provision hereof that may be held invalid or unenforceable under any applicable law or in any particular instance shall not affect the validity or enforceability of any other provisions hereof or of such provision in any other instance, and to this extent the provisions hereof shall be severable.

[98] If any provision of this Subscription Agreement is invalid or unenforceable under any applicable law, then such provision shall be deemed inoperative to the extent that it may conflict therewith and shall be deemed modified to conform with such applicable law. Any provision hereof which may be held invalid or unenforceable under any applicable law shall not affect the validity or enforceability of any other provisions hereof, and to this extent the provisions hereof shall be severable.

would be permitted to "reimburse" or "compensate" the Defendants for certain losses under Kentucky constitutional provisions.

1. The Unambiguous Language of the Subscription Agreements Places Clear Limitations on the Reach of the Indemnification Language

The threshold issue in contract interpretation is to determine whether the terms of the contract are ambiguous. If the contract is unambiguous, "a written instrument will be enforced strictly according to its terms." *Frear v. P.T.A. Industries, Inc.*, 103 S.W.3d 99, 106 (Ky. 2003) (citations omitted). In interpreting the terms of an unambiguous contract, a court should "interpret the contract's terms by assigning language its ordinary meaning." *Id.* The phrase "provided, however" has been interpreted as a "proviso," which serves to limit the immediately preceding text. *Dalton v. State Prop. Bldgs. Comm'n et. al.*, 304 S.W.2d 302, 353-354 (Ky. App. 1957) (citations omitted).

Here, the Court is presented with three separate contracts negotiated by the same KRS outside counsel contemporaneously with Prisma, PAAMCO, and BAAM. The disputed language from the three Subscription Agreements is similar; indeed, the language in the Prisma and BAAM provisions is exactly the same.

a. Prisma and BAAM

The relevant language in the Prisma and BAAM Subscription Agreements is divided into two subsections, identified as (i) and (ii). Under subsection (i), KRS first acknowledges that both Prisma and BAAM are relying on its representations. In addition, under subsection (ii), KRS agrees to reimburse the relevant parties for "any and all claims, demands, losses, damages, costs and expenses whatsoever arising directly as a result of any material breach by [KRS] of any such, representations, warranties or acknowledgments." KRS's agreement to reimburse the relevant parties is immediately followed by the language "provided, however, that [KRS's]

obligations to provide such reimbursement shall be further subject to limitations imposed upon [KRS] under the Constitution of the Commonwealth of Kentucky and subsequent judicial interpretation of Kentucky laws."

The Court finds this language from the Prisma and BAAM Subscription Agreements to be unambiguous. That is, in subsection (i), KRS acknowledged Prisma/BAAM's reliance on its representations and, further, in subsection (ii), agreed to reimburse Prisma/BAAM in the event of a "material breach" related to such representations. However, under the rules governing the operation of a proviso, subsection (ii) is limited by any condition following the phrase "provided, however." Indeed, in the BAAM Subscription Agreement, the phrase "provided, however" is underlined, literally underscoring the importance of the limitation that follows.

In both Subscription Agreements, the limitation included after the proviso specifies that any "reimbursement shall be further subject to limitations imposed upon [KRS] under the Constitution of the Commonwealth of Kentucky and subsequent judicial interpretation of Kentucky laws." The unambiguous meaning of this limitation is that Prisma/KRS and BAAM/KRS entered into the Subscription Agreement with the explicit understanding any "reimbursement" relating to a "material breach" by KRS would only be available to the extent no "subsequent judicial interpretation" limited such reimbursement. In other words, the provisions may or may not be enforceable – depending on how they were interpreted by a Kentucky court.

Adjacent provisions in each Subscription Agreement support the notion that Prisma/BAAM understood the uncertainty surrounding KRS's ability to "reimburse" either Defendant. They seemingly attempt to mitigate this uncertainty by referencing protections that may have been available under other agreements with KRS. In the Prisma Subscription Agreement, Section 4(A), analyzed *supra*, is immediately followed by Section 4(B), which

states: "[KRS] hereby acknowledges that [Prisma], the Administrator and each officer of the [LLC] are entitled to be indemnified out of the assets of the Company as provided in the [LLC] Agreement." Similarly, the BAAM Subscription Agreement includes Section IV(B) (immediately following Section IV(A), analyzed *supra*), which states: "Notwithstanding the foregoing, the [LLC] and [BAAM] shall have the right to enforce such obligations at law or in equity as stated in the [LLC] Agreement." These references to indemnification provisions in separate agreements further confirm not only the lack of ambiguity regarding the limitations on KRS "reimbursement" in Sections 4(A) and IV(A) of Prisma and BAAM's respective Subscription Agreements, but also the fact that Prisma and BAAM fully understood such limitations and attempted to draft another possible route to indemnification.

b. PAAMCO

Although the relevant language in the PAAMCO Subscription Agreement is not identical to the Prisma/BAAM Subscription Agreements, it is no less clear. Section VII(A) of the Subscription Agreement begins with the language: "To the extent permitted by applicable law, including any limitations imposed upon [KRS] under the Constitution of the Commonwealth of Kentucky and subsequent judicial interpretation of Kentucky laws . . . ." The remainder of Section VII(A) sets forth circumstances in which KRS may be required to "compensate" PAAMCO. Given this structure, the PAAMCO Subscription Agreement merely shifts the proviso language to the beginning of the provision. However, the effect is the same as with the Prisma and BAAM Subscription Agreements analyzed *supra*: any language included after the proviso is limited by its terms. Thus, KRS will only be able to "compensate" PAAMCO as set forth in Section VII(A) "to the extent permitted" by "subsequent judicial interpretation of Kentucky laws."

2. Extrinsic Information, Though Unnecessary, Supports the Contracts' Unambiguous Language

Where a contact is unambiguous, a court should not take extrinsic evidence into account. *Frear*, 103 S.W.3d at 106. However, even if this Court were to take into account the Reinhart email, as proposed by BAAM, it only supports the analysis detailed *supra*. Where ambiguity exists, "the court will gather, if possible, the intention of the parties from the contract as a whole" giving consideration to "the subject matter of the contract, the situation of the parties, and the conditions under which the contract was written." *Id.*

The Reinhart email does nothing more than confirm to the Court that, indeed, the parties were concerned about whether KRS would be permitted to indemnify Prisma, PAAMCO, or BAAM under the terms of the Subscription Agreements. The parties made this concern abundantly clear by including the "proviso" language "provided, however" analyzed *supra*; they understood that including the proviso language was the only route by which KRS would have authority to sign the Subscription Agreements.

Concern over the provisions' validity also led the parties to omit the verb "indemnify" from all three agreements; however, it isn't the use of a particular verb that creates an indemnification provision.[99] The Court must look to the substance of what the provision seeks to accomplish. "A contract of indemnity is an obligation or duty requiring a promisor . . . to make good any loss or damage which another has incurred while acting at the request or for the benefit of the promisor." *Intercargo Insurance Company v. B.W. Farrell*, 89 S.W.3d 422, 426 (Ky. App. 2002). Sections 4(A) (Prisma), VII(A) (PAAMCO), and IV(A) (BAAM) of the Subscription

[99] The Reinhart email related specifically to KRS/BAAM contract negotiations; however, the Court draws the reasonable inference that such discussions also likely occurred during Prisma and PAAMCO negotiations because: (1) the Subscription Agreements were negotiated and executed contemporaneously; (2) Reinhart represented KRS in negotiating each of the three Subscription Agreements; and (3) the word "indemnify" is, indeed, omitted from each of the three Subscription Agreements.

Agreements fall squarely within this definition. That is, the provisions impose a duty on KRS to make good any loss incurred by Prisma, PAAMCO, or BAAM and, as such, are indemnification provisions. Using the verb "reimburse" or "compensate" cannot somehow transform their substance or character. *Cobb v. King Kwik Minit Mart, Inc.*, 675 S.W.2d 386, 389 (Ky. 1984) (citations omitted) ("[C]ommon sense must not be a stranger in the house of the law."); *See also Clougherty Packing Company v. Commissioner of Internal Revenue*, 84 T.C. 948, 964 (1984) ("[A] rabbit wearing a sign that reads 'chinchilla,' in a cage marked 'chinchilla cage,' and eating food denoted as 'chinchilla food,' is nevertheless a rabbit.").

Defendants nevertheless urge the Court to construe this action to involve a "breach of contract" and, indeed, are engaged in separate litigation adopting the same reasoning. BAAM Motion to Dismiss the Commonwealth's Claim Against BAAM" (September 7, 2021) (the "BAAM Motion"), 4; Prisma/PAAMCO Motion at 19-20. However, reading the indemnification provisions in this manner effectively eliminates the proviso language (occurring after the phrase "provided, however" in the Prisma and BAAM Subscription Agreements and at the beginning of the provision in the PAAMCO Subscription Agreement) completely from the contract. While Prisma/BAAM are correct that Sections 4(A) and IV(A), subpart (ii) requires KRS to "reimburse" them for any loss occurring as a result of a "material breach" relating to KRS representations, this reimbursement is subject to a contingency. That is, "reimbursement shall be further subject to limitations imposed upon [KRS] under the Constitution of the Commonwealth of Kentucky and subsequent judicial interpretation of Kentucky laws." With regard to PAAMCO, a similar contingency is created from the initial outset of the indemnification provision with the language "[t]o the extent permitted by applicable law, including any limitations imposed upon [KRS] under the Constitution of the Commonwealth of Kentucky and

subsequent judicial interpretation of Kentucky laws." The practical effect of Defendants' interpretation would be to delete proviso language "provided, however" as well as any text included after it from the contract. Such a result would be contrary to long-standing principles of legal construction in interpreting contracts. *Siler v. White Star Coal Co.*, 226 S.W. 102, 104 (Ky. 1920); *see also Price v. Toyota Manufacturing Kentucky*, 2017 WL 3498777 (Ky. App. 2017) ("[N]o part of the agreement should be construed as meaningless, ineffectual, or rejected as mere surplusage if it serves a reasonable purpose.").

3. As the Parties Feared, KRS Was Not Constitutionally Permitted to Obligate Future General Fund Revenues or Lend the Credit of the Commonwealth

Now that the Court has ascertained the unambiguous meaning of Sections 4(A) (Prisma), VII(A) (PAAMCO), and IV(A) (BAAM) of the Subscription Agreements, the only remaining task is to analyze whether "subsequent judicial interpretation" of the Kentucky Constitution will permit the provisions to stand.

Section 50 of the Kentucky Constitution provides that:

> No act of the General Assembly shall authorize any debt to be contracted on behalf of the Commonwealth . . . unless provision be made therein to levy and collect an annual tax . . . to discharge the debt . . . nor shall such act take effect until it shall have been submitted to the people at a general election . . . .

Moreover, Section 177 of the Constitution states: "The credit of the Commonwealth shall not be given, pledged or loaned to any individual, company, corporation or association, municipality, or political subdivision of the State . . . ."

The Kentucky Supreme Court has opined on the meaning of each Section individually and read Sections 50 and 177 together to create a prohibition from undertaking a financial commitment to reimburse a party for losses where the ultimate source of the funds is the general fund or other assets of the Commonwealth. In *McGuffey v. Hall*, 557 S.W.2d 401 (Ky. 1977), the

Kentucky Supreme Court applied the two provisions in weighing the constitutionality of a statutorily-created fund to pay malpractice judgments levied against licensed physicians and hospitals in Kentucky to the extent their own insurance coverage was insufficient to pay the judgments. A critical aspect of the rules specifying how judgments would be paid was that if the fund's resources were exhausted, excess judgment amounts would be paid out of the Commonwealth's general fund.

Turning first to Section 50, the Court noted its "simple message," which, as relevant here, was "[n]o agency of the state, including it legislature, can place an obligation against the general funds otherwise available for appropriation and expenditure by a future legislature." *Id.* at 409. With regard to Section 177, the *McGuffey* court observed that it generally "prohibits lending the credit of the Commonwealth." *Id.* (citations omitted). More specifically, Section 177 precludes any fund "underwritten by a guaranty in which the general funds of the state derivable from future tax revenues are made the surety." *Id. McGuffey* gives an intentionally broad reading to Section 177, calling it a "clincher" because "if perchance some court might hold a contingent or secondary liability not to be a 'debt' under Const. § 50, it would nevertheless fall under the interdict of Const. § 177." *Id.* at 411. Reading the two sections together, the Court found them to "bespeak the same motivating thought . . . . [S]tate constitutions ordinarily forbid one generation from stealing the earnings of another, at least without a vote of the people as a whole." *Id.*

Sections 50 and 177 apply equally to statutes enacted by the General Assembly and contracts entered into by state agencies. In *City of Shelbyville ex rel. Shelbyville Mun. Water & Sewer Comm'n v. Commonwealth*, 706 S.W.2d 426, 430 (Ky. App. 1986), the Kentucky Court of Appeals refused to construe a contract between the Department of Fish and Wildlife Resources and the Shelby County Industrial and Development Foundation as imposing on the Department a

"perpetual duty" to keep the Guist Creek dam in existence. The Court held that such an interpretation would create a contract "which might result in future liabilities against the general resources of the state" and, as such, violate Sections 50 and 177 of the Kentucky Constitution. *Id.*

In contrast, the Kentucky Supreme Court has distinguished a financing arrangement in which "there is no guarantee" that the General Assembly would appropriate funds, observing the parties were "clearly at the mercy of the Kentucky legislature in a technical and legal sense." *Hayes v. State Prop. & Bldgs.Com'n*, 731 S.W.2d 797, 801 (Ky. 1987). Thus, because *Hayes* involved a two-year financing arrangement which was "totally subject to the actions of future legislatures in appropriating funds for the renewal of an agreement," the Supreme Court held it did not violate Section 177. *Id.* at 800.

Here, the Court finds it warranted to engage in precisely the type of "judicial interpretation" the parties contemplated when they drafted the Subscription Agreements. Prisma, PAAMCO, and BAAM have all asserted that KRS breached the representations it made in the Subscription Agreements and further claim they are entitled to reimbursement for their defense costs related to the Underlying Action. Apparently, no limit is imposed on the temporal reach of the "reimbursement" provisions they seek to invoke. Perhaps clearly, in 2022 the parties are well-beyond the fiscal biennium that was current at the time the contracts were executed in 2011. To the extent KRS received a judgment ordering it to pay on any claim to Prisma, PAAMCO, or BAAM in 2022, such claim would be made from general fund appropriations from the current biennium's executive branch budget (KRS 45A.270(1)) or from the next biennium's budget (KRS 45A.270(2)). Just as with the malpractice-judgment fund in *McGuffey*, KRS's payment of such claims would "place an obligation against the general funds otherwise available for

appropriation and expenditure by a future legislature." Section 50 of the Kentucky Constitution, as interpreted by *McGuffey*, plainly says this is impermissible.

Any claim for indeminification (or "reimbursement") under the Subscription Agreement also runs afoul of Section 177's prohibition on "lending the credit of the Commonwealth" because they attempt to make KRS a surety for the Defendants. Unlike the facts in *Hayes*, the Subscription Agreement contains no warning that any future payments are contingent on the willingness of future legislatures to make appropriations for any claims. Instead, the Subscription Agreement provisions place no restrictions whatsoever on the amount of the claims or the time for bringing such claims. In doing so, they seek to make KRS a surety in an unlimited amount for the defense costs they have incurred and will incur. As with Section 50, Section 177 of the Kentucky Constitution renders the Subscription Agreement provisions void.

4. The Court Is Permitted to Place a "Limitation" on "Reimbursement" or "Compensation" Based on the Plain Language of the Indemnification Provisions and the Severability Clause Included in Each Agreement

Defendant BAAM also asks the Court to be cautious in interpreting how Sections 50 and 177 of the Kentucky Constitution apply to the Subscription Agreements, lest it "cripple [Kentucky] agencies' ability to enter into contracts at all." BAAM Motion at 4. However, BAAM need not be concerned that bringing the Subscription Agreements within the parameters of Sections 50 and 177 would require the Court to fashion an extreme remedy that would upend all Kentucky agency contracts. Understanding the dubious constitutionality of these provisions from the time of drafting, the parties included a tailored remedy that the Court is able to invoke easily without creating mayhem as it relates to any other contract between Kentucky agencies and a third party. Moreover, the Severability Clauses contained in each of the Subscription

Agreements, referenced at footnotes 96-98 *supra*, allow the Court to invoke such "limitations" under Sections 50 and 177 without disturbing any other section of the Subscription Agreements.

VII. PRISMA, KKR, OTHER DEFENDANTS CANNOT BE INDEMINIFIED UNDER LLC AGREEMENT

A. Background

As part of the FoHF investments, Prisma, PAAMCO, and BAAM each created an LLC pursuant to separate LLC agreements. Each LLC agreement included indemnification provisions that must also be addressed by the Court. However, in light of separate stipulations entered into by the Commonwealth with PAAMCO and BAAM, this argument is only relevant to the motions filed by Prisma and the Daniel Boone Fund LLC.

1. PAAMCO Stipulation

In creating the structure for the FoHF investment, PAAMCO, KRS and PAAMCO Bluegrass, Inc. ("PAAMCO Bluegrass") formed a limited liability company, Newport Colonels, LLC ("Newport Colonels Fund"), pursuant to the Newport Colonels Limited Liability Company Agreement ("Newport Colonels LLC Agreement"), which was executed on August 29, 2011. Under the Newport Colonels LLC Agreement, PAAMCO was identified as the Manager of the Newport Colonels Fund. In addition, PAAMCO Bluegrass was member of the Newport Colonels Fund. On September 3, 2021, pursuant to a Stipulation and Agreed Order (the "PAAMCO Stipulation"), the Commonwealth dismissed certain claims against the Newport Colonels Fund, PAAMCO, and PAAMCO Bluegrass with prejudice. As part of the PAAMCO Stipulation, PAAMCO, PAAMCO Bluegrass, and the Newport Colonels Fund represent that they "do not now have or assert any claim for indemnity or breach of contract based in whole or in part on Section 2.4(d) of the [Newport Colonels LLC Agreement]." The effect of the

PAAMCO Stipulation is that any basis for KRS to indemnify PAAMCO must arise under the Subscription Agreement.

3. BAAM Stipulation

In creating the structure for the FoHF investment, BAAM, KRS and Blackstone Alternative Asset Management Associates, LLC ("BAAMA") formed a limited liability company, Blackstone Henry Clay Fund, LLC ("Henry Clay Fund"), pursuant to the Blackstone Henry Clay Limited Liability Company Agreement ("Henry Clay LLC Agreement"), which was executed on August 29, 2011. Under the Henry Clay LLC Agreement, BAAM was identified as the Manager of the Henry Clay Fund. In addition, BAAMA was member of the Henry Clay Fund. On September 3, 2021, pursuant to a Stipulation and Agreed Order (the "BAAM Stipulation"), the Commonwealth dismissed certain claims against the Henry Clay Fund, BAAM, and BAAMA with prejudice.[100] As part of the BAAM Stipulation, BAAM, BAAMA, and the Henry Clay Fund represent that they "do not now have or assert any claim for indemnity or breach of contract based in whole or in part on Section 2.3(d) of the [Henry Clay LLC Agreement]." Given this statement, BAAM has waived any rights to seek indemnification under the Henry Clay LLC Agreement. However, the BAAM Stipulation, unlike the PAAMCO Stipulation discussed *supra*, also specifies that BAAM does not waive "any claims they may have arising out of, or based on, the [Henry Clay LLC Agreement], other than those for indemnification or breach under Section 2.3(d) of the [Henry Clay LLC Agreement]."

B. Prisma Maintains Claims for Indemnification Under Its LLC Agreement

1. Background

[100] Also relevant to BAAM and its affiliates, as part of the Commonwealth's Motion to Amend the original complaint, filed on August 16, 2021, any claims against The Blackstone Group, Inc. (*i.e.*, the SEC registrant that is a BAAM affiliate) were withdrawn.

In creating the structure for the FoHF investment, Prisma, KRS and Prisma Capital Partners LLC ("Prisma LLC") formed a limited liability company, Daniel Boone Fund LLC ("Daniel Boone Fund"), pursuant to the Daniel Boone LLC Agreement, which was executed on August 23, 2011. Under the Daniel Boone LLC Agreement, Prisma was identified as the Manager of the Daniel Boone Fund. In addition, Prisma LLC was a "Special Member" and held a "Special Member Interest" in the Daniel Boone Fund. Critical provisions from the Daniel Boone LLC Agreement are set forth *infra*.

Unlike PAAMCO and BAAM, Prisma did not enter into a stipulation with the Commonwealth regarding indemnification claims under the Daniel Boone LLC Agreement and, further, asserts that indemnification provisions in that Agreement are not impermissible under the Kentucky Constitution. Defendant Daniel Boone Fund's Motion to Dismiss; Notice; Memorandum (October 22, 2021) ("Daniel Boone Fund Motion") raises similar arguments.

2. The Daniel Boone Fund Limited Liability Company Agreement[101]

The Daniel Boone LLC Agreement includes a number of provisions that reference indemnification and limits on indemnification that may exist under Kentucky law.

a. Section 2.3(d): Indemnification

Section 2.3(d) of the Daniel Boone LLC Agreement sets forth provisions relating to "Limitation of Liability; Indemnification", including, as relevant here, requirements that the Daniel Boone Fund shall hold harmless and indemnify the Manager, Manager Affiliates,[102] and other Indemnitees:

[101] Based on documents provided by Mr. Cuticello, the Court can discern that the Daniel Boone LLC Agreement was amended three times between August 23, 2011 *(i.e.*, the original execution date) and August 1, 2016 (*i.e.*, the execution date of the Third Amendment to Limited Liability Company Agreement of Daniel Boone Fund LLC). Cuticello Decl., Exhibit 15. The Court notes the difficulty in giving a complete interpretation of the Daniel Boone LLC Agreement when two amendments to the agreement are unavailable.

[102] Article XI of the Daniel Boone LLC Agreement defines "Manager Affiliate(s)" to mean "the Manager, each Person who controls, is controlled by or is under common control with the Manager within the meaning of Section

> . . . against any and all loss, liability and expense (including, without limitation, reasonable legal and expert witness fees and expenses reasonably incurred in connection with investigating, preparing for and/or defending against any claim, action, suit or proceeding, threatened or commenced), judgments, civil fines, amounts paid in settlement, and other amounts reasonably paid or incurred by the Indemnitee to the extent arising from the good faith performance by the Indemnitee of his, her or its responsibilities to the Company (including without limitation any liability as a result of any action taken or failed to be taken by the Company prior to the appointment of the Manager as manager of the Company); provided, however, that an Indemnitee shall not be indemnified for losses, liabilities or expenses, judgments, civil fines, amounts paid in settlement, and other amounts actually and reasonably paid or incurred by the Indemnitee resulting from his, her or its fraud, bad faith, willful misconduct, gross negligence or breach of the standard of care . . . .

Moreover, Section 2.3(d) also specifies that such amounts must be paid "solely out of the Assets." The terms "Assets" is defined in Article XI to include, most broadly, all of the Daniel Boone Fund LLC's investments, cash, cash equivalents, accounts receivable, and all "other assets of every kind and nature."

b. Section 2.3(e) – Kentucky Law Provisions

Section 2.3(e)(i)-(iv) of the Daniel Boone LLC Agreement lists limitations on indemnification under "Kentucky law" (the "Kentucky Law Provisions"). The Kentucky Law Provisions describe in great detail potential restrictions on the general indemnification provisions of Section 2.3(d):

> (e) Notwithstanding the foregoing, no exculpation or indemnification of the Manager or any Manager Affiliate or another Indemnitee shall be permitted hereunder to the extent such exculpation or indemnification would not be permitted under applicable Securities and Commodities Law or any other applicable law, including Kentucky law. With respect to Kentucky law:
>
> (i) The Company and Manager understand and acknowledge that the laws of Kentucky may limit KRS's ability to be subject to personal indemnification obligations or to provide indemnification to any Person, and agree that KRS may therefore be prohibited from

15 of the Securities Act, and each director, officer or employee of the Manager or any such controlling or controlled person."

making payments of indemnification or advancement of expenses under this Section.

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

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

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

c. Section 2.6 – Representations, Warranties and Agreements of the Manager

Section 2.6(u) requires Prisma to maintain insurance coverage "in accordance with the levels set forth in Annex G." Annex G bears the heading "Insurance Coverage for the Manager." That heading is followed by a list of two types of insurance: (1) Financial Institution Bond (Fidelity Coverage): $5,000,000, subject to a $100,000 deductible for each and every loss, and (2) Fiduciary Liability Insurance: $2,000,000, subject to $1,000 deductible for non-indemnifiable losses and $25,000 for indemnifiable losses.

d. Section 7.2(d) - Reserves

Section 7.2(d) of the Daniel Boone LLC Agreement establishes the guidelines for when Prisma, as the Manager, may require the Daniel Boone Fund LLC to maintain a financial reserve. The section provides:

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

Section 7.2(d) is relevant in the current litigation because Prisma has invoked its powers under this section to retain a $134.5 million reserve for claims arising from the Underlying Action and related litigation. Cuticello Decl. ¶ 53.

e. Section 10.5 – Severability

Section 10.5's severability clause provides instructions for interpretation of the Daniel Boone LLC Agreement in the event that any provision is found invalid:

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

f. Article XI – Definitions

As relevant to the indemnification provisions discussed *supra* in Section II.C.2.b.ii, the definition of "Indemnification Obligation" provides additional context:

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

Although the Court could not find instances of a defined term "Indemnification Obligation" being used in Section 2.3(d), the noun "obligation" was used two times.[103]

4. Additional Information – Cuticello Declaration

Vincent Cuticello, the Chief Operating Officer and Chief Compliance Officer of Prisma and PAAMCO Prisma[104] offers insight into the 2011 negotiations between Prisma and KRS that gave rise to the Daniel Boone LLC Agreement. Mr. Cuticello asserts that the Daniel Boone LLC Agreement was the subject of "arm's-length negotiations" between KRS, Prisma, and their respective counsel. Cuticello Decl. ¶ 5-6. He also confirms that the initial draft of the Daniel Boone LLC Agreement was provided to Prisma by Reinhart. Cuticello Decl. ¶ 8 and Exhibit 1. In support of his assertion that KRS's counsel took an active role in negotiating the Daniel Boone LLC Agreement, Mr. Cuticello provides as Exhibit 2 to his Affidavit a "redlined" document that highlights Prisma's suggested revisions to the draft agreement. Based on that draft document, Prisma requested no changes to the Kentucky Law Provisions, Section 2.6(s), or the definition of "Indemnification Obligation" in Article XI. Cuticello Decl. Exhibit 2.

C. Analysis

1. Plain Language of the LLC Agreement

Although the language of the Daniel Boone LLC Agreement is more complex than the language in the Subscription Agreements, this much is clear: just as with the Subscription Agreements, the parties in the Daniel Boone LLC Agreement contemplated the notion that a court could find the indemnification provisions of Section 2.3(d) void. Moreover, the language of Section 2.3(e) is explicit: [n]otwithstanding the foregoing, no exculpation or indemnification of

[103] "Notwithstanding anything herein to the contrary, before the Company may advance any funds to an Indemnitee, the Manager must first obtain a written confirmation of the repayment obligation of such Indemnitee and if it deems it appropriate, obtain reasonably adequate security for such Indemnitee's obligation." (emphasis supplied)
[104] As will be discussed in greater detail *infra*, PAAMCO Prisma is the entity created after the merger of PAAMCO and KKR Prisma in 2017.

the Manager or any Manager Affiliate or another Indemnitee shall be permitted hereunder to the extent such exculpation or indemnification would not be permitted under applicable Securities and Commodities Law or any other applicable law, including Kentucky law." The clause "notwithstanding the foregoing" at the beginning of this provision relates to Section 2.3(d), which contains the indemnification language and is listed immediately prior to Section 2.3(e). The fact that the Manager was required to obtain insurance only supports the idea that the parties were unsure about the validity of the indemnity provisions.

Moreover, even though, as with the Subscription Agreements, there is no need to look to extrinsic information, doing so only supports the Court's interpretation of the plain language of Sections 2.3(d) and (e). The "redlined" draft of the LLC agreement offered by Mr. Cuticello shows that Prisma requested no changes to Section 2.3(e), the Kentucky Law Provisions, during contract negotiations. This acceptance of these detailed limitations on indemnity, comprising nearly an entire page of the LLC Agreement, makes it clear that, as was the case with the Subscription Agreement, Prisma knew and accepted that any indemnification included in the LLC agreement was contingent upon subsequent rulings by a Kentucky court opining on the constitutionality of such indemnity.

2. Constitutional Limitations

Prisma and Daniel Boone Fund LLC have argued that the indemnification provisions in the Daniel Boone LLC Agreement are distinguishable from those in the Subscription Agreements. The contend that any indemnification under the Daniel Boone LLC Agreement (for Prisma or any parties claiming to be its "Affiliates," such as KKR or Girish Reddy, as referenced in footnote 32 *supra*) cannot be limited by Sections 50 and 177 of the Kentucky Constitution because, under the Daniel Boone LLC Agreement, claims for indemnification are paid solely out

of the assets of the Daniel Boone Fund LLC. Their assumption appears to be that because KRS would not be making a direct payment to an indemnitee the limitations of Sections 50 and 177 are not implicated.

First, the Court would point out that, under *McGuffey*, Section 50 "is not satisfied by substituting other assets equal in value to the forbidden encroachment" such that a "presently-existing receivable" cannot be traded for "access to future general revenues." *McGuffey*, 557 S.W.2d at 410. Put differently, in that case converting a future debt to a current account receivable did not satisfy the mandate of Section 50. The substance of this limitation appears to center on prohibiting both direct and indirect encroachment on future revenues. The same limitation must apply here. That is, if KRS itself would be prohibited from encroaching on future revenues, then it seems logical that an entity in which it owns substantially all of the ownership interest would be subject to similar limitations.

However, outside of this limitation from *McGuffey*, recent reasoning by the Kentucky Supreme Court in the Underlying Action further underscores the link between KRS funds held by the Daniel Boone Fund LLC and a potential encroachment on future revenue. As background, funding for most KRS retirement benefits comes from two sources: (1) employee contributions,[105] which are deducted from each employee's wages ("Employee Contributions") and (2) employer contributions,[106] which are paid by each participating state and county agency

[105] Non-hazardous employees are statutorily required to contribute 5% of pre-tax salary to their pension benefit, while hazardous employees contribute 8% on a pre-tax basis. Most employees are required to contribute an additional 1% of their pre-tax compensation toward their retiree health insurance benefits. These monies are deposited in a 401(h) account within the pension trust. Kentucky Retirement Systems, Annual Report (2011) https://kyret.ky.gov/Publications/Books/2011%20Annual%20Report.pdf, 6.

[106] Employers contribute to Pension Capital at the rate determined by the KRS Board of Trustees to be necessary for the actuarial soundness of the systems. *See* KRS 61.565. Employer contributions include the normal cost of pension and insurance benefits plus an amortized contribution toward the unfunded liability of the pension and insurance trusts. Employer contributions also include an administrative fee that is used to pay annual operating expenses of KRS. Kentucky Retirement Systems, Annual Report (2011) https://kyret.ky.gov/Publications/Books/2011%20Annual%20Report.pdf, 6.

("Employer Contributions") (collectively, "Employee/Employer Contributions"). Employee/Employer Contributions, along with any return that can be earned on their investment, are used to fund monthly pension and healthcare payments for retired employees.

Overstreet v. Mayberry, 603 S.W.3d 244, 253 (Ky. 2020) explained that KRS retirement benefits are generally considered a "defined-benefit plan," because "retirees receive a fixed payment each month, and the payments do not fluctuate with the value of the plan." Benefits for many retirees receive an extra level of protection based on a statutorily-created "inviolable contract," which guarantees the payment of pension benefits even if the retirement plans "become[] so severely underfunded that [they] runs out of assets and terminate[]." *Id.* at 254. In the event of severe underfunding, "the Commonwealth has the authority to increase its own contribution to the . . . plan to make up any actuarial shortfall." *Id.* Given that "the full faith and credit of the Commonwealth serves as a backdrop for [retirees'] pension benefits even in the event that severe plan mismanagement renders [plans] insolvent," the Commonwealth is the ultimate debtor in the context of any pension shortfalls. *Id.*

To the extent there is a loss (or injury, if one is considering an issue of standing, as was the case when the Underlying Action was before the Kentucky Supreme Court) of KRS funds, through indemnification or otherwise, there are two places where the loss/injury can be borne: the employee or the employer, which would, on these facts, constitute an agency or subdivision of the Commonwealth. The *Mayberry* court held that the loss/injury was not borne by the employee, which was the basis for its holding that employees did not have standing in that case. If employees will not ultimately bear the loss and, instead, "the full faith and credit of the Commonwealth serves as a backdrop for [retirees'] pension benefits even in the event that severe plan mismanagement renders [plans] insolvent," then there is no distinction between potential

encroachment on future revenue occurring under the Subscription Agreements and potential encroachment on future revenue occurring under the Daniel Boone LLC Agreement.

VIII. DECLARATORY ACTION IS APPROPRIATE BECAUSE DEFENDANTS' DELAWARE AND CALIFORNIA SUITS ARE NOT "PRIOR PENDING ACTIONS" AND, MOREOVER, THE COMMONWEALTH IS IMMUNE FROM SUIT IN THOSE COURTS

A. The Commonwealth's Request for Declaratory Action is Appropriate Because Defendants' Delaware and California Suits Are Not "Prior Pending Actions"

The Commonwealth brought this Declaratory Action in response to Defendants' litigation in Delaware and California seeking indemnification for defense costs incurred in connection with the Underlying Action, which they attribute to a "breach of contract" by KRS. Am. Compl. ¶ 37-45. In addition, the Commonwealth asserts that this action is necessary because Prisma, KKR, and other defendants "seek to retain control over the assets of [KRS] . . . in the possession of . . . Daniel Boone Fund . . . and to appropriate those assets to pay their attorney's fees, costs, and any damages they may subsequently be required to pay . . . ." Am. Compl. ¶ 53. Defendants, however, characterize the Commonwealth's declaratory judgement claims as unsuitable given the "Prior Pending Actions" brought by each of them in Delaware, California, and this Court.

Generally, Kentucky's declaratory judgment act ("DJA") is intended to be remedial in nature and to "afford[] relief from uncertainty and insecurity with respect to rights, duties and relations." *See* KRS 418.080. The Kentucky Supreme Court has provided additional guidance on interpreting the DJA in *Mammoth Medical, Inc. v. Bunnell*, 265 S.W.3d 205 (Ky. 2008), a case in which a law firm brought an action seeking a declaration that it could not be held liable on a potential legal malpractice claim involving the firm's simultaneous representation of an employer and employee who had been sued by the employer. Citing authority from 18 states that it described as "persuasive," the Kentucky Supreme Court found that declaratory relief was not

intended "as a vehicle for adjudicating allegations of past negligence or damage." The Court's analysis continues by pointing out that the employer-defendant's remedy in appealing the law firm's declaratory action would be inadequate because the employer-defendant "would have to adjudicate its tort claims against [the plaintiff law firm] based on the lawsuit brought by [the plaintiff law firm], with issues framed by [the plaintiff law firm], in a forum chosen by [the plaintiff law firm]."

Here, Defendants claim that, as in *Mammoth*, the Commonwealth's declaratory action suit is improper because "Prior Pending Actions" exist in Delaware and California; however, this characterization is, at best, incomplete and conflicts with the factual and procedural history. This declaratory action litigation, the Prisma Delaware Action, and the PAAMCO California Action all concern the consequences of the Underlying Action, which was originally filed on December 27, 2017 and remains an active case to this day. Because the Prisma Delaware Action and PAAMCO California Action were not filed until 2019 (both actions were filed on April 9, 2019), it would be impossible to consider either of those actions "prior" or "pending" in relation to the Underlying Action. In fact, by filing actions in Delaware and California, Defendants have engaged in the very conduct that the Kentucky Supreme Court prohibited (and, indeed, expressly spoke of with "disapproval") in *Mammoth*. That is, it was Defendants who, like the plaintiff law firm in *Mammoth*, are requiring the Commonwealth (*i.e.*, the Plaintiff in the Underlying Action) to adjudicate its claims "based on the lawsuit brought by" Defendants, "with issues framed by" Defendants, and "in a forum chosen by" Defendants.

In fact, in light of Delaware and California litigation seeking indemnity from KRS for all judgements, defense costs, and attorneys' fees incurred by them in the Underlying Action, the Commonwealth had few options for resolving the "uncertainty and insecurity" presented by

Defendants' litigation outside seeking a declaratory judgement to ascertain its rights under the contracts (*i.e.*, the Court's interpretation of the constitutionality of the indemnification provisions as well as whether the Commonwealth was immune from suit in foreign jurisdictions). More specifically, absent a declaratory judgment, circumstances could arise in which a Kentucky factfinder in the Underlying Action determined that the Defendants breached their fiduciary duties to KRS, while Delaware and California factfinders determine that KRS is liable under Defendants' "breach of contract" claims. In these circumstances, KRS could be required to reimburse the Defendants for the full extent of the injury caused to KRS – plus underwriting Defendants' legal defense. This situation seems to fall squarely within the remedial nature intended for a declaratory judgement action.

B. The Commonwealth, and KRS, Are Immune from Suit in Delaware and California

Presently, Prisma and PAAMCO have ongoing litigation on "breach of contract" claims against KRS in Delaware and California, respectively. These defendants have asserted that they filed these actions because each of those states was their respective "home state." This reasoning cannot, however, overcome the fact that the Commonwealth of Kentucky and its agencies, including KRS, are immune from suit in the courts of other states unless such immunity has been explicitly waived by the General Assembly.

The U.S. Supreme Court has held unequivocally that a state "retain[s] [its] sovereign immunity from private suits brought in the courts of other States." *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S.Ct. 1485 (2019). In *Hyatt* an individual who was a Nevada resident brought suit against the Franchise Tax Board ("FTB"), an agency of the State of California, in Nevada state court. *Id.* at 1490-91. The Supreme Court held, however, that Hyatt could not maintain a suit against the FTB because to do so would conflict with principles of sovereign immunity. This

immunity extended to the FTB, a state agency. *Id.* at 1499 ("Because the Board is thus immune from Hyatt's suit in Nevada's courts, the judgment of the Nevada Supreme Court is reversed. . . .").

Defendants argue that KRS 61.645(2)(a)'s grant of the power to KRS "to sue and be sued in its corporate name" is sufficient to waive sovereign immunity. They further argue that *Hyatt* is distinguishable because in that case the FTB did not "enter into an arm's-length commercial contract, in accordance with its statutory authority, subjecting it to suit in the other state's forum." Prisma/PAAMCO Response to Motion for Summary Judgement and for an Expedited Hearing (October 4, 2021), 33. However, neither of these arguments can point to the express language that is required for a waiver of sovereign immunity. Waiver of sovereign immunity will occur only where it is stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." *Withers v. University of Kentucky,* 939 S.W.2d 340, 346 (Ky. 1997) (citations omitted). Specifically, "the bare language of 'sue or be sued' is inadequate, on its own, to exhibit a legislative intent to waive immunity on behalf of a governmental agency." *Bryant v. Louisville Metro Housing Auth.*, 568 S.W.3d 839, 850 (Ky. 2019). To the extent the Commonwealth has waived immunity to suit in breach of contract actions, its immunity has only been waived on actions brought in Franklin Circuit Court. KRS 45A.245(1).

Here it is "abundantly clear that the Kentucky Retirement Systems is an 'arm, branch, or alter ego' of the state." *Commonwealth v. KRS*, 396 S.W.3d 833, 837 (Ky. 2013). As such, like the FTB in *Hyatt* and absent an express waiver, the Commonwealth's sovereign immunity extends to KRS, making it similarly immune from suit in other states. To the extent Prisma and

PAAMCO wish to bring breach of contract claims against KRS, those claims can be brought in Franklin Circuit Court, including as cross-claims in the Underlying Action.

With regard to Prisma, the Court observes that its insistence on maintaining an action in Delaware patently conflicts with Section 2.6(s) of the Daniel Boone LLC Agreement, which provides: "[Prisma] acknowledges that KRS . . . reserve[s] all immunities, defenses, rights or actions arising out of KRS's status as a sovereign state or entity, including those under the Eleventh Amendment to the United States Constitution and applicable Kentucky law."[107]

Further, Section VII(D) of the Newport Colonels Fund Subscription Agreements includes a forum selection clause, which identifies California as the forum in which all claims must be litigated. Am. Compl. ¶ 58-61. Given the analysis *supra*, KRS did not have the authority to waive the sovereign immunity of the Commonwealth when it agreed to that provision in the PAAMCO Subscription Agreement and, as such, the provision is void. The Court will rely on the Severability Clause in the Subscription Agreement, set forth in footnote 97 *supra*, to strike the forum selection clause and leave all other terms in that agreement undisturbed.

IX. OTHER ISSUES

To the extent the parties raised additional arguments that were not addressed *supra*, this means the Court found no basis to grant relief in connection with such arguments or to address them further for any other reason.

X. CONCLUSION

For the reasons discussed above, this Court **GRANTS** the Commonwealth's Motion for Summary Judgment and **DENIES** the Motions of Defendants KKR, Prisma, PAAMCO, BAAM, and the Daniel Boone Fund LLC. There is no genuine issue of material fact regarding KKR

[107] The Court has not been provided with a copy of the Newport Colonels LLC Agreement and, therefore, it cannot assess whether language similar to that of Section 2.6(s) in the Daniel Boone LLC Agreement would also apply to PAAMCO.

being subject to the jurisdiction of the Kentucky courts. In addition, there is no genuine issue of material fact with regard to the constitutionality of the indemnification provisions in the Subscription Agreements or the LLC Agreements as any Defendant seeks to apply such provisions. Moreover, the Commonwealth and its agencies are immune from suit in Delaware and California and, as such, the forum selection clause in Section VII(D) of the Newport Colonels Subscription Agreement is void and unenforceable.

So **ORDERED** this the 24th day of March, 2022.

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

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