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

79291FB7-060A-4973-87BD-A170FD40FC4A : 000001 of 000167

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' Motion to Modify the January 3 Order to Permit Consideration of Their Motion Directing the KKR-Prisma Defendants to Return KRS Trust Funds, Plus Interest and Penalty, in a Total Exceeding $807 Million

KKR & CO., L.P. *et al.* — DEFENDANTS

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that, on February 5, 2025, at the conclusion of the motion hour (9:00 a.m.), 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 move the Court, before the Honorable Thomas D. Wingate, at the Franklin County Courthouse, located at 222 St. Clair Street, Frankfort, Kentucky 40601, for entry of the proposed order:

- modifying this Court's January 3, 2025 order for the limited purpose of permitting consideration of their pending motion to direct the KKR-Prisma Defendants[1] to (1) return $137–$145 million in Kentucky Public Pensions Authority ("KPPA") Trust funds, plus 8% interest and a three-time statutory penalty, for a total of $807 million; and (2) provide an accounting; and
- granting such other and further relief as the Court deems just and proper.

[1] The KKR Defendants include KKR & Co., Inc. (formerly known as KKR & Co., L.P.) ("KKR"), Henry Kravis, and George Roberts. The KKR-Prisma Defendants include the KKR Defendants, Prisma Capital Partners L.P., Girish Reddy, and William S. Cook.

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

In support, the Tier 3 Trust Plaintiffs submit the following memorandum, together with Exhibits 1–13, and rely on all papers and proceedings in this action.

MEMORANDUM IN SUPPORT OF MOTION

Table of Contents

I. INTRODUCTION 1

II. ARGUMENT 6

A. The Court Should Modify the Stay Because the Hedge Fund Sellers' Attempt to Settle the Claims in This Case Is a Direct Violation of the Court's May 1 Decision Rejecting the AG's "Occupied-the-Field" Arguments and Its July 9 Order Staying the Case 6

B. Failure to Modify the Stay Would Block the Prosecution of Meritorious Claims That Are Potentially Worth Billions of Dollars to the KRS Trusts 15

1. The Partial Summary Judgment Motion as to the Hedge Fund Sellers' Participation in the Culpable Trustee's Breaches of Fiduciary Duties 17

2. The Blackstone-Park Hill Motion for Hundreds of Millions of Dollars in Interim Equitable Relief 23

C. The Stay Should Be Modified to Ensure That the Individual Perpetrators, Including the Controlling Principals and Executives of the Hedge Funds, Be Held Accountable 33

D. The Stay Should Be Modified Because the Hedge Fund Sellers and the AG's Contingency-Fee Lawyers Are Abusing the Stay — Which Was Intended to Maintain the Status Quo — Not to Permit Them to Gain a Litigation Advantage 35

E. The Stay Should Be Modified to Allow the Tier 3 Trust Plaintiffs to Show That the Involvement of the Culpable Trustee in Approving the Settlement and Releasing the Trusts' Claims Pollutes the Settlement 39

F. The Stay Should Be Modified Because the Tier 3 Trust Plaintiffs Must Be Free to Pursue Steps to Show That the Settlement Is Procedurally and Substantively Defective and Violates the Due Process Rights of the Tier 3 Trust Plaintiffs and the KRS Trusts 41

III. CONCLUSION 51

79291FB7-060A-4973-87BD-A170FD40FC4A : 000002 of 000167

Table of Authorities

Cases

Amchem Prods., Inc. v. Windsor,
521 U.S. 591 (1997) 48

Briseno v. Henderson,
998 F.3d 1014 (9th Cir. 2021) 47, 48, 50

City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,
68 Cal. App. 4th 445 (1998) 4, 40, 41

Commonwealth ex rel. Hancock v. Paxton,
516 S.W.2d 865 (Ky. 1974) 12

Commonwealth v. KKR & Co., L.P.,
Case No. 17-CI-01348, slip op. (Ky. Cir. Ct. Franklin Cnty. Sept. 21, 2021) 45

Commonwealth v. Wingate,
460 S.W.3d 843 (Ky. 2015) 1

Engle v. Liggett Grp., Inc.,
945 So.2d 1246 (Fla. 2006) 43

Gautreaux v. Pierce,
690 F.2d 616 (7th Cir. 1982) 45

Geddes v. Anaconda Copper Mining Co.,
254 U.S. 590 (1921) 32

In re Literary Works in Elec. Databases,
654 F.3d 242 (2d Cir. 2011) 48, 49

In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.,
827 F.3d 223 (2d Cir. 2016) 42, 48, 49

Inman v. Inman,
648 S.W.2d 847 (Ky. 1982) 9, 35

Landis v. N. Am. Co.,
299 U.S. 248 (1936) 1

Lehmann v. Gibson,
482 S.W.3d 375 (Ky. 2016) 1

Logan v. Zimmerman Brush Co.,
455 U.S. 422 (1982) 42

79291FB7-060A-4973-87BD-A170FD40FC4A : 000003 of 000167

Martin v. Wilks,
400 U.S. 755 (1989) 42

Moses v. N.Y. Times Co.,
79 F.4th 235 (2d Cir. 2023) 47

Newton v. Hornblower, Inc.,
224 Kan. 506 (Kan. 1978) 32

Ortiz v. Fibreboard Corp.,
527 U.S. 815 (1999) 48

Overstreet v. Mayberry,
603 S.W.3d 244 (Ky. 2020) 38

Satsky v. Paramount Commc'ns,
7 F.3d 1464 (10th Cir. 1993) 43

Taylor v. KKR & Co., L.P.,
Case No. 21-CI-00645, slip op. (Ky. Cir. Ct. Franklin Cnty. May 1, 2024) 6, 12, 13

Statutes

KY. REV. STAT. § 48.005 .... 40, 43, 44

KY. REV. STAT. § 61.645 .... 5, 29

KY. REV. STAT. § 61.650 5

Rules

KY. R. CIV. P. 23.04 46

KY. R. CIV. P. 23.05 .... 10, 44, 45, 46

KY. SUP. CT. R. 3.130 (1.9) 38

FED. R. CIV. P. 23 47

Treatises

76 AM. JUR. 2D TRUSTS § 603 (2016) 9

James Wm. Moore, *et al.*,
5 MOORE'S FEDERAL PRACTICE, § 23.165 (3d ed. 2005) 45

RESTATEMENT (SECOND) OF TRUSTS § 326 (1959) 9

79291FB7-060A-4973-87BD-A170FD40FC4A : 000004 of 000167

Other Authorities

Blackstone CEO Schwarzman Received $896.7 million in 2023,
REUTERS (Feb. 23, 2024) 33

Blackstone's Schwarzman Received over $1 billion in Pay Dividends in 2022,
REUTERS (Feb. 25, 2023) 33

Crit Luallen,
Examination of Certain Policies, Procedures, Controls, and Financial Activities of Kentucky Retirement Systems (June 28, 2011) 29

Gary Rivlin,
The Whistleblower, How a Gang of Hedge Funders Strip Mined Kentucky's Public Pensions,
THE INTERCEPT (Oct. 21, 2018) 20

Hank Tucker,
As Profits Rise, Private Equity Billionaires Have Huge Paydays,
FORBES (Feb. 28, 2022) 33

John Cheves,
KY State Pension System Agrees to Settle Long-Running Lawsuit over Hedge Funds,
LEXINGTON HERALD LEADER (Jan. 3, 2025) 2

John Cheves,
Hedge Fund with $100 Million in Kentucky Retirement Funds,
LEXINGTON HERALD LEADER (June 12, 2012) 29

Kevin Grout,
Attorney General Coleman Announces $227.5 Million Settlement for Kentucky Pension Systems,
NEWS RELEASE, OFFICE OF THE ATTORNEY GENERAL (Jan. 8, 2025) 2

Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*,
126 HARV. L. REV. 486 (2012) 42

Mary Williams Walsh,
Pension Advice For Hire, More States Start Inquiries into Conflicts of Interest,
THE NEW YORK TIMES (May 6, 2009) 29

Paul, Weiss, Rifkind, Wharton & Garrison LLP Client Memorandum,
Kentucky Supreme Court Dismisses $50 Billion Derivative Action Against Hedge Fund Managers for Lack of Standing (July 14, 2020) 4

79291FB7-060A-4973-87BD-A170FD40FC4A : 000005 of 000167

Rebecca Moore,
KY Audit Details Questionable Placement Agent Activities,
PLANSPONSOR (June 29, 2011) 29

Rob Kozlowski,
Kentucky Settles for Millions from KKR, Blackstone and Others in Hedge Fund Litigation,
PENSIONS & INVESTMENTS (Jan. 15, 2025) 3, 39

Sam Dangreman,
The Affluenza Set,
AIRMAIL (Aug. 10, 2024) 33

The Editor,
Profile, Real Time Net Worth,
FORBES (Jan. 16, 2025).. 33

Zach O'Malley Greenberg,
Secret Agent,
FORBES (May 23, 2011).. 29

79291FB7-060A-4973-87BD-A170FD40FC4A : 000006 of 000167

I. INTRODUCTION

A stay is maintainable only when the parties against whom the stay is imposed are "sufficiently protected against substantial loss or prejudice."[1] The Court must modify the stay of this action because the Hedge Fund Sellers and the KRS Insiders,[2] in concert with others, have exploited the stay to prejudice the Tier 3 Trust Plaintiffs by attempting to settle their claims, including hundreds of millions of dollars of interim recovery and equitable relief sought in their pending and specifically identified anticipated motions.

During the Court-imposed stay, the Hedge Fund Sellers, together with the private contingency-fee lawyers for the Attorney General ("AG"), have brokered an agreement (the proposed "Settlement") to settle all claims asserted by the Tier 3 Trust Plaintiffs *in this case*. To protect their legal rights and the interests of the KRS Trusts,[3] the Tier 3 Trust Plaintiffs must now bring this development to the Court's attention, and seek a limited — but urgently needed — modification of the stay. For, without the modification, the Court would be required to assess the fairness of the proposed Settlement *without the ability to assess the merits of the Tier 3 Trust Plaintiffs' claims*, including those asserted in their May 13, 2024 motion for the return of the wrongfully withheld $137–$145 million

---

[1] *See Landis v. N. Am. Co.*, 299 U.S. 248, 258 (1936) (Cardozo, J.); *see also*, *e.g.*, *Lehmann v. Gibson*, 482 S.W.3d 375, 380 (Ky. 2016) (denying a writ petition seeking to vacate a stay because the petitioner "suffered no prejudice" from the stay); *Commonwealth v. Wingate*, 460 S.W.3d 843, 850 (Ky. 2015) (same).

[2] The Hedge Fund Sellers are Defendants KKR & Co., L.P. ("KKR"), Henry R. Kravis, George R. Roberts, Prisma Capital Partners, L.P., Girish Reddy, Blackstone Group Inc. ("Blackstone"), Blackstone Group L.P., Blackstone Alternative Asset Management L.P., J. Tomilson Hill, Stephen A. Schwarzman, Pacific Alternative Asset Management Company, LLC, Jane Buchan, and William S. Cook. Additional defendants are five former officers of Kentucky Retirement Systems ("KRS," now known as "KPPA"): David Peden, T.J. Carlson, William Thielen, Brent Aldridge, and David Eager (the "KRS Insiders").

[3] The terms "KRS" and "KPPA" are used interchangeably.

79291FB7-060A-4973-87BD-A170FD40FC4A : 000007 of 000167

of Trust funds,[4] plus 8% interest and a three-time statutory penalty, amounting to over $807 million.

On January 3, 2025 — the same day when the Court denied the Tier 3 Trust Plaintiffs' motion to lift the stay — the news of the Settlement surfaced. The LEXINGTON HERALD LEADER reported a cryptic statement by Blackstone's lawyer: the Settlement would allow KRS to "receiv[e] *previously invested funds* … representing *a substantial majority of the settlement*[,] as well as *a meaningfully smaller cash settlement*."[5]

The details of this "substantial majority" of the Settlement fund and the "meaningfully smaller cash settlement" came to light on January 8, 2025, when the AG and the Hedge Fund Sellers moved in the AG's taxpayer action for approval of the proposed Settlement. While the joint motion touts that upon approval, "the settlement will result in a substantial recovery of $227,500,000.00[,]" Joint Mot. at 3, the AG had to admit in his press release that $145 million of that "recovery" is actually the return of "investment fund[s]" belonging to the KRS Trusts, but held by "Prisma-managed" fund:

> The settlement recovery includes a distribution to the Commonwealth's pension funds of approximately $145 million in assets that the Prisma-managed *investment fund* held in reserve.[6]

[4] The $137 million amount claimed in the May 13 motion has, according to the settling parties, grown to $145 million. This $137 million, plus 8% interest (from April 2019 to February 2025) and a three-time civil penalty, amounts to approximately $807,386,572. *See* Ex. 5 at 1 n.4.

[5] John Cheves, *KY State Pension System Agrees to Settle Long-Running Lawsuit over Hedge Funds*, LEXINGTON HERALD LEADER (Jan. 3, 2025) (Exhibit 1 at 3). Unless otherwise noted, all emphases in quoted texts are added.

[6] Kevin Grout, *Attorney General Coleman Announces $227.5 Million Settlement for Kentucky Pension Systems*, NEWS RELEASE, OFFICE OF THE ATTORNEY GENERAL (Jan. 8, 2025) (Exhibit 2).

79291FB7-060A-4973-87BD-A170FD40FC4A : 000008 of 000167

Indeed, "[t]he total agreed-upon amount announced by [the AG] … includes the return of $145 million in capital from KRS' 2011 investment in … a customized hedge fund of funds managed by [Defendant] Prisma Capital."[7] So, notwithstanding the AG's grand-standing claim of a $227.5 million "recovery," the proposed Settlement recovers only $82.5 million of "fresh money" — before the deduction of tens of millions of dollars of attorneys' fees claimed by the private contingency-fee lawyers retained by the AG.

Worse, the joint motion conceals the contractual contingency fee claimed by the AG's private lawyers. Under their fee contract — made possible by a 2022 special legislation enacted over the Governor's veto — the AG's private lawyers stand to pocket 20% of the first $250 million of the "gross recovery." Ex. 3 at 3. If these private lawyers claim the entire $227.5 million (as opposed to the $82.5 million portion) as the "gross recovery," their attorneys' fees will be a staggering $45.5 million, and the net recovery from the proposed Settlement will fall to $37 million ($82.5 million minus $45.5 million). And even if these private lawyers claim only the "fresh money" portion of $82.5 million as the "gross recovery," the attorneys' fees will be $16.5 million, and the net recovery will be $66 million. Since the Hedge Fund Sellers and the AG's contingency-fee lawyers have concealed the dollar amount of the net Settlement fund, the Tier 3 Trust Plaintiffs must assume the worst — a $45.5 million fee and a much-smaller net "fresh money" recovery of $37 million. If it is the other way around, the outrage is just mildly diluted, while the outcome of this motion is unaffected.

Either way, the proposed Settlement — with the range of "fresh money" recovery between $37 million and $66 million for the Trusts — cannot pass muster for judicial

[7] Rob Kozlowski, *Kentucky Settles for Millions from KKR, Blackstone and Others in Hedge Fund Litigation*, PENSIONS & INVESTMENTS (Jan. 15, 2025) (Exhibit 10 at 2).

79291FB7-060A-4973-87BD-A170FD40FC4A : 000009 of 000167

approval under any circumstances, because this litigation arose from billions of dollars of KRS investments involving hundreds of millions of dollars in exorbitant fees.[8] Among its numerous procedural and substantive defects, the proposed Settlement purports to release all claims asserted by the Tier 3 Trust Plaintiffs, *which necessarily includes the $807 million recovery at issue in the Tier 3 Trust Plaintiffs' May 13 motion*.

Yet, the motion was prevented from being heard because, on July 9, 2024, one day before the Tier 3 Trust Plaintiffs' reply was due, the Court *sua sponte* stayed this action pending further order from the Court of Appeals on the Hedge Fund Sellers' writ petition. Because the proposed Settlement, brokered during the stay, directly implicates the merits of the Tier 3 Trust Plaintiffs' motion for the return of Trust funds, the Court should permit the filing of the reply brief and hear the motion, before considering whether the claims at issue in this case may be properly released by the proposed Settlement.

Consideration of the Tier 3 Trust Plaintiffs' May 13 motion is also critical in assessing the fairness of the proposed Settlement in light of the surprising approval of it by the KPPA, a nonparty to this breach-of-trust action and the AG's taxpayer action. Under the Tier 3 Trust Plaintiffs' culpable-Trustee case theory, the Trustee committed a breach of trust, in which the Hedge Fund Sellers participated. As the culpable Trustee, KPPA's ability to participate in and approve the proposed Settlement pollutes it. Thus, KPPA is disabled from settling or releasing any part of these breach-of-trust claims.[9]

[8] According to Blackstone's counsel, the claims asserted in the original *Mayberry* case are worth $50 billion. *See* Paul, Weiss, Rifkind, Wharton & Garrison LLP Client Memorandum, *Kentucky Supreme Court Dismisses $50 Billion Derivative Action Against Hedge Fund Managers for Lack of Standing* (July 14, 2020) (Exhibit 9).

[9] *See City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 68 Cal. App. 4th 445, 470 (1998) (holding that trust beneficiaries retained the right to bring breach-of-trust claims against third parties despite their settlement with the trustee).

79291FB7-060A-4973-87BD-A170FD40FC4A : 000010 of 000167

KPPA's approval of the proposed Settlement also cannot withstand judicial scrutiny because the $145 million component of the Settlement is indisputably *the Trust's property* — already so and always has been. It is baffling how KPPA — charged by statute to act only in "good faith" and "[s]olely in the interests of the members and beneficiaries" (*see* KRS §§ 61.645(15)(a), 61.650(1)(c)(2)) — can approve a broad release of valuable claims in exchange for a settlement fund whose "substantial majority" is its own property (Ex. 1 at 3). Yet, KPPA, together with the AG and the Hedge Fund Sellers, seek judicial blessing of this proposed Settlement, asking the Court to find that KPPA has "exercised its business judgment … in compliance with its fiduciary duties … [and] in the best interest of the [Trusts]":

> 7. The Court finds that the KPPA Entity, having exercised its business judgment, and in compliance with its fiduciary duties, has the authority to determine and has independently concluded that this Settlement Agreement, including the global Releases of the Released Claims therein for the benefit of itself and its members, is in the best interests of the KPPA Entity and all plans, trusts, systems, pension funds, and tiers whose interests any of the KPPA Entity administers and/or oversees … .

Proposed Final Order ¶ 7. This requested finding is legally improper because, instead of the "business judgment rule," Kentucky statutes require that KPPA act in "good faith," "in the best interests" of the Trusts, and "[s]olely in the interests of the members and beneficiaries." KRS §§ 61.645(15)(a), 61.650(1)(c)(2). The Court also lacks a factual basis to make such a finding because the record is devoid of any evidence of what the KPPA did in connection with approving the proposed Settlement. In any event, without fully assessing the merits of the Tier 3 Trust Plaintiffs' claims — and specifically those asserted in their May 13 motion — the Court cannot make this finding for KPPA.

For the reasons set forth below, the Court should modify the stay to allow consideration of the Tier 3 Trust Plaintiffs' pending motion for the return of Trust funds.

79291FB7-060A-4973-87BD-A170FD40FC4A : 000011 of 000167

II. ARGUMENT

A. The Court Should Modify the Stay Because the Hedge Fund Sellers' Attempt to Settle the Claims in This Case Is a Direct Violation of the Court's May 1 Decision Rejecting the AG's "Occupied-the-Field" Arguments and Its July 9 Order Staying the Case

In its May 1, 2024 order denying Defendants' motions to dismiss the complaint, this Court held that the Tier 3 Trust Plaintiffs have constitutional and trust standing to sue for the Trusts. Ex. 4 at 3–4.[10] The Court rejected the claims, asserted by the AG and the Hedge Fund Sellers, that the AG's case "preempt[ed]" this breach-of-trust case — that the AG "occup[ied] the field." *Id.* at 4. In so holding, the Court expressly stated that a judgment in the AG's case "would not preclude" the Tier 3 Trust Plaintiffs' case:

> *The "occupy the field" term of art is misplaced.* There is no preemption issue in this case. Furthermore, the Court does not believe the claims asserted by the Tier 3 members are duplicative of the [AG's] claims. *A judgment would not preclude the other.* The two separate actions are subject to different defenses, procedural and substantive.

Id. The Court further held that this case should proceed independently from the AG's case. *See id.*

Following these rulings, on May 13, 2024, the Tier 3 Trust Plaintiffs moved for an order directing the KKR-Prisma Defendants to return some $137 million (now $145 million) in KRS Trust funds, plus 8% interest and a three-time statutory penalty — $807 million as of today. The motion detailed the account holding the Trust funds and the circumstances of its wrongful withholding by the KKR-Prisma Defendants. Plfs.' May 13, 2024 Mot. at 4–10.

---

[10] *Taylor v. KKR & Co., L.P.*, Case No. 21-CI-00645, slip op. (Ky. Cir. Ct. Franklin Cnty. May 1, 2024) (Wingate, J.) (Exhibit 4).

79291FB7-060A-4973-87BD-A170FD40FC4A : 000012 of 000167

Originally noticed for a hearing on May 20, 2024, the motion hearing was postponed to July 17, 2024 at the KKR-Prisma Defendants' request. The KKR-Prisma Defendants procured the Tier 3 Trust Plaintiffs' agreement to the postponement without disclosing that negotiations with the AG to settle this litigation were underway. On June 19, 2024, the KKR-Prisma Defendants filed their opposition. The Tier 3 Trust Plaintiffs' reply was due on July 10, 2024.

But on July 9, 2024, the Court *sua sponte* stayed this action because the Hedge Fund Sellers petitioned for a writ to overturn the May 1 order. On November 12, 2024 the Court of Appeals denied KKR's writ petition, upholding this Court's May 1 rulings, including its findings that the Tier 3 Trust Plaintiffs have constitutional standing, and that they should be permitted to prosecute their own claims in parallel with the AG's taxpayer case.

Relying on the Court of Appeals' order, on November 22, 2024, the Tier 3 Trust Plaintiffs moved to vacate the stay identifying the need to resolve several motions, including this pending $807 million motion as to KKR and two other specified motions they had prepared and were ready to file. One of these motions would seek partial summary judgment as to the culpable Trustee's breach of fiduciary duty and the Hedge Fund Sellers' participation in the breach, and which, if granted, would, for all practical purposes, end this case (the "Summary Judgment Motion"). Directed against Blackstone, Schwarzman, and Hill, the second motion would seek up to $1 billion in restitution and disgorgement, as interim equitable relief, for wrongful diversion of Trust assets (the "Blackstone-Park Hill Motion").

So, in late November 2024, Defendants saw what was coming. By that time, they had lost every motion of substance in this case. The Hedge Fund Sellers' writ petition

79291FB7-060A-4973-87BD-A170FD40FC4A : 000013 of 000167

challenging the Court's May 1 order was denied by the Court of Appeals. The KRS Insiders' immunity appeals were dismissed by the Court of Appeals for want of jurisdiction. Subject to dismissal under the law-of-the-case doctrine and the final-judgment rule, Defendants' remaining appellate maneuverings are longshots. Rather than facing the inevitable reality that the stay would soon be lifted, and that they would be forced to deal with the strength of the Tier 3 Trust Plaintiffs' claims on the merits, the Hedge Fund Sellers quickly completed the sellout settlement in the taxpayer case, buying off the AG's private lawyers with the promise of a huge uncontested and undisclosed fee payment.[11]

The Hedge Fund Sellers and the AG's contingency-fee lawyers are abusing and exploiting the stay, if not outright violating it. The stay was entered by this Court for Defendants' protection from potentially unnecessary and avoidable ongoing litigation, costs, fees, and inconvenience, and to assure the orderly management of the proceedings in this Court in accordance with its May 1 order. By attempting to settle claims in this case, Defendants are in violation of this Court's May 1 order, which carves out these claims, including this $807 million motion for separate prosecution, without involving

[11] At a March 5, 2018 hearing in the *Mayberry* action, Judge Shepherd reiterated the presumption of public access to this litigation, in light of its public importance. Mar. 5, 2018 H'rg Tr. in *Mayberry* Action at 53:7–11 ("[The Court:] My philosophy is that … 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."). However, the AG's contingency-fee lawyers agreed to a broad protective order that denied public access to the discovery materials. The Tier 3 Trust Plaintiffs made clear their opposition to this secrecy and, in their November 22 motion to lift the stay, also identified their pending open-proceedings motion (originally filed in August 2021). Resolution of the open-proceedings motion in the Tier 3 Trust Plaintiffs' favor would have provided complete public access to this case. The desire of the AG's contingency-fee lawyers and the Hedge Fund Sellers to keep all evidence secrete is another reason why they are attempting this cheap sellout Settlement.

79291FB7-060A-4973-87BD-A170FD40FC4A : 000014 of 000167

the AG's contingent-fee lawyers. It is urgently necessary that, *at a minimum*, the Court modify its January 3, 2025 order to permit Plaintiffs to file their reply to the KKR opposition, and schedule a hearing for that motion.

Despite the repeated rejection of the Hedge Fund Sellers' repeated repetition of the AG's repeated claims to "occupy the field" and of "preemption" and "litigation supremacy" – the Hedge Fund Sellers are attempting to resurrect them, ignoring this Court's and the Court of Appeals' rulings to the contrary that are, as of now, the law of this case. *See Inman v. Inman*, 648 S.W.2d 847, 849 (Ky. 1982). Neither the AG nor KPPA have standing to assert the claims for the Trusts – including recovering the $137–$145 million in Trust funds willfully withheld by KKR. These circumstances permit — in fact, require — that the Tier 3 Trust Plaintiffs bring the $807 million motion because where, as here, the Trustee is culpable, only trust beneficiaries can assert those claims.[12]

One cannot create standing to settle a claim belonging to and being prosecuted by another. The stay applied to *all* parties to this action, including the Hedge Fund Sellers and the KRS Insiders, as well as their lawyers. How do parties and their lawyers to a stayed action, the Hedge Fund Sellers and the KRS Insiders here, settle the claims asserted against them in the stayed action? This action cannot be settled while the stay is in place. This attempt of the AG's contingency-fee lawyers to settle those claims for a

---

[12] *See*, *e.g.*, RESTATEMENT (SECOND) OF TRUSTS § 326 (1959) ("A third person who, although not a transferee of trust property, has notice that the trustee is committing a breach of trust and participates therein is liable to the beneficiary for any loss caused by the breach of trust."); 76 AM. JUR. 2D TRUSTS § 603 (2016) ("a trust beneficiary may sue third persons who, for their own financial gain or advantage, induced the trustee to commit a breach of trust, participated with, aided or abetted the trustee in such a breach of trust, or while knowing of the breach of trust, received and retained trust property from the trustee").

79291FB7-060A-4973-87BD-A170FD40FC4A : 000015 of 000167

small "fresh money" recovery but a large undisclosed and uncontested fee is improper, inconsistent with this Court's May 1 order, and, indeed, violates due process.

Because the stay was entered *sua sponte* on July 9, 2024, the Tier 3 Trust Plaintiffs were not provided an opportunity to be heard on the matter. Had they been heard, they would have argued against the stay then by repeating the alarm they sounded to the Court back in 2022 as to what the AG's private lawyers and the Hedge Fund Sellers were likely up to. On June 13, 2022, the Tier 3 Trust Plaintiffs' counsel then warned that the Hedge Fund Sellers and the AG's contingency-fee lawyers were working behind the scenes to arrange a headline grabbing "global" settlement (which would attempt to extinguish this action) without any prosecution on the merits or public disclosure of *the evidence detailing the excessive fees*, *looting and gross mismanagement of the KRS Trust funds* that KRS members, Trust beneficiaries, taxpayers and the public are entitled to — and the media should demand — when any such settlement is presented to the Court for approval. *See* Pls' Aug. 31, 2021 Mot. for Open Proceedings at 11–14. This is exactly what the Hedge Fund Sellers and the AG's contingency-fee lawyers are trying to do.

But even worse — there is to be no mailed notice to Trust beneficiaries and taxpayers, no disclosure of the real "fresh money" recovered or of the dollar amount of the fees, and no disclosure of other matters required by CR 23.05 — an approval procedure Judge Shepherd stated long ago *must be followed*, if the AG tries to settle the *Mayberry* case after he and his contingency-fee lawyers took that case over. In any event, by seeking judicial approval of what they are trying to do, the AG and the Hedge Fund Sellers have invoked contemporary judicial approval standards — including the procedure provided by CR 23.05 and related rules that govern approval of proposed settlements in representative actions.

79291FB7-060A-4973-87BD-A170FD40FC4A : 000016 of 000167

The Tier 3 Trust Plaintiffs have constantly warned that because of the impaired nature of the prior derivative claims being prosecuted by the AG in a direct lawsuit, his contingency-fee lawyers would fold, take a cheap settlement, get a fee, and be done. The proposed Settlement is cheap because the claims are weak. And worse than weak, its true terms, the amount of attorneys' fees, and the real recovery are being obfuscated. *See* Section II.F, *infra*.

If all the AG's lawyers and the Hedge Fund Sellers were doing was settling the weak taxpayer case, that would be between the AG, those parties, their lawyers, and this Court. The Commonwealth's claims were never worth very much, given the *in pari delicto* conduct of both KPPA and the Commonwealth (which underfunded KRS for over a decade) and contract disclaimers the culpable Trustee agreed to, that impaired or gave up KPPA's legal rights and protections. However, the Settlement by the Hedge Fund Sellers and the AG's contingency-fee lawyers in his taxpayer case goes much further. It tries to settle all the claims asserted in this breach-of-trust case upheld by this Court and carved out for separate prosecution in this Court's May 1 order.[13] It attempts to do so after the Tier 3 Trust Plaintiffs have won every substantive motion and have prevailed in every appellate proceeding. And it does so in the face of pending and specified anticipated motions in this case that are potentially worth billions of dollars to the Trusts. This must not be permitted.

The decisive issue is the scope of the release in the taxpayer case "settlement." The release is both incredibly broadly-worded and at the same time specifically targeted to release these breach-of-trust claims, including the $807 million claim that was pleaded

[13] In reality, they are trying to wipe out the treble-damage claims pending (but stayed) in federal court.

79291FB7-060A-4973-87BD-A170FD40FC4A : 000017 of 000167

in this case and where a motion for equitable relief as to those funds has been pending for months. The release specifically obliterates all the Tier 3 Breach of Trust case's valuable claims, including the Blackstone-Park Hill Motion and the Partial Summary Judgment Motion Plaintiffs told the Court they were ready to file several weeks ago.

But this Court has already carved this Tier 3 Breach of Trust case and all its claims out for separate, protected prosecution. Recognizing the fundamental differences between the two cases, this Court decided to manage them on parallel tracks:

> *The two cases … are different and distinct in important respects.* First, the parties are not the same …. *Discovery and motion practice will be affected by this difference. At trial, the evidence, argument and jury charge including any comparative fault question will be markedly different. The Tier 3 members/beneficiaries have interests different from the interests of* "*the Commonwealth, the body politic,*" *to which the AG owes his* "*primary obligation.*" *Commonwealth ex rel. Hancock v. Paxton*, 516 S.W.2d 865, 868 (Ky. 1974). Second, the claims are not entirely the same. The central theory underlying this case — that the KPPA Board, as a whole and as the sole trustee of the KPPA trust funds committed breaches of trust, in collusion with the third-party defendants — *is different from the theory underlying the AG's case.* Third, the relief is not the same. While both the Tier 3 Trust Plaintiffs and the AG seek to hold the Hedge Fund Sellers and other third-party Defendants liable, the different theories of the case may well result in different remedies.

Ex. 4 at 4. This Court rejected the AG's "preemption" and "occupy the field" arguments:

> *The* "*occupy the field*" *term of art is misplaced.* There is no preemption issue in this case. Furthermore, the Court does not believe the claims asserted by the Tier 3 members are duplicative of the [AG's] claims. *A judgment would not preclude the other.* The two separate actions are subject to different defenses, procedural and substantive.

Id.

The Court may recall this exchange from May 2024 when the AG's private lawyers attempted to disrupt proceedings in this case relating to the $807 million motion:

> WALSON: They're like the house squatter that doesn't have a lease or any title, but breaks into your house and won't leave. We've talked about this

79291FB7-060A-4973-87BD-A170FD40FC4A : 000018 of 000167

before, and you said you had handled it and you did judge. You worked hard on that order. You made it clear we got separate cases.

[00:11:42.10] - JUDGE WINGATE

They don't. That's the way I look at it. Yeah, well.

[00:11:44.19] - WALSON

You have ruled on that. It's over. So, judge, we ask that there be no more appearances or jumping up to the podium by a squatter. It's there. Not in our case. And will not. We just want to.

[00:11:58.13] - JUDGE WINGATE

Yeah.

[00:11:59.05] - JUDGE WINGATE

Uh, I look at that as totally different from the other cases. Is this one. Uh, we've discussed that. I've discussed it with my lawyers that work for me. And we are of that belief.

May 20, 2024 H'rg Tr. at4–5. This Court's finding that the cases are "totally different" is correct. *See* Ex. 4 at 4. So is the Court's ruling that "[a] judgment [in one case] would not preclude the other," whether the judgment results from a trial or a settlement. *See id*.

The Court has already decided the key issues regarding any attempt of the Hedge Fund Sellers to buy off the AG's private contingency-fee lawyers to create their "global settlement," with huge undisclosed fees to those lawyers. The Tier 3 breach-of-Trust claims are immune from the "global," "occupy-the-field" Settlement brokered by the AG's contingency-fee lawyers and the Hedge Fund Sellers for their mutual benefit. Any attempt to settle, impair, or release these claims is inconsistent with, and violates that May 1 order, and its stay of this case pending Defendants' appeals. They are trying to ride rough shod over those orders and this Court's oversight and management of these competing cases. The Court has already "carved out" these unique common law breach

79291FB7-060A-4973-87BD-A170FD40FC4A : 000019 of 000167

of Trust claims to be independently protected by Trust beneficiaries because the Trustee is culpable.

The Hedge Fund Sellers and the AG's contingency-fee lawyers know this. And that is why the Settlement is *artfully drafted* to accommodate their mutual selfish needs if the Court honors the existing carve-out of the breach-of-trust claims, as it should and they surely feared it would. The release language that specifically targets this breach-of-trust case states that the release applies to this case "*to the fullest extent of [the Commonwealth and the KPPA Entity's] legal authority*." Settlement Agreement at 6 (¶ 9). But they know a release of the breach-of-trust claims is not legally possible — it is beyond the "legal authority" of both the Commonwealth and KPPA. So, they drafted the Settlement to accommodate the eventuality that this Court adheres to its prior decision — endorsed by the Court of Appeals — directing separate prosecution of these breach-of-trust claims, and carves them out from the release of the Settlement because the Commonwealth and the KPPA lack "legal authority" to release these separate breach-of-trust claims.

When this Court does so, the Settlement is then limited to the taxpayers' claims and is still binding on the Settling Parties. The Hedge Fund Sellers and the AG's contingency-fee lawyers are trying to have it both ways. Let the Hedge Fund Sellers and the KRS Insiders keep their Settlement, and let the AG's private lawyers keep their contingency fees. The Hedge Fund Sellers get out of the taxpayer case for $82 million — a pittance. The AG's private lawyers get $46 million — a bonanza. The Trusts net only $37 million in "fresh money." The Court can approve this charade if it can stomach it. But the Court must leave the Tier 3 Trust Plaintiffs, their claims, and their lawyers out of this, and must allow their separate claims to be prosecuted, including the pending $807 million motion. This is gamesmanship.

79291FB7-060A-4973-87BD-A170FD40FC4A : 000020 of 000167

B. Failure to Modify the Stay Would Block the Prosecution of Meritorious Claims That Are Potentially Worth Billions of Dollars to the KRS Trusts

79291FB7-060A-4973-87BD-A170FD40FC4A : 000021 of 000167

This relief is urgently needed. When the Court declined to modify the stay on January 3, 2025, it did not know that the Hedge Fund Sellers were secretly settling the claims asserted by the Tier 3 Trust Plaintiffs in this case. Plaintiffs strongly disagree with the continuation of the stay in any form. But the Tier 3 Trust Plaintiffs respect the Court's authority to manage the two competing litigations pending before it. So, rather than petitioning for a writ as the Court suggested, the Tier 3 Trust Plaintiffs have made this very limited request as to just one specific motion that is already all but fully briefed, was previously scheduled for hearing, has been pending for eight months, and has been directly implicated by the proposed Settlement involving the same $137–$145 million in previously invested Trust funds at issue in this motion.

Modifying the January 3, 2025 order in this limited regard is essential to protecting the rights of the Tier 3 Trust Plaintiffs. No discovery is necessary to decide this $807 million motion. All the Court is asked to do is to permit the Tier 3 Trust Plaintiffs to file their reply brief (*see* Ex. 5) and decide the motion. Deciding this one motion, which was scheduled for hearing and all but fully briefed when stayed, will not open a "can of worms." It is essential to permitting Plaintiffs to protect their rights and to avoid prejudice without causing KKR any real inconvenience or expense.

This situation has become critical not because of anything the Tier 3's have done. This urgency is not of the Tier 3 Trust Plaintiffs' making. KKR has placed this motion in immediate issue by attempting to settle the claims asserted in this action including the relief sought by this $807 million motion. However unhappy the Tier 3 Trust Plaintiffs are with the stay, or the January 3, 2025 order maintaining it, they could accept the status

quo in the expectation that the Court would let them litigate their claims on the merits when the interlocutory appeals of the May 1 order are decided. The Hedge Fund Sellers have provoked this confrontation by trying to settle the claims in this case and wipe out the pending $807 million motion and the two other motions, while the Tier 3 Trust Plaintiffs' hands are tied by the stay.

The potential Settlement is no reason to continue to block this long pending motion in this case. Given its procedural and substantive defects, as well as the concealment of the huge legal fees that actually exceed the "new fresh money" recovery, the Settlement will never withstand the judicial approval process. *See* Section II.F, *infra*. The fact that the Settlement in the AG's case has not been approved is actually all the more reason to move forward with the pending motion *now* and resolve it in an expeditious fashion. Any further delay in considering the pending motion prejudices the Tier 3 Trust Plaintiffs.

Blackstone, Schwarzman, Hill, KKR, Kravis, and Roberts are also exploiting the stay to try to extinguish the two other motions of potentially great value to the Trusts. When Plaintiffs moved to vacate the stay in November 2024, they specifically identified motions that they had prepared and would file following the lifting of the stay:

> [(1)] motion for partial summary judgment as to the Trustee's breaches of duties, and the Hedge Fund Sellers' participation in, and aiding and abetting of, the Trustee's breaches of duties.
>
> [(2)] motion to compel Defendants Blackstone, Schwarzman, and Hill to account for and to return "sidekick" payments, *i.e.*, secret diversion of Trust assets, to Park Hill (an entity formed by Schwarzman, and controlled by him, Hill and Blackstone), plus disgorgement of all other similar payments diverted from other public pension funds (as part of Blackstone's alternative-asset business plan), plus interest and penalty.

79291FB7-060A-4973-87BD-A170FD40FC4A : 000022 of 000167

79291FB7-060A-4973-87BD-A170FD40FC4A : 000023 of 000167

1. The Partial Summary Judgment Motion as to the Hedge Fund Sellers' Participation in the Culpable Trustee's Breaches of Fiduciary Duties

The Hedge Fund Sellers are trying to extinguish and avoid ever dealing with this partial summary judgment motion, *i.e.*, the evidence of their egregious misconduct ever seeing the light of day. This partial summary judgment motion would seek a finding as to the culpable Trustee's breach of its fiduciary duties — *i.e.*, its culpability, and the Hedge Fund Sellers' and the KRS Insiders' participation in that breach. If granted, this motion would end this case. The AG's contingency-fee lawyers of course could never even file such a motion because their case is based on the *innocent* Trustee theory, while this one is based on a *culpable* Trustee theory. This is a unique and uniquely valuable claim in this case and in this case only.

This partial summary judgment motion would have detailed how — after making the $1.245 billion Black Box Hedge Fund bet with 10% of the Trust assets, when those investments ran out their five-year life in 2016 — KRS was collapsing into a "death spiral" and becoming "essentially bankrupt." Commonwealth officials and new individual Trustees came in. They did a "*deep dive*" and were "*shocked*." ¶ 36.[14] Their investigation confirmed years of fiduciary failures by the culpable Trustee, *i.e.*, its "cover up/catch up scheme" and how the Hedge Fund Sellers profited from $300 million in "exorbitant hedge fund fees." They concluded the conduct by the Trustee that led to the "accumulation of billions in unfunded liabilities" was "morally negligent", "irresponsible," even "criminal." ¶¶ 35–38, 61–69.

---

[14] The allegations in the Tier 3 Trust Plaintiffs' August 21, 2021 complaint (the "Complaint") are cited as "¶ ___."

79291FB7-060A-4973-87BD-A170FD40FC4A : 000024 of 000167

COMMONWEALTH OFFICIALS CONDEMN THE CULPABLE TRUSTEE'S MANIPULATION OF ACTUARIAL ASSUMPTIONS

BEVIN GOVERNOR | **HOOVER** HOUSE SPEAKER | **STIVERS** SENATE PRESIDENT | **CHILTON** BUDGET DIRECTOR

"

...PAST ASSUMPTIONS WERE OFTEN MANIPULATED UNREASONABLY HIGH INVESTMENT EXPECTATIONS ... FUNDING BASED ON FALSE PAYROLL NUMBERS.

THE RESULT WAS TO PROVIDE A FALSE SENSE OF SECURITY TO THE PENSION PLANS.

KRS HAS TAKEN ON SIGNIFICANTLY MORE INVESTMENT RISK OVER THE LAST DECADE TO CHASE UNREALISTICALLY HIGH INVESTMENT RETURNS.

LACK OF REALISTIC AND RATIONAL ACTUARIAL ASSUMPTIONS **HELPED** ***OBSCURE*** **THE DISTRESSED FINANCIAL STATUS OF THE PLANS**

"

"WHAT HAS BEEN DONE IN OUR PENSION SYSTEMS HAS BEEN CRIMINAL. IT HAS BEEN NEGLIGENT. IT HAS BEEN IRRESPONSIBLE. IT IS SHAMEFUL"

H-L 8.25.17;

¶36-37,61-69

Slide #1

2016 - NEW KRS BOARD - FRESH EYES - DEEP DIVE

Shocked • Assumptions Ridiculously High • Blatantly Incorrect • Wildly Overstated • Aggressively Wrong • Fantasyland Numbers

- KRS... "payroll growth, investment returns and inflation assumptions ***blatantly incorrect or wildly overstated***

"Actuarial assumptions ***ridiculously high***

- When you use re... een used for the last 10 years ***fantasyland numbers*** gonna go up"

Exorbitant fund fees

shocked

March 5, 2017

"... most important, is that the actuarial assumptions are realistic ... the Board's No. 1 responsibility is to set the rates on investment returns, payroll growth and inflation. These three numbers determine the actual liability and required actuarial payments by the legislature"

"One of the first things [new KRS board] did was to undertake an examination of 10-year historical rates. We were shocked to find that the actuarial assumptions used by the previous board were 30% to 60% percent higher

too afraid of the political consequences to use the accurate numbers for these assumptions

June 18, 2018,

The new leadership...terminated

helped hide the true pension costs and liabilities from Kentucky taxpayers

actions helped hide the true pension costs and liabilities from Kentucky taxpayers.

John R. Farris

The massive increased deficit numbers are largely a result of new assumptions which replaced **optimistic assumptions** used by boards in the past that **led to the accumulation of billions in unfunded liabilities**

H-L 2.16.17;

NEW TRUSTEES FIRE PEDEN AND END HEDGE FUND ADVENTURE

"EXORBITANT" HEDGE FUND FEES

- "Exorbitant Hedge Fund Fees"~ Farris, June 25, 2018/Feb

Exorbitant Hedge Fund fees

- Former KRS Trustee: "can't get [fees] from anywhere besides public pension plans. Corporate plans are too smart to pay these outrageous fees. **The only stupid people are the taxpayers of Kentucky for letting these people get away with this."**

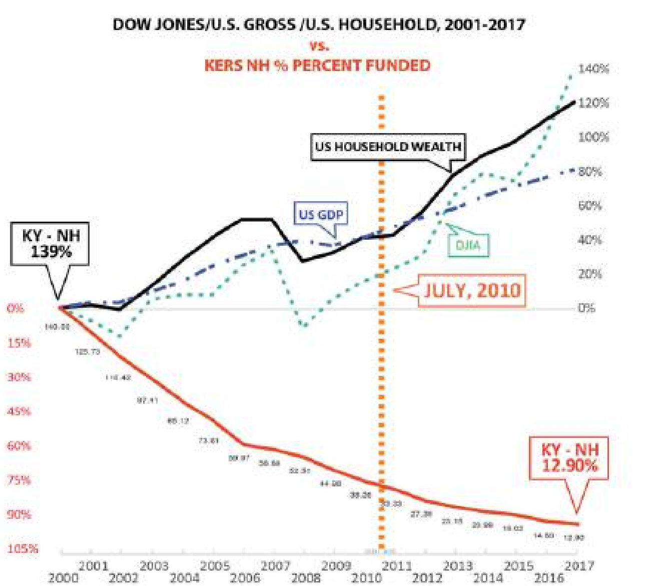
"WE HAVE BEEN AGGRESSIVELY WRONG IN OUR ASSUMPTIONS FOR MANY, MANY YEARS" ADVENTURE

¶ 36-37, 61-69

Slide #2

- The Black Box Hedge Fund Fees were "exorbitant."
- "Payroll growth, investment return and inflation assumptions" were "ridiculously high, blatantly incorrect or wildly overstated."
- "Past assumptions were manipulated." "Fantasyland numbers" helped "hide the true pension costs and liability."
- The "lack of realistic actuarial assumptions helped obscure the distressed financial status of the plans."
- The Trustee had engaged "in aggressively wrong assumptions for many, many years" which "led to the accumulation of billions in unfunded liability."

KRS-NH PERFORMANCE vs. OTHER PUBLIC PENSION PLANS



Pension Fund	% Funded	Pension Fund	% Funded	Pension Fund	% Funded
Connecticut Municipal	86%	Missouri Local EES	95%	Sacramento Co. ERS	87%
Delaware State EES	89%	Missouri PEERS	86%	South Dakota EES	100%
TENN	93%	Missouri Teachers	86%	South Dakota EES	100%
Florida Retirement System	85%	Montana County EES	92%	Texas County	88%
Houston Fire Fighters	86%	Nebraska School EES	90%	Texas Court EES	88%
Iowa PERS	84%	New York State Teachers	87%	Texas Teachers	86%
Los Angeles Fire and Police	94%	North Carolina Local	95%	Washington School EES /Teachers	88-92%
Louisiana State Parochial	99%	North Carolina EES	91%	Washington, DC P&F	110%
Maine Local Govt. EES	86%	Oklahoma PERS	93%	Washington, DC Teachers	91%
Milwaukee City ERS	95%	Oklahoma Police	99%	Wisconsin EES	100%
Minnesota Police and Fire	88%	Pennsylvania Municipal	100%	KERS NH	12.9%

TODAY KRS PLANS ARE WORST FUNDED IN US – 50 OF 50 ¶ 20-21, 28

Slide #18

This was the worst financial scandal and fiscal crisis in Kentucky history. ¶¶ 18-78, 229-325. KRS became "a contender both for the title of most corrupt and most

79291FB7-060A-4973-87BD-A170FD40FC4A : 000025 of 000167

incompetent public pension funds in the U.S. … in no small measure [due] to its dodgy relationships with placement agents [and] having invested in … hedge fund dogs." Gary Rivlin, *The Whistleblower*, *How a Gang of Hedge Funders Strip Mined Kentucky's Public Pensions*, THE INTERCEPT (Oct. 21, 2018).

A state audit, a "deep dive" by Commonwealth officials and the KRS internal investigation report have documented "conflicts of interest", "improper procedures," "no due diligence over the final Hedge Fund Seller selection process," and $13–$15 million in secret unapproved diversions of Trust monies *i.e.*, "sidekicks," to third persons, that polluted the Trustee's alternative investments. May 12, 2021 Investigation Report by Calcaterra Pollack LLP ("Report") at 8, 20, 25–26, 32–33, 49, 51, 53, 57–58, 62, 67, 74–78; *see also* ¶¶ 53–55, 233–235, 245–250, 250, 260.

KRS Documents show Peden, Elliott, Cook and Rudzik engaged in **"improper conduct,"** that **"showed deference to Prisma"** while Peden **"lied" and "was dishonest"**, working to **"protect"** and **"prefer" KKR-KKR Prisma's interests, "manipulating"** events, engineering an **"improper selection process"** in the hedge fund transactions, seeking to find ways to **"pay [KKR-KKR Prisma] back"**.

The Trustee's operations were in "***chaos***" – and its finances in "***crisis mode***". "***Conflicts***" existed via KKR – KKR Prisma, Cook, Peden, Tosh, Reddy Rudzik, and Elliott's involvement in the Hedge Fund transactions. The manner in which Peden and Tosh proceeded "***was improper***" – "***flawed due diligence***" "***no due diligence over final Hedge Fund Seller selection.***"

Jennifer Elliott did not recuse herself. **"A recusal should have occurred". "Troubling lack of disciplined recusal process in the case of Elliott and Cook"**.

Due to the improper relationships/conflicts at least six KRS staff members fled. *CIO Carlson*, Mastay, Schelling and Muringhan quit in protest over these dealings.

PPT Ex1, CR 8, 20, 25, 32-33, 49, 51, 53, 57-58, 62, 67, 74-78

Slide #4

79291FB7-060A-4973-87BD-A170FD40FC4A : 000026 of 000167

Peden, placed inside the KRS investment office by Cook and Rudzik of Prisma – where and for whom Peden had worked — was working inside KRS to "protect" and "prefer" KKR Prisma's interests, "manipulating" events, engineering an "improper" selection process, seeking to find ways to "pay [KKR-KKR Prisma-Reddy] back," who Peden felt he "owed it to." Report at 20, 32–33, 74–78; *see also* ¶¶ 40–43, 54–55, 93, 232–234, 289.

These were "conflicted", "improper", "flawed" transactions, with "deference to Prisma" with "no RFP" and "no due diligence over the final selection" of these Hedge Fund Sellers. Peden's conduct involved "lying," "manipulation," "dishonesty," and "bias" toward the Hedge Fund Sellers *i.e.*, breaches of "fiduciary duty."

CALCATERRA REPORT DOCUMENTS – CONFLICTS – FIDUCIARY FAILURES

PEDEN

ELLIOTT

KRAVIS

ROBERTS

COOK

RUDZIK

REDDY

THIELEN

EAGER

"CHAOS/CRISIS" – "CONFLICTS" – "IMPROPER INVOLVEMENT" – "DISHONEST CONDUCT" LIES" – "MANIPULATION" – TO PROTECT AND PREFER KKR/PRISMA'S INTERESTS – "TO PAY PRISMA BACK" "DEFERENCE TO PRISMA", "IMPROPER SELECTION PROCESS" "NO DUE DILEGENCE OVER FINAL SELECTION" OF HEDGE FUND SELLERS CR 25, 26, 58, 67, 78

CONFLICTS CONFLICTS CONFLICTS CONFLICTS CONFLICTS CONFLICTS

2011

"Conflict of interest – there are known relationships between KRS trustees/employees and PRISMA Capital Partners; KRS board of trustees chair Jennifer Elliott's employer, Stites & Harbison, PLLC, has provided legal work for PRISMA co-owner AEGON group; David Peden was previously employed by both AEGON group and PRISMA Capital Partners."

2015-2016

Peden, Rudzik, Cook and Eager arranged for KKR - KKR PRISMA to take over entire $1.8 billion hedge fund portfolio. No RFP. Rudzik and other KKR employees go inside KRS but stay on KKR payroll Cook goes on KRS Board/IC.

CONFLICTS NEVER CLEARED

CR 25-33, 53-62, 67-83 ¶ 53-55

Slide #5

79291FB7-060A-4973-87BD-A170FD40FC4A : 000027 of 000167

The damage done to the KRS Trusts is unlikely to ever be overcome, absent the large recovery that this breach-of-trust case — and this case alone — promises. And the damage is enormous. After years of strong markets as of 2023, the largest KRS fund as of today remains just 21% funded. KRS has $40 billion in obligations and just $16.5 billion in assets — a $23 billion deficit — just below the $26 billion peak deficit. Even assuming kind markets going forward, the largest Fund (non-hazardous) will likely never bounce back.

To fund the Black Box Hedge Fund speculation, the culpable Trustee sold off large amounts of the Trusts' high quality dividend paying equities and safe U.S. Treasures. The Black Boxes then performed miserably, while the S&P 500 went up over 350% in the next few years and today is at an all-time high — up almost 700%. ¶ 56. If the culpable Trustee had *done no harm*, *and just stood pat*, and if the KRS Insiders and the Hedge Fund Sellers had not worked together to put $1.8 billion in Trust funds in "conflicted," "improper" Black Box hedge fund investments, those $1.8 billion in Trust Funds handed over to them *would be worth over $13 billion* today. No "exorbitant fees" would have been extracted.

Here, the culpable Trustee — not even a party to this breach-of-trust case *or* the AG's taxpayer case — is trying to release the valuable claims based on its misconduct for a pittance, while allowing contingency-fee lawyers to pocket more money in fees than the Trusts would recover in net "fresh money."

The cheap, fee-driven Settlement attempted by the Hedge Fund Sellers and the AG's contingency-fee lawyers does nothing to remedy any of this. Whatever net "fresh money" the AG's settlement provides for KPPA after huge fees does not even qualify as a drop in the bucket.

79291FB7-060A-4973-87BD-A170FD40FC4A : 000028 of 000167

2. The Blackstone-Park Hill Motion for Hundreds of Millions of Dollars in Interim Equitable Relief

The ready-to-be-filed Blackstone/Park Hill motion sets out Blackstone's key role reversing a KPPA ban on hedge funds to create a hedge fund bonanza for it and KKR, while secretly and improperly diverting at least $3.8 million in Trust funds to its placement agent, Park Hill, here in Kentucky and hundreds of millions more in Trust funds from other public pension funds. While Blackstone and KKR shared in over $300 million in "exorbitant hedge fund fees," Blackstone separately secretly diverted $3.85 million of KRS Trust monies to Park Hill, a placement agent founded by Schwarzman and controlled by Blackstone. ¶¶ 135, 40–41, 93. These sidekicks were part of Schwarzman, Hill and Blackstone's nationwide business plan and practices which targeted public pension plans.

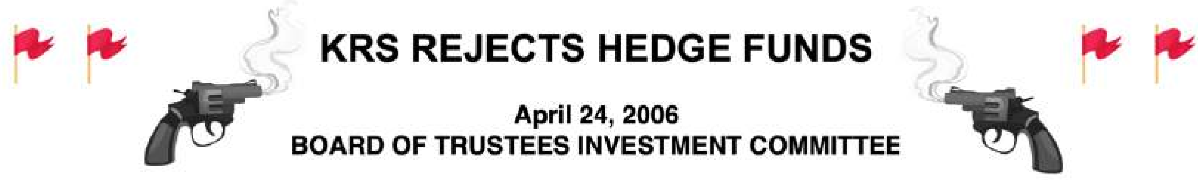
The Blackstone-Park Hill Motion seeks interim monetary relief and an accounting of all public pension trust funds that were diverted to Park Hill Inc., including the secret diversion of $3.85 million in KRS Trust Funds to Park Hill here in Kentucky. This diversion benefited Blackstone-Park Hill, as well as Schwarzman, Hill, and other Blackstone executives personally. The improper retention of those diverted Trust Funds warrants an 8% interest, as well as the imposition of a three-time civil penalty. The relief sought by the motion, including restitution and disgorgement could reach $1 billion.

Blackstone, Schwarzman, and Hill are trying to wipe out this case. They do not want their misconduct to be exposed to the public. They do not want the public to learn the extent of their participation in the culpable Trustee's breach or how they profited from it. Nor do they want the Court to be able to assess the value of these breach-of-trust claims, while they inflate the appearance of the size of their sellout settlement.

79291FB7-060A-4973-87BD-A170FD40FC4A : 000029 of 000167

The Blackstone-Park Hill Motion will show that Blackstone participated in the Trustee's breach from the outset. As KRS's funding levels fell in 2006, the Trustee was warned the Trusts/Plans had "significant [and] substantial funding problems … that it could not invest its way out of." ¶¶ 10, 29. As a result of these funding declines, in 2006 the Trustee evaluated exotic and highly risky alternative investments called "hedge funds," to boost returns. The Investment Committee rejected hedge funds from a "fiduciary standpoint" because of their "secrecy", "unconstrained" investments, and "higher risk exposure". There were too many "red flags." "No need to go any further." KRS was "not interested in hedge funds." ¶¶ 27–28.

79291FB7-060A-4973-87BD-A170FD40FC4A : 000030 of 000167



- *NEED TO BE CONCERNED ABOUT THE PERCEPTION FROM MEMBERS, LEGISLATORS, OR OTHER PUBLIC OFFICIALS.*
- *CONCERN FROM FIDUCIARY STANDPOINT - HEDGE FUNDS UNCONSTRAINED.*
- *WILL NOT TELL INVESTORS WHAT THEY DO* [OR] *WHAT POSITIONS THEY HOLD.*
- FUNDS SELL ASSETS THEY DO NOT OWN.
- HAVE HIGHER RISK AND EXPOSURE.
- ENOUGH RED FLAGS ABOUT HEDGE FUNDS – NO NEED TO GO ANY FURTHER.

Blackstone was the *key* to discarding this ban on hedge funds and to getting the Trustee to make the September 2011 $1.245 billion Black Box hedge fund allocation.

Blackstone already had insider access at KRS. It had previously sold KRS $225 million in "alternative investments," which it was managing as a fiduciary. ¶¶ 86–88, 358. Blackstone gave the first "tutorial" on hedge funds to the Board — what a KRS internal investigatory report termed "*training*" of the Trustee — in November 2008. This "training" took place at the same time that Blackstone was secretly diverting the $3.8 million of Trust funds in "sidekicks" to its Park Hill placement agent. *This Blackstone "tutorial" was essential to turning a hedge fund ban into a Black Box bonanza*, generating $300 million in exorbitant fees for the Hedge Fund Sellers.

HOW KRS BUYS $1.245 BILLION BLACKBOX HEDGE FUNDS

KRS REJECTS HEDGE FUNDS

April 24, 2006
BOARD OF TRUSTEES INVESTMENT COMMITTEE

- NEED TO BE CONCERNED ABOUT THE PERCEPTION FROM MEMBERS, LEGISLATORS, OR OTHER PUBLIC OFFICIALS.
- CONCERN FROM FIDUCIARY STANDPOINT - HEDGE FUNDS UNCONSTRAINED.
- WILL NOT TELL INVESTORS WHAT THEY DO [OR] WHAT POSITIONS THEY HOLD.
- FUNDS SELL ASSETS THEY DO NOT OWN.
- HAVE HIGHER RISK AND EXPOSURE.
- ENOUGH RED FLAGS ABOUT HEDGE FUNDS – NO NEED TO GO ANY FURTHER.

KRS NOT INTERESTED IN HEDGE FUNDS

¶¶43-44 PPT Ex 3
Slide #8

TOSH AND BLACKSTONE "KICKSTART"
THE REVERSAL OF THE HEDGE FUND PROHIBITION

MINUTES OF MEETING
of the
BOARD OF TRUSTEES INVESTMENT COMMITTEE
KENTUCKY RETIREMENT SYSTEMS
November 5, 2008, at 9:00 A.M., E.T.

Mr. Tosh advised that Blackstone Alternative Asset Management L.P. would be presenting an educational piece on absolute return strategies and the fundamentals and basics of hedge funds

PPT Ex6

BLACKSTONE ALTERNATIVE ASSET MANAGEMENT L.P.

The first presentation was made by Halbert Lindquist and James McMillan of Blackstone Alternative Asset Management L.P.

The following matters were presented by Mr. Lindquist and Mr. McMillan:
Hedge Fund Overview
Diversified Hedge Fund Investing

TRANSITION FROM "KRS NOT INTERESTED IN HEDGE FUNDS"

TOSH SCHWARZMAN HILL

TO $1.245 BILLION IN BLACK BOX HEDGE FUND SPLIT BETWEEN BLACKSTONE/PAAMCO /KKR-PRISMA

"TRAINING SESSION" FOR BLACKBOXES

8/10/24 CR14 PPT Ex 15 Slide #09

In February 2009, just weeks after Blackstone's November 2008 hedge fund "training" session of the culpable Trustee, and despite being warned of "structural risks" which "could not be avoided" the Trustee authorized an allocation of Trust funds to Black Box Hedge Funds. ¶ 49.

79291FB7-060A-4973-87BD-A170FD40FC4A : 000031 of 000167

79291FB7-060A-4973-87BD-A170FD40FC4A : 000032 of 000167

STAFF RECOMMENDS 5% ALLOCATION TO BLACK BOXES – TRUSTEE WARNED OF NEED FOR EXTENSIVE DUE DILIGENCE INTO PRINCIPALS OF ANY ABSOLUTE RETURN MERCHANT

Investment Committee – February 3, 2009

Subject: KRS Absolute Return Strategy Allocation

Recommendation: It is the recommendation of the KRS Investment Staff and Consultant that the Investment Committee approve an initial allocation **of up to 5.0% of the Fund's assets to be invested in absolute return strategy fund-of-funds ("FOF").**

Risks: Structural risks are the primary concerns faced by absolute return fund–of–funds. THEY CANNOT BE ELIMINATED. STRUCTURAL RISKS CAN BE MONITORED AND CONTROLLED BY ENSURING THAT EXTENSIVE DUE DILIGENCE IS CONDUCTED THOROUGH USE OF PRIVATE INVESTIGATOR CHECKS.

¶¶ 49, PPT Ex 11

Slide #15

However, in April 2010, as the Trustee was considering the Hedge Fund allocation, the Trustee received a "*bombshell*" liquidity report, warning that the Trusts were in danger of running out of money.

April 2010
Asset/Liability Study
Non-Hazardous Pension Fund*

Presented to: I.C. May 4, 2010; B/T May 20, 2010
Present: **J. Elliott Tosh Peden Thielen**

"The Bombshell"

KRS faces an appreciable risk of running out of assets… complete exhaustion of the fund's assets in seven to ten years

…adoption of a significantly more aggressive investment strategy substantially increases the chances of the catastrophic event of depleting all assets in the near future

No reasonable investment strategy that would allow plan to *invest its way to significantly improved financial status* without courting substantial risk. That risk, once taken, may lead to the fastest depletion of the plan's assets

"SIMPLY STATED THERE IS NO INVESTMENT STRATEGY THAT OFFERS THE PROBABILITY OF SIGNIFICANT IMPROVED RETURNS WITHOUT ALSO ASSUMING UNACCEPTABLE RISKS TO THE ASSET BASE OF THE PLAN"

Slide #10

¶¶ 42, 262-263 PPT Ex

Despite this lurid warning, the Trustee allocated $1.245 billion, 10% of the Trusts' assets for these Hedge Fund Sellers, to put into their super-risky Black Box Hedge Funds. They each took fees "off the top." They each dumped the monies into dozens of "sub-fund" Black Boxes that added on their own fees. Exorbitant fees, losses, bad returns together led trust funding to plummet to 12.9%, leaving the Trusts in a "death spiral" — "essentially bankrupt" as these Black Boxes ran out their five-year lives in 2016. This is exactly what the culpable Trustee had been warned would happen if it took this reckless Black Box bet — the risks of which were readily admitted in the Hedge Fund Sellers' own regulatory filings:

79291FB7-060A-4973-87BD-A170FD40FC4A : 000033 of 000167

TRUE RISKS OF THE BLACK BOX FUNDS OF HEDGE FUNDS BLACKSTONE/KKR-PRISMA 10-K SEC FILINGS

"OUR" HEDGE FUNDS

- ***newly established without any operating history or track records***
- ***illiquid* investment vehicles – invest in markets that are volatile – impossible to liquidate**
- ***Use leverage – significant degree of risk – enhances possibility of significant loss subject to unlimited risk of loss in short selling, commodities***
- ***could result in significant losses* – Involve risk of loss that investors should be prepared to bear – high degree of business and financial risk that can result in substantial loss**

AND THESE *RISKS ARE EXACERBATED FOR OUR FUNDS OF HEDGE FUNDS*

¶¶ 52-284-287

Slide #30

Blackstone's cut of the $1.245 billion Black Box allocation allowed Blackstone to share in over $300 million in "exorbitant hedge fund fees." But the "exorbitant" fees were not enough for Blackstone. It (and KRS insiders) secretly diverted $3.85 million of KRS Trust monies to Park Hill. ¶¶ 135, 40–41, 93. These sidekicks were part of Schwarzman, Hill and Blackstone's nationwide business plan and practices which targeted public pension plans, involved hundreds of millions in secret "sidekicks" of trust funds, and victimized the KRS Trusts.

A state audit uncovered $13–$15 million in secret diversions of KRS Trust funds to "placement agents" who, in return for getting KRS Trust monies placed in a given

79291FB7-060A-4973-87BD-A170FD40FC4A : 000034 of 000167

"alternative investment" were "side-kicked" some of the money, fees, or both.[15] ¶¶ 40–43, 90, 93. Of the $13–$15 million in secret "sidekick" payments here in Kentucky, $6 million went to a crook named Glen Sergeon. The second largest amount of $3.85 million was funneled to Schwarzman's placement agent, Park Hill. It was a "major scandal" involving "Placement Agents" that engulfed Kentucky and other public pension funds. Several major pension fund figures and fixers went to jail,[16] while here in Kentucky KPPA's CEO, CIO, and General Counsel were fired, and its Board Chair kicked off the Investment Committee. ¶ 253.

---

[15] Crit Luallen, *Examination of Certain Policies, Procedures, Controls, and Financial Activities of Kentucky Retirement Systems* (June 28, 2011), *available at* https://kyret.ky.gov/About/Internal-Audit/Documents/2011StateAudit.pdf.

[16] *See, e.g.*, Zach O'Malley Greenberg, *Secret Agent*, FORBES (May 23, 2011), *available at* https://www.forbes.com/forbes/2011/0523/features-pensions-glen-sergeon-auditors-secret-agent.html (last visited Jan. 13, 2025); Mary Williams Walsh, *Pension Advice For Hire, More States Start Inquiries Into Conflicts of Interest*, THE NEW YORK TIMES (May 6, 2009), *available at* https://www.nytimes.com/2009/05/07/business /07pension.html (last visited Jan. 13, 2025) ("A survey of practices across the country portrays a far-reaching web of friends and favored associates, political contributors, campaign strategists, lobbyists, relatives, brokers, and others capitalizing on relationships and paying favors .... What has developed is a corrupt system, where Wall Street, various fiduciaries, politicians and corporate managers are dicing America's savings."); Rebecca Moore, *KY Audit Details Questionable Placement Agent Activities*, PLANSPONSOR (June 29, 2011), *available at* https://www.plansponsor.com/ky-audit-details- questionable-placement-agent-activities/ (last visited Jan. 13, 2025); John Cheves, *Hedge Fund with $100 Million in Kentucky Retirement Funds*, LEXINGTON HERALD LEADER (June 12, 2012), *available at* http://www.kentucky.com/news/politics-government/article44148768.html (last visited Jan. 13, 2025) ("Tosh ... arranged for Sergeon to attend the 2009 KRS meeting that led to the commitment to invest in Arrowhawk").

Kentucky later outlawed the use of placement agents and other similar payments. *See* KRS § 61.645(21) ("no funds ... shall be used to pay fees and commissions to placement agents").

79291FB7-060A-4973-87BD-A170FD40FC4A : 000035 of 000167

Kentucky Retirement Systems Placement Agent Audit Report

Placement Agent Audit
APPENDIX B
Managers Hired July 1, 2004, through
September 30, 2009

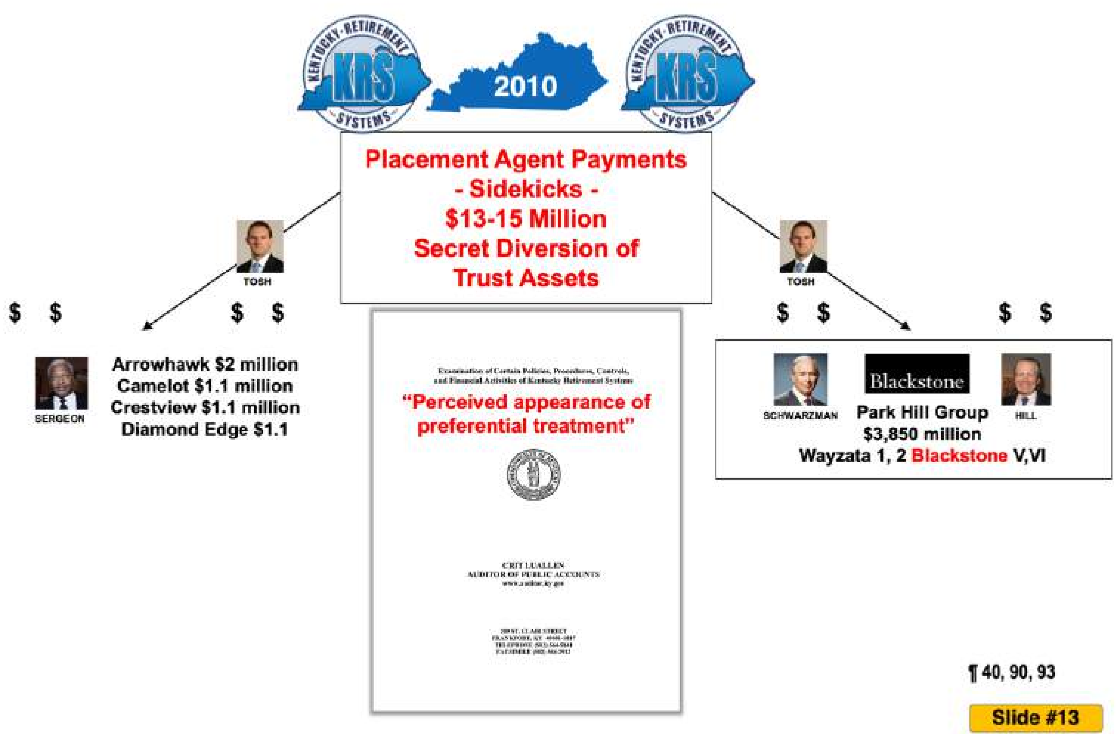
Fund	Date	Amount	Placement Agent	Amount Paid
Wayzata I	11/30/2005	$ 75,000,000.00	Park Hill - Roberts, Prendergrast, Keene	**Not Stated**
Blackstone V	11/31/2006	$125,000,000.00	Park Hill - Dan Prendergrast & Sean Keene	$1,250,000.00
Wayzata II	2007	$ 75,000,000.00	Park Hill - Roberts, Prendergrast, Keene	**Not Stated**
Blackstone VI	7/31/2008	$100,000,000.00	Park Hill - Thomas Roberts & Sean Keene	$1,000,000.00

Total Secret Park Hill "Sidekicks" $3.850 million

PPT Ex 37,38,40

Slide #14

79291FB7-060A-4973-87BD-A170FD40FC4A : 000036 of 000167



This breach-of-trust "side kick" claim has nothing to do with the Hedge Fund Sellers claim. It has not been pursued by the AG's contingency-fee lawyers. Yet their Settlement with the Hedge Fund Sellers will extinguish this claim while the Tier 3 Trust Plaintiffs' hands are tied.

These three motions are powerful and potentially valuable. Given that the breaches of fiduciary duties by the culpable Trustee (and its insiders) cannot be fairly disputed, the Hedge Fund Sellers' liability for participating in that breach is also beyond fair dispute. These are breach of trust claims against fiduciaries, essentially strict-liability claims. Under black-letter law, *the Hedge Fund Sellers bear the obligation of full disclosure and the burden of proof* on the issues of liability. A party accused of the breach (or participating in another's breach) bears the burden of proffering "clear and satisfactory evidence" to make an "affirmative showing of fairness and good faith" in the

79291FB7-060A-4973-87BD-A170FD40FC4A : 000037 of 000167

challenged transactions. *See Geddes v. Anaconda Copper Mining Co.*, 254 U.S. 590, 599 (1921).

> Any unfair transaction induced by a fiduciary relationship between the parties gives rise to a liability with respect to unjust enrichment of the fiduciary. Where such transaction is attacked, *the burden of proof is on the fiduciary to establish the fairness of the transaction, and to this end he must fully disclose the facts and circumstances, and affirmatively show his good faith.*

Newton v. Hornblower, Inc., 224 Kan. 506, 508 (Kan. 1978).

The Court cannot be in a position to evaluate the merits of the claims in this case — the claims involving the cheap, fee-driven Settlement brokered by Defendants and the AG's contingency-fee lawyers — without a hearing and allowing the public to see these motions. While these motions remain in draft form, they can be completed and filed in a few days. No discovery is needed to proceed with these motions. To bar these motions from proceeding would be prejudicial to the Tier 3 Trust Plaintiffs and inconsistent with the Court's May 1, 2024 ruling, as well as the Court of Appeals' order denying the Hedge Fund Sellers' writ. On the other hand, to proceed with the joint motion for approval of the proposed Settlement would violate the stay in this case, as well as the constitutional due process rights of the Tier 3 Trust Plaintiffs and KRS Trusts.

[The remainder of this page is deliberately left blank.]

79291FB7-060A-4973-87BD-A170FD40FC4A : 000038 of 000167

C. The Stay Should Be Modified to Ensure That the Individual Perpetrators, Including the Controlling Principals and Executives of the Hedge Funds, Be Held Accountable

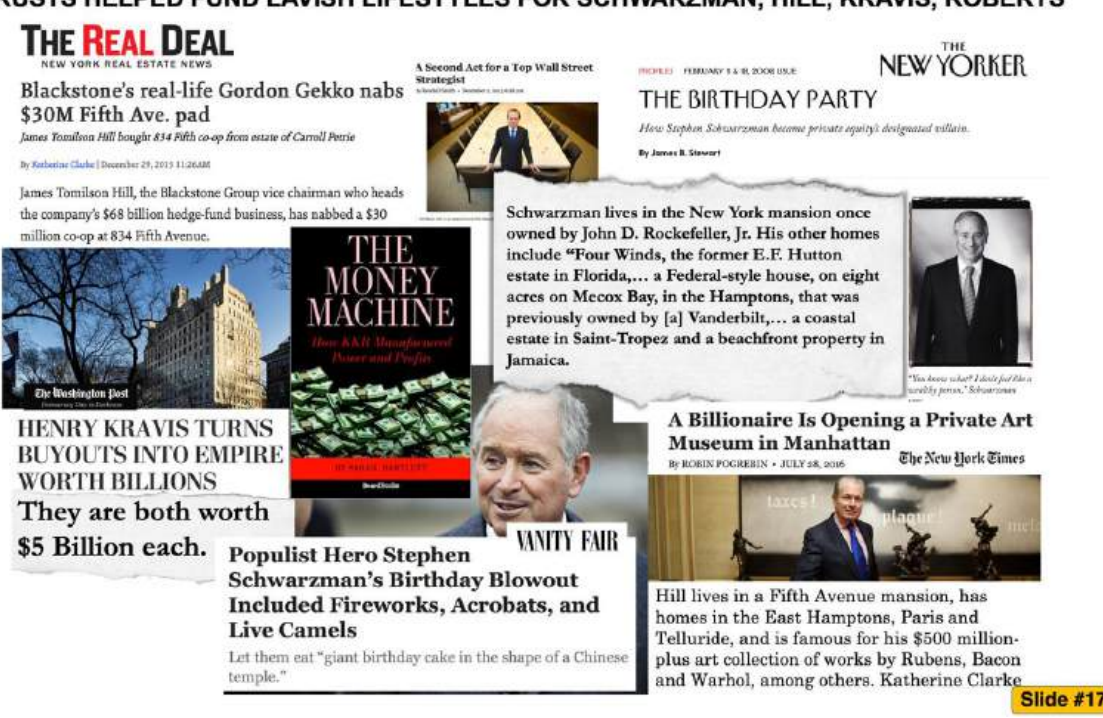
The AG's Settlement would let Kravis, Roberts, Schwarzman, and Hill off scot-free. They are defendants in this case, and direct individual targets of all three of the motions for summary judgment or interim equitable relief filed or requested to be filed in this case. These individuals are all movants for approval of the proposed Settlement.

The exorbitant fees and diverted Trust funds they received helped fuel lifestyles of extravagance. Kravis, Roberts, and Schwarzman are billionaires many times over. Schwarzman's personal 2022–23 take from Blackstone was close to $2 billion. *Blackstone's Schwarzman Received over $1 billion in Pay Dividends in 2022*, REUTERS (Feb. 25, 2023); *Blackstone CEO Schwarzman Received $896.7 million in 2023*, REUTERS (Feb. 23, 2024). Kravis and Roberts each pocketed $94–108 million in 2022 and 2023. *See* Hank Tucker, *As Profits Rise, Private Equity Billionaires Have Huge Paydays*, FORBES (Feb. 28, 2022) (Exhibit 11). These three individual defendants have a combined personal net worth totaling $86 billion. *See id.*; *see also* The Editor, *Profile, Real Time Net Worth*, FORBES (Jan. 16, 2025) (Exhibit 12).

Schwarzman's triplex on Park Avenue was once owned by Rockefeller. He has an 8+ acre estate out in the Hamptons. His waterfront estates in Palm Beach and Jamaica are worth $125 million. *See* Sam Dangreman, *The Affluenza Set*, AIRMAIL (Aug. 10, 2024). The estate in Nantucket is worth $23 million. *Id.* He held a "housewarming" for 200 guests to check out his new 30,000 square feet, $27 million mansion, at Newport, a display "almost at the Gatsby level." *See id.* Most recently he picked up a 2,500-acre estate in the English countryside for over $100 million. *Id.*

79291FB7-060A-4973-87BD-A170FD40FC4A : 000039 of 000167

"EXORBITANT HEDGE FUND FEES", AND MONIES DIVERTED FROM KRS TRUSTS HELPED FUND LAVISH LIFESTYLES FOR SCHWARZMAN, HILL, KRAVIS, ROBERTS



79291FB7-060A-4973-87BD-A170FD40FC4A : 000040 of 000167

The AG got not one penny from these individual defendants, who were personally involved in the alleged wrongdoing. But the AG's private contingency-fee lawyers and the Hedge Fund Sellers want to prevent the Tier 3 Trust Plaintiffs' $807 million motion, as well as the other motions involving these individuals, from ever being heard.

D. The Stay Should Be Modified Because the Hedge Fund Sellers and the AG's Contingency-Fee Lawyers Are Abusing the Stay — Which Was Intended to Maintain the Status Quo — Not to Permit Them to Gain a Litigation Advantage

After this Court's May 1 order was attacked in the Court of Appeals by the Hedge Fund Sellers and the KRS Insiders, the stay was entered. We believe the stay was intended to implement the May 1 order by maintaining the status quo while Defendants pursued appellate relief. This would avoid unnecessary proceedings for the Court, as well as fees and inconvenience for Defendants, if they ultimately prevailed. Nor was the stay intended to give the AG's contingency-fee lawyers a litigation advantage to exploit or to disadvantage the Tier 3 Trust Plaintiffs, like secretly settling their claims while their hands are tied.

The Hedge Fund Sellers and KRS Insiders have disrupted the status quo. These Defendants are interfering with the orderly proceedings in this Court, exploiting, if not violating, the stay by attempting to settle claims pleaded in this case and upheld by this Court and the Court of Appeals. The Tier 3 Trust Plaintiffs in this case have won *every* substantive motion and prevailed in *every* appellate proceeding as to these Defendants. So, they want to settle the case out from under the Tier 3 Trust Plaintiffs.

These Defendants have disrupted the status quo. As of now, this Court's May 1 order, certainly binds the Hedge Fund Sellers. The Court of Appeals has affirmed that order, making it the law of the case. *See Inman*, 648 S.W.2d at 849. The Hedge Fund

79291FB7-060A-4973-87BD-A170FD40FC4A : 000041 of 000167

Sellers' attempt to settle the claims asserted in this case via settling the AG's case is premised on their "occupy-the-field" arguments that have been rejected by this Court and the Court of Appeals, *i.e.*, every court that has examined the issue.

To better understand what is now going on, we must revisit the origin of these two competing cases. When this all started, counsel for the Tier 3 Trust Plaintiffs had been retained by Judge Brown, Captain Mayberry, and three other long-time Commonwealth employees. The *Mayberry* clients and their counsel investigated KRS for months, incurring substantial costs in employing consultants, forensic accountants, and private investigators. Counsel then drafted a highly-detailed complaint exposing the wrongdoing at KRS, naming the Hedge Fund Sellers and their executives as defendants. When the investigation was completed and the complaint was ready to be filed, Judge Brown and Captain Mayberry retained local lawyers to assist. After presenting the taxpayer claims to the then-AG, who declined to file them, counsel for the *Mayberry* plaintiffs filed the original *Mayberry* complaint, asserting a derivative claim for KRS and a taxpayer claim for the Commonwealth.

Shortly after the *Mayberry* litigation was filed in late 2017, Judge Shepherd asked KPPA to consider its position on the allegations of wrongdoing. KPPA's then Board reviewed and investigated the *detailed allegations of wrongdoing by both the Trustee and the Hedge Fund Sellers*. This involved an extensive presentation to a KRS Board "Special Litigation Committee" by counsel for the Tier 3 Trust Plaintiffs (then for Judge Brown and Captain Mayberry). This resulted in the filing of the Joint Notice (Exhibit 8) between KPPA and Plaintiffs with the Court in early 2018. This filing was *authorized by the KPPA Board of Trustees*.

The Joint Notice stated *to the Court*:

79291FB7-060A-4973-87BD-A170FD40FC4A : 000042 of 000167

> Since this action was filed, Kentucky Retirement Systems ("KRS") has established *an independent special litigation committee of the Board of Trustees to investigate* and consider the claims asserted in Named Plaintiffs' Amended Complaint, and determine what role KRS should take in this litigation, KRS: (1) will not pursue the claims asserted by Named Plaintiffs; [and] (2) would not have been in a position to pursue those claims had they been brought to KRS prior to the filing of the Complaint …
>
> … KRS Trustees have expended diligent and significant efforts to … investigate prior conduct at the Funds including, *investigating the merits of the claims made by Named Plaintiffs in this litigation …*
>
> Based on the investigation the … claims … appear to have merit … The amount in controversy … is substantial and, if recovered, could have a significant impact on the financial well-being of KRS and its member employees and retirees.
>
> ***
>
> KRS believes that counsel for Named Plaintiffs *i.e.* the Tier 3's counsel are highly skilled, having specialized experience in cases of similar scope and magnitude, are highly motivated, and, as a result, are capable of handling litigation of this nature. [They] will bear the primary risk of litigation costs and time necessary to pursue these claims without undue expense to KRS, while providing a substantial potential recovery that would directly benefit KRS.
>
> ***
>
> Named Plaintiffs are members and beneficiaries of one or more KRS pension plans and have been during the time period of alleged wrongdoing as set forth in the First Amended Complaint ("FAC") filed January 12, 2018. Based on KRS's observations and the investigation of the independent special litigation committee, KRS believes that Plaintiffs are appropriate and adequate representatives … and they are qualified to prosecute the … claims … through their counsel of record.
>
> …KRS is persuaded..that the potential rewards of this litigation, in which billions of dollars are sought on behalf of KRS and its member retirees and state employees, justify pursuit by Named Plaintiffs of their claims.
>
> *This is especially true when viewed in light of the fact that Named Plaintiffs have capable and experienced counsel who have themselves undertaken much of the time, risks, and costs associated with such litigation.*

Ex. 8 at 3–5.

When filing the Joint Notice, on April 20, 2018, KRS's Board issued a press release:

> The current Board commends [the *Mayberry*] Plaintiffs and their counsel for their diligent and significant legal and investigatory work that enabled

79291FB7-060A-4973-87BD-A170FD40FC4A : 000043 of 000167

them to present proper and potentially valuable claims on behalf of KRS – and without any compensation or assistance from KRS to date, thus undertaking significant risks to themselves for the benefit of the members of KRS. These actions demonstrate [a] commitment of their counsel to represent the best interests of KRS ….

… A recovery in this litigation could go a long way in supporting [an] underfunded retirement system.

Ex. 13 at 1.

As stated above, before the *Mayberry* case had been commenced in 2017, the then-AG was presented with "an advance copy of [the] complaint" setting forth — in all material details — the taxpayer claims so he could prosecute those claims if he chose to do so. Even with the file-ready complaint in hand, that AG declined to bring these claims. *Overstreet v. Mayberry*, 603 S.W.3d 244, 251 (Ky. 2020). Then in 2020, *Overstreet* was decided and everything changed. These local lawyers then stole the case.

While these proceedings were unfolding, the lawyers who had been hired by Judge Brown and Captain Mayberry as local Kentucky counsel had been discharged for incompetence and disloyalty, as detailed by Judge Brown and Captain Mayberry in their termination letter. *See* Ex. 6.

Betraying their former clients, these lawyers took the *Mayberry* complaint — and other work product prepared by counsel for the *Mayberry* plaintiffs — to the AG and solicited him to hire them. These lawyers had duties of loyalty to their former clients, including Judge Brown and Captain Mayberry. *Id.* at 2, 10, 15. Kentucky Supreme Court Rule 3.130 (1.9) (entitled "Duties to Former Clients") forbids exactly what the disloyal lawyers did and are now doing by acting adversely to former clients.

Yet these lawyers acted adversely to those former clients using information and work product they gained access to while representing those clients. *See id.* They

79291FB7-060A-4973-87BD-A170FD40FC4A : 000044 of 000167

deserted their *Mayberry* clients, to represent claims and interests adverse to those clients. To accommodate these lawyers' demands for higher contingent fees than permitted by statute, that AG obtained special legislation, enacted over Governor Andrew G. Beshear's veto and without any public hearing or competitive process. *See* Ex. 7. The AG's contingency-fee lawyers then copied the *Mayberry* complaint and filed it to assert the AG's taxpayer claims. Ex. 6 at 2, 10, 15.

This is all being driven by discharged contingency-fee lawyers who expropriated and improperly used the work product of the *Mayberry* plaintiffs' counsel. Now these disloyal, terminated lawyers are again expropriating the work of the Tier 3 Trust Plaintiffs' counsel, *attempting to settle a $807 million motion they never made*, *seeking relief they never sought* — all based on the ideas, investigations, and efforts of the Tier 3 Trust Plaintiffs' counsel. In fact, as a Blackstone spokesperson admitted, this is being done in order to deny any legal fees to the lawyers Judge Brown and Captain Mayberry hired years ago. *See* Ex. 10 at 3 ("[a] Blackstone spokesperson said in that firm's statement, that [the settlement is] 'to put an end to seven years of meritless litigation initially brought by private plaintiffs' attorneys Bill and Michelle Lerach'").

E. The Stay Should Be Modified to Allow the Tier 3 Trust Plaintiffs to Show That the Involvement of the Culpable Trustee in Approving the Settlement and Releasing the Trusts' Claims Pollutes the Settlement

The involvement of KPPA is shocking and puzzling. It raises troubling issues of a culpable Trustee's involvement in "settling" and "releasing" claims against third parties for misconduct that the culpable Trustee and the KRS Insiders participated in, including releasing the disloyal, incompetent and conflicted KPPA officials at the center of the wrongdoing. The Trustee's misconduct — and that of the KRS Insiders — are at the core of this case.

79291FB7-060A-4973-87BD-A170FD40FC4A : 000045 of 000167

KPPA is the culpable Trustee. The whole point of this lawsuit is the culpable Trustee cannot be trusted to prosecute this lawsuit let alone agree to settle it. KPPA is not a party to this case. It is not a party to the AG's case. The AG has disclaimed representing KPPA. KPPA never retained the AG to represent it in this matter. KRS § 48.005 mandates that any recovery in any case where the AG has entered an appearance goes to the Commonwealth treasury. They have directly violated the provision. *See* Section II.F, *infra*.

The involvement of the disgraced culpable Trustee pollutes this Settlement. While it is not a party to any of the litigations, KPPA seeks an *express judicial blessing* of this further betrayal of its Trust beneficiaries' interests, by asking this Court to sign a super-broad, subjectively-worded order. In the order submitted by the AG and the Hedge Fund Sellers, the Court is asked to approve what the culpable Trustee — a nonparty — has done. Specifically, the Court is to endorse KPPA's purported exercise of its "business judgment" in approving the Settlement and releasing all claims against the Hedge Fund Sellers and the KRS Insiders, even though the "business judgment" standard is nowhere to be found in the law and completely inconsistent with the statutory command of "sole interest of the beneficiaries." Indeed, the culpable Trustee's breach of its duties — detailed in the record of this case and condemned by all — is what resulted in this lawsuit. That misconduct disqualifies this culpable Trustee from tampering with — let alone releasing — the Trusts' claims asserted in this case, including this $807 million motion, as well as the Blackstone-Park Hill and the Summary Judgment Motions that are potentially worth over a billion dollars.

In *Atascadero*, the culpable Trustee invested billions in trust funds with Merrill Lynch in "a highly speculative investment strategy ... with little liquidity." 68 Cal. App.

79291FB7-060A-4973-87BD-A170FD40FC4A : 000046 of 000167

4th at 453. The investments failed, causing huge losses to the beneficiaries. Certain Trust beneficiaries sued Merrill Lynch directly. The culpable Trustee obtained a multi-million-dollar settlement on a suit it had filed. Merrill Lynch claimed the beneficiaries could not sue directly and the Trustee's settlement (approved by a court) barred their claims. *Atascadero* held that because the Trustee was allegedly culpable, the beneficiaries could sue Merrill Lynch directly and the culpable Trustee's attempted settlement did not bar that suit. There, the culpable Trustee tried to settle and release the claims. The beneficiary was still allowed to sue even though the culpable Trustee had tried to settle the claims that involved its own culpable actions. That is this case.

This attempted Settlement apparently generates a $46 million fee for the AG's contingent-fee lawyers, and lets Schwarzman, Hill, Kravis, and Roberts off scot-free despite the $807 million motion pending and the promised Blackstone/Parkhill and Hedge Fund Sellers Partial Summary Judgment motions worth a billion dollars to the Trusts, while KPPA gets $32 million net "new" cash. This Court should haul the KPPA Board and Executive Director before it and demand an explanation.

F. The Stay Should Be Modified Because the Tier 3 Trust Plaintiffs Must Be Free to Pursue Steps to Show That the Settlement Is Procedurally and Substantively Defective and Violates the Due Process Rights of the Tier 3 Trust Plaintiffs and the KRS Trusts

The AG has a proper role here in attempting to seek damages for the Commonwealth's taxpayers, to be deposited in the State Treasury, however weak and impaired the claims may be. But the AG is not an "Angel General" — who descends to adequately represent *every* legal claim of *every* person in Kentucky — in *every* capacity, *to the exclusion of all separate private claims*. To grant such a broad reach to the AG — and/or give his actions such preclusive effect — assures serious constitutional due process

79291FB7-060A-4973-87BD-A170FD40FC4A : 000047 of 000167

problems. The Tier 3 Trust Plaintiffs detailed these arguments to the Court in 2021, while moving to intervene in the *Mayberry* case and later opposing Defendants' motions to dismiss in this case. This Court eliminated these problems by allowing this case to go forward separately, holding that a judgment in the AG's case would not preclude this case or its claims. The Court must now protect the "carved out" status of these breach-of-trust claims from the Hedge Fund Sellers' attempts to extinguish them.

Lawsuits by Attorneys General that seek preclusive effect in connection with the claims of others raise significant due process issues. Attempts to prosecute and then extinguish claims of broad groups of claimants and interests require vigorous *separate* representation of differing claims and interests *at all times during the litigation process*. Not every citizen of the state has the same interests or claims respecting an overlapping set of complex facts unfolding over some 20 years that damaged many individuals and groups. And every citizen has due process rights to litigate claims belonging to him[17] — especially claims involving *property* interests that are unique from or potentially in conflict with claims "for all the people." *See In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, 827 F.3d 223 (2d Cir. 2016). The conflicts inherent in the many "hats" worn by the AG are of constitutional dimension if, and to the extent, claim preclusion is sought. *Id.*; *see also,* Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486 (2012).[18]

---

[17] "[A] cause of action is a species of property protected by the Fourth Amendment Due Process Clause." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982). This is grounded in "our deep-rooted historic tradition that everyone should have his own day in court." *Martin v. Wilks*, 490 U.S. 755, 762 (1989). In addition to their constitutional standing and ability as trust beneficiaries to sue, the Plaintiffs have vested property interests in their KRS accounts/benefits held in the Trusts.

[18] This scholarly article discusses the conflicts and serious constitutional issues raised when state attorneys general attempt to bring claims that subsume private suits or

79291FB7-060A-4973-87BD-A170FD40FC4A : 000048 of 000167

As recognized by this Court in its May 1 order, this breach-of-trust case on behalf of the Trusts is different from the AG's taxpayer case on behalf of the Commonwealth regarding where any recoveries go. Any recoveries in this case must go to the Trusts — as the recovery is a Trust asset. Any recoveries in the AG's case must by law (KRS § 48.005) go to the Commonwealth and its general treasury. This creates a statutory bar to what the Hedge Fund Sellers and the AG's contingency-fee lawyers are trying to do. Taxpayers will object to this diversion of funds recovered in the taxpayer case, where the AG entered an appearance triggering the statutory mandate of depositing all recovery to the Commonwealth Treasury. Under § 48.005, no one — not the Commonwealth, not the AG, not even this Court — possesses the power to ping-pong or approve the ping-ponging of the recovery in the AG's case over to KRS.

They brush aside KRS § 48.005(4). According to some undefined "routine practice," the Settlement proposes that the AG "ping-pongs" the Settlement fund to KPPA, and then KPPA promises to "inure[] to the public benefit of … the beneficiaries of all tiers … in amounts computed under *pre-determined formulae*." *See* Joint Mot. at 19. What

---

enter into "global" (*i.e.* statewide) settlements, extinguishing the litigation claims and rights of its citizens – whether they have been asserted individually or not. It suggests that to permit the AG to sue for every person in Kentucky — all claims — direct/derivative or otherwise and/or to extinguish those claims will create a constitutional morass that would plague these litigations for years. *See Satsky v. Paramount Commc'ns*, 7 F.3d 1464, 1470 (10th Cir. 1993) (state settlement of claims of environmental discharge violations which included comprehensive relief and money damages could not bar individual damage suits by impacted owners of private property because they are "purely private interests which the state cannot raise"). In *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246, 1261 (Fla. 2006), the Florida Supreme Court wrote:

> We agree with the reasoning of *Satsky* and with the principle that "litigation by a government agency will not preclude a private party from vindicating a wrong that arises from related facts but generates a distinct individual cause of action."

79291FB7-060A-4973-87BD-A170FD40FC4A : 000049 of 000167

formulae? Nowhere in the Settlement Agreement or the joint motion do the AG and KPPA disclose what their "pre-determined formulae" is, where it comes from, and what benefit, if any, the various KRS beneficiaries are receiving from the Settlement fund.

The original *Mayberry* Plaintiffs (except Judge Brown) who are taxpayers and had originally sued as such will object to this evasion of § 48.005 — which by the ping-pong tactic — the money bounces off the Treasury with the AG attempting to deflect it to the Trusts. *That's not the law*. KRS § 48.005 requires that the recovery go to the Treasury. The AG cannot disregard that law. Only the legislature can modify a legislative command. It has not done so. The *Mayberry* Plaintiffs, as taxpayers and KRS members, will object to this evasion of § 48.005 not to hurt the Trusts, but to benefit the Trusts as they have always fought to do, because the ping-pong maneuver is being done in a way and as part of a sellout settlement that harms the KRS Trusts whose culpable Trustee is releasing valuable Trust claims for a pittance in the proposed Settlement, while lawyers secretly pocket $45.5 million in fees.

Any attempt to extinguish the Tier 3's claims for the Trusts via the proposed Settlement is procedurally infirm. Judge Shepherd long ago ruled that the AG's suit is in substance, and will be treated as, a class or representative action. He said the AG's suit raises "the same concerns regarding fairness, notice and the opportunity to be heard that are addressed for class actions in CR 23.05.[19] The due process concerns, codified for class actions in CR 23.05, apply with equal force to the compromise or dismissal of any claims

[19] Even though the case is not technically a class action, by seeking judicial approval the settling Defendants trigger the Court's authority and obligation to review the proposed Settlement under judicial approval standards for representative actions.

79291FB7-060A-4973-87BD-A170FD40FC4A : 000050 of 000167

in [the AG's] action." *Commonwealth v. KKR & Co. L.P.*, No. 17-CI-01348, slip op., at 1 (Ky. Cir. Ct. Franklin Cnty. Sept. 21, 2021).

In a class action, the settling parties always seek preliminary approval from the court of the proposed settlement, before moving for final approval and sending out notice to affected parties. *See generally Gautreaux v. Pierce*, 690 F.2d 616, 621 n.3 (7th Cir. 1982); 5 James Wm. Moore, *et al.*, MOORE'S FEDERAL PRACTICE, § 23.165 (3d ed. 2005). The preliminary approval motion sets out in detail the settlement terms, including any attorneys' fees sought, how they are to be divided (*see* CR 23.05), as well as the bases for the settlement. To grant preliminary approval, the court must find that (1) the proposed settlement is sufficiently fair and reasonable as to fall within the range of final approval; and (2) the proposed notice to the beneficiaries of the settlement contains sufficient disclosure as to pass muster under due process — providing the beneficiaries with sufficient information to evaluate the true value of the settlement, including any attorneys' fees, and to decide whether to opt out of or object to the settlement. After publishing the notice, under a best-practicable notice program, and allowing sufficient time for any potential objectors to participate in the final approval process, the settlement parties then move for final approval of the settlement. The court then holds a final approval hearing, in which objectors may participate, and decides whether to approve the settlement. *None of that has been done here*. The AG's contingency-fee lawyers and the Hedge Fund Sellers are trying to avoid all of that and yet get this Court to approve all of what they are doing and what they want, apparently including $46 million in legal fees to the AG's private lawyers.

While Plaintiffs will provide comprehensive objections to the proposed Settlement in the taxpayer case when appropriate, even from a cursory review, the Settlement is

79291FB7-060A-4973-87BD-A170FD40FC4A : 000051 of 000167

procedurally and substantively defective. CR 23.05 requires that the Court must direct individual notice to class members who can be identified through reasonable effort *i.e.*, the best notice that is practical under the circumstances. Rules 23.04 and 23.05 provide:

Rule 23.04 - Orders in conduct of actions

(1) In conducting [a class action], the court may issue orders that:

(a) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(b) require — to protect certified class members and fairly conduct the action -- giving appropriate notice to some or all class members of:

(i) any step in the action

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into this action;

(c) impose conditions on the representative parties or on intervenors;

(d) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(e) deal with similar procedural matters.

Rule 23.05 - Dismissal or compromise

The claims, issues, or defenses of a certified class may be settled, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

79291FB7-060A-4973-87BD-A170FD40FC4A : 000052 of 000167

> (2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.
>
> (3) *The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.*

The proposed Settlement does not provide for notice. Nowhere is there a proposed description of the Settlement accurately disclosing its terms, its consequences, or the legal fees. Nor have the parties involved filed "a statement identifying any agreement made in connection with the proposal," which would include how fees are to be paid and divided.

And the fees are a fatal problem. Not only must the fees be disclosed — and they must be fair and reasonable — they must also be proportionate to "the relief actually delivered to" the beneficiaries of the proposed settlement. *See Moses v. N.Y. Times Co.*, 79 F.4th 235, 244 (2d Cir. 2023) (quoting FED. R. CIV. P. 23(e)(3) Advisory Committee's Note to 2018 Amendment). When the fees are disclosed, whether they are $45.5 million or $16.5 million, they can never be approved given the exacting legal standard for settlement approval. In *Moses*, for example, the Second Circuit reversed a trial court's approval of a class action settlement, with a face value exceeding $5.5 million, that permitted class counsel to receive a $1.25 million fee. *Id.* at 241. The Second Circuit faulted the trial court for failing to consider the value of the "actual[]" relief received by the class — only $1.65 million — because the $1.25 million fee — constituting 76% of the actual value of the settlement — was disproportionately high. *See id.* at 256–57. Likewise, in *Briseno v. Henderson*, the Ninth Circuit reversed the trial court's approval of a class action settlement with a face value of over $95 million and a fee award of nearly $7 million because the class members ended up receiving less than $1 million in benefits — making the attorneys' fees disproportionately high. 998 F.3d 1014, 1026 (9th Cir. 2021). Under

79291FB7-060A-4973-87BD-A170FD40FC4A : 000053 of 000167

Moses and *Briseno*, the concealed fees claimed by the AG's private lawyers cannot withstand judicial scrutiny.

Attorneys' fees aside, the proposed Settlement is fatally infirm because it attempts to release claims asserted in this separate breach-of-trust case. For present purposes it is sufficient for the Court to be aware of *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); *Payment Card*, 827 F.3d 223; and *In re Literary Works in Electronic Databases*, 654 F.3d 242 (2d Cir. 2011). These cases impose formidable due process barriers to "global" settlements of representative suits impacting related, overlapping, competing/claims, or cases arising from shared facts.

Payment Card voided a $7.2 billion settlement achieved after 10 years of litigation. The settlement had been negotiated with the active involvement of experienced and respected mediators and the two district court judges involved. 400 depositions, 32 days of expert depositions and the production of 80 million pages of documents, had occurred. However, the claims extinguished by the "global" settlement had received "*unitary representation*," from several law firms that had been appointed by the court as "class counsel." That unitary representation was held as a matter of law to be inadequate representation of the competing and conflicting claims settled within the "global" settlement. That unitary representation violated the due process rights of individuals with claims released by that settlement. The settlement was voided on their objection.

What matters at the end of the day is not the size of any overall recovery, or even its overall fairness or its allocations. As the Second Circuit explained, what matters is whether distinct interests and claims were separately and adequately represented throughout:

79291FB7-060A-4973-87BD-A170FD40FC4A : 000054 of 000167

> “Adequacy must be determined independently of the general fairness review of the settlement; the fact that the settlement may have overall benefits for all class members is not the ‘focus’ in the ‘determination whether proposed classes are sufficiently cohesive to warrant adjudication.’”
>
> * * *
>
> One aspect of the Settlement agreement that emphatically cannot remedy the inadequate representation is the assistance of judges and mediators in the bargaining process .... even “an intense, protected, adversarial mediation, involving multiple parties” including “highly respected and capable” mediators and associational plaintiffs, does not “compensate for the absence of independent representation.” *Literary Works*, 654 F.3d at 252–53. The mission of mediators is to bring together the parties and interests that come to them. It is not their role to advance the strongest arguments in favor of each subset of class members entitled to separate representation, or to voice the interests of a group for which no one else is speaking.

Payment Card, 827 F.3d at 232, 234.

The fact that two lower court judges had actually participated in the settlement negotiations in *Payment Card* and approved the settlement allocations as fair and equitable, and that the plaintiffs’ lawyers had been diligent and honest, and all involved had acted in good faith, did not matter. Going forward with the suit with unitary representation and creating a “global” resolution without separate representation and advocacy forced on them all an inherently “*inequitable task*” that doomed the entire decade of litigation and the $7.2 billion settlement regardless of that huge recovery and its overall fairness.

This case is high-profile, with many eyes on it. The presence of the Tier 3 Trust Plaintiffs and their counsel in prosecuting these overlapping, but conflicting, claims ensures a no-holds-barred prosecution of the claims of the Trusts. The process and result here must be — and must be seen as — honest and above-board. To ensure public confidence in the ultimate result, the appearance of impropriety must be guarded against.

79291FB7-060A-4973-87BD-A170FD40FC4A : 000055 of 000167

Potential public perception of favorable treatment, combined with the previously-discussed constitutional problems that would arise from any attempt to preclude the Tier 3 claims, would be problematic in the extreme. The Court sought to avoid these problems by keeping the cases separate — carving out this separate action and allowing it to go forward, unimpeded by the AG and his contingent-fee lawyers. By assuring vigorous independent representation of separate competing interests, the Court assured that everyone's due process rights would be honored.

The mediation process — although supervised by a respected mediator — is no license for the AG and the Hedge Fund Sellers to violate the Tier 3 Trust Plaintiffs' constitutional rights. The Tier 3 Trust Plaintiffs were excluded from the mediation process. Nothing in the record shows that the mediator evaluated the strength of these unique breach-of-trust claims. Nor is there any indication that the mediator was aware of the ethical issues arising from the conduct of the AG's private contingency-fee lawyers or their motivations to use a smoke-and-mirror sellout Settlement to generate a disproportionate fee for themselves. The mediator's statement that the Settlement resulted from an "arm's length" negotiation does not immunize the Settlement from being collusive. Instead, the disproportionate fee and the Settling Parties' concealment of it "signal a collusive settlement" and thus call for enhanced judicial scrutiny and extra skepticism. *See Briseno*, 998 F.3d at 1027. The mediation therefore provides no protection to the sellout Settlement.

What is the rush to dispose of these cases that have been pending for over seven years? The appellate remedies being pursued by Defendants to clarify who has standing to sue or settle are still pending. There is no liquidity issue at KPPA. The legal issue of the Tier 3 standing — constitutional or common law — and the AG's claim to "occupy the

79291FB7-060A-4973-87BD-A170FD40FC4A : 000056 of 000167

field" are pending in the appellate courts. But, so far, they lost. This Court's May 1, 2024 rulings remain the law of this case. That is the status quo.

This Court entered the stay — and continued it — because of its respect and deference to the Appellate Courts. If this Court's desire was to permit the appellate proceedings to play out to gain more certainty as to these issues, that's fine. Plaintiffs are confident they will prevail in the appeals over the next few months. The Court cannot continue the stay here and proceed with settlement proceedings there. It should defer any settlement proceedings until after the appeals are played out.

The exact same Settlement of the AG's taxpayer case will be there when the appeals are concluded. Since no notice of the February 26, 2025 hearing has been given, no one will be inconvenienced by a postponement. But then, these standing, preemption and occupy-the-field issues, having the benefit of further appellate rulings, will be finally determined. Alternatively, Defendants can abandon their appeals and proceed under the Court's May 1 rulings, which prevent them from doing what they are doing. To push ahead with the proposed Settlement now — without final legal certainty — creates the potential for confusion and duplication.

III. CONCLUSION

Given Defendants' disruption of the status quo, their continued defiance of the Court's May 1 order, and their attempt to exploit the stay by seeking to eliminate the breach-of-trust claims, including the $807 million motion, they have forfeited any entitlement to benefit from the continued stay. For all the foregoing reasons, the Court should grant this motion and modify the stay to permit consideration of the Tier 3 Trust Plaintiffs' $807 million motion.

79291FB7-060A-4973-87BD-A170FD40FC4A : 000057 of 000167

Dated: January 21, 2025

Respectfully submitted,

s/ Michelle Ciccarelli Lerach

Michelle Ciccarelli Lerach (KBA 85106)
Albert Y. Chang (*pro hac vice*)
BOTTINI & BOTTINI, INC.
7817 Ivanhoe Avenue, Suite 102
La Jolla, California 92037
Telephone: (858) 914-2001
Email: michelle@mcllawgroup.com
achang@bottinilaw.com

Charles J. LaDuca (*pro hac vice*)
R. Michael Smith (*pro hac vice*)
Claire A. Esmonde (*pro hac vice*)
CUNEO GILBERT & LADUCA, LLP
4725 Wisconsin Avenue, Suite 200
Washington, D.C. 20016
Telephone: (202) 789-3960
Email: charlesl@cuneolaw.com
mike@cuneolaw.com
cesmonde@cuneolaw.com

Jeffrey M. Walson (KBA 82169)
WALSON LAW-CONSULTANCY-MEDIATION
P.O. Box 311
Winchester, Kentucky 40392-0311
Telephone: (859) 414-6974
Email: jeff@walsonlcm.com

Counsel for Plaintiffs Tia Taylor, Ashley Hall-Nagy, Bobby Estes, and Jacob Walson

79291FB7-060A-4973-87BD-A170FD40FC4A : 000058 of 000167