COMMONWEALTH OF KENTUCKY
COUNTY OF FRANKLIN CIRCUIT COURT
DIVISION II
CASE NOS. 20-CI-00590 & 24-CI-0354

COMMONWEALTH OF KENTUCKY PLAINTIFF

vs.

Omnibus Objection to Proposed Settlement and Request to (1) Strike the Affidavit of Layn R. Phillips; (2) Adjourn Approval Hearing and Defer Consideration of Proposed Settlement; and (3) Conduct a *Potter* Hearing and Discovery

KKR & CO. INC., *et al.* DEFENDANTS

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Tia Taylor, Ashley Hall-Nagy, Bobby Estes, Jacob Walson, Estate of Hon. Brandy O. Brown, Jeffrey C. Mayberry, Martha Miller, Steve Roberts, and Teresa Stewart (together, the "Objectors")[1] respectfully submit the following objections to the proposed Settlement entered into on December 20, 2024 by the Hedge Fund Sellers,[2] the Attorney General (the "AG"), and non-party KPPA. As discussed below, the Court should reject the proposed Settlement or, in the alternative, carve out the Tier 3 Trust Plaintiffs' claims for separate prosecution, as the Court decided in the May 1, 2024 order:

> 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.

Taylor v. KKR & Co., L.P., Case No. 21-CI-00645, slip op., at 4 (Ky. Cir. Ct. Franklin Cnty. May 1, 2024) (Wingate, J.) (Exhibit 4).[3]

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[1] Taylor, Hall-Nagy, Estes, and Walson (the "Tier 3 Trust Plaintiffs") are plaintiffs in *Taylor v. KKR & Co. L.P.*, Case No. 21-CI-0645 (Ky. Cir. Ct. Franklin Cnty.) ("*Taylor 1*") and *Taylor v. KKR & Co. Inc.*, Case No. 21-cv-0029 (E.D. Ky.) ("*Taylor 2*" and together with *Taylor 1*, the "*Taylor* Actions"). Brown, Mayberry, Miller, Roberts, and Stewart (the "*Mayberry* 5 Plaintiffs") were plaintiffs in *Mayberry v. KKR & Co. L.P.*, Case No. 17-CI-01348 (Ky. Cir. Ct. Franklin Cnty.). They object in their status as plaintiffs and Kentucky Public Pensions Authority ("KPPA") members and Trust beneficiaries, as well as taxpayers. Their objections are based on the record in this action, the *Taylor* Actions, and the *Mayberry* action, including the Tier 3 Trust Plaintiffs' Pretrial Exhibits, which are filed contemporaneously with these objections.

[2] The Hedge Fund Sellers are defendants in the *Taylor* Actions, including 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 and directors of Kentucky Retirement Systems ("KRS," now known as "KPPA"): David Peden, T.J. Carlson, William Thielen, Brent Aldridge, and David Eager (the "KRS Insiders"). The terms "KRS" and "KPPA" are used interchangeably. KPPA is not a party to these litigations.

[3] Unless otherwise noted, all emphases in quoted texts are added.

INTRODUCTION AND OVERVIEW

The Hedge Fund Sellers and non-party KPPA (the "Settling Parties"), in concert with the AG's contingency-fee lawyer Ann B. Oldfather, are seeking judicial approval of their attempt to settle the Tier 3 Trust Plaintiffs' claims asserted in the *Taylor* Actions, including their treble-damages claims under the Racketeer Influenced and Corrupt Organizations (RICO) Act pending in federal court. This proposed Settlement, if approved, would also wipe out the claims asserted in the Tier 3 Trust Plaintiffs' motions (pending and anticipated) that are worth billions of dollars in potential interim recoveries to the KPPA trusts. Working in secret, the Settling Parties have brokered this sell-out deal to release the Tier 3 Trust Plaintiffs' valuable claims — after those plaintiffs have prevailed over the Hedge Fund Sellers and the KRS Insiders on every substantive motion and in every appellate proceeding in their separate breach-of-trust case (*Taylor 1*). In the face of those successes, these Defendants, with the connivance of KPPA, are attempting to have this Court approve their sell-out deal to the detriment of the KPPA Trusts and beneficiaries. Worse, the proposed Settlement is designed to funnel a secret $45.5 million fee — much larger than the KPPA's real recovery — to Oldfather via a "clear sailing" provision, whereby the Hedge Fund Sellers still get their release from, and bar order against, the Tier 3 Trust Plaintiffs, even if the Court refuses to approve that oversized fee.

This 100-page omnibus objection is lengthy because the proposed Settlement is plagued by numerous procedural and substantive defects. As discussed in detail below, the Court must reject this proposed Settlement on the following grounds:

- The Settlement is smoke-and-mirrors — the claimed face value of $227.5 million is vastly overstated because, after deducting Oldfather's contingent fee of up to $45.5 million, the net "real recovery" is $37 million.

- The release in the Settlement and the litigation bar in the proposed Final Order Approving Settlement Agreement (the "Final Approval Order") are grossly overbroad because they (1) contravene the Court's May 1, 2024 order, carving out the breach-of-trust claims for separate, parallel prosecution and finding that "a judgment [in the AG's case] would not preclude the [Tier 3 Trust Plaintiffs' case]" (Ex. 4 at 4); and (2) violate the due process rights of the Objectors and other KPPA beneficiaries by extinguishing their potential individual recoveries in the Tier 3 Trust Plaintiffs' claims, including their RICO treble-damages claims pending in federal court.
- The Settling Parties fail to provide notice to KPPA Trust beneficiaries and taxpayers, whose individual rights are impacted by the Settlement, and have thus deprived them of their right to be heard and to object to the Settlement, including the award of contingency attorneys' fees to Oldfather.
- The proposed Settlement is polluted because the AG's taxpayer case was prosecuted and is now attempted to be settled, by Oldfather, who originated that case by violating Kentucky Supreme Court Rule 1.9 — misappropriating confidential information and work product of her former clients (the *Mayberry* 5 Plaintiffs), after they terminated her for disloyalty and incompetence.
- The Final Approval Order is grossly overbroad because it requires the Court to find that KPPA, a non-party to these litigations, has properly exercised its "business judgment" and "fulfill[ed] its fiduciary duty" — a finding that is unsupported by the record and unsanctioned by KRS §§ 61.645(15)(a) and 61.650(1)(c)(2).

- The Settlement structure, which calls for "ping-ponging" the Settlement funds from the Commonwealth's treasury to KPPA, violates KRS § 48.005's mandate to deposit all recovery in the AG's taxpayer case into the Commonwealth's treasury — a mandate that this Court has no power to alter.
- The secret mediation — paid for by the Hedge Fund Sellers and conducted without the Tier 3 Trust Plaintiffs — does not support a finding of "arm's length" negotiations or bestow any presumption of regularity.

* * *

If the Hedge Fund Sellers want to settle the claims asserted in this case, they should negotiate a settlement of those claims with the Tier 3 Trust Plaintiffs and their counsel, either directly or via mediation, the way parties to a lawsuit normally do. This Court has the power to facilitate such negotiations.

Consistent with Kentucky Rules of Civil Procedure 99.03–99.04, Franklin County Rule of Court 14 authorizes the Court to "refer a case to mediation under the terms and conditions agreed to by the parties or ordered by the Court." FRANKLIN CNTY. R. OF CT. 14. This Court should consider ordering a mediation to negotiate a settlement of the Tier 3 Trust Plaintiffs' cases, postponing the February 26, 2025 hearing — no one would be prejudiced by a postponement because no notice of the Settlement has been given.

With respect to the choice of a mediator, the Tier 3 Trust Plaintiffs recommend Professor Eric D. Green,[4] who, like Judge Phillips, is a respected mediator with experience in high-stakes litigation and is well known to the Hedge Fund Sellers and their counsel.

[4] Professor Green's background and qualifications are set forth in footnote 37, on page 87, *supra*.

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On January 3, 2025, the news of the Settlement surfaced in the media. 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*." Ex. 1 at 3.[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 for approval of the 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 claimed "recovery" is actually the return of $145 million "investment fund[s]" belonging to the KRS Trusts, but withheld by KKR in retaliation for litigation the AG filed to void illegal indemnity clauses in the hedge fund investment contracts:

> 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]

Thus, "[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 fund managed by [Defendant] Prisma Capital," now by KKR.[7] So, notwithstanding the

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[5] John Cheves, *KY State Pension System Agrees to Settle Long-Running Lawsuit over Hedge Funds*, LEXINGTON HERALD LEADER (Jan. 3, 2025) (Exhibit 1). 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).

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

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 the 20% contingent attorneys' fee amounting to millions of dollars claimed by Oldfather — the private contingency-fee lawyer retained by the AG.[8]

The Joint Motion conceals Oldfather's contingency fee under her contract with the AG, which was made possible by a 2022 special legislation enacted over the Governor's veto.[9] That contract allows Oldfather to pocket 20% of the first $250 million of the "Gross Recovery," including "all monetary recovery." Ex. 3 at 2–3.

There is no expert or independent valuation of the value of the Settlement offered by the Movants. The only valuation is given by unsworn statements of persons with a direct financial or political stake in the outcome of these litigations. The return of previously invested Trust monies, which have always been Trust assets, to KPPA is not a "monetary recovery." KPPA just got back physical possession of what was already the Trust's property, *i.e.*, investment funds — just wrongfully withheld by KKR. As Anthony Gales, a certified public accountant, explains in his declaration, the "recovery" did not impact or improve KPPA's or the Trusts' financial condition/position or balance sheets by *one cent*. Ex. 22 ¶ 6. That fund of "previously invested" Trust funds is and always was a Trust asset. *Id.* Now it is simply being returned, without interest or penalty, despite its wrongful withholding by the Hedge Fund Sellers for years.

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[8] The AG's fee contract is with the "Oldfather Law Firm, PLLC" only. Ex. 3 at 1.

[9] The existing legislation KRS § 45A.717(4) limits a contingency fee to twenty million dollars ($20,000,000). The Governor explained that "this provision permits the Attorney General to bypass the state's model procurement code to hire lawyers for a single case. This unprecedented authorization provides no guard rails on how much the rate of payments will be, provides for no competition amount qualified law firms, and does not ensure accountability with taxpayer dollars." Ex. 7 at 2.

If Oldfather claims the entire $227.5 million (as opposed to the $82.5 million portion) as the "Gross Recovery," the 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 she claims 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.[10]

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 and the Court have no choice but to 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, and the Movants have still not carried their burden of proving the Settlement is procedurally compliant, fair, reasonable and adequate and does not violate the due process rights of those impacted. This Settlement cannot be approved under either circumstance.

The sophisticated financial press that cover pension funds are on to this charade. *See*, *e.g.*, Yves Smith, *More Kentucky Dirty Dealings: Attorney General Schemes to Leave Hundreds of Millions in Pension Recovery on the Table, Gives Sweetheart Payout to Attorneys, to Settle Claims Against Private Equity Kingpins KKR and Blackstone, Including One by Plaintiffs the AG Does Not Represent*, NAKED CAPITALISM (Jan. 23,

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[10] The bottom line here is that, as demonstrated in the Governor's 2022 Veto Message (Ex. 7 at 2), the model procurement code and statutory fee limit were set aside to generate an eye-popping fee, which would have been limited by KRS § 45A.717(4) to $15.75 million (based on the $227.5 million Settlement amount) or $7.35 million (based on the $82.5 million recovery amount). While the Legislature has the power to remove the statutory fee limit, the AG has no justification or excuse to conceal his arrangement with Oldfather that would generate a grossly excessive fee. This fee arrangement cannot be approved by the Court.

2025) (Exhibit 14). They have spotted the corrupt, sellout Settlement. *See* Tom Loftus, *KY State Workers Group Blasts Pension Settlement with Hedge Funds*, KENTUCKY LANTERN (Jan. 24, 2025) (Exhibit 15).

This Court long ago ruled that the AG's suit is in substance, and would be treated as, a class or representative action. This Court ruled 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. The due process concerns, codified for class actions in CR 23.05, apply with equal force to the compromise or dismissal of any claims 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 any event, by seeking judicial approval, Movants triggered the application of current standards for judicial approval of settlements in cases impacting the rights of those before the court.

Because, by denying the Hedge Fund Sellers' writ petition, the Court of Appeals has upheld this Court's May 1 order and its finding that the Tier 3 Trust Plaintiffs have constitutional and common law trust standing, and are entitled to prosecute their breach-of-trust claims separately from the AG's case; the May 1 order is the law of the case. *See Inman v. Inman,* 648 S.W.2d 847, 849 (Ky. 1982). The Hedge Fund Sellers' attempt to settle the Tier 3 Trust Plaintiffs' claims is premised on the AG's "occupy-the-field" arguments that have been rejected by both this Court and the Court of Appeals.

The involvement of a mediator does not create an "arms-length" settlement, or lessen Movants' burden of proof by creating any presumption of regularity or approvability to the Settlement. Nor does it shield the Settlement from the rigorous judicial review demanded by CR 23.05 and case law. Especially since the mediation was conducted without the knowledge or participation by the Tier 3 Trust Plaintiffs or their counsel. Yet a "mediator's proposal" wiped out the legal rights and pending claims of persons not before him. The *Mayberry* claims once valued by the Hedge Fund Sellers at $50 billion were settled for a $37 million real recovery, which constitutes .00072% of that exposure.

Under settled law, a proposed settlement in a representative action is presumed to be "invalid." *Briseno v. Henderson*, 998 F.3d 1014, 1030 (9th Cir. 2021) (citing FED. R. CIV. P. 23(e)(2)). The proponents of a settlement bear the burden of proving it is procedurally proper, comports with due process, and is substantively "fair, adequate and reasonable." *Id*. Here, the Movants do not — and cannot — carry this burden, in light of the multitude of defects plaguing the proposed Settlement.

1. The Settlement is smoke and mirrors and deceptively described. Its claimed value is vastly overstated. The "net new money" recovered after the $45.5 million fee is $37 million, less than the fee called for by Oldfather's 20% contract. *See* Ex. 3 at 3. The $145 million is just the return of preliminary investment trust assets that have always belonged to the KRS Trusts. *See* Ex. 22 ¶ 6.

2. No notice (with language previously approved by the court) of the Settlement has been sent to anyone. Not KPPA members. Not Trust beneficiaries. Not taxpayers. No one whose individual rights are impacted has been given notice of the Settlement's terms, how it affects them, including as compared to other litigations pending on their behalf, of their right to appear, be heard (with or without counsel) and object to the Settlement, including fees, at a public hearing. *See* Argument V.A.

3. The Settlement's release, bar and Final Approval Order are grossly overbroad in attempting to settle and bar (1) the Tier 3 breach of Trust claims pending in a separate lawsuit before this Court. That suit has been previously upheld and designated

by this Court — "carved out" — for separate, parallel prosecution alongside the AG's case, but without interference from the AG's contingency-fee lawyers, and (2) their RICO treble-damage class action pending in federal court, seeking individual monetary recoveries for class member, *i.e.*, KPPA Trust beneficiaries (including all Objectors) without compliance with CR 23.05–23.08. *See* Argument V.A.

4. The Settlement improperly releases claims which the AG could not and did not bring, including claims identified in the motions for interim equitable monetary relief or partial summary judgement, in the Breach of Trust case involving KKR, Blackstone, Kravis, Roberts, Schwarzman and Hill, that are potentially worth billions to the Trusts and "thousands of dollars" to all Trust beneficiaries individually, including Objectors. *See* Argument III.

Nor can the court find that the Settlement is fair, just and reasonable — since it releases the Tier 3's claims, without fully assessing the merits of the Tier 3 Trust Plaintiffs' claims — and specifically those asserted in the $807 million KKR Trust Funds Motion, the Blackstone/Parkhill Diverted Trust Funds Motion worth hundreds of millions or the KPPA/Hedge Fund Sellers Partial Summary Judgment motion which would end the Tier 3 breach-of-trust case in the Plaintiffs' favor on liability. *See* Argument III.

5. The Settlement is polluted because the AG's taxpayer case was originated, prosecuted and is now attempted to be settled by Oldfather, a lawyer hired as local counsel and only after signing a confidentiality agreement, was retained as local counsel and provided a ready-to-file *Mayberry* complaint. Oldfather ended up being fired by the Hon. Brandy Brown,[11] State Police Captain Jeffrey Mayberry and the rest of the *Mayberry* 5

[11] Judge Brown died in 2024, seven years into the litigations she started. Her estate continues to pursue this litigation and objects to the proposed Settlement.

Plaintiffs for *cause*, misrepresentation, incompetence, disloyalty and refusal to follow her clients' instructions, including getting a former MCL Law Group employee to provide her with internal emails and other confidential information on Michelle Lerach and MCL Law Group. When terminated, Oldfather's *Mayberry* clients specifically warned her of her ethical obligations to her former clients, including protecting their confidences and work product. *See* Argument VI.

Oldfather's conduct violated duties under Kentucky Supreme Court Rule 1.9 to her former *Mayberry* clients by sharing and communicating confidential information and work product with a successor client (the AG) when soliciting the AG to hire her to pursue the taxpayer case. Oldfather then acted adversely to her prior clients in trying to settle the breach of trust and RICO cases, extinguishing those former clients' *individual* recoveries in those cases, claims potentially worth "thousands of dollars" to them, either as KPPA Trust beneficiaries or class members in the RICO case.

If Oldfather did not disclose all this to the AG, she is at fault. If she did, he is at fault. Either way, the case Oldfather prosecuted for him and is now using to try to extinguish her former clients' valuable claims for nothing, cannot stand. Oldfather led this lawsuit as lead prosecutor. This is Oldfather's illicit deal.

This is all being driven by a discharged contingency-fee lawyer who expropriated and improperly used the work product of the *Mayberry* clients and their counsel. Despite ethical restrictions and restraints and her confidentiality agreement, Oldfather betrayed her *Mayberry* clients and took their confidential information and work product to the AG to get hired by him to prosecute the AG's case. Now this disloyal terminated lawyer is *attempting to extinguish cases and motions*. In fact, as a Blackstone spokesperson admitted, this is being done to try to deny any involvement of or 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,' ... [and that] the Lerach attorneys will not receive any fees").

This Settlement was negotiated by Oldfather, in a manner directly adverse to the economic rights and interests of her former clients. The original *Mayberry* 5 Plaintiffs were, and are, KPPA Trust beneficiaries. The potential recovery in the Tier 3 Breach of Trust case could be substantial and result in a large recovery, yielding *thousands of dollars* for their individual accounts, when any trust recovery is spread among all of the trust beneficiaries. In addition, the claims asserted on their and all trust beneficiaries' behalf in the RICO federal class action, are also being eliminated by the release and bar order Oldfather has engineered. The federal RICO class claims were pleaded on behalf of all trust beneficiaries and thus every trust beneficiary has a direct economic interest in any recovery in that case — an economic expectation if it were to be successful.

Despite this, their former lawyer Oldfather negotiated a settlement of this lawsuit as lead negotiator. And she is moving for joint approval of this lawsuit as *the top signatory on the Joint Motion appearing above the deputy AG*. This eliminated all of these claims, acting adversely to the *Mayberry* 5 Plaintiffs, her former clients, who had terminated her for misperformance, failure to follow instructions, and disloyalty. Oldfather did exactly what Kentucky Supreme Court Rule 1.9 prohibits.

Oldfather got the AG into a litigation in which she was out-gunned, out-lawyered and ended up folding, creating a smoke and mirrors deceptively-described settlement, which consists of mostly trust funds already and always belonging to KPPA, and then funneling Oldfather a $45.5 million fee without disclosing it to anyone. Plaintiffs have complained about Oldfather's conflicts and ethical wrongdoing for years. It violates Kentucky Supreme Court Rule 1.9. This court must not permit it.

6. The Settlement's release and litigation bar, as well as the Final Approval Order, violate the due process rights of the Objectors and the beneficiaries of the KPPA Trusts by eliminating their potential individual recoveries in the Tier 3 breach of Trust suit, and the federal RICO treble-damages case. Their Settlement of the taxpayer claims can go forward, if this Court carves out the Tier 3 Trust Plaintiffs' breach-of-trust and RICO cases. *See* Argument V.A.

7. The mediation leading to the claimed "arm's length" settlement was a charade with respect to the Tier 3 Trust Plaintiffs claims because it was conducted without their knowledge or participation. This mediation was quickly put together on July 12, 2024, just three days after this Court on July 9 *sua sponte* stayed the Tier 3 Trust Plaintiffs' case. To take advantage of this stay, the Hedge Fund Sellers rushed to settle the Tier 3 Trust Plaintiffs' claims, knowing that their case was stayed and their hands were tied. Attempting to use the mediation process as a cover, the Hedge Fund Sellers and Oldfather, who stood to pocket an outsized fee, arranged a settlement that would release and bar all the claims of the Tier 3 Trust Plaintiffs. *See* Argument V.B.

The mediator's affidavit, submitted to this Court by Movants, shows that, during the mediation process, he oversaw the negotiations to settle only the "Claims" asserted in the AG's action (Case No. 21-CI-00590), and that he made the "mediator's proposal" to the Settling Parties to resolve only the AG's "Claims." Phillips Aff. ¶¶ 1, 7, 11, 16. Nothing in the mediator's affidavit indicates that he ever evaluated, or had sufficient information to evaluate, the strength of the Tier 3 Trust Plaintiffs' claims. Nor is there any indication that the mediator ever read the Settlement Agreement or knew about the attempted release of the Tier 3 Trust Plaintiffs' claims. In any event, the submission of the mediator's affidavit is contrary to Kentucky's policies reflected in Kentucky Supreme Court Rule 99.01, *et seq*. and is therefore improper. *See* Argument V.B.

8. The Settlement's structure violates KRS § 48.005 which mandates any recovery in the AG's taxpayer case *must* go to the Commonwealth's Treasury. This is a statutory command that cannot be evaded by the AG's ping-pong attempt to divert the taxpayer recovery that by law must go to the Commonwealth over to KPPA. *See* Argument V.A.

The original *Mayberry* 5 Plaintiffs, who are taxpayers and originally sued as such, must object to the attempted evasion of § 48.005 — the ping-pong tactic — a "bank shot" by which the \$137–145 million in what are already KPPA "previously invested" trust funds goes toward the Commonwealth, but then it bounces off with the AG deflecting it back to KPPA. *That's not the law*. It is not permitted. KRS § 48.005 mandates that whatever that recovery is, it must go to the Treasury because the AG chose to intervene in the *Mayberry* case, take that case over, and continue it on as his current "belt and suspenders" case for the Commonwealth. The AG cannot disregard that law. Nor can KPPA. Nor can a court. Only the legislature can modify a legislative command. It has not done so.

The *Mayberry* 5 Plaintiffs object not to deny the Trusts money but to *benefit* the Trusts as they have always fought to do. The ping-pong maneuver is being done as part of a deal that harms the KRS Trusts, trying to extinguish claims of individual value to each of them and of great value to the Trusts as a whole, yet the still-culpable Trustee is releasing those valuable Trust claims for a pittance in the Settlement, which if approved permits a grossly excessive attorneys' fee to be paid in secret.

9. The proposed Final Approval Order is grossly overbroad. It seeks to make the Court complicit in this by approving the *conduct of KPPA*, which is not even a party to any of these litigations, in purporting to have properly exercised its "business judgment" while "fulfilling its fiduciary duty," separate and apart from seeking approval of the terms of the Settlement itself. *See also* Argument VI.

10. The Culpable Trustee's shocking involvement in crafting and approving the Settlement — while attempting to release the Trust's and the Trust beneficiaries' claims against the KRS Insiders and the Hedge Fund Sellers — pollutes the deal. KPPA is not a party to either this breach-of-trust action or 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 and KRS Insiders participated. Thus, KPPA is disabled from settling these breach-of-trust claims based on its breach of its trust/fiduciary duties, as a matter of law.[12]

KPPA's conduct is inexplicable given the history of this case. 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 *allegations of wrongdoing by both the Trustee and the Hedge Fund Sellers in the Complaint drafted by MCL Law Group*. This involved an extensive presentation to a KRS Board "Special Litigation Committee" by the MCL Law Group and their consultant. This resulted in the filing of the Joint Notice between KPPA and Plaintiffs with the Court in early 2018. *See* Ex. 8. This filing was *authorized by the KPPA Board of Trustees*.

[12] *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).

The Joint Notice stated *to the Court*:

> 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 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.

Despite this, these current Trustees approved a deal where the Trust nets $37 million. Just .00072% of what the Hedge Fund Sellers have repeatedly admitted were $50 billion worth of claims. KPPA's approval of the proposed Settlement cannot withstand judicial scrutiny because the $145 million component of the Settlement is already indisputably *the Trust's property*. It is already so and always has been. KKR just took it and would not give it back.[13] KPPA's executive director, Eager, who is a defendant and alleged co-conspirator with the Hedge Fund Sellers, let this go on for years. 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 use its "business judgment" to approve a broad release of valuable claims in exchange for a settlement fund whose "substantial majority" is its own property. 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]":

[13] When the KPPA invested trust funds into the Prisma fund, that did not transfer ownership of those funds to Prisma Capital. *See* Ex. 22 ¶ 6. Those funds remained Trust assets. *See id.*

> 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," or merely complying with "fiduciary duties," 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). No such finding is sought. Nor would it be possible to so find.

11. The abject failures of the Culpable Trustee have plagued Kentucky, its 420,000 public employees, its taxpayers and clogged its courts with legal fallout for many years. Finally, it is coming to a head. The Supreme Court foreboded in *City of Fort Wright v. Board of Trustees* that the dangers posed to the KRS by "high-risk," "unregulated hedge funds" could "lead to colossal losses." 635 S.W.3d 37, 45 (Ky. 2021). This is what happened at KPPA due to the Culpable Trustee's breach and the Hedge Fund Sellers' participation. *Overstreet* condemned this Culpable Trustee's, its Insiders' and the Hedge Fund Sellers' combined actions as "*significant misconduct*." *Overstreet v. Mayberry*, 603 S.W.3d 244, 266 (Ky. 2020). Yet, the breach of Trust and RICO lawsuits to remedy this "significant misconduct" and recover these "colossal losses" is being sold out for a pittance with huge legal fees to be paid in secret.

In *City of Fort Wright,* a unanimous Court noted that "KRS underfunding" has "been a public issue over the last fifteen or so years," and held that while the Trustee had the legal power to invest in "hedge funds," it could do so only if the Trustee complied with the duties of due care and diligence imposed by KRS § 61.650, a provision the Tier 3 Trust

Plaintiffs pleaded as reinforcing the Trustee's strict common law obligations. *City of Fort Wright*, 635 S.W.3d at 39 n.2.

In *City of Fort Wright*, Justices Keller and Conley wrote separately and found "value" in the arguments regarding the *risks* of hedge funds, "which exposed important concerns for the citizens of the Commonwealth." 635 S.W.3d at 45 (concurring, Keller, J.). Noting their "share[d] … anxieties" over those risks, even though no damages were at issue or sought in that case, they recognized that "[h]edge funds are high-risk investments" — "loosely regulated [and] more likely to lead to colossal losses." *Id.* They also noted "Kentucky is only one of several states confronting the risks associated with investing public pensions in hedge funds." *Id.* at 46.[14] They continued:

> Even though hedge funds are generally permitted under KRS 61.650, for the Board to invest in hedge funds, those investments must still comport with the language of the statute. If the Board takes such a risk, it must do so prudently, with "care, skill, and caution," as well as "impartially" and in "good faith." … The investment must be made "[s]olely in the interest of the members and beneficiaries[.]" …
>
> … [T]he Board is called to invest funds according to beneficiary needs and interests. … If the Board is to adequately reflect their investment interests with caution, as it is required by statute to do, it may look to this case, and no further, in which some beneficiaries have stated clearly their displeasure with hedge fund investment.

City of Fort Wright, 635 S.W.3d at 46 (citations omitted).

A recent study confirmed the "exorbitant fees" of Hedge Funds have gotten <u>even</u>

[14] According to one study, hedge funds' poor returns cost 11 pension funds $8 billion in lost investment revenue while taking $7.1 billion in fees — $.57 cents in fees for every dollar of net returns. Elizabeth Parisian & Saqib Bhatti, *All That Glitters Is Not Gold, an Analysis of U.S. Public Pension Investments in Hedge Funds*, at 32 (Roosevelt Institute 2015), *available at* https://www.aft.org/sites/default/files/media/2016/allthatglittersisnotgold2015.pdf (last visited Jan. 30, 2025).

worse. Their fees now consume 50% of client's investment returns. *See* Bloomberg, *Hedge Funds Kept $1.8 Trillion As Fees, or Half Their Gains*, PENSIONS & INVESTMENTS, Jan. 21, 2025. ("Hedge funds have long been regarded as notoriously expensive. New research reveals just how costly they truly are for their clients. Of the $3.7 trillion in profits they have earned as an industry since 1969, nearly half or a staggering $1.8 trillion was gobbled up as fees … hedge funds have raised their charges to 50.4% of gains, up from the roughly 30% they earned until the early 2000s," "Warren Buffett once described those fees as "a compensation scheme that is unbelievable," while Bill Gross, the co-founder of *Pacific Investment Management Co.*, called them a "giant ripoff.""); Caitlin McCabe, *Hedge-Fund Fees Eat Up Half of Clients' Profits*, WALL STREET JOURNAL (Jan. 19, 2025). ("Hedge-fund investors often gripe about high fees. A new report puts the problem in sharp relief. Just over half of the industry's total gross performance was eaten away by fees over the past two decades …. That compares with about 30% between 1969 and the early 2000s").

Unfortunately, the "anxieties" dreaded by Justices Keller and Conley materialized into "colossal losses" and $300 million in "exorbitant fees" for the Hedge Fund Sellers as identified upon the KPPA Trusts and beneficiaries, sought to be remedied in the Tier 3 Breach of Trust and RICO cases. *See id.* (noting that "hedge fund investment" is unsuitable to public pension funds because it "is most often used by financially sophisticated and wealthy investors who can stomach losses"). But this collusive settlement will prevent any meaningful recovery. Proponents cannot prove it is fair, adequate, and reasonable; therefore, it must not be approved.

* * *

This Court has already "carved out" these unique common law breach of Trust claims to be independently prosecuted by Trust beneficiaries because the Trustee is culpable. The Court has already decided the key issues regarding this attempt of the Hedge Fund Sellers to buy off the AG's private contingency-fee lawyers with a $45.5 million undisclosed fee, to create their "global settlement." The Tier 3 breach of Trust claims are already "carved out" from the "global," "occupy-the-field" settlement constructed by the contingency-fee lawyers and the Hedge Fund Sellers and KRS Insiders for their mutual benefit. Any attempt to settle, impair, release or bar these claims violates that May 1 order, and its orders staying the Tier 3 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 Hedge Fund Sellers and the AG's private lawyers know their gambit is extraordinarily ambitious. That is why the Settlement is *artfully drafted* to accommodate their selfish goals, even if, as they fear, the Court honors the existing carve out of the Tier 3 breach-of-trust claims. The release language that specifically targets the breach of Trust and RICO cases, states that they apply "*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 and RICO claims is not possible because it is beyond their "legal authority" to do so. So, they carefully drafted the Settlement to accommodate the likely eventuality that this Court would follow the law and adhere to its prior decision — endorsed by the Court of Appeals — directing separate prosecution of the breach-of-trust claims, and continue to carve them out from the release and bar order of the Settlement because the Commonwealth and the KPPA do not occupy any field — or have litigation supremacy — "standing" or "legal authority" — to release these separate breach-of-trust claims and the RICO claims as well. So, what they did was structure, what for them, is the "no risk" gambit of this grossly overbroad settlement, because if and when the attempted release of the Tier 3 Trust Plaintiffs' claims fails, *the Hedge Fund Sellers still have their sweetheart deal and Oldfather still has her $45.5 million fee*.

And then in paragraph 14.f. of the Settlement Agreement comes the provision that shows just how corrupt this deal is. This provision provides "[t]he parties to the Fund-of-Funds Litigation shall not dispute in any forum the amount of attorneys' fees determined by the office of the Attorney General to be payable to counsel for the Commonwealth as set forth in its contracts." Settlement Agreement ¶ 14.f. That is an explicit clear-sailing provision to protect the secret $45.5 million fee to Oldfather. The provision also ensures that the Hedge Fund Sellers receive the release from and bar order against the Tier 3 Trust Plaintiffs' claims, in the event that Oldfather's attorneys' fees are challenged:

> Any disputes or objections by third parties regarding attorneys' fees payable to counsel for the Commonwealth in connection with this Settlement Agreement, including any appeal regarding the same, *shall not have any impact on the finality of the Approval Order and the effectiveness of the releases in the Approval Order or the timing of the Effective Date*.

Id. Again, the Hedge Fund Sellers have it both ways. They know they are paying off this lawyer via a secret fee — obscene in amount — under odious circumstances. They feared the fee to Oldfather was likely to be disapproved and spoil their Settlement. But they drafted the Settlement Agreement in a way to preserve their release and bar order, in return for letting Oldfather try to get the $45.5 million fee. These types of self-dealing terms are not permitted in class actions — or any suit submitted for court approval — especially one involving an important public agency.

Accordingly, the Court should reject the proposed Settlement.

ARGUMENT

I. Movants Bear the Burden of Proving That Their Proposed Settlement Complies with Procedural Requirements, Satisfies Due Process, and Is Fair, Reasonable, and Adequate

In seeking judicial approval of this proposed Settlement, Movants' theme is that the Settlement is an "arm's length" deal blessed by a mediator based on his "proposals" and thus deserves this Court's deference and approval. Then KPPA, *not even a party* to the case, goes on and on about how weary it is of these years of litigation over its catastrophic mismanagement and breaches of trust duties, which caused it to end up in a "*death spiral*" and "*essentially bankrupt*," due to what this Commonwealth's top officials said was "irresponsible[,]" "shameful[,]" and "criminal" conduct. *See* ¶¶ 21, 36.[15] These self-serving themes are wrong.

First, a settlement negotiated without the participation of the parties whose pending claims are released is not arm's length, no matter who oversaw the negotiations. The attempt to release the Tier 3 Trust Plaintiffs' claims — while their case is stayed — violates their due process rights, as well as this Court's stay orders. Star Chamber settlements eliminating a person's legal rights are no more permitted than Star Chamber adjudications of a person's rights.

Second, as to KPPA's whining about the years of litigation — that is all the culpable Trustee's fault. These litigations are the direct result of the culpable Trustee's decade-long breaches of trust/fiduciary duties, in which the Hedge Fund Sellers participated. *The lawsuits are the wages of its sins.* And the fact KPPA would go to these lengths to extinguish claims potentially worth billions in a sellout settlement, *without* mailed notice

[15] The allegations in the Tier 3 Trust Plaintiffs' August 19, 2021 complaint in Case No. 21-CI-00645 are cited as "¶ __."

to KPPA's members and beneficiaries, while secretly agreeing to a payment of $45.5 million in legal fees to consume most of the cash recovery, shows how culpable this current Trustee is, as it has been for almost 25 years. Some things never change.

This Court's prior ruling, appellate precedent, and CR 23.05–23.08 require rigorous court review of settlements submitted for judicial approval. Because Movants have sought judicial approval, current standards for judicial approval of settlements in representative actions apply. Those standards require individual notice to impacted parties with full disclosure of a Court approved description of the Settlement. They also require a detailed review of the actual — as opposed to the claimed — value of the Settlement and of all attorneys' fees, and the relationship between the two. Under these rules and precedents this Settlement can never pass muster.

Briseno makes clear a fundamental rule that applies to judicial approvals of settlements of representative actions. *See* 998 F.3d at 1030. There is no presumption of validity. *Id.* The settling parties bear the burden of proof on all aspects of the deal — its procedural regularity, compliance with due process, substantive fairness, reasonableness and adequacy must be proven by them:

> Rule 23(e)(2) assumes that a class action settlement is invalid. ...
>
> In *Roes, 1–2*, we reversed a district court that applied a "'*presumption that [a] settlement is fair and reasonable*'" to a [settlement] that "is the product of arms-length negotiations." ... courts must scrutinize attorneys' fees for potential collusion that shortchanges the class ....

Id.

Countless cases and legal writings use the words "fair" "reasonable" and "adequate." But these three words embrace deep meanings, requirements, and behaviors, which are of extreme importance here, in the context of cases involving billions of dollars of damages to the Trusts holding the retirement savings of 420,000 Commonwealth employees.

- *Fair* – common use meanings include "important and just, without favoritism and discrimination"; "without cheating or trying to achieve unjust advantage"; marked by "impartiality and honesty," "free from self-interest, prejudice or favoritism." Black's Law Dictionary says it means "[h]aving the qualities of impartiality and honesty; free from prejudice, favoritism, and self-interest."
- *Reasonable* – common use meanings include "based on or using good judgement"; "sound judgement"; "sensible." Black's Law Dictionary says it means "fair, proper, just, moderate, suitable under the circumstances" and "not immoderate or excessive, being synonymous with rational, honest, equitable, [and] fair[.]"
- *Adequate* – common use meanings include "sufficient, proportionate"; "satisfactory or acceptable in quantity or quality" "quantity that is good or acceptable"; "sufficient specific need" "lawfully and reasonably supported." Black's Law Dictionary says it means "[s]ufficient, commensurate[], … equal to what is required[,] suitable to the case …, [and] satisfactory."

BLACK'S LAW DICTIONARY, at 39, 595, 1265 (6th ed 1990).

II. The Court Must Reject the Settlement as Unfair, Unreasonable, and Inadequate Because the Movants' Attempt to Settle and Release the Tier 3 Trust Plaintiffs' Claims Is Prohibited by the Court's May 1 Order Overruling the AG's "Occupied-the-Field" Arguments, as Well as Its July 9 Order Staying the Breach-of-Trust Case

In its May 1, 2024 order denying Defendants' motions to dismiss the Tier 3 Trust Plaintiffs' 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. The Court rejected the assertions 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 favorable rulings, on May 13, 2024, the Tier 3 Trust Plaintiffs moved for an order directing the KKR Defendants to return some $137 million in KRS Trust funds, plus 8% interest and a three-time statutory penalty which if granted in full could then generate $772 million (today $807 million) in interim monetary equitable relief for the KPPA Trusts. Plfs.' May 13, 2024 Mot. at 4–10. Originally noticed for a hearing on May 20, 2024, the motion hearing was postponed to July 17, 2024 at the KKR Defendants' request at the Court's urging. The KKR Defendants procured the Tier 3 Trust Plaintiffs' agreement to the postponement *without disclosing that negotiations in a secret mediation with the AG's* contingency-fee lawyer to settle this litigation by trying to return the very same $137–145 million fund to KPPA and wipe out that motion were underway.

By July 2024, Oldfather and the Hedge Fund Sellers saw what was coming. However, briefing was ongoing on the KKR $807 million motion, and on July 9, 2024, the Court *sua sponte* stayed the Tier 3 action to permit the Hedge Fund Sellers and KRS Insiders to pursue their appellate remedies seeking to overturn the May 1, 2024 order.

Immediately on July 11 and 12, 2024, Oldfather and the Hedge Fund Sellers started a mediation to get rid of this case while including the pending motion seeking $807 million from KKR, Kravis and Roberts. The Tier 3 Plaintiffs' hands were tied.

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 parallel with the AG's taxpayer case.[16] Six days later on November 18, 2024, Oldfather and the Hedge Fund Sellers reached agreement on the "non-monetary terms" of their deal, whatever that means.

Unaware of any of these behind-the-scenes goings-on, the Tier 3 Trust Plaintiffs moved to vacate the stay, identifying the need to resolve several motions, including the pending $807 million motion as to KKR and two other specified motions they were ready to file. One of the other motions would seek partial summary judgment on the issue of the culpable Trustee's breach of its trust/fiduciary duties[17] and the Hedge Fund Sellers' and their executives' participation in the breach, and which, if granted, would, for all practical purposes, end that case (the "KPPA/Hedge Fund Sellers' Summary Judgment Motion"). The second motion involves Blackstone, Schwarzman, and Hill and would seek up to $1 billion in restitution and/or disgorgement for the secret, wrongful diversion of

[16] On August 20, 2024, the Court of Appeals rejected the KRS Insiders immunity appeal, as premature and for lack of jurisdiction.

[17] While the culpable Trustee is not a party to the Tier 3 breach-of-trust case, its breach of duty is a key issue at the core of the case. Rule 56 permits summary judgment as to "issues" that cannot in good faith be disputed. The issue of the culpable Trustee's breach of its fiduciary duty cannot be disputed in good faith and that issue is susceptible to summary judgment. *Abbott v. Chesley*, 413 S.W.3d 589, 600 (Ky. 2013); *Chesley v. Abbott*, 524 S.W.3d 471 (Ky. 2017); *see also Osborn v. Griffin*, 865 F.3d 417, 447 (6th Cir. 2017).

millions in Trust assets here in Kentucky, and hundreds of millions elsewhere in the public pension fund universe where Blackstone pursued the same predatory business practices as here in Kentucky, the "Blackstone-Park Hill Trust Funds Diversion Motion".

By November 18, 2024, Defendants had lost every motion of substance in this case. The Hedge Fund Sellers' writ petition challenging the Court's May 1 order had been denied by the Court of Appeals. The KRS Insiders' immunity appeals had been 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 were long-shots. Rather than face the inevitable reality that the stay would soon be lifted, and that they would be forced to deal with these motions and the strength of the Tier 3 Trust Plaintiffs' claims on the merits, the Hedge Fund Sellers quickly completed a sellout settlement in the taxpayer case which would wipeout the Tier 3 case as well — buying off Oldfather with a $45.5 million, undisclosed fee payment[18] protected by a "clear sailing" promise.

The Hedge Fund Sellers violated, and Oldfather abused and exploited, the stay in secretly settling the Tier 3's breach of Trust case (and the federal court RICO case) while

[18] 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. Why the AG, a public official, would go along with that secrecy is hard to understand.

these cases were stayed. 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 Tier 3 claims for separate prosecution, without interference from the AG or his lawyers, and the stay which was to maintain the status quo pending completion of appellate proceedings.

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*, 648 S.W.2d at 849. Neither the AG nor KPPA have standing to assert or settle the breach of Trust and/or RICO claims for the Trusts and the Trust beneficiaries.

One cannot create standing to settle a claim belonging to, and being prosecuted by, another. The stay applies to *all* parties to the Tier 3 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 attempt of the AG's contingency-fee lawyers to settle those claims for a small "fresh money" recovery yet pocket a giant, $45.5 million "clear sailing" fee is improper, and violates both this Court's May 1 order, the stay — and indeed, due process as well.

The Tier 3 Trust Plaintiffs raised the alarm to the Court back in 2022 as to what the AG's private contingency-fee lawyers and the Hedge Fund Sellers were likely up to. On June 13, 2022, the Tier 3's warned that the Hedge Fund Sellers and the AG's contingency-fee lawyers were likely working behind the scenes to arrange a headline grabbing "global" settlement (which would attempt to extinguish their breach of Trust action) without any 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. This is exactly what the Hedge Fund Sellers and Oldfather did while the Tier 3 Trust Plaintiffs' case was stayed and now ask this Court to not only get away with it, but to approve their conduct, as well as the terms of the Settlement.

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. Nor is there disclosure of all side agreements and fee splits required by CR 23.08, *i.e.*, any agreements made in connection with the Settlement — an approval procedure this Court stated long ago *must be followed*, if the AG tried to settle the *Mayberry* case after he and his contingency-fee lawyers took that claim over. In any event, by seeking judicial approval, the AG's contingency-fee counsel and the Hedge Fund Sellers have triggered the approval requirements of CR 23.05, and the contemporary legal standards for judicial approval of settlements in representative actions generally.

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 actual recovery are being obfuscated in an effort to get this Court to approve it.

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, these parties to the taxpayer case, 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 lawyer in the 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, and the federal RICO treble-damages claim over in federal court as well. It attempts to do so after the Tier 3 Trust Plaintiffs have won every substantive motion and have prevailed in every appellate proceeding in the breach-of-trust case. And it does so in the face of pending and specified anticipated motions in that case that are worth billions of dollars to the Trusts, and thousands of dollars to the Trust beneficiaries. This cannot be approved by this Court.

The decisive issue is the scope of the release and bar order in the Settlement. They are both incredibly broadly-worded and at the same time specifically targeted to settle, release and bar these breach-of-trust claims, and the federal court RICO claims.[19] The

[19] The Hedge Fund Sellers and the AG also participated to settle the RICO class action pending in federal court, but put on hold by agreement, while the state court proceedings played out. Yet the AG and KPPA are not parties to that lawsuit. Nor have the Hedge Fund Sellers complied with Rule 23's stringent requirements for approval of settlements, or dismissal of claims, in representative actions.

The RICO claims are very significant. In addition to treble damages, that case if successful would provide a direct cash recovery to every Trust beneficiary individually. This Court cannot approve wiping out their federal court claims.

release specifically obliterates all these valuable claims, including the KKR $807 million motion to return Trust assets, the Blackstone-Park Hill Diversion of Trust Funds Motion and the KPPA/Hedge Fund Sellers Partial Summary Judgment Motions, motions that hold the potential for the recovery of hundreds of millions, if not billions, for the Trusts and thousands to each of the Objectors and other Trust beneficiaries, which if granted would effectively end that case.

This Court has already carved the Tier 3 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. Movants have proceeded in defiance of these rulings.[20]

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[20] The motion to sever the AG's claims against the KRS Insiders is just another example of such defiance. *See* Joint Mot. at 19–21.

The Court may recall this exchange from May 2024 when the AG's private lawyer attempted to get into and disrupt proceedings in this case relating to the $807 million motion the Tier 3's had just filed and were trying to get scheduled for a hearing:

> 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 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 Hr'g Tr. at 4–5. 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*.

At this same May 2024 hearing, where the Tier 3 Trust Plaintiffs were seeking to get a hearing on their KKR $807 million motion, which the Hedge Fund Sellers were trying to delay and Oldfather was attempting to prevent, Oldfather admitted: "The AG is not in this case. Does not represent any party." May 20, 2024 Hr'g Tr. at 1. This Court then turned Oldfather away, telling her "I think what you need to try to do .... I think you need to intervene ... I think you need to make that motion ... you really have to make a motion." *Id*. at 10. Oldfather never made such a motion. Instead, when this Court stated "I want to hear from this side … set it [the $807 million KKR, Kravis, Roberts Motion] for a mutually agreed upon date," and the Tier 3 Plaintiffs did so, she and KKR and Blackstone ran to a mediator and secretly settled the Tier 3 case, in a deal where the Hedge Fund Sellers eliminated claims they repeatedly publicly valued at $50 billion (*see* Exs. 9, 16) for $82.5 million, eaten away by Oldfather's secret $45.5 million in fees — a deal sanctioned by a secret mediation, where the mediator appeared to have never reviewed the release and bar order in settlement documentation prepared by the Hedge Fund Sellers' lawyers. If that is not wrong, nothing is wrong.[21]

The Court has already "carved out" these unique common law breach of Trust claims to be independently protected by Trust beneficiaries because the Trustee is culpable. The Court has already decided the key issues regarding this attempt of the Hedge Fund Sellers to buy off the AG's private contingency-fee lawyers, with huge undisclosed fees, to create their "global settlement." The Tier 3 breach of Trust claims are already "carved out" from the "global," "occupy-the-field" settlement constructed by the contingency-fee lawyers for the AG and the Hedge Fund Sellers and KRS Insiders for their mutual benefit. Any attempt to settle, impair, release or bar these claims violates that May 1 order, and the stay of that Tier 3 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.

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[21] As Abraham Lincoln wrote to A.G. Hodges of Frankfort, Kentucky on April 4, 1864, condemning an even worse evil, "if [this] is not wrong, nothing is wrong." Lindsay Peterson, *Letter to Albert Hodges (April 4, 1864)*, LINCOLN AND EMANCIPATION (2016), *available at* https://lincolnandemancipation.weebly.com/letter-to-hodges-1864.html (last visited Jan. 30, 2025).

As pointed out earlier, the Hedge Fund Sellers and Oldfather are trying to have it both ways and let the Hedge Fund Sellers and the KRS Insiders keep their Settlement and let Oldfather keep her fees, no matter what. When this Court preserves the existing carved out claims, *the Settlement is then limited to the taxpayers' claims but it is still binding on those Settling Parties*. The Hedge Fund Sellers get out of the taxpayer case for $82.5 million — a *pittance*. Oldfather secretly gets $45.5 million, a *bonanza*. The Trusts net only $37 million in "fresh money." The Court can approve this charade as to them, if it can stomach it. But the Court must leave the Tier 3 Trust Plaintiffs and their claims out of this, and allow their separate claims to be prosecuted.

III. The Court Must Reject the Smoke-and-Mirrors Settlement Because It Would Bar the Prosecution of the Meritorious Breach-of-Trust Claims, as Well as the Motions That Alone Are Worth Billions of Dollars in Potential Interim Recovery to the KRS Trusts and Their Beneficiaries

The Hedge Fund Sellers and Blackstone, Schwarzman, Hill, KKR, Kravis, and Roberts are trying to extinguish three motions of potentially great value to the Trusts, that expose in detail the culpable Trustee's and its Insiders' atrocious breaches of duties. 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, in addition to the then pending KKR return of Trust funds motion seeking $770 million, now grown to $807 million.

> [(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.

These are not abstract claims that someone might someday somewhere assert, necessary to be extinguished for global peace in a substantial, fair, adequate and reasonable settlement. This is an on-file case, being vigorously prosecuted when not stayed, having survived motions to dismiss and designated for separate, independent "carved out" prosecution, which include 3 pending or promised motions that could be worth billions to the Trust overall and *thousands of dollars* to the Objectors.

Plaintiffs' Tier 3 breach of Trust case is very strong. Legally it is simple because the Tier 3 Plaintiffs' breach-of-trust claims are strict-liability claims. Factually, misconduct is obvious and in large part already documented. Combined, it creates a lawsuit worth potentially billions of dollars for the Trusts. Under black-letter law, *Defendants actually bear the burden of proof* on the issues of both liability and damages. Given this legal standard, the Tier 3 case – and these above-specified motions – seeking equitable relief are also very powerful and valuable given the facts laid out in those filed and/or promised motions.

As courts have consistently held in cases involving a trustee's breach of trust, a party accused of the breach (or participating in others' breaches) bears the burden of proffering "clear and satisfactory evidence" to make an "affirmative showing of fairness and good faith" in the challenged transactions. *See Geddes v. Anaconda Copper Mining Co.*, 254 U.S. 590, 599 (1921). Applying this settled rule governing the burden of proof in a case involving breach of fiduciary duty, the Kansas Supreme Court explained:

> 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).

This rule applies with equal force on the issues of damages, harm and losses to the Trusts. Defendants alleged to have participated in a breach of trust also bear the burden of proving their conduct did not cause the losses claimed by trust beneficiaries. *See Donovan v. Bierwirth*, 754 F.2d 1049, 1056 (2d Cir. 1985). In *Donovan*, a case involving alleged breach of fiduciary duty by trustees, the Second Circuit applied the common-law rule requiring trustees to either "restor[e] ... the trust beneficiaries to the position they would have occupied but for the breach of trust" or "prov[e] that the funds would have earned" less than "the most profitable of the alternative models of investments made without the trustees' breach." *See id.* In determining the proper remedy, the Second Circuit instructed that "[a]ny doubt or ambiguity should be resolved against [the trustees]." *Id.* (citing cases). This was so, the Second Circuit reasoned, because "once a breach of trust is established, uncertainties in fixing damages will be resolved against the wrongdoer." *Id.*

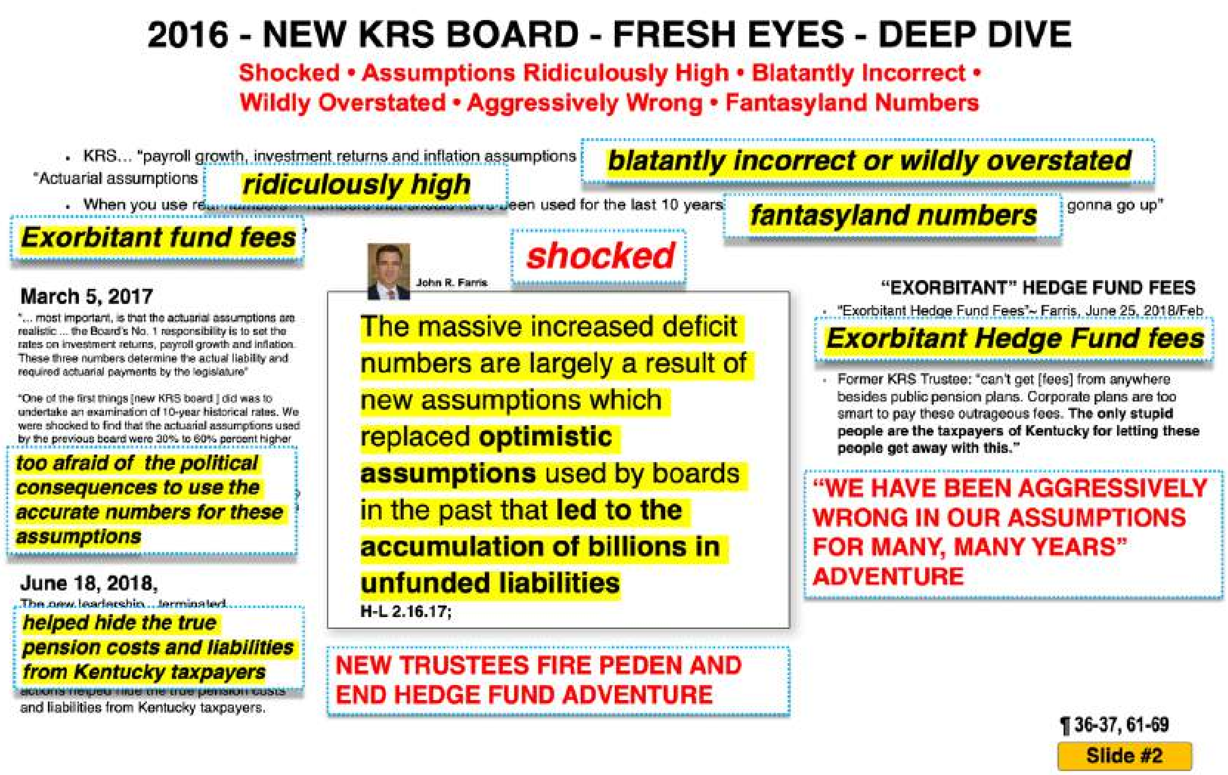
Aside from the burden of full disclosure and proof on liability and damages, this breach-of-trust case is simple and straightforward due to Kentucky's non-imputation doctrine. *See Wilson v. Paine*, 288 S.W.3d 284, 287–88 (Ky. 2009) (following the non-imputation doctrine and refusing to impute the knowledge of corporate insiders to a claim asserted by the innocent corporation). Because the Tier 3 Plaintiffs are innocent victims of the breach of trust perpetrated by the culpable Trustee, together with other Defendants, the culpable Trustee's misconduct cannot be imputed to them. *See id.* As such, the Tier 3 Plaintiffs are not subject to a defense based on *in pari delicto*. *See Jo Ann Howard & Assocs., P.C. v. Cassity*, 868 F.3d 637, 647 (8th Cir. 2017) (affirming the trial court's order striking an *in pari delicto* defense to a claim asserted by innocent beneficiaries). Nor are the Tier 3 Plaintiffs subject to any contract-based defenses applicable to the claims asserted under the "Innocent Trustee" theory by the Commonwealth. *See id.*; *see also* KY. REV. STAT. § 411.182 ("[a]llocation of fault in tort actions"). In fact, recognizing these important distinctions between this breach-of-trust case and the Commonwealth's case, this Court found that "[a]t trial, the evidence, argument and jury charge (*including any comparative fault question*) will be markedly different." *Taylor*, slip op., at 4–5.

A. The Partial Summary Judgment Motion as to the Breach of the Culpable Trustee's Fiduciary Duties and the Hedge Fund Sellers' Participation in That Breach

The Hedge Fund Sellers and Schwarzman, Hill, Kravis and Roberts are trying to extinguish and avoid ever dealing in public with the partial summary judgment motion as to the culpable Trustee's breach of fiduciary duties and the Hedge Fund Sellers' participation in that breach, *i.e.*, the evidence of their egregious misconduct ever seeing the light of day. This partial summary judgment motion would seek a finding on the issue of the Trustee's breach of its trust/fiduciary duties — *i.e.*, its culpability, and the KRS Insiders' and the Hedge Fund Sellers' participation in that breach. If granted, this motion would end the liability phase of the Tier 3 breach of Trust case in Plaintiffs' favor. The AG's contingency-fee lawyer of course could never even file such a motion because the AG's case is based on the *innocent* Trustee theory, while this one is on a *culpable* Trustee theory. This is a unique and uniquely valuable claim in the Tier 3 breach-of-trust case and in that case only.[22]

[22] The Objectors have submitted 49 pretrial exhibits prepared by the Tier 3 Trust Plaintiffs in their breach-of-trust case. These pretrial exhibits support all three motions of the Tier 3 Trust Plaintiffs. Here, although the burden is on the Settling Parties to establish that the proposed Settlement is fair, reasonable, and adequate, these pretrial exhibits form an evidentiary record of the strength and value of the claims sought to be extinguished.

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 term 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. 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.



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"

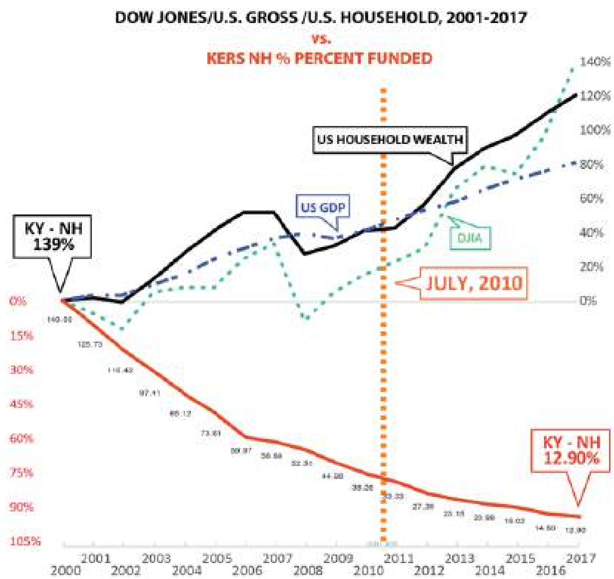
H-L 8.25.17;

¶36-37,61-69

Slide #1

- 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

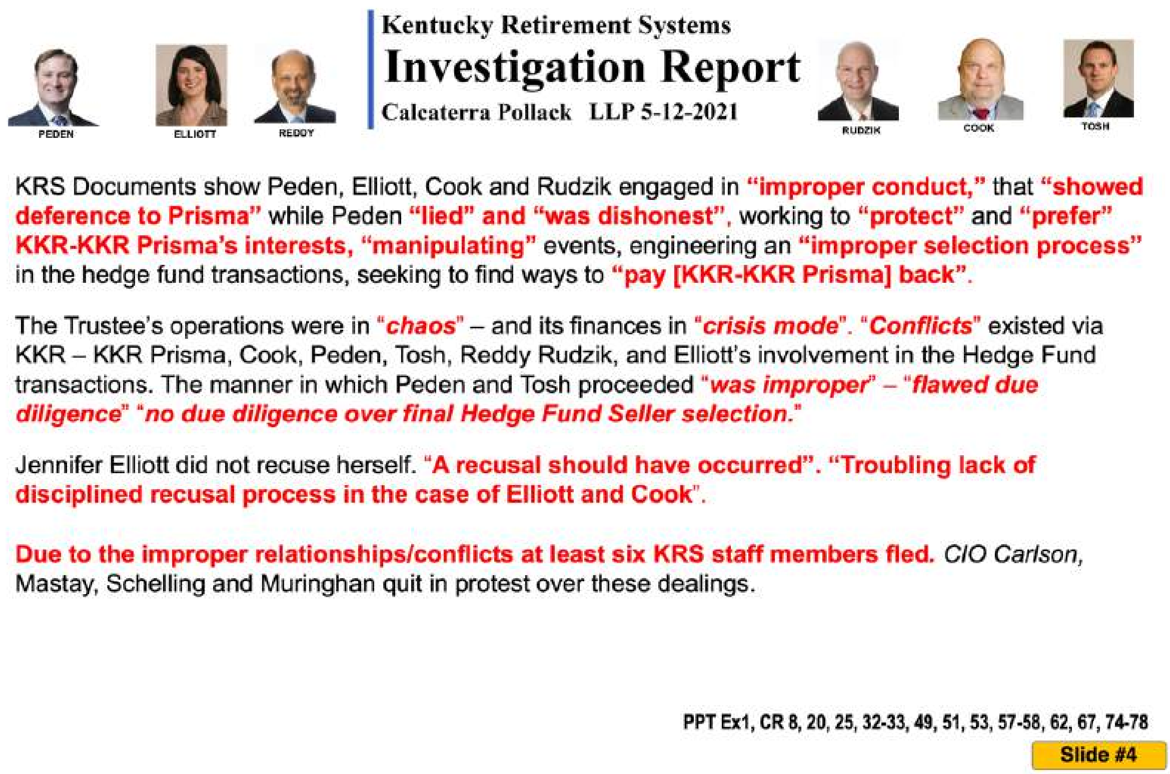
¶ 20-21, 28

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 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. Investigation Report by Calcaterra Pollack

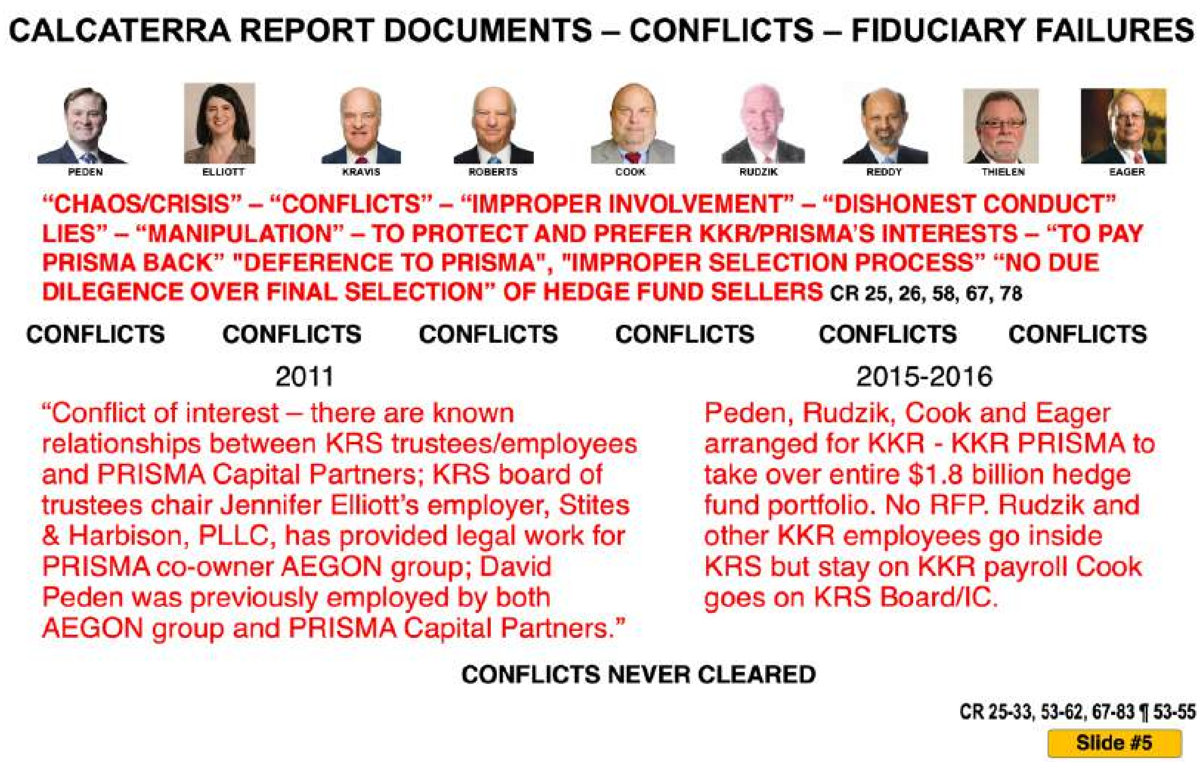
LLP ("Report") (Pls.' Pretrial Ex. 1) at 8, 20, 25–26, 32–33, 49, 51, 53, 57–58, 62, 67, 74–78; ¶¶ 53–55, 233–235, 245–250, 250, 260.



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, 583–67, 74–78; ¶¶ 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.”



The damage done to the KRS Trusts is unlikely to ever be overcome, absent the large recovery that the breach-of-trust case — and that case alone and its RICO federal court companion — 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. $300 million in "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" — it is .00072% of what the Hedge Fund Sellers admitted to be worth $50 billion.

Without this motion being heard, this Settlement cannot be found to be fair or reasonable or adequate in these circumstances.

B. The Blackstone-Park Hill Motion for Restitution and Disgorgement of Hundreds of Millions of Dollars of Trust Funds Diverted from the KPPA and Other Public Pension Fund Trusts

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.

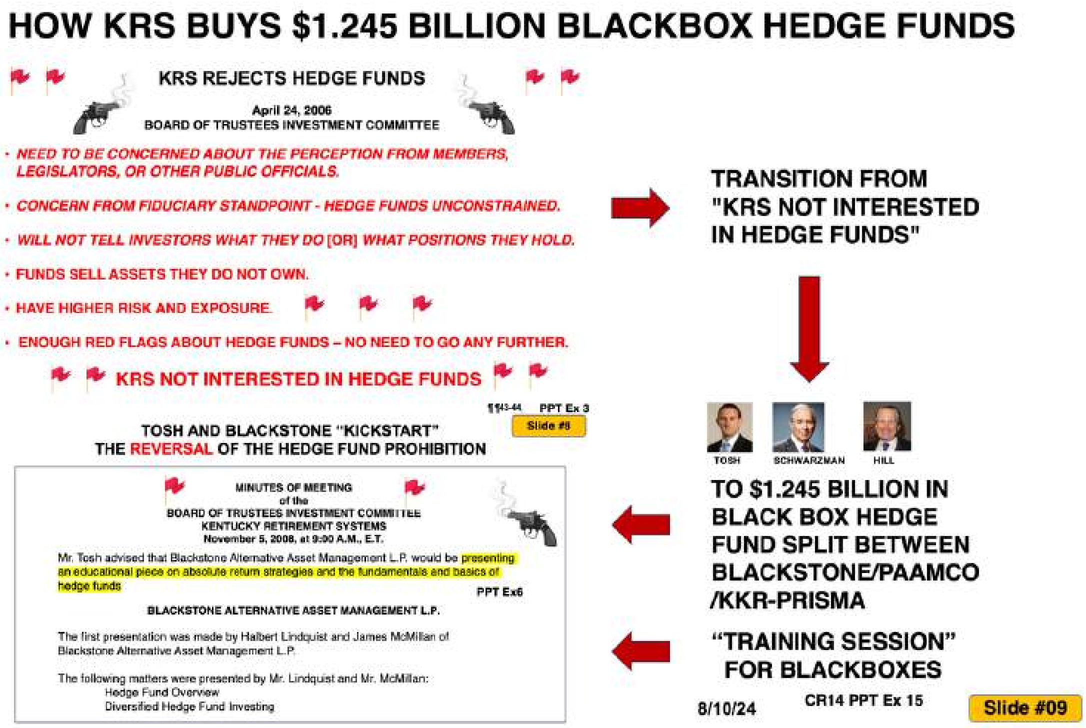
The Blackstone-Park Hill motion seeks interim monetary recovery and an accounting of all public pension trust funds that were diverted to Park Hill Inc., including the secret diversion of $3.85 million in KRS Trust Funds to Park Hill here in Kentucky, and hundreds of millions more from other public pension plans also victimized by the same illegal course of business and business practices as those that diverted the Trust monies here. This diversion benefited Blackstone-Park Hill, as well as Schwarzman, Hill, and other Blackstone executives personally. The improper retention of those diverted Trust Funds entitles Plaintiffs to 8% interest and as a "Misapplication of Entrusted Property" it warrants the imposition of a three-time civil penalty. The relief sought by the motion, including restitution and disgorgement could reach $1 billion.

As laid out in this motion, 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 know 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.

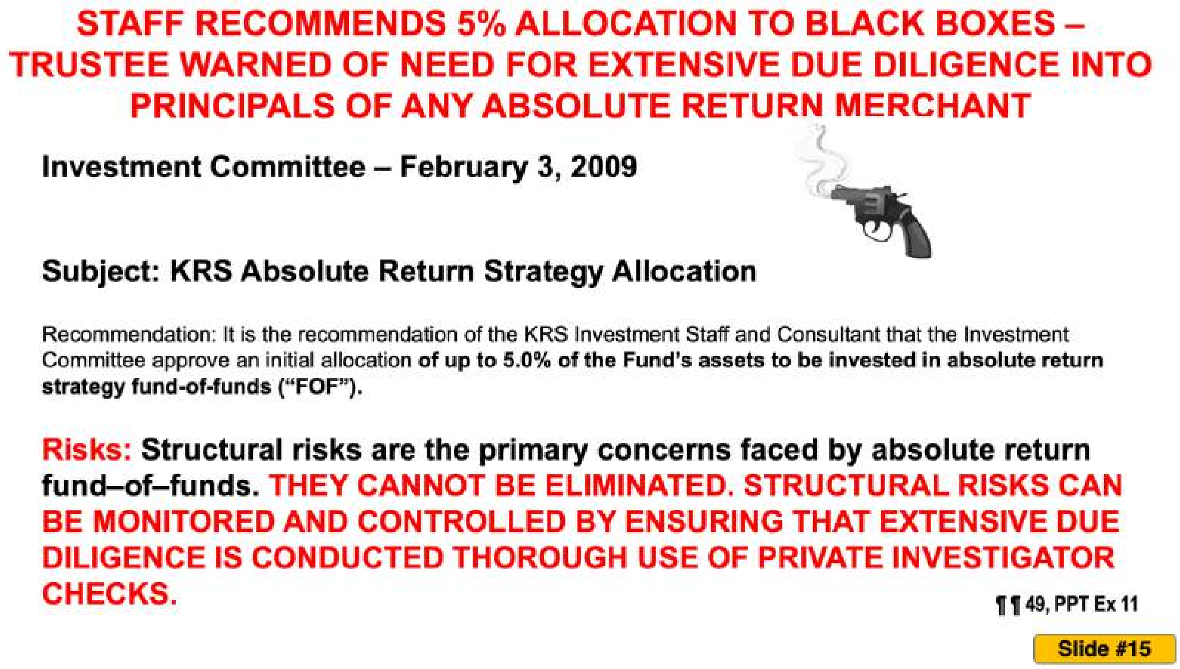
The motion will show that Blackstone participated in the Trustee's breach from the outset. As KRS's funding levels fell in 2006, the Trustee was warned the Trusts/Plans had significant funding problems that it "could not invest its way out of." ¶ 29. As a result of these funding declines, in 2006 the 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.

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.

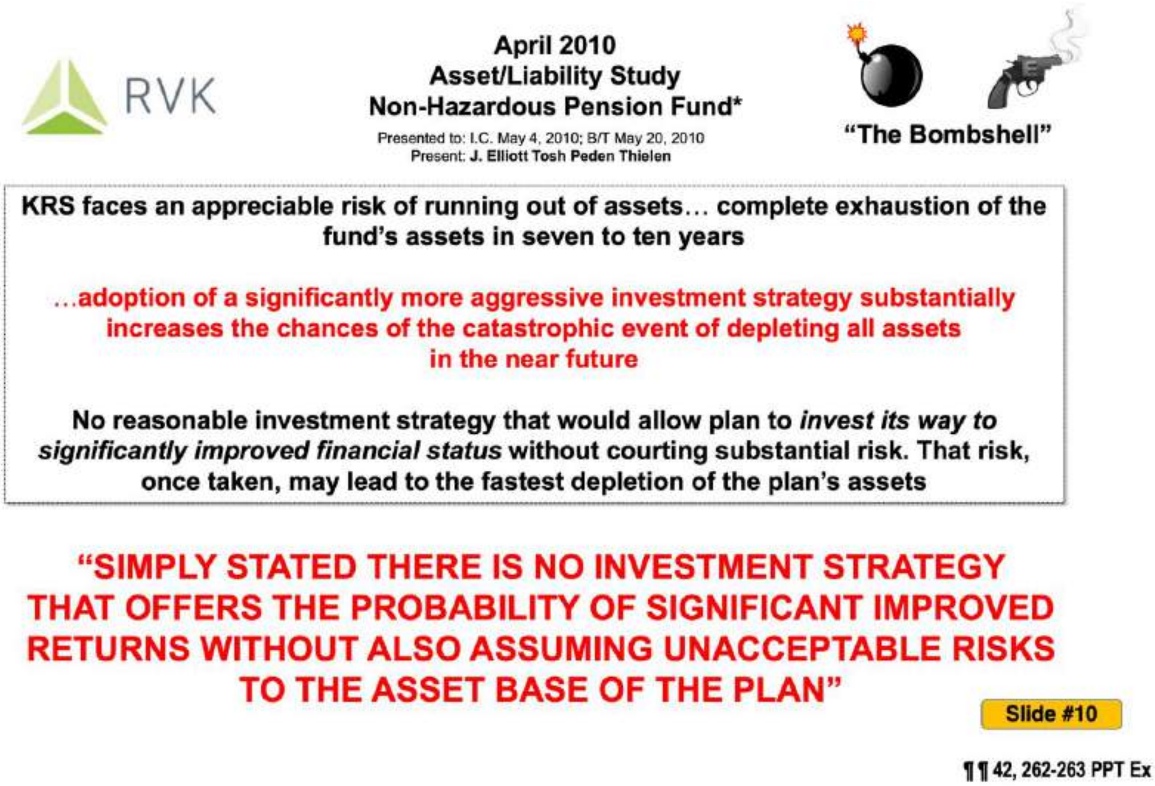
Blackstone already had insider access at KRS. It had previously sold KRS $225 million in "alternative investments," which it was managing as a fiduciary. Blackstone gave the first "tutorial" on hedge funds to the Board — what a KRS internal investigatory report termed "*training*" of the Trustee — in 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.



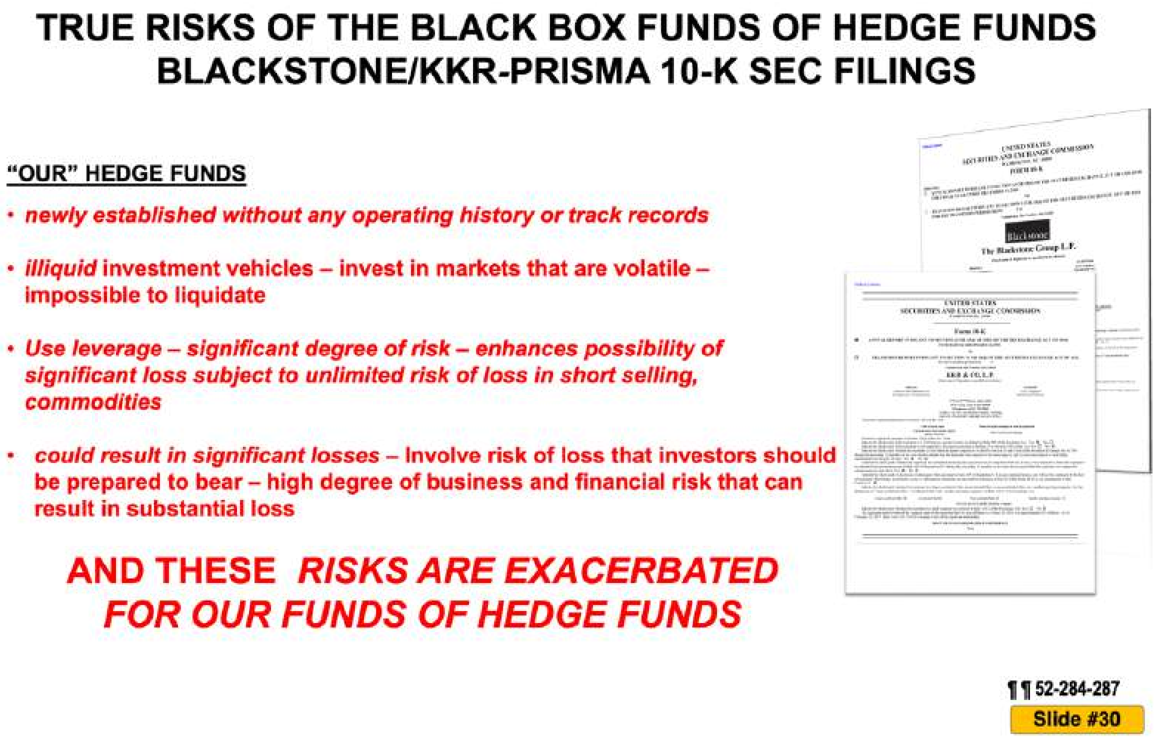
In February 2009, just weeks after Blackstone's November 2008 hedge fund "training" session of the culpable Trustee, and despite being warned of "structural risks" which "could not be avoided" the Trustee authorized an allocation of Trust funds to Black Box Hedge Funds. ¶ 49.



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.



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, and 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:



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; Pls.' Pretrial Exs. 30, 31, 37, 38, 39. 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 "alternative investment" were "side-kicked" some of the money, fees or both.[23] ¶¶ 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,[24] while here in Kentucky KPPA's CEO, CIO, and General Counsel were fired, and its Board Chair kicked off the Investment Committee. ¶ 253.

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[23] 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.

[24] *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*, 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 largely outlawed the use of placement agents and other similar payments. KRS 61.645(21) ("no funds ... shall be used to pay fees and commissions to placement agents").

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

¶ 40, 90, 93

Slide #13

This secret diversion of Trust assets claim has nothing to do with the taxpayer claim. It has not been pursued by the AG's contingency-fee lawyer. Yet the Settlement will extinguish this claim while the Tier 3 Trust Plaintiffs' hands are tied.

Unless this motion is heard and determined, the Settlement cannot be found to be fair or reasonable under these circumstances.

C. The Motion to Force KKR to Return $137–145 Million in Wrongfully Withheld Trust Assets, Plus 8% Interest and Three Times Penalty, Now Totaling $807 Million[25]

On May 13, 2024 this motion was filed to recover misappropriated funds on behalf of the various KPPA trusts requesting an order directing the KKR Defendants, including Kravis and Roberts personally to:

- return over $137,000,000 of misappropriated KRS trust funds, plus interest at 8% since April 2019 (accruing at $913,333.33 per month for 61 months),[26] for a total of $192,713,333 as of April 30, 2024;
- pay a civil penalty, authorized by Subsection (3) of KY. REV. STAT. § 61.685, of $578,139,999 (three times the amount of $192,713,333 (as of April 30, 2024)); and
- provide an accounting of all dealings with these KRS trust monies.

Another 10 months have passed due to Defendants' delay and the stay. The motion today is worth over $807,000,000 and counting.

[25] This motion is the subject of a pending motion to be heard on February 12, 2025 after this Objection had to be filed.

[26] Under KY. REV. STAT. § 360.010(1), the amount of interest accumulated from April 2019 (when the trust funds were withheld) to May 2024 (when this motion is prepared) is approximately $55,713,333 ($137,000,000 x 8% (per annum) x 1/12 x 61 (months)).

Updated to current under KY. REV. STAT. §§ 61.685(3)(b) and 360.010(1)(4), the total amount due is calculated as follows:

Amount wrongfully withheld since April 2019	$137,000,000
Interest at 8% per year = $913,333 per month (April 2019 to February 2025) — 71 months[27]	$64,846,000
Total monies withheld plus interest	$201,846,000
Civil penalty 3 x $201,846,663	$605,539,000
Total to be paid[28]	$807,385,000

In April 2019, when the Daniel Boone Black Box Hedge Fund came due, KKR-Prisma withheld from the KPPA Trusts $137 million. It did so purportedly based on its contractual right to be indemnified by KPPA for its legal fees and expenses in connection with the "*Mayberry* Litigation."

KKR did this in retaliation against KPPA for initially supporting the *Mayberry* suit and filing the Joint Notice (Ex. 8). The conduct was willful retaliation by a fiduciary against the KPPA Trusts, that harmed innocent persons, *i.e.*, the KPPA Trust and Trust beneficiaries. KKR had no right to indemnification by KRS. In March 2022, this Court, Judge Shepherd, held in the Commonwealth's declaratory-relief action that the Kentucky Constitution prohibited the enforcement of the purported "indemnification" provisions asserted by KKR-Prisma. *See Commonwealth v. KKR & Co., Inc.*, Case No. 21-CI-00348, slip op. (Ky. Cir. Ct. Franklin Cnty. Mar. 24, 2022). Judge Shepherd's holding — which was affirmed by the Court of Appeals in December 2023 — renders illegal KKR-Prisma's

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[27] KY. REV. STAT. § 360.010(1)(4) provides the legal rate of interest is 8% per annum.

[28] The precise final amount will depend on a complete accounting and on the exact payment date, as interest will run until then, impacting all totals.

withholding of the KRS trust funds. *KKR & Co. Inc. v. Commonwealth*, 2023 WL 8285978, at *20 (Ky. Ct. App. Dec. 1, 2023).

In the declaratory-relief case, the AG sued for the Commonwealth and not for the KRS Trusts, seeking only declaratory relief. He did not pray for a return of the funds. The AG's complaint did not seek, could not seek, and could not recover any of the $137 million in wrongfully withheld Trust Funds for the Trusts, or the interest and penalties due the Trusts as well. The AG's declaratory-relief action was crafted and filed by the AG's "in house" staff and filed under KRS § 418.040. The AG's complaint only sought declaratory relief, seeking to void certain contractual provisions. *It did not seek damages.*[29] *Nor did it seek equitable relief or even mention the $137 million in Trust Funds.*

The AG's action did not seek to recover the $137 million because by law the AG cannot recover the $137 million in Trust Funds. Under the statutory scheme "if any funds of any kind or nature whatsoever are recovered by or on behalf of the Commonwealth in any action … where the Attorney General has entered an appearance or is a party … those funds will be handled under KRS § 48.005." KRS § 48.005 requires "those funds shall be deposited in the State Treasury," administered by the Office of the Controller and then end up in the Commonwealth's Surplus General Fund.

The KKR motion sought to have the Court exercise its extensive, discretionary power based on two statutory provisions governing the KRS trust funds. First, under Subsection (1) of Section 61.650, all KRS trust funds must be managed "[s]olely in the interest of," and "[f]or the exclusive purpose of providing benefi to," the members and beneficiaries. KY. REV. STAT. § 61.650(1)(c)(2)(a)–(b). By the statute's own definition,

[29] The AG has never been retained or authorized by KRS to sue to recover the $137 million.

this "sole interest" standard "shall be determined using only pecuniary factors and shall not include any purpose to further a nonpecuniary interest." *Id.* at § 61.650(1)(c)(1)(a). KKR's withholding of $137 million in trust funds does not — and cannot — satisfy the statutory standards of "sole interest" and "exclusive purpose." In fact, the withholding has been held to be unlawful by Judge Shepherd in the declaratory-relief action. *See Commonwealth*, slip op., at 74–75. And Judge Shepherd's holding has been affirmed by the Court of Appeals. *See KKR & Co.*, 2023 WL 8285978, at *20. Under the Kentucky Penal Code, KKR was guilty of "Misapplication of Entrusted Property," because its withholding of KRS trust funds constitutes taking "property that has been entrusted to [KKR-Prisma] as a fiduciary … in a manner which [KKR-Prisma] knows is unauthorized and involves substantial risk of loss or detriment to the owner of the property or to a person for whose benefit the property was entrusted." KY. REV. STAT. § 517.110(1).

Second, under Subsection (3) of Section 61.685, KKR-Prisma — having unlawfully withheld $137 million in KRS trust funds — "shall be liable for … [a] civil payment in an amount up to three (3) times the amount of [the withheld funds]." KY REV. STAT. § 61.685(3)(c)(2). This provision for civil penalty applies here because, consistent with the text of paragraph (b) of Subsection (3), KKR-Prisma "knowingly … [p]ossess[ed] … property used or to be used by [KRS] … and fail[ed] to deliver or deliver[ed] less than all of the money … or property to which [KRS is] entitled[.]" *Id.* § 61.685(3)(b)(3).

A three-time civil penalty is justified here because, as Judge Shepherd found, KKR-Prisma had no legal basis to withhold the $137 million in KRS trust funds, and because the KKR Defendants acted in bad faith in litigating the declaratory-relief action. For example, KKR has repeatedly claimed that it had no legal connection with or responsibility for Prisma and was not subject to personal jurisdiction in Kentucky. Judge

Shepherd has already rejected these specious claims in his detailed opinion in the *Mayberry* case — a finding that the Supreme Court left undisturbed in the *Overstreet* appeal. *See Mayberry v. KKR & Co, L.P.*, No. 17-CI-01348, slip op., at 17–19 (Ky. Cir. Ct. Franklin Cnty. Nov. 30, 2018). Undeterred, however, the KKR Defendants raised these specious challenges to personal jurisdiction in the declaratory relief action. Judge Shepherd again rejected this ploy:

> Although the Court has been asked to rule on a number of specific legal issues in this case, an overarching question runs throughout these issues: what should be the expected tradeoff between receiving benefits from the Kentucky marketplace, including from contracts with a Kentucky administrative agency that contain express limitations originating in the Kentucky Constitution, and being held accountable in Kentucky by a Kentucky court under such constitutional provisions? Should KKR, a "leading global investment firm," currently managing more than $470 billion of investments in various assets, be able to exert ongoing influence over Kentucky policy by lobbying the Commonwealth's executive branch, control and manage operations for wholly-owned affiliates that are and were unquestionable doing business in Kentucky, and, ultimately, receive the benefit of substantial fees from the transaction at issue in Kentucky … yet escape the burden of litigating in a Kentucky court? Further, should sophisticated defendants who knowingly engaged in contract negotiations that explicitly recognized limitations on indemnification imposed by the Kentucky Constitution now be able to ignore the bargain they struck and, in doing so, seek judgements in foreign jurisdictions requiring Kentucky taxpayers to indemnify them for their legal fees? Finally, where there is on-going litigation in Franklin Circuit Court on the transactions that arose from those contracts, can certain Defendants bring preemptive suits in Delaware and California, asking those courts to opine on the Kentucky Constitution and, in doing so, disregarding the sovereign immunity of the Commonwealth? …

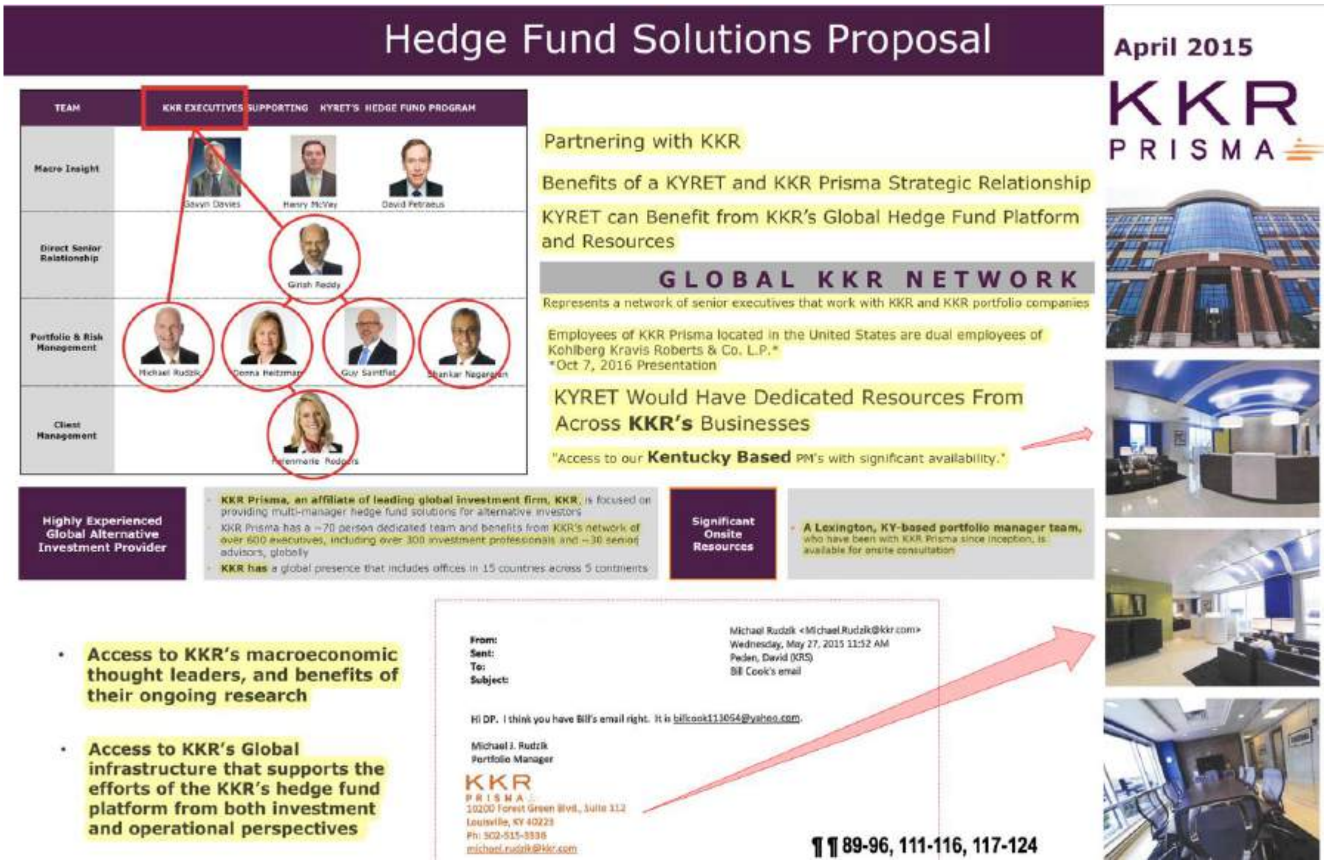
Commonwealth, slip op., at 2–3. The answer to these questions is obvious.

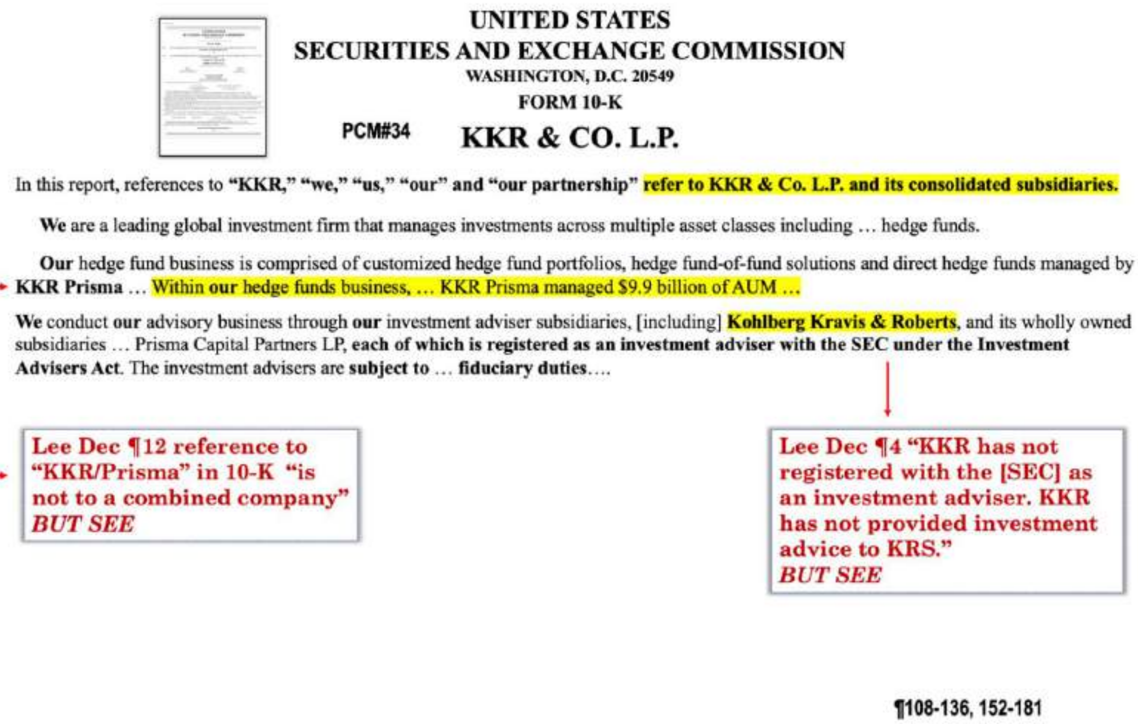
Worse, the KKR Defendants submitted false testimony to support their specious claim for lack of personal jurisdiction. Judge Shepherd detailed the false statements made by Christopher Lee, Assistant Secretary of KKR Management LLC, in his February 22, 2018 affidavit:

> Many of these facts *overtly contradict KKR's assertion* that it "lacks any business connections of its own with the Commonwealth." KKR's own Kentucky Executive Branch Ethics Commission filings, SEC filings, client documents and [other documents] along with KRS Board/Investment Committee minutes, are *wholly inconsistent with KKR's sworn representations to this Court*.
>
> ***
>
> *All of the facts … contrast starkly with the facts supplied by Christopher Lee, Assistant Secretary of KKR Management LLC, in his February 22, 2018 Affidavit …. The contrast in the two factual accounts is striking. Mr. Lee's Affidavit simply cannot be reconciled with other publicly-available facts.*
>
> ***
>
> *The most significant discrepancies between the facts and Mr. Lee's affidavit, however, arise in his description of the purported absence of any KKR business activities in Kentucky*:
>
> ***
>
> Mr. Lee, under penalties of perjury, has sworn to this Court that KKR *never*: maintained *any* office in Kentucky; had *any* employees who resided or regularly worked in Kentucky; and most troubling given the conflicting facts gathered by the Court, c*onducted any business in Kentucky relating to KKR, Prisma*, or their respective investment activities. However, KKR's own SEC filings and client documents along with archived pages from the KKR website and KRS Board/KRS Investment Committee minutes *contradict his statements*. Given the consistency of the various factual accounts *supra* as well as their credibility as contemporaneous accounts of events occurring in 2012–2016, the Court finds them more inherently reliable than Mr. Lee's self-serving declaration. Moreover Mr. Lee and KKR *failed to disclose to the Court that KKR*, during the relevant time frame, employed an executive branch lobbyist in Kentucky. That fact alone establishes minimum contacts for the exercise of personal jurisdiction.

Id. at 9, 36–38. Although the Court of Appeals reversed Judge Shepherd's decision to convert the KKR Defendants' motion to dismiss to a motion for summary judgment, the Court of Appeals left undisturbed his factual findings. *See KKR & Co.*, 2023 WL 8285978, at *5 (rejecting KKR's argument that Judge Shepherd's fact findings were erroneous). Judge Shepherd's findings remain valid and binding. *See Hengehold v. City of Florence*, 596 S.W.3d 599, 606 (Ky. Ct. App. 2020) ("When sitting as an appellate court, the circuit court is bound by the district court's factual findings unless they are clearly erroneous.").

Indeed, the evidence contradicting the KKR Defendants' claims is in plain sight.





UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549
FORM 10-K

PCM#34 **KKR & CO. L.P.**

In this report, references to **"KKR," "we," "us," "our" and "our partnership" refer to KKR & Co. L.P. and its consolidated subsidiaries.**

We are a leading global investment firm that manages investments across multiple asset classes including … hedge funds.

Our hedge fund business is comprised of customized hedge fund portfolios, hedge fund-of-fund solutions and direct hedge funds managed by **KKR Prisma** … Within **our** hedge funds business, … KKR Prisma managed $9.9 billion of AUM …

We conduct **our** advisory business through **our** investment adviser subsidiaries, [including] **Kohlberg Kravis & Roberts**, and its wholly owned subsidiaries … Prisma Capital Partners LP, **each of which is registered as an investment adviser with the SEC under the Investment Advisers Act**. The investment advisers are **subject to … fiduciary duties**….

Lee Dec ¶12 reference to "KKR/Prisma" in 10-K "is not to a combined company" ***BUT SEE***

Lee Dec ¶4 "KKR has not registered with the [SEC] as an investment adviser. KKR has not provided investment advice to KRS." ***BUT SEE***

¶108-136, 152-181

KKR-Prisma is a dishonest litigant. The KKR Defendants' withholding of KRS trust funds constitutes a "Misapplication of Entrusted Property" — a crime under the Kentucky Penal Code. The KKR Defendants acted in bad faith in litigating the declaratory-relief action, in which they submitted a false affidavit to contest personal jurisdiction. They also commenced retaliatory litigation in Delaware in an attempt to evade Kentucky's justice system. The KKR Defendants' bad-faith conduct warrants the imposition of a three-time civil penalty. Not only had KKR willfully withheld these Trust funds for over five years, depriving KPPA of the use and value of the $137 million in withheld funds, but also because the withheld funds *inexplicably decreased by hundreds of thousands of dollars*.[30]

[30] Somehow the fund grew to $145 million when returned as part of the sellout settlement. Whatever number an accounting would show is correct, the motion has huge potential value, and the sellout settlement gets *no* interest and *no* penalty.

The KKR Defendants' bad-faith conduct must also be viewed in the context of their underlying breaches of fiduciary duties in putting KRS trust funds in black box hedge funds. As recounted by Judge Shepherd in the declaratory-relief action, $768,728,901 in trust funds were put in the Daniel Boone Fund. *Commonwealth*, slip op., at 14. KKR and KKR-Prisma returned just $5,276,203 to the KRS trusts, plus its original capital. *Id.* at 14–15. This gave the KRS Trusts a return of .00686% on their eight-year $768 million investment, while KKR and Blackstone gouged the *KKR Trusts for some $300 million in "exorbitant" fees.*

Having wrongfully withheld $137–$145 million of Trust funds for years, KKR's conduct is factually outrageous and legally indefensible. They cannot dispute their fiduciary status. They cannot dispute that the lawsuits against them for breach of fiduciary duty — the purported basis for withholding the $145[31] million for legal fees and liability indemnification have been upheld as legally sufficient — obliterating any claim for fees or liability indemnification. Nor can they dispute that as of February 2025, based on the interest rate and civil penalty provided by applicable statutes, they owe over $807 million and counting to the KRS Trusts.

KKR can offer no credible explanation for why as fiduciaries they are entitled to withhold Trust funds from the Trusts because of terms in an investment contract with the *culpable Trustee*, terms which have been held invalid and unenforceable as to KRS by Judge Shepherd and the Appellate Court, or some litigation they filed against the *culpable Trustee*, their alleged co-actor in another state, to which neither the Tier 3 Plaintiffs nor the Trusts are a party.

[31] According to the proposed Settlement, the initial withholding of $137 million has grown to $145 million.

The contractual provisions these Defendants relied on to justify their seizure and failure to return Trust monies were ruled invalid by Judge Shepherd and the Appellate Court. While those decisions are pending or stayed with possible review by the Supreme Court, *this motion does not depend on the invalidity of those provisions*.[32] While it is unlikely the Supreme Court will reverse both Judge Shepherd and the Court of Appeals' rulings, it does not matter if they do. These contract provisions do not bind the Tier 3 Trust beneficiaries or impair their claims or prevent the granting of the relief requested.

Whatever provisions are in contracts the culpable Trustee signed with KKR Prisma or litigation stipulations between them *are not applicable* to the direct breach of trust claims asserted by the Tier 3 Trust beneficiaries. In fact, those contracts themselves are pleaded *as breaches of fiduciary duty*, for impairing the legal rights of KRS and harming the trust beneficiaries.

The KKR Defendants do not have any defense to their misconduct in withholding $137–145 million in fiduciary funds. They cannot justify their conduct as *fiduciaries*. The validity of the lawsuits against them for their breach of duties has been upheld — they are not entitled to the recapture of legal fees or to indemnification against liability even as to KRS which signed the contracts. But even if those provisions, currently ruled invalid, are upheld as to KRS, *they still do not bind the Tier 3 Trust Plaintiffs. This unilateral, punitive action has cost the Trusts millions of dollars in lost income/interest over the past several years. Yet KPPA wants to give away the claim in a settlement of dubious legality that provides a huge legal fee that exceeds these Trusts' actual net recovery of new money. This can only be the act of a culpable Trustee.*

[32] And if it does, that is another reason not to quickly approve this sellout Settlement, but rather await further appellate guidance as to key legal issues.

Approving the AG's Settlement and wiping out this motion pending but stayed for months will not result in the KRS Trusts getting the $137–$145 million in "previously invested funds" any time soon. Under KRS § 48.005 these Trust funds must go to the Commonwealth not KPPA. The ping-pong tactic is just that and it is of dubious legality. That Settlement will be objected to. If approved, there will be years of appeals during which under the Settlement, the money remains in KKR's hands and will earn little interest. The withheld trust funds must be restored now, and will be if the Court were to grant this Motion. Because the cost of an appeal of that order will be prohibitive – even for the colossal KKR — 8% interest and the 3x penalty will escalate rapidly during any appeal. The arithmetic is against them, as well it ought to be. Courts deal harshly with disloyal/dishonest fiduciaries — like the KKR Defendants — who *intentionally* withhold funds and *submit false pleadings*. Those interest charges and penalties will accrue to KKR's detriment in escalating amounts. A court's equitable powers and Court Rule 67.02 expressly authorize such an order — without any summary judgment proceeding — directing a fiduciary to turn over withheld funds to the beneficiary.

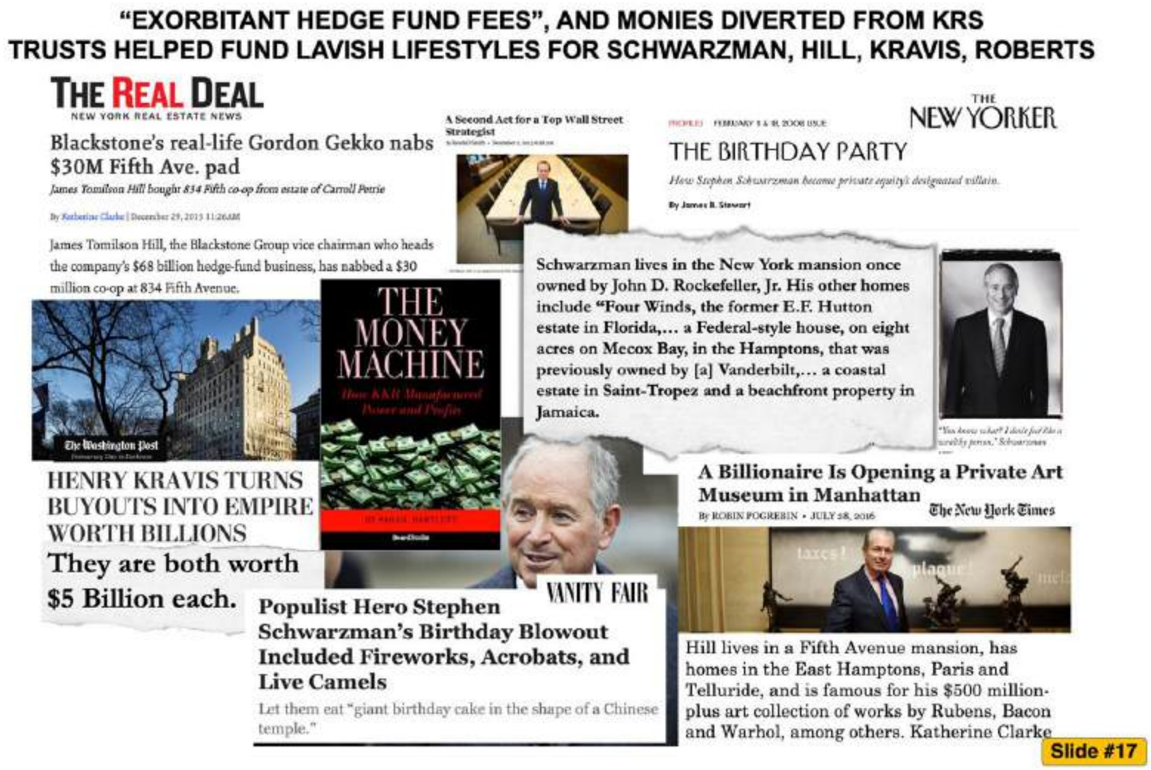
The Settlement cannot be found to be fair, adequate and reasonable unless this motion seeking $807 million is heard and determined.

IV. The Court Must Reject the Settlement Because It Fails to Hold the Hedge Funds' Controlling Principals — Kravis, Roberts, Schwarzman, and Hill — Accountable, Despite the Fact That They Personally Participated in and Profited from the Underlying Wrongdoing

The Settlement would let Kravis, Roberts, Schwarzman, and Hill off scot-free. They are defendants in the AG's case and in this case. In this case, they are direct targets of all three of the motions for summary judgment or interim equitable relief filed or ready to be filed in the Tier 3 Breach of Trust case. These individuals' separate motions to dismiss the Tier 3 case were denied in the May 1, 2024 order. They are subject to the stay order. These individuals are among the Movants for approval of the Settlement.

The $300 million in "exorbitant fees" and millions more in diverted Trust funds they and their firms received benefited these individuals personally, and helped fuel lifestyles of extravagance. Kravis, Roberts, Schwarzman and Hill 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 pocketed $94 million each in 2022. *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. 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." Most recently he picked up a 2,500-acre estate in the English



countryside for over $100 million.

The AG's contingency-fee lawyer got not one penny from these targeted individual defendants against whom the Tier 3 claims had been upheld, yet she secretly gets a $45.5 million fee, protected by a "clear sailing" agreement. Without an individual accounting of what these individuals pocketed from their participation in the culpable Trustee's breach of its duties, and the hearing and determination of this motion, there is no personal accountability, and the Settlement cannot be approved as fair, reasonable and adequate.

V. The Court Must Reject the Settlement Because Movants Have Failed to Carry Their Burden of Demonstrating That It Complies with Procedural Requirements, Satisfies Due Process, and Is Fair, Reasonable, and Adequate

Any attempt to extinguish the Tier 3's claims for the Trusts via this proposed Settlement is procedurally and substantively infirm. This Court long ago ruled that the

AG's suit is in substance, and would be treated as, a class or representative action. This Court 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. The due process concerns, codified for class actions in CR 23.05, apply with equal force to the compromise or dismissal of any claims 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). This Court ruled any settlements of this case would be subject to Kentucky Rule 23. The RICO case they seek to settle and release is a class action under, and subject to, Federal Rule 23. Movants, including KPPA, which is not even a party to any of the lawsuits, <u>have voluntarily sought court approval, triggering contemporary judicial approval standards for representative lawsuits.</u>

The Settlement is 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, here first class mail. 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.

(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 to KPPA members or Trust beneficiaries whose claims are released and barred by the Settlement. There is no notice to taxpayers. Nowhere is there a Court approved proposed description of the Settlement accurately disclosing its terms, its consequences, or the legal fees to be included in the notice. Nor have the parties involved filed "a statement identifying any agreement made in connection with the proposal," which would include how fees are divided.

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 settlement 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 lawyer 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 getting, including $45.5 million in legal fees to the AG's private lawyers. Existing standards for judicial approval of settlements forbids this.

In addition to the lack of notice, the proposed Settlement contains terms completely antithetical to this type of class and public-interest litigation in Kentucky. Paragraph 14.b. of the Settlement Agreement contains an improper confidentiality provision that requires the Settling Parties — including the AG and KPPA — to keep confidential "all communications and information exchanged" during the settlement negotiations." *See* Settlement Agreement ¶ 14.b.i.–iv. But the information and materials covered by paragraph 14.b. are subject to disclosure under CR 23.05–23.08 and the

Kentucky Open Records Act and the Kentucky Open Meetings Act. *See Lexington-Fayette Urban Cnty. Gov't v. Lexington Herald-Leader Co.*, 941 SW. 2d 469 (Ky. 1997).

Perhaps even worse than this secrecy, the Settling Parties have agreed in paragraph 14.b. ii. to script, including, what will be said to this Court. They have agreed that no one will make any statement inconsistent with the approval motion, and that "all references to the aggregate amount of the Settlement Recovery … shall state that the Settlement Recovery includes a distribution to the KPPA entity of approximately 145 million in assets that the Prisma-managed investment fund was holding in reserve in connection with potential indemnification claims." Settlement Agreement ¶ 14.b.ii. This is a deliberate effort to conceal from the Court and the public the real recovery from the proposed Settlement.

The undisclosed $45.5 million in fees here, protected by a "clear sailing" promise, is a fatal problem.[33] Not only must the fees be fully disclosed — they must be fair and reasonable — 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 standards 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

[33] KPPA, a non-party to the litigation, is a party to the Settlement Agreement and the clear sailing $45.5 million fee.

$1.25 million fee — constituting 76% of the actual value of the settlement — was disproportionately high. *See id.* at 256–57. Likewise, in *Briseno*, 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 at 1026. Under *Moses* and *Briseno*, the concealed fees claimed by the AG's private lawyer cannot be approved by this Court.

In *Briseno*, the Ninth Circuit refused to approve a Settlement where the attorneys' fees were $6.85 million, as much as or more than the actual benefits of the settlement:

> Rule 23(e) imposes on district courts and independent obligation to ensure that any class settlement is "fair, reasonable, and adequate," accounting for the interests of absent class members. Fed. R. Civ. P. 23(e)(2). Likewise, we recognize "an independent obligation to ensure that [any attorneys' fee] award, like the settlement itself, is reasonable, even if the parties have already agreed to an amount." *In re Bluetooth Headset Products Liability Litigation*, 654 F.3d 935, 941 (9th Cir. 2011) … settlement agreements "warrant special attention when the record suggests that settlement is driven by fees; that is, when counsel receive a disproportionate distribution of the settlement." Regardless of "whether the attorneys' fees come from a common fund or are otherwise paid, the district court must exercise its inherent authority to assure that the amount and mode of payment of attorneys' fees are fair and proper."
>
> ***
>
> In *Bluetooth*, we explained that courts should scrutinize agreements for "subtle signs that class counsel have allowed pursuit of their own self-interests … to infect the negotiations." 654 F.3d at 947. We identified … those signs: (1) "when counsel receive[s] a disproportionate distribution of the settlement," [or] (2) "when the parties negotiate a 'clear sailing arrangement,' under which the defendant agrees not to challenge a request for an agreed-upon attorney's fee … *Id*. In reviewing settlements … district courts must apply these so-called *Bluetooth* factors to smoke out potential collusion … courts must consider "the terms of any proposed award of attorney's fees" when determining whether "the relief provided for the class is adequate." … Rule 23(e) makes clear that courts must balance the "proposed award of attorney's fees" vis-à-vis the "relief provided for the

class" in determining whether the settlement is "adequate" for class members.

> … The specter of collusion … casts a long shadow over … settlements when they involve divvying up funds between class members and class counsel.

998 F.3d at 1023-24. *See also Bluetooth*, 654 F.3d at 948-49, "[e]ven when technically funded separately, the class recovery and the agreement on attorneys' fees [are] a package deal … for purposes of analyzing … the settlement's overall reasonableness").

Treating the AG's case as a class or representative action subject to Rule 23's requirements is meant to guard against just this abuse. The legal rights of KPPA members and Trust beneficiaries are specifically released by the Settlement, and they are specifically barred from litigating any of the claims via the global Settlement and its release. In any event, the parties to that Settlement have chosen to seek judicial approval – so these rules apply, *especially when it involves potential collusion over divvying up funds between class counsel and the class*. *See Staton v. Boeing Co.*, 327 F.3d 938, 972 n.22 (9th Cir. 2003) (recognizing "the inherent tensions among class representation, defendant's interests in minimizing the cost of the total settlement package, and class counsel's interest in fees").

A Court considering this kind of collusive, secretly-arranged settlement, with a concealed but huge attorneys' fee protected by an illicit "clear seeking deal" must be careful, because:

> … [C]lass counsel … has the incentive to conspire with the defendant to reduce compensation for class members in exchange for a larger fee. A defendant goes along with this collusion because it cares only about the total payout, not the division of funds between class and class counsel. After all, a defendant, no matter if a class has been certified, has "no reason to care about the allocation of its cost of settlement between class counsel and class members." … Instead, "all it cares about as a rational maximizer of its net worth is the bottom line — how much the settlement is likely to cost it." …

> [Scrutiny of a settlement must address] the inherent incentives that tempt class counsel to elevate his or her own interest over those of the class members. As one prominent academic who supports class actions put it, "the profit motive will give class action lawyers incentives to do sneaky things, just like it gives businesses incentives to do sneaky things." ... The potential for this type of collusion is no hoax — it is real ....
>
> We hold that district courts must ... scrutinize fee arrangements ... to determine if collusion may have led to class members being shortchanged. The class settlement here features ... red flags of potential collusion that we warned about in *Bluetooth*.
>
> First, plaintiffs' counsel "receive[d] a disproportionate distribution of the settlement." ... The lion's share of the money — almost $7 million — will end up in the pockets of attorneys, while the class receives relative scraps ... This gross disparity in distribution of funds between class members and their class counsel raises an urgent red flag demanding more attention and scrutiny.
>
> Second, the parties agreed to a "clear sailing arrangement" in which ConAgra agreed not to challenge the agreed-upon fees for class counsel. This flashes yet another red flag under *Bluetooth*. ... A clear sailing provision signals the potential that a defendant agreed to pay class counsel excessive fees in exchange for counsel accepting a lower amount for the class members. ... Indeed, the "very existence of a clear sailing provision increases the likelihood that class counsel will have bargained away something of value to the class." ... When faced with a clear sailing provision, courts thus have a "heightened duty to peer into the provision and scrutinize closely the relationship between attorney's fees and benefit to the class, being careful to avoid awarding 'unreasonably high' fees simply because they are uncontested." ...

Briseno, 998 F.3d at 1025. Here, the Settling Parties, including KPPA, have mutually agreed to support a unitary settlement which includes the undisclosed fees. That's as "clear sailing" as you can get. Kentucky Rule 23.08 prohibits this unitary approach, requiring a separate application for the settlement approval.

In *Briseno*, the parties tried to justify the settlement and the $6.85 million in fees by claiming the settlement created value that could be theoretically worth over $100 million — a $67 million potential payout and injunctive relief worth over a claimed $27 million. However, the Court of Appeals rejected this and demanded the district court *independently review and determine the actual – real economic benefits of the settlement*. *See Roes v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1055 (9th Cir. 2019) (explaining that a district court must either quantify and explain the value of the relief or exclude it from calculations).

Especially where, as here, the Settlement extinguishes other pending or potential claims of class members, heightened scrutiny is required:

> A district court abuses its discretion when it approves a settlement despite "no evidence that the relief afforded by [a] settlement *has any value to the class members, yet to obtain it they had to relinquish their right to seek damages in any other class action*." …
>
> ***
>
> And "[i]n evaluating what class members relinquished in [a] settlement, [courts] must also consider *whether class members were required to release claims that were more meritorious than the theories Plaintiffs pursued in [the present] litigation*." …

Briseno, 998 F.3d at 1028. That certainly sounds like what is proposed here. More recently, the Court in *Moses* reinforced these fundamental requirements for approval of settlements which contain a release extinguishing the ability to pursue *other claims*. *See* 79 F.4th at 235. *Moses* involved a settlement the parties claimed was worth $5.5 million to justify a $1.25 million attorneys' fee award. The Second Circuit reversed the approval.

> First, the district court applied a presumption of fairness to the settlement because "it was reached in arm's-length negotiation between experienced, capable counsel . . . after a nine-hour mediation before a mutual third party."
>
> ***
>
> … we hold that Rule 23(e)(2)'s procedural factors prohibit courts from applying a presumption of fairness to proposed settlements arising from an arms-length agreement. Courts evaluating the fairness, reasonableness, and adequacy of a proposed settlement must consider the four factors outlined in Rule 23(e)(2) holistically, taking into account – among other substantive considerations stated in the rule — the proposed attorneys' fees …

***

> Thus, notwithstanding the district court's careful consideration of the settlement's procedural fairness — concluding that Moses adequately represented the class and that the Settlement Agreement was reached in an arm's-length negotiation involving a neutral mediator … *the district court erred when it presumed that the proposed settlement was fair, reasonable, and adequate because it was reached in an arm's-length negotiation*.

***

> As to the adequacy of class relief, courts must "tak[e] into account," among other considerations, "the terms of any proposed award of attorney's fees." … "This_*review provides a backstop that prevents unscrupulous counsel from … settling a class's claims to cut a check*." … Similarly, "the relief *actually delivered* to the class can be a significant factor in determining the appropriate fee award." … The symbiotic review of proposed relief and attorneys' fees aligns with "[t]he express goal of [our] *Grinnell* opinions [which] was to prevent *unwarranted windfalls for attorneys*." …
>
> Thus, when reviewing the substantive fairness of a proposed settlement, "the district court is required to review both the terms of the settlement and any fee award encompassed in a settlement agreement" in tandem. … [C]ourts must balance the proposed award of attorney's fees vis-à-vis the relief provided for the class in determining whether the settlement is adequate for class members."

***

> *The district court was obligated to take these intertwined fees into account prior to approving the settlement, and erred when it treated the appropriateness of the awards as a separate matter, divorced from the overall evaluation of the fairness of the settlement.*

Moses, 79 F.4th at 244–46. The Movants cannot prove the Settlement meets these stringent standards. The Settlement cannot be approved in light of these precedents and because the Movants have not proven it is fair, reasonable or adequate — or compliant with due process.

A. The Settlement Violates the Due Process Rights of the Objectors, the KPPA Trusts, and the Trust Beneficiaries

The AG has a 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 problems. The Tier 3 Trust Plaintiffs detailed these arguments to the Court in their opposition to the motion to dismiss in this case and in their motion to intervene in the *Mayberry* case. These problems were eliminated by this Court allowing this case to go forward, separately – stating a judgment in the AG's case would not preclude this case or its claims. This Court carved out these claims so they could be independently litigated, protecting the due process and property rights of the Tier 3 Trust Plaintiffs. It must protect the "carved out" status of these cases and their claims — including those in any pending and anticipated motions — from the Hedge Fund Sellers' attempts to extinguish or diminish 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[34] — 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 and 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).[35]

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)

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[34] "[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.

[35] This scholarly article discusses the conflicts and serious constitutional issues raised when state attorneys general attempt to bring claims that subsume private suits or enter into "global" (*i.e.*, state wide) 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."

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 and that the law *mandates* must go to the State Treasury — not the Trusts, and does not give anyone — the AG or even this Court — the power to ping-pong or approve the attempted "bank shot" ping-ponging of the money 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 will "inure[] to the public benefit of … the beneficiaries of all tiers … in amounts computed under pre-determined formulae." *See* Joint Mot. at 19. Nowhere in the Settlement Agreement or the joint motion do the AG and KPPA disclose what their "pre-determined formulae" is and what benefit, if any, the KRS beneficiaries are receiving from the Settlement fund.

The original *Mayberry* 5 Plaintiffs who are taxpayers and had originally sued as such object to the evasion of § 48.005 — the ping-pong tactic — by which the existing fund of trust funds withheld by KKR — bounces off the Treasury with the AG trying to deflect it back to the Trusts. *That is not the law*. It is not permitted. KRS § 48.005 mandates that the recovery go to the Treasury because the AG appeared and chose to intervene in *Mayberry*, take that case over and continue that case on with his current "belt and suspenders case" for the Commonwealth. The AG cannot disregard that law. Nor can KPPA. Nor can a court. Only the legislature can modify a legislative command. It has not done so.

The *Mayberry* 5 Plaintiffs and the Tier 3 Trust Plaintiffs, as taxpayers and KRS members and Trust beneficiaries, object to this evasion of § 48.005 not to hurt the Trusts or deny them the funds that are already theirs, but to benefit the Trusts as they have always fought to do. This ping-pong bank-shot maneuver is being done in a way that harms the KRS Trusts as part of trying to extinguish claims of great value to the Trusts and potential "thousands of dollars" to them individually because the culpable Trustee is releasing valuable Trust claims for a pittance in the proposed Settlement that creates secret huge legal fees.

Attorneys' fees aside, the proposed Settlement is fatally infirm because it attempts to release claims asserted in this separate breach-of-trust case and the federal RICO case, in effect taking the Tier 3 Trust Plaintiffs' property without due process. *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) settle the point. 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 — what matters is whether distinct interests and claims were separately and adequately represented throughout.

> "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 federal 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. Mediators do not produce due-process proof Settlements – whether they are current or retired federal judges. 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 $7.2 billion settlement regardless of that huge recovery and its overall fairness. The mediator also performed an "inequitable task," and he failed.

As one noted jurist involved long ago remarked, some defenses of unconstitutional conduct are simply "too extravagant to be maintained." *Marbury v. Madison*, 5 U.S. 137, 179 (1803). So it is with this course of conduct, secret mediation, release of separate judicially sanctioned and meritorious claims pending under state law in state court – carved out for independent prosecution – and in federal court under the RICO statute for good measure — all without notice. That is too extravagant to be maintained.

B. The Secret Mediation — Paid for by the Hedge Fund Sellers — Does Not Make the Settlement "Arm's Length" or Bestow It with Any Presumption of Regularity, Especially Where the Tier 3 Trust Plaintiffs Were Excluded from the Negotiations, While Their Legal Rights Are Compromised and Their Claims Extinguished

The Hedge Fund Sellers and Oldfather extoll the mediation, which has cost them hundreds of thousands of dollars.[36] But the mediation process was a charade with respect to the Settling Parties' attempt to release the Tier 3 Trust Plaintiffs' claims. The Tier 3 Trust Plaintiffs and their counsel were not informed of the mediation and did not participate. As a result, the mediator never heard from the Tier 3 Trust Plaintiffs or their counsel. Nor is there any indication in the record that the mediator evaluated, or had sufficient information to evaluate, the strength of these unique breach-of-trust claims.

In fact, the mediator's affidavit demonstrates that his involvement in the settlement negotiations is limited to only the AG's action (Case No. 20-CI-00590). In the first paragraph of his affidavit, the mediator defines the term "Claims" as "*the claims in the above-captioned* [*Case No. 20-CI-00590*] *action*[,]" and states that he submits his

[36] KPPA could not possibly have spent Trust monies to pay for the mediation, which involved multiple in-person sessions and months of negotiations. Discovery will show it was the Hedge Fund Sellers and the conflicted lawyer out to grab $45.5 million in fees who retained the highly paid mediator.

affidavit "in [his] capacity as an independent mediator regarding the … *Claims* … and in connection with the proposed settlement of the *Claims*." Phillips Aff. ¶ 1. Later in his affidavit, the mediator confirms that his September 22, 2024 mediator's proposal was issued "to resolve the *Claims* for $227.5 million, inclusive of the approximately $145 million held in the Daniel Boone Fund." *Id.* ¶ 11. Nowhere in his affidavit does the mediator reference the *Taylor* Actions or the Tier 3 Trust Plaintiffs' breach-of-trust claims and RICO claims. Indeed, the Tier 3 Trust Plaintiffs are not included in the capitalized term "Parties" appearing in the mediator's affidavit. *See id.* ¶ 7 (listing the "Parties").

In sum, the mediation process involved only the Settling Parties and concerns only the "innocent Trustee" "Claims" asserted in the AG's case. And the mediator's proposal, as well as his statement regarding the fairness of the Settlement, concern only the AG's claims and Setting Parties:

> 16. Based on my experience as a litigator, a former United States Attorney, United States District Judge, and a mediator, I believe that the Settlement represents a recovery and outcome that is reasonable and fair for *all Parties involved*. I further believe it was in the best interests of the Parties that they avoid the burdens and risks associated with taking a case of this size and complexity to trial. *I support the Court's approval of the Settlement in all respects*.

Id. ¶ 16. All told, even if the Court were to accept at face value the mediator's recommendation for approval of the Settlement, that recommendation must be limited only to the settlement of the AG's case and the release of the Settling Parties.

In any event, aside from self-congratulatory platitudes and generalities, the mediator's affidavit offers no facts demonstrating that, even in the confines of negotiating a settlement of the AG's claims, the Settling Parties' negotiations were conducted at arm's length. The general statements by the mediator provide no information necessary for this Court to independently assess whether the settlement negotiations were at arm's length:

> 8. In advance of the mediation, the Parties exchanged and submitted to me detailed opening mediation briefs addressing liability and damages. The mediation briefs addressed the specific evidence and legal arguments each side believed supported their respective claims and defenses. During the mediation sessions, counsel for the Parties presented arguments regarding their clients' respective positions. …
>
> 9. During the mediation sessions, the Parties discussed with me the legal and factual merits of their positions regarding liability and damages, and I engaged in extensive discussions with counsel on both sides in an effort to find common ground between the Parties' respective positions …. In addition to vigorously arguing their positions, the Parties exchanged multiple rounds of settlement demands and offers. The Parties were not able to reach an agreement … but agreed to continue discussions.
>
> 10. Over the next several weeks, I and my Phillips ADR colleagues held a number of phone calls with counsel for the Parties regarding the monetary and non-monetary terms of a potential resolution.
>
> 11. Based on those discussions, *I issued a mediator's proposal* on September 22, 2024, to resolve the Claims for $227.5 million, inclusive of the approximately $145 million held in the Daniel Boone Fund.

Id. ¶¶ 8–11. There is no information regarding these "non-monetary terms" to be resolved. *See id.* ¶ 10. Whatever they are, they remain secret. The mediator states:

> 12. … [T]he Parties continued to dispute important non-monetary terms of a potential agreement. I and my Phillips ADR colleagues held a number of additional phone calls with the Parties regarding these disputed terms.
>
> 13. On October 22, 2024, *one of my Phillips ADR colleagues* held another mediation … in an effort to reach resolution on such disputed non-monetary terms. The Parties were not able to reach an agreement. Based on those subsequent discussions, *I issued a mediator's proposal* on November 17, 2024, to resolve certain remaining disputed terms. I announced the Parties had accepted my recommendation on November 18, 2024. *Thereafter, the Parties documented their resolution in the settlement agreement before the Court.*

Id. ¶¶ 12–13.

More importantly, nowhere in his affidavit does the mediator indicate that he was even aware of the release of and litigation bar against the Tier 3 Trust Plaintiffs' claims. Nor is there any indication that the mediator even reviewed the Settlement Agreement —

since the Settlement was "documented" by the "Parties" after they "accepted" the mediator's November 8, 2024 recommendation. *Id.* ¶ 13. The mediator's affidavit therefore does not — and cannot — form a basis for this Court to find that the mediation process had anything to do with the Tier 3 Trust Plaintiffs' claims, or that, even within the confines of the settlement of the AG's case, the negotiations were conducted at arm's length.

Moreover, the submission of the mediator's affidavit here appears improper under Kentucky procedure. The Kentucky Supreme Court Rules 99-100 endorse "the wise and judicious use of mediation." KY. SUP. CT. R. 99.01. However, there are strict rules for court-ordered mediations that parties in non-court ordered mediations are "encouraged" to follow. KY. SUP. CT. R. 99.01(4). Rule 100.06(3) requires that a mediator refrain from "impos[ing] his … opinion about the merits of a dispute or about the acceptability of any proposed option for settlement." KY. SUP. CT. R. 100.06(3).

Contrary to the policies reflected in these rules, the mediator's affidavit here describes in glowing generality his endorsement of the "acceptability" of the proposed Settlement. To the extent that the Movants are using the mediator's affidavit to justify the Settlement and release of the Tier 3 Trust Plaintiffs' claims, such use is decidedly improper because the Tier 3 Trust Plaintiffs were excluded from the mediation, and because, in the mediator's own words, their breach-of-trust claims fall outside the definition of the "Claims" to be settled through mediation.

Accordingly, the Court should strike the mediator's affidavit because it does not — and cannot — support the Settling Parties' bid to settle and release the Tier 3 Trust Plaintiffs' claims and to allow Oldfather to receive a $45.5 million fee. Afterall, the approval of this Settlement is for this Court and this Court alone to decide. No mediator, however experienced, respected, and well-informed, should be allowed to offer his opinion as a substitute for this Court's judgment.

* * *

If the Hedge Fund Sellers want to settle the claims asserted in this case, they should negotiate a settlement of those claims with the Tier 3 Trust Plaintiffs and their counsel, either directly or via mediation. This Court has to the power to facilitate such negotiations.

Consistent with Kentucky Rules of Civil Procedure 99.03–99.04, Franklin County Rule of Court 14 authorizes the Court to "refer a case to mediation under the terms and conditions agreed to by the parties or ordered by the Court." FRANKLIN CNTY. R. OF CT. 14. This Court should consider referring the Tier 3 Trust Plaintiffs' case to mediation and postponing the February 26, 2025 hearing — no one would be prejudiced by a postponement because no notice of the Settlement has been given.

With respect to the choice of a mediator, the Tier 3 Trust Plaintiffs recommend Eric D. Green,[37] who, like Judge Phillips, is a respected mediator with experience in high-stakes litigation and is well known to the Hedge Fund Sellers and their counsel.

[37] Professor Eric D. Green is a pioneer of Alternative Dispute Resolution (ADR) in the United States and around the world. He is co-founder of two prominent ADR/Mediation firms, Endispute (now part of JAMS) and Resolutions, LLC in Boston. Professor Green graduated from Harvard Law School in 1972 *magna cum laude*, and was awarded the Knox Fellowship, which he spent at Cambridge University, England. He was a Law Clerk for Justice Benjamin Kaplan, Massachusetts Supreme Judicial Court and then an associate and a partner at Munger, Tolles & Olson in Los Angeles. Professor Green taught at Boston University School of Law and Harvard Law School for over 33 years combined. *See Our Team*, RESOLUTIONS, LLC, *available at* https://resolutionsllc.com/eric-d-green/ (last visited Jan. 30, 2025).

VI. The Court Cannot Approve the Settlement Because the AG's Case Originated from Oldfather's Violations of Supreme Court Rule 1.9 in Misappropriating Confidential Information and Work Product Obtained While Representing the *Mayberry* 5 Plaintiffs, Who Terminated Her Representation for Incompetence and Disloyalty

These hedge fund litigations started in late 2017. Counsel for the Tier 3 Trust Plaintiffs then represented Judge Brown, Captain Mayberry, and other longtime Commonwealth employees. Counsel and these *Mayberry* 5 Plaintiffs had investigated KRS for months using MCL Law Group and its consultants, investigators and experts. MCL Law Group drafted a highly-detailed 150-page complaint exposing the wrongdoing at KRS, naming the Hedge Fund Sellers and their top executives and others as defendants.

When the complaint was ready to be filed, Judge Brown and Captain Mayberry authorized Michelle Ciccarelli Lerach ("MCL") to retain a Kentucky lawyer to serve as local counsel. Oldfather was then interviewed and retained as local counsel *only after signing a confidentiality agreement*.[38]

After Oldfather did so, she was provided confidential information and work product of the *Mayberry* 5 Plaintiffs, MCL Law Group, and its team. They subsequently provided the then-AG (now Governor Beshear) with "an advance copy of [the] complaint" setting forth — in all material detail — the taxpayer claims so he could prosecute those claims if he chose to do so. *See Overstreet*, 603 S.W.3d at 251. But that AG declined to bring those taxpayer claims. *Id.* The *Mayberry* case was then filed, litigated in the Circuit Court, but ultimately dismissed in *Overstreet*, on the technicality of failure to plead standing, despite pleading "significant misconduct." *Id.* at 266.

[38] Vanessa B. Cantley, Esq. was also retained as local counsel along with Oldfather. However, it is Oldfather who drove the ethical misconduct set forth here.

Four exhibits — the *Mayberry 5* Plaintiffs' September 3, 2019 letter (Ex. 6) and the August 13, 2020 declarations of Judge Brown (Ex. 5), Captain Mayberry (Ex. 18), and MCL (Ex. 19) — explain in detail the difficulties of trying to work with Oldfather, as well as events involving her incompetence, intransigence, and disloyalty that led to her termination.

When Oldfather was fired, she turned on her former *Mayberry 5* Plaintiffs and their counsel. She took their confidential information and work product to the AG to aggrandize her own economic interests. She then acted adversely to her former clients. She tried to block the breach-of-trust lawsuit, which would have benefited their personal accounts as Trust beneficiaries. Now she has negotiated a smoke-and-mirrors settlement worth far less than the $227 million claimed and is trying to secretly pocket $45.5 million in fees. All with no notice to KPPA members or Trust beneficiaries, in a Settlement that extinguishes the Tier 3 Trust Plaintiffs' breach-of-trust and RICO claims that could be worth "thousands of dollars" to each of them as trust beneficiaries and RICO class members.

Oldfather would never have been anywhere near this case had Judge Brown and Captain Mayberry not hired her as local counsel. Once hired, her performance as local counsel was terrible. *See generally* Ex. 6. She immediately aggrandized her role as local counsel beyond what was intended. *See id.* She tried to block the filings of amended pleadings, the adding of defendants and the pursuit of other litigation steps. *See id.* at 3–4, 8, 10. She met with KPPA without authorization (*id.* at 4), to persuade KPPA to turn against the vigorous prosecution of claims they had endorsed in the Joint Notice. Her performance at an early mediation to try to settle with the KRS Insiders was pathetic, causing Captain Mayberry to say – "Where's our lawyer?" Ex. 18 ¶ 19. She was disloyal, disruptive, impossible to tolerate or work with. *See generally* Ex. 6. Finally, she was caught trying to get a key former MCL Law Group employee to give her confidential information and "*dirt*" on the *Mayberry 5* Plaintiffs' prosecution team. *See* Declaration of Angela Mueller (Ex. 20). Oldfather was fired for cause. *See* Ex. 6.

The declarations detail:

- The origins of the *Mayberry* case. The declarations explain how Judge Brown and Captain Maberry retained MCL to investigate the case because of her and her husband's prior involvement in large pension litigations where billions of dollars had been recovered for Pension Funds, how MCL used consultants (including her husband), experts, private investigators, and forensic accountants to investigate the case, and how her team drafted the initial *Mayberry* complaint. Ex. 5 ¶¶ 4–7; Ex. 18 ¶¶ 4–7, 9, 16; Ex. 19 ¶¶ 6–10, 14–15, 19, 21–26, 34–43. The declarations also explain how *Oldfather had no role whatsoever in the investigation and preparation of the case* and how they intended Oldfather's role to be as "*local counsel*." Ex. 5 ¶¶ 8–10; Ex. 18 ¶¶ 7–9.
- Oldfather's limited role as "local counsel." The MCL Declaration details how Oldfather was retained, and was provided a complete draft of the *Mayberry* complaint *only after signing a confidentiality agreement*. Ex. 19 ¶¶ 11–14. In fact, Oldfather herself *drafted* an agreement whereby she and Cantley would "receive for their services as *local counsel*" 25% of the total attorneys' fees. *Id.* ¶ 14. The declarations detail that Oldfather agreed to work as local counsel under the direction of MCL and her team, with the understanding that MCL

was responsible for prosecuting and financing the case. Ex. 5 ¶¶ 4–10; Ex. 19 ¶¶ 1–13, 29.

- Oldfather's obtained confidential information and work product from the *Mayberry 5* Plaintiffs and their counsel. MCL's declaration explains how Oldfather, after signing the confidentiality agreement, was provided with vast amounts of investigatory work, the initial *Mayberry* complaint (which had been through over 70 drafts), and access to all work product of the *Mayberry 5* Plaintiffs' prosecution team. Ex. 19 ¶¶ 11–15, 50(A)-(H).

The *Mayberry 5* Plaintiffs' termination letter details why they fired Oldfather for cause – "misperformance, misbehavior and failure to follow [] instructions," as well as disloyalty. Ex. 6 at 1, 12. As former clients, the *Mayberry 5* Plaintiffs explicitly warned Oldfather of her "significant ethical obligations" in connection with their work product and confidential information:

> As discharged counsel you have significant ethical obligation and duties regarding files, work product, confidentiality, loyalty to clients and non-disparagement. We expect you to comply with these duties and to fully cooperate with us and the lawyers who will continue to prosecute the case.

Ex. 6 at 2.

The original *Mayberry* complaint was filed in December 2017. All the substantive creative work in this case was generated by the combined efforts of MCL Law Group, MCL's consultants and their team of private investigators, forensic accountants, *etc*. *See generally* Ex. 19 ¶¶ 6–10, 14–15, 19, 21–28, 34–43. All factual investigation, review, analysis and drafting is the result of their work. Together with consultants, investigators and forensic accountants, MCL researched and drafted the complaint. MCL alone agreed to provide millions of dollars of funding for the case. *See id.* ¶¶ 1, 19, 49. Oldfather as local counsel had no funding obligations and declined an opportunity to provide or participate in financing major case expenses when given that opportunity. *See id.* ¶ 14. The *Mayberry* case depended entirely on MCL for its origin and its financing. *See id.* ¶ 1. Several hundred thousand dollars were expended. *See id.* ¶¶ 19, 49. Oldfather refused to reimburse any of these costs and has wrongfully retained confidential information.

Oldfather had never played a lead role in a case of this procedural complexity and size. When presented with the draft complaint on December 26, 2017 she wrote MCL: "Thanks for your steady leadership, in general and this evening." *Id.* ¶ 18. In separate emails earlier that same day, she acknowledged that a drafting decision was "Michelle's call," asked her as "fearless leader" to make another final decision, and acknowledged that "You and Jon [Cuneo][39] are the team leaders." *Id.*

MCL's husband, William S. Lerach ("WSL"), a disbarred lawyer, participated as a consultant, investigator and draftsman at the *Mayberry 5* Plaintiffs' urging, *after MCL had received pre-clearance from the Kentucky Bar to do so*.[40] WSL's investigative work on this case was specifically requested by Judge Brown and Captain Mayberry. Everyone on the prosecution team recognized that WSL was indispensable to the case surviving the motion to dismiss before Judge Shepherd, and was a key to success. As admitted by lawyer Dobson (who was working with Oldfather):

[39] Cuneo was a longtime colleague of MCL/WSL, an experienced big case litigator who participated in the $7 billion *Enron* recovery. Like Judge Brown, Cuneo was another casualty of this marathon. He died in 2024, seven years on in the case.

[40] When KKR raised WSL's status as a disbarred lawyer in front of Judge Shepherd, Oldfather defended his involvement, and defended the prosecution team's use of him. *See* Ex. 21. Judge Shepherd turned away the accusations telling them he had seen nothing wrong, would not interfere, and that they should go to the Kentucky bar. *See id.* They never did.

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

Ex. 19 ¶ 31.

Oldfather herself stated on national TV in "The Pension Gamble" on PBS in October 2018:

> ANN OLDFATHER: … Our team of lawyers are blessed to have as our consultant Bill Lerach, who's a disbarred attorney, but indeed, an expert in pension fund analysis. And so we have somebody right there at our beck and call who has educated us about the breadth of this problem. Throughout the United States, Kentucky might be the first one to go down, but it won't be the last.

Id.

Oldfather, however, stole the *Mayberry 5* Plaintiffs' confidential information and work product. She then got the AG to hire her, but without the MCL Law Group and its team. And she now tries to get the Court to approve a deceptive smoke-and-mirrors Settlement, while pocketing a secret $45.5 million fee, to the detriment of her former clients.

By doing so, Oldfather violates Kentucky Supreme Court Rule 1.9 ("Duties to Former Clients."). This rule provides:

> (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

> (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
>
> > (1) whose interests are materially adverse to that person; and
> >
> > (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

KY. SUP. CT. R. 1.9(a)–(b). The Comment to Rule 1.6 emphasizes its broad reach and the absolute nature of its prohibition:

> [2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. ...
>
> [3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings .... The confidentiality rule, for example, applies not only to matters communicated in confidence by the client *but also to all information relating to the representation, whatever its source*.
>
> [16] The duty of confidentiality continues after the client-lawyer relationship has terminated. *See* Rule 1.9(c)(2). *See* Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

KY. SUP. CT. R. 1.6, Cmt. [2]–[3], [16]. The Comment to Rule 1.9 is equally clear:

> [1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and ... may not represent another client except in conformity with this Rule. ...

KY. SUP. CT. R. 1.9, Cmt. [1]. The rule also clarifies the "same or [] substantially related" matter as:

> [2] The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. ... When a lawyer has been *directly involved* in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited.

Id., Cmt. [2].

Oldfather was "directly involved" within the meaning of Rule 1.9. *See* KY. SUP. CT. R. 1.9, Cmt. [2]. While acting as local counsel in the *Mayberry* case, Oldfather acquired confidential information and had access to work product prepared by the lawyers for the *Mayberry 5* Plaintiffs, as well as their investigators, consultants, and forensic accounting experts, who conducted the pre-filing investigation and drafted the complaint. Ex. 19 ¶¶ 11–15, 50(A)-(H). After she was fired, Oldfather then "use[d]" confidential information relating to her representation of the *Mayberry* 5 Plaintiffs to their "disadvantage" and revealed confidential information to her new client — the then AG — who hired her. And she is now seeking approval of a settlement that would wipe out the claims of the Tier 3 Trust Plaintiffs and the *Mayberry* 5 Plaintiffs. Thus, Oldfather violated Rule 1.9 by acting "materially adverse" to her former clients. *See* KY. SUP. CT. R. 1.9(a).

Oldfather's disloyalty is documented in the January 30, 2020 Declaration of Angela Mueller, a former key employee of MCL Law Group. *See* Ex. 20. As detailed in the Mueller declaration, Oldfather exploited an employment dispute between Mueller and MCL Law Group and recruited Mueller to collect confidential information, as well as "dirt," from the *Mayberry 5* Plaintiffs' prosecution team. *See id.* ¶¶ 8–11. Under Oldfather's direction, Mueller provided her and others with numerous internal communications of the MCL Law Group, including emails. *See id.* ¶¶ 11–13. The unethical disclosure of the MCL Law Group's internal confidential communications became so egregious that attorney Dobson intervened. *Id.* ¶ 13. In a March 29, 2019 email, attorney Dobson told Mueller that he would decline to receive any further confidential communications within the MCL Law Group:

> I decline … to have you send me any mail not already shared outside MCL Law Group. MCL Law Group is co-counsel. I owe it contractual duties. MCL Law Group may consider some or all of the subject emails to be

> confidential business information .... [I do not] consider myself entitled ... to review emails that you and/or Lerach may have considered confidential .... Please don't send me any more emails ....

Ex. 20 ¶ 13 (at 7). Despite Dobson's admonition, however, Oldfather continued to communicate secretly with Mueller, and Mueller provided her with more confidential information. *Id.* ¶¶ 14–18. Oldfather persisted in this unethical, disloyal conduct until Mueller left the MCL Law Group. Oldfather's misconduct in connection with Mueller was one of the grounds for her firing by the *Mayberry 5* Plaintiffs. *See* Ex. 6 at 16.

Well documented in these declarations and the termination letter (*see* Exs. 5–6, 18–20), Oldfather's unethical conduct cannot be ignored. It is not known whether Oldfather disclosed her termination by the *Mayberry 5* Plaintiffs to the AG or discussed Rule 1.9 with him. *But for sure Kentucky rules prohibit what Oldfather did and is doing*. Her prosecution of the AG's case over her former clients' objections, and her negotiation of a Settlement to extinguish their valuable individual rights constitute a violation of Rule 1.9.

VII. If the Court Does Not Reject the Settlement Outright, It Should Continue the Settlement Approval Process in Order to Hold a *Potter* Hearing, Conduct Discovery, and Allow the Resolution of the Hedge Fund Sellers' and the KRS Insiders' Pending Appeals

There is no urgency to dispose of these cases, which have been pending for over seven years. There is no liquidity issue at KPPA. The appellate remedies being pursued by Defendants to clarify who has standing to sue or settle are still pending. The legal issue of the Tier 3 Trust Plaintiffs' standing and the AG's "occupy-the-field" claim are pending in the appellate courts. But, so far, Defendants have lost. This Court's May 1, 2024 order remains the law of this case. That is the status quo. Any attempt by Defendants to stay their appeals only reinforces this Court's May 1 rulings.[41]

What is unfolding is highly irregular. The Court is being asked to approve not only the Settlement terms, but the conduct of non-party KPPA — to find that KPPA properly exercised "business judgment" and fulfilled its "fiduciary duties." *See* Final Approval Order ¶ 7. Moreover, the Court has been presented with *no facts* regarding the settlement negotiations and mediation process. Nor has the AG disclosed any information regarding his retention of Oldfather or his fee arrangements with her. The Court would need to know a great deal more before it can properly scrutinize the proposed Settlement.

To that end, as the Supreme Court held in *Potter v. Eli Lilly & Co.*, circuit courts have extremely broad power to conduct discovery and hold hearings to deal with suspicious settlements. *See* 926 S.W.2d 449 (Ky. 1996), *overruled in part on other grounds by Hoskins v. Maricle*, 150 S.W.3d 1, 5 (Ky. 2004). In *Potter*, a high-profile case involving eight deaths and the drug Prozac, the Circuit Court entered judgement after conducting a trial that involved 75 live witnesses and 411 exhibits. *Id.* at 451. In connection with a motion to correct a clerical error in the judgment, the Circuit Court suspected that the parties had entered into a settlement. *See id.* at 452. But the parties refused to divulge any details, even though the Circuit Court issued subpoenas and ordered them to appear. *See id.* ("there was a great lack of candor to the trial court in regard to the settlement agreements"). The parties obtained a writ of prohibition from the Court of Appeals preventing the Circuit Court from enforcing the subpoenas and holding a hearing. *Id.* Reversing the Court of Appeals, the Supreme Court held that the

[41] Their attempt to stay their own appeals is outrageous. Just another step to try to tie this Court's hands as well as the Tier 3 Plaintiffs'.

Circuit Court "has a duty and a right to determine that its judgments are correct and accurately reflect the truth." *Id.* at 453. In so holding, the Supreme Court reasoned that the circuit courts' "inherent power to conduct an independent investigation" arises "from the very nature of their institution" as "Court[s] of Justice in this State." *Id.* at 453–54. The circumstances that justify the invocation of this power "go[] beyond actual fraud." *Id.* at 454. The circuit court may invoke this power if it suspects "bad faith conduct, abuse of judicial process, any deception of the court and lack of candor to the court." *Id.*

Whatever has gone on here — including the secret mediation, the smoke-and-mirrors Settlement, and Oldfather's fee arrangement and ethical violations — is far more suspicious than the lack of candor found in *Potter*. To get to the truth, the Court should conduct a *Potter* hearing and order the Settling Parties to produce discovery.

The Settling Parties (including KPPA) should be directed to produce, within ten days, all documents concerning:

- the negotiation and structuring of the Settlement, including drafts, emails, notes of meetings, phone calls, *etc.*;
- the fees to the AG's private counsel;
- all agreements relating to CR 23.05 and CR 23.08;
- assessment of the value of the Settlement; and
- the mediation (including all communication with the mediator).

Objectors should be granted leave to depose the following individuals:

- KPPA's Executive Director and Board members; and
- Schwarzman, Hill, Kravis, and Roberts.

This Court entered the stay in the Tier 3 Trust Plaintiffs' case — and continued it — in deference to the appellate courts. By the same token, the Court should defer approval of the proposed Settlement until after the pending appeals are resolved. Since no notice of the February 26, 2025 hearing has been given, no one will be inconvenienced by an adjournment.

The exact same Settlement of the AG's taxpayer case will be there when the appeals are over. The Settlement will have all the same defects. Consideration of the Settlement will still require the discovery requested now. So, if the Court does not reject the Settlement now, it should allow discovery to proceed in connection with the anticipated *Potter* hearing.

CONCLUSION

Whatever needs to be done to stop this Settlement and to preserve the existing carve-out of the Tier 3 Trust Plaintiffs' claims for separate prosecution must be done. Once these breach-of-trust claims are carved out, the Court can address the settlement of the AG's separate claims as it sees fit.

Dated: January 31, 2025

Respectfully submitted,

s/ Michelle Ciccarelli Lerach
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