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

JEFFREY C. MAYBERRY, *et al.* PLAINTIFFS

v.

THE TIER 3 PLAINTIFFS' OPPOSITION TO THE COMMONWEALTH'S MOTION FOR EXTENSION OF TIME

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

ELECTRONICALLY FILED

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COME NOW Tia Taylor, Ashley Hall-Nagy and Bobby Estes (the "Tier 3 Plaintiffs") and respectfully oppose the eleventh-hour Motion for Extension of Time filed by the Office of the Attorney General ("OAG"). The Court should deny the OAG's motion and hear the Tier 3 Plaintiffs' Motion to Intervene on February 8, 2021.

I. ARGUMENT

On January 11, 2021, the Court conducted a hearing on the Tier 3 Plaintiffs' motion for leave to file an amended complaint. The Court decided to hold the Tier 3 Plaintiffs' motion in abeyance upon its preliminary determination that the motion should instead be styled as a motion for intervention. And the Court set a schedule that would permit it to evaluate the Tier 3 Plaintiffs' anticipated motion for intervention in the context of the OAG's amended Intervening Complaint, which was ordered to be filed no later than Monday, February 1, 2021.

Late in the day on Friday, January 29th, the OAG informed the Court that it ***would not comply*** with the Court-ordered deadline.[1] The OAG noticed a motion for hearing

[1] It is not clear whether the OAG discussed this maneuver in advance with some or all of the defendants or with KRS, but we note that the OAG and the defendants had

on February 8th, at which time it will seek ***as much as ten*** (***10***) ***more weeks to file an amended Intervening Complaint*** — and, not incidentally, will also seek to delay the Tier 3 Plaintiffs' motion for another two (2) weeks after that (by which time it may be too late to matter). Self-help, in other words, after failing to persuade the Court to accept the result desired by the OAG and the defendants the first time around. ***The OAG aims to blow up the schedule directed by the Court***. In this, the OAG seems to be in league with the defendants.

It is perfectly apparent what the OAG and the defendants are trying to do. That is, they want to create a space in which they — the OAG and the defendants — can negotiate a ***quick settlement without the Hedge Fund Sellers ever having to produce documents or sit for depositions*** — and without having to contend with the team that created the case in the first place and that (in apparent contrast to the OAG) ***does*** know enough about the facts and the law to aggressively plead, prosecute and (at the appropriate time and under the appropriate circumstances) negotiate the kind of settlement of the case that can make a material difference to KRS and its members/retirees.[2]

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previously agreed to an extended schedule — and that the Court expressly declined to grant that request. In any event, the OAG did not discuss it with us.

[2] The OAG's adoption of the defendants' "non-party" nomenclature to describe the Tier 3 Plaintiffs, and its comment about having already discussed with at least some defendants "the potential resolution of the claims against them" — while excluding us from any such conversations — combine for a clear "tell" about what's going on behind the curtain. In any event, for the OAG to say both that it needs substantially more time to "conform its intervening complaint … to the facts and the law" ***and***, at the same time, that it has entered into settlement discussions with at least some defendants does little to inspire confidence that an optimal result achieved after hard negotiations on both sides is in the offing.

The Tier 3 Plaintiffs will file their intervention motion on Monday, February 1, 2021, and will request that their motion be heard along with the OAG's motion to delay. The Tier 3 Plaintiffs will point out in their papers that the OAG will almost certainly face defenses that can only be blunted or avoided through the kind of public-private prosecution we have previously proposed. The defendants have made no secret of their intention to try to sink the OAG's case with, among others, an *in pari delicto* defense that lays blame for KRS's funding problems at the feet of the Legislature that (they will say) short-funded the pension plan for years. The Tier 3 Plaintiffs will be far better positioned to parry those defenses. But if the OAG is now learning the rudiments of the case, as it says it is, through "discussions with counsel for various defendants regarding the merits of the claims," it is unsurprising that the OAG is having difficulty drafting a more effective complaint that it already has.

This Court observed in its Order of December 28, 2020 that "[s]erious breaches of fiduciary duties have been alleged in this case, and the Court believes that statute, case law, the Civil Rules, as well as principles of equity and public interest, require that the factual allegations in this case — and the defenses asserted by all Defendants — should be adjudicated on the merits." Dec. 28, 2020 Order at 17. Further, that "[a]ny party that breached its fiduciary duties and engaged in reckless conduct, conflicts of interest, or self-dealing should be accountable under the law." *Id*. at 16. ***But delay — and especially delay cloaked in secrecy — is the enemy of real accountability***. ***It is difficult to conceive that the OAG is now in a position to achieve the best possible settlement when it is still evaluating the facts and the law***, ***and any settlement brought forward under these circumstances would likely be seen by KRS members/retirees***, ***and by the public***, ***as the product of a negotiation***

driven as much by politics as by hard-nosed assessment of the legal risks and opportunities after a fair opportunity for adversarial discovery.[3]

The Tier 3 Plaintiffs therefore oppose the OAG's motion for indefinite delay.[4] The OAG has had ample time and opportunity to amend its Intervening Complaint — having first filed papers in support of that complaint (copied almost *verbatim* from the *Mayberry* amended complaint filed in January 2018) more than 6 months ago. There is no reason to give more time for the OAG to amend — and no reason to stop the Tier 3 Plaintiffs from pursuing their derivative claims (which seems like the real motivating factor here). And there is ample reason to permit the Tier 3 Plaintiffs to intervene. The OAG has done nothing to demonstrate that it will adequately protect their unique interests. On the other hand, the Tier 3 Plaintiffs are uniquely positioned to protect

[3] There may well be an opportunity to settle soon. The case as it currently exists — the product of years of work by our team, helped by the well-timed intervention by the OAG — represents a significant asset. One might say a "bird in the hand," but that is not to say that going after the birds in the bush would entail undue additional risk. The question devolves to: should we be content with a settlement that seems large in the abstract — say, $100–200 million — but ***does virtually nothing to change the trajectory of the KRS plans***, ***or the certainty that state employers will continue to be saddled with huge annual make-up payments***, ***or the likelihood that the taxpayers will be forced to foot a multi-billion dollar liability***. And not to mention ***the certainty that Tier 3 benefits will be forever diminished*** unless damages are fully realized, paid into the KRS trust funds and apportioned to plan years so as to realize the lost upside sharing dollars that should have been credited to Tier 3 accounts, and which should have increased the balances after compound earnings for many years to come for the 80,000-plus Tier 3 members. And, as we have previously mentioned, any early and unilateral settlement by the OAG will likely spur renewed public concern that political considerations were among the chief drivers. *See*, *e.g.*, https://kycir.org/2020/07/23/attorney-general-revives-lawsuit-against-state-pension-officials-and-hedge-funds/.

[4] The OAG failed serve its papers on the Tier 3 Plaintiffs' counsel. Therefore, the motion is technically defective.

virtually all of the legitimate interests on the plaintiffs' side; the inverse, however, is not true.[5]

We will file, with no further delay, the Tier 3 Plaintiffs' Motion to Intervene, and will urge the Court to evaluate this motion in relation to the OAG's Intervening Complaint in its current form — and to do so at the hearing now set on February 8th. There is no need to acquiesce to the OAG's slow-down strategy. No need to delay. Kentucky never did play (or like) the four-corners stall.

The OAG's assertion that that it "understand[s] … that Kentucky Retirement Systems has entered into a contract with independent outside counsel" to perform some sort of behind-the-scenes "investigation" to determine if there were "any improper or illegal activities … and to produce a detailed report documenting their investigation and findings" is no reason to stop the train. Quite the opposite. This secret "investigation" has apparently been in the works for close to 6 months. Despite our written offer to meet and provide the unnamed outside counsel with the benefit of our three-plus years of work on this case, we have heard not a peep. But if KRS — like the OAG — has been conducting private meetings with the defendants to "discuss … the merits of the claims," while holding plaintiffs' counsel at arm's length, the likely result will be a ***defendant-friendly whitewash*** designed to thwart transparency and real accountability by proposing a settlement, prior to discovery, that does virtually nothing to change the trajectory of the

[5] The OAG has demonstrated no interest in restoring the "Upside Sharing" credits (and subsequent annual earnings thereon, extending many years into the future) that the Tier 3 members have been deprived of. Moreover, as we previously noted, the OAG is bound by statute to deposit any net settlement it achieves in the general fund of the State Treasury, not in one or more KRS trust funds. Further, the OAG will no doubt face defenses (such as *in pari delicto*) that the derivative plaintiffs will be able to avoid. This is not to suggest that the OAG has no place in the case, but to highlight reasons why the OAG is wrong in suggesting by implication that the Tier 3 Plaintiffs aren't needed.

KRS plans, or the certainty that state employers will continue to be saddled with huge annual make-up payments, or the likelihood that the taxpayers will be forced to foot a multi-billion dollar liability — not to mention the ***near-certainty that the Tier 3 members will be shortchanged***.[6] In other words, both the OAG's request for a lengthy extension (while attempting to keep the Tier 3 Plaintiffs in their place as "non-parties"), and the non-public "investigation" by KRS, point in the same direction – an insider settlement of the case rather than a full-blown, transparent litigation designed to achieve the greatest possible recovery.

Far from providing a reason to delay — ***the playbook being flashed here provides a compelling reason to act sooner not later on the Tier 3 Plaintiffs' intervention***. The Tier 3 Plaintiffs, in fact, will file their motion early and request its consideration at the same time the OAG's motion for more time is heard, on February 8th.

We also urge the Court to deny the OAG's attempt to dump the February 22nd status conference. We suggest that would be a mistake. We look forward to participating in that status conference and expect to bring forward at that time a proposed pre-trial order designed to facilitate the orderly and efficient prosecution of these proceedings, to include a short period of intense, focused discovery that will permit the parties to prepare

[6] We will allege in the Tier 3 Plaintiffs' Complaint in Intervention, as we have before, that KRS Executive Director David Eager was a participant in certain aspects of the wrongdoing while on the KRS Board, then did nothing to stop the wrongdoing after stepping into the Executive Director role. We fully understand that making these and certain other allegations — though fully justified by the facts and compelled by our duties as derivative counsel — creates a level of conflict, and it probably makes us no friends over at KRS headquarters. But conflict, played out in open court, is how our adversarial system works best. And it's how big settlements are achieved. The model proposed by the OAG (and, apparently, KRS) — to handle the matter in private, without truly adversarial counsel advancing the allegations and without the guiding hand of this Court — is not designed to, and won't, achieve a recovery in the billions.

for and engage in ***fully-informed settlement discussions under the auspices of a world-class mediator*** such as Kenneth R. Feinberg[7] and to include other provisions, including:

- An order under CR 42.01 consolidating this case with *Commonwealth of Kentucky v. KKR & Co., Inc.*, No. 20-CI-00590 (Ky. Cir. Ct. Franklyn Cnty.), and *Taylor v. KKR & Co., L.P.*, No. 21-CI-00020 (Ky. Cir. Ct. Franklyn Cnty.);

- An order providing for the immediate commencement of the discovery that defendants have managed to hold off for three years now; and

- An order requiring that any settlement, whether proposed by the OAG, the Tier 3 Plaintiffs or any other party, be brought to the Court for approval upon hearing on notice to all parties.

The proper way to proceed is to allow the Tier 3 Plaintiffs to move ahead on their Motion to Intervene — grant that motion quickly so we can begin discovery before some *coup d'état* cover up is attempted. If the OAG needs to pursue a more leisurely pace in prosecuting the Commonwealth's claims as dictated by staff, experience, resource and expertise levels, so be it. We do not need or want to wait. We want to move forward on the KRS claims — prosecuting them aggressively on the merits, uninfluenced by whatever it is that is causing the OAG to stall.

II. CONCLUSION

For the reasons set forth above, the Court should deny the OAG's motion and hear the Tier 3 Plaintiffs' Motion to Intervene on February 8, 2021.

Dated: January 31, 2021

Respectfully submitted,

s/ Michelle Ciccarelli Lerach
Michelle Ciccarelli Lerach (KBA 85106)

[7] Ken Feinberg is one of the most recognized and effective mediators in the United States, known and trusted by the plaintiffs' bar, the defense bar and carriers nationwide. *See* https://feinberglawoffices.com. He is available and interested in serving as the mediator in this case.

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