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

JEFFREY C. MAYBERRY, *et al.* PLAINTIFFS

REPLY MEMORANDUM IN RESPONSE TO DEFENDANTS' OPPOSITION TO, AND IN FURTHER SUPPORT OF, THE TIER 3 PLAINTIFFS' MOTION TO INTERVENE

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

ELECTRONICALLY FILED

* * * * * * * *

Table of Contents

Table of Authorities

Cases

Statutes

Rules

Treatises

Other Authorities

I. INTRODUCTION

The issue of the Tier 3 Plaintiffs' intervention to continue to prosecute the claims originally asserted in the *Mayberry* action is the most straightforward one upon which this Court has been asked to rule on to date. So uncomplicated, in fact, the Tier 3 Plaintiffs proposed a stipulation to save the Court the time and trouble of trudging through it. Rather than even respond, Defendants have dumped hundreds of pages of materials on this Court — a smorgasbord of premature or previously rejected claims. With inconsistent and overlapping arguments, they attempt to re-litigate legal issues they briefed, argued and lost years ago. *See* Nov. 30, 2018 Opinion & Order.[1] But there is one unifying theme to Defendants' submissions — echoed by the Kentucky Retirement Systems ("KRS") and the Office of the Attorney General ("OAG"). They want the Tier 3 Plaintiffs and their counsel out of the picture — *i.e.*, the lawyers who were retained by KRS members to investigate suspected wrongdoing, and who crafted the factual allegations and legal theories, ***all*** of which were upheld by this Court so the claims could be prosecuted on the merits.

Certainly, the Court has seen their tactic before: Facing a dearth of valid legal or factual arguments, Defendants' primary effort is a salvo of *ad hominem* attacks against the lawyers on the other side. They denigrate their opponents and how they might someday be paid, matters irrelevant to the real issue — whether the Tier 3 Plaintiffs are entitled to intervene.

[1] *Mayberry v. KKR & Co., L.P.*, No. 17-CI-1348, slip op. (Ky. Cir. Ct. Franklin Cnty. Nov. 30, 2018) (Shepherd, J.).

The Tier 3 Plaintiffs' February 1, 2021 Memorandum (cited as the "Main Brief") showed how the Tier 3 Plaintiffs have pleaded facts establishing constitutional standing and why that and other factors entitled them to intervene under CR 24.01-24.02.

According to Defendants — including KRS's Investment, Actuary, and Fiduciary Advisors and the Hedge Fund Sellers, as well as their multi-billionaire owners, Schwarzman, Kravis and Roberts — the Tier 3 Plaintiffs' Motion to Intervene should be denied because:

- it is untimely;
- it asserts time barred claims;
- the Tier 3 Plaintiffs failed to make a pre-suit demand to KRS;
- the Tier 3 Plaintiffs lack prudential standing;
- the Tier 3 Plaintiffs lack constitutional standing; and
- the Tier 3 Plaintiffs and their lawyers are a bunch of unethical troublemakers, who manipulated the legal system and ought to be run out of town.

All Defendants' arguments are without merit. The Motion to Intervene is timely — filed on the date the Court directed (indeed, as Defendants also complain, too soon).[2] The claims are not time-barred. They were brought years ago and found to be pleaded within the statute of limitations by the Court. The prudential standing of KRS members to sue under KRS § 61.645, common law and trust law was also long ago upheld, when the Court rejected Defendants' argument that only the OAG had standing to prosecute these claims.

[2] Defendants' claim that the Tier 3 Plaintiffs' Motion to Intervene is untimely is illogical — even incomprehensible. This Court directed the Tier 3 Plaintiffs to move to intervene, after denying without prejudice their motion for leave to file an amended complaint. How a motion made at the direction of the Court on the date specified can be untimely escapes us. We filed our motion on the date the Court directed. The motion is timely.

This Court held that the original plaintiffs did not have to make demand on the KRS Board to sue. The Tier 3 Plaintiffs do not have to make demand now to continue that ***same*** lawsuit — whether by amendment or as intervenors.

The Tier 3 Plaintiffs have pleaded facts showing constitutional standing under a long line of federal appellate authorities under the Employee Retirement Income Security Act of 1974 ("ERISA") — the new legal standard of standing for KRS members to sue adopted in *Overstreet v. Mayberry*, 603 S.W.3d 244 (Ky. 2020), where the Kentucky Supreme Court, relying on *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615 (2020), ***specifically reserved ruling on the constitutional standing of KRS Tier 3 members***.

And while the initiating Mayberry Five and the recently added Tier 3 Plaintiffs may be troublesome and disruptive to established institutions and politicians as they seek to exercise their legal rights as citizens of Kentucky, public employee members of KRS and beneficiaries of its trusts, they intend to continue in their efforts to hold accountable the Wall Street Hedge Funds and their top executives/owners and the other faithless fiduciaries who pursued a conspiracy and common enterprise that all but destroyed KRS, and plundered it, taking hundreds of millions of dollars in excessive fees — leaving it in a "***death spiral***." Because the interests of these plaintiffs, other KRS members and KRS are at stake, the Tier 3 Plaintiffs should be permitted to intervene in this action.

II. ARGUMENT

A. The Merits of the Intervenors' Claims Are Clear — as Is the Importance of the Claims Being Litigated and Adjudicated on the Merits

The ***merits*** and ***importance*** of the claims asserted by the Tier 3 Plaintiffs derivatively on behalf of KRS cannot be disputed. While the Kentucky Supreme Court felt constrained to dismiss the First Amended Complaint ("FAC") — as this Court observed —

on a "legal technicality" due to changes in the law of constitutional standing after the case was initially filed, the Supreme Court nevertheless acknowledged the FAC alleged "***significant misconduct***." *Overstreet*, 603 S.W.3d at 266.

This Court subsequently characterized the FAC as alleging (1) "extremely serious violations of fiduciary and other common law duties on the part of certain KRS Board members and advisors and the defendant hedge fund managers"; and (2) "severe misconduct and breaches of fiduciary duties" involving "self-dealing, exorbitant fees, conflicts of interest" causing "staggering losses of public funds." Dec. 28, 2020 Order at 15-17.[3] Because "any party that breached its fiduciary duties and engaged in reckless conduct, conflicts of interest, or self-dealing should be accountable under the law," this Court concluded that "principles of equity and public interest require that the factual allegations in this case … should be adjudicated on the merits." *Id*. at 16-17; *see also generally* Nov. 30, 2018 Opinion & Order.

So, the KRS claims being ***asserted by the Tier 3 Plaintiffs*** are important to KRS and the public interests, and potentially worth a lot of money. How are those claims to be prosecuted and "adjudicated on the merits"? Who is to prosecute them? And how is the largest possible recovery for KRS to be obtained? That is what is at stake.

Defendants want the corrupted, conflicted KRS — led by Executive Director David Eager, ***who was in the middle of the wrongdoing*** — to be able to use some after-the-fact "investigation" he is orchestrating to curtail the ongoing prosecution of claims against himself and the other Defendants that this Court ***has already determined are well-pleaded and have merit***, regardless of the merits of the claims or their potential

[3] *Mayberry v. KKR & Co., L.P.*, No. 17-CI-1348, slip op. (Ky. Cir. Ct. Franklin Cnty. Dec. 28, 2020) (Shepherd, J.).

for a multi-billion-dollar recovery benefitting KRS's trust funds, its members (including the Tier 3 Plaintiffs), and the broader public interest.

Without any real, substantive reason, KRS has disavowed the Joint Notice it signed and submitted to the Court years ago — which depended ***not*** on the identity of the nominal named plaintiffs (whom the Trustees and Officers had never met and had no pre-existing relationship with, other than as KRS members), but on the ***quality*** and the ***potential value*** of the claims asserted on KRS's behalf. After a detailed presentation to the Board by Plaintiffs' counsel, and, as KRS asserted to the Court then, an independent investigation by KRS, which was represented then by independent counsel, ***KRS determined these claims to have merit and be of potentially significant value to KRS***. At the same time, KRS ***admitted*** to the Court that it lacked the resources or expertise to undertake prosecuting them. The fact that, after this unfortunately brief "lucid interval" during which KRS endorsed the prosecution of these claims in a derivative format via the Joint Notice, KRS has reverted to its old corrupt cover-up methods (as alleged in the complaint), should not stop the independent pursuit of valid and valuable claims on behalf of the victimized and damaged ***entity*** — regardless of the selfish interests of the Executive Director or any inconvenience to the KRS Trustees or, for that matter, to Defendants.

In addition to embracing KRS, the Defendants are also now pining for the late-arriving OAG to rescue them from a vigorous independent prosecution of the KRS derivative claims. But his complaint seeks relief ***only*** for the Commonwealth, ***not*** KRS. ***The OAG deliberately removed the pleaded claims on behalf of KRS previously pleaded by Plaintiffs when the Attorney General otherwise***

***copied the* Mayberry *complaint*.** This Court long ago rejected Defendants' argument that only the OAG had the authority to prosecute the claims asserted here.

This case continues to make history. This is the first time ever that deep-pocket Wall Street banks — facing a billion-dollar bullet — seek to elevate the role of a Commonwealth's Attorney General over private counsel to prosecute claims against them. Even more peculiar, Defendants desire the Attorney General to take over and prosecute claims he ***has not even asserted***. They would see him oust private plaintiffs' counsel who created the case, while putting in charge a litigant likely facing defenses not available against the claims asserted by the Tier 3 Plaintiffs in the ***derivative*** format on behalf of KRS. Which brings us to the goal of their novel position: a desire for weakened claims brought by one less familiar with this case and less experienced in litigating these kinds of claims. In any court at any time, have any other defendants been so arrogant as to advance the argument they should be able to hand-pick who sues them?

Avoidance of this type of manipulation is precisely why private "representative" or "derivative" litigation exists, whether under the common law or authorized by statute, prosecuted by private counsel (and not any government entity). A representative suit exists to protect the damaged, exploited entity (and its members) from the misconduct of those who control the entity and try to cover up or to conceal wrongdoing and protect themselves and other wrongdoers at the expense of the entity and its members. This Court must not allow this remedy to be blocked by legal technicalities and previously rejected arguments served up by Defendants — now part of an unholy alliance of KRS and the Attorney General.

Defendants know where and how they will get a more palatable prosecution (if at all) and a more "reasonable" settlement — for an amount far below what the merits and

damages justify. They also know what could be obtained by independent, vigorous prosecution by lawyers with the expertise, experience, and financial incentives and funding to obtain a recovery of a size that could meaningfully help restore KRS to financial stability — not to mention stop the "death spiral" and avoid the necessity of the State ever having to pay out its inviolable contract obligations (that cover some, ***but not all***, of the KRS pension obligations).

Who will control and prosecute these valuable claims of KRS that have already been upheld across the board? Will it be the private counsel — politically independent, well-funded lawyers, incentivized by private fee contracts, who have a history of multibillion dollar recoveries against Wall Street Banks for other pension funds, *e.g.*, *Enron*, *Worldcom*, *etc.* — representing the Tier 3 Plaintiffs (and the original plaintiffs) who investigated the case, conceived, pleaded and litigated it for years? Or will it be an entity where wrongdoers are still in key control positions or a late-to-the-party, conflicted Attorney General, who lacks expertise in this type of civil litigation, which neither he nor his staff have ever prosecuted.

The private counsel for the Tier 3 Plaintiffs are the only participants in the litigation (on the plaintiffs' side) who have ***any*** real, in-depth understanding of the facts and the law and how they interrelate here — in a complex multi-party case matrix spanning over a decade of wrongdoing with billions in damages. These lawyers — by aggressively prosecuting the claims — secured the early production of many thousands of documents, ***and*** reviewed and analyzed them, ***and*** used them in submissions to this Court which more than confirmed the allegations in the FAC and greatly increased the potential value of the claims. No wonder Defendants desperately want these Tier 3

Plaintiffs' Counsel muzzled, handcuffed, or better yet — run out of town. This is a clear "tell" as to what Defendants and their new "allies" are up to.

B. This Court Has Already Considered and Rejected Defendants' Arguments Based on Demand, Prudential Standing, Liability and Statute of Limitations

Beyond disputing constitutional standing, Defendants seem determined to re-litigate the entire gaggle of the motions to dismiss the FAC they lost three years ago. They again raise the demand, prudential-standing, liability and statute-of-limitations issues. Someone even raised personal jurisdiction. They want to re-brief — and re-argue — all of this. Whether this Court will tolerate Defendants' attempt at re-litigation is up to the Court; but at a minimum, it is surely premature. Except for constitutional standing — which the Tier 3 Plaintiffs must plead to intervene because they assert affirmative claims for relief — these other issues, all previously determined adversely to Defendants, can (and must) wait. Those issues — all previously adjudicated — should not complicate the sole issue of intervention now before the Court. Nor should they be permitted to further delay this case.

Defendants want to start the case over. Since memories fade, it is worthwhile to look back to this Court's November 30, 2018 Opinion & Order and see how clearly, and in detail, it covered and rejected the very arguments Defendants are now trying to recycle.

1. Demand and Plaintiffs' Ability to Sue — Prudential Standing

The Court carefully considered and dispensed with the pre-suit demand argument on multiple grounds:

> Typically, derivative suits arise in the context of dissenting shareholders who must first comply with various statutory requirements prior to bringing suit to enforce the rights of the corporation. *See* KRS 271B.7-400. Defendants now argue that Plaintiffs failed to comply with these statutory requirements. Specifically, Defendants point to the

> requirement that the shareholders first make a demand upon the board of directors under KRS 271B.7-400(2). Under that statute, the complaining shareholders must allege that the demand was refused or explain why they failed to make such a demand.
>
> However, the Court finds that Defendants' argument fails for two reasons. ***First, this case is not a typical shareholder derivative suit against a private corporation***. Plaintiffs are not shareholders of a private for-profit corporation; instead they are members of KRS and beneficiaries of KRS's trust by operation of the statutes establishing Kentucky's public pension system. Accordingly, ***they are not bound by the precise statutorily mandated procedures set forth for private shareholder derivative suits***. Instead, ***their right to sue stems primarily from KRS 61.645(15)***, which lists the duties of the trustees and explains under what circumstances a person may sue for failure to perform these duties. *See* KRS 61.645(15)(e), (f). In addition, the Restatement (Third) of Trusts provides that a beneficiary of a trust can sue a third party when the trustee cannot or will not do so, to the detriment of the beneficiary's interest. *See* Restatement (Third) of Trusts §107(2)(b) (2012); *Osborn v. Griffin*, 865 F.3d 417, 447 (6th Cir 2017).
>
> * * *
>
> ***There is no requirement that the claimant first present their claims to the Attorney General, nor is any statutory authority necessary to bring suit***.

Nov. 30, 2018 Opinion & Order at 8-10.

In concluding that the OAG did not have the sole authority to represent KRS or to prosecute these claims, and that pre-suit demand was not required for this lawsuit, this Court noted that one must be cautious in analogizing the claims asserted by KRS plan members to traditional corporate derivative suits authorized by statute. They are not identical. Corporate type derivative suits take place within a statutory framework with explicit legislatively-imposed "gatekeeper rules": pre-suit demand, security for costs, contemporaneous and/or minimum share ownership requirements, *etc.* Corporate shareholders are investors — they share in the profits and also losses of the enterprise. Their investment is portable — liquid — as they can sell, take their money and move on if they are hurt or dissatisfied. Not so with a KRS Member. Their pensions are immobile.

They are "trapped" in the fund. Their financial, property interest in the funds are completely dependent on the Trustees obeying their stringent fiduciary and statutory duties.

Members of KRS can sue based on KRS § 61.645, as well as trust and common law — ***none of which has any statutory demand requirement***. And while we have all called their suit "derivative" to highlight KRS as the "true plaintiff" (as the entity for whose benefit the suit is brought), it is more generically a "representative action"[4] like the ***suits by pension plan members under ERISA on behalf of their plans*** that establish Plaintiffs' constitutional standing to sue here (*see* Main Brief at 15-27). Such suits — whether called derivative or representative — ***are actions on behalf of the fund***, ***for which there is no demand requirement***.

Like KRS § 61.645, ERISA empowers a plan member to sue to redress violations and recover damages ***for the Plan***. Like KRS § 61.645, ERISA contains no explicit pre-suit demand requirement and the federal courts have refused to imply or create one. *Santomenno v. John Hancock Life Ins.*, 677 F.3d 178 (3d Cir. 2012). ***No federal court of appeals has ever found a pre-suit demand to be a requirement for civil actions brought under ERISA***. *See*, *e.g.*, *Katsaros v. Cody*, 744 F.2d 270, 280 (2d Cir. 1984) ("Congress did not incorporate that [demand] doctrine into the ERISA statute.

---

[4] ***This suit is not the same as a corporate derivative suit***. "Although this suit may be characterized as 'derivative' in the broad sense, it clearly does not fall with the terms of Rule 23.1 That rule applies only to derivative actions 'brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association.' ***Plaintiffs here are not suing as 'shareholders'*** or 'members' to enforce the right of any 'corporation' or 'unincorporated association.' Rather, ***they are suing as plan beneficiaries to enforce the right of the plan against its fiduciaries***." *Kayes v. Pac. Lumber Co.*, 51 F.3d 1449, 1462-63 (9th Cir. 1995).

The ERISA jurisdictional statute … contains no such condition precedent to filing suit.”); *Licensed Div. Dist. No. 1 MEBA/NMU v. Defries*, 943 F.2d 474, 479 (4th Cir. 1991) (no prior demand requirement is incorporated into ERISA).

In *Santomenno,* the court said:

> We now turn to whether pre-suit demand… is required for Participants’ claims …
>
> The text is silent as to pre-suit demand… in fact, no preconditions on a participant or beneficiary’s right to bring a civil action to remedy a fiduciary breach are mentioned at all.
>
> One reason for this lack of a demand requirement for [ERISA] claims is that the ***protective purposes*** of ERISA ***would be subverted if the section covering fiduciary breach required beneficiaries to ask trustees to sue themselves***.

677 F.3d at 188-189.

Like ERISA, KRS § 61.645 does not contain any pre-suit demand (or other) requirement. That legislative choice, like the one Congress made with ERISA, must be respected, as these statutes serve the same remedial purpose — to protect working people who belong to pension plans. Now that standing to sue as a pension fund participant in Kentucky is determined by federal ERISA standards (*Overstreet*, 603 S.W.3d at 257) this unbroken line of federal appellate authorities gives very strong support to this Court’s construction of KRS § 61.645: it does not contain a pre-suit demand requirement and none can or should be created or implied.

Moreover, requiring the KRS members to make a demand on the KRS Board would be a “fool’s errand,” *i.e.*, a useless, fruitless endeavor which — as Defendants know and hope — would only serve to further delay the case for months/years, a result this Court has denounced. The demand issue is over; it was not required when the suit was filed and it is not required now.

2. Defendants' Liability

The Court carefully considered the FAC's factual allegations and liability as to these Defendants and found them sufficient across the board:

> The trustees, as well as the officers, are also subject to fiduciary duties under the common law …. The Court finds these allegations sufficient to imply a relationship of trust between the Board, the officers, and KRS members, and a duty to act in the best interest of those members. The Complaint also alleges a failure to act in accordance with that duty and resulting damages … the ***Complaint sufficiently alleges a fiduciary relationship and breaches of those duties***.
>
> At this time, the Court finds that the First Amended Complaint ***contains allegations sufficient to imply a common law fiduciary relationship between the Hedge Fund Seller Defendants and KRS and its members***. *See*, *e.g.*, First Am. Compl. ¶ 183 (referencing "superior knowledge and expertise" of the Hedge Fund Seller Defendants, KRS's dependence on said expertise, and Defendants' knowledge of that dependence). ***The Complaint also contains sufficient allegations of a breach of those fiduciary duties***. For example, ***Plaintiffs reference the massive fees collected by these defendants in breach of the common law fiduciary duty to not charge excessive fees***.
>
> In the present suit, Defendants argue that Plaintiffs fail to allege an agreement among the defendants to do the unlawful or tortious act. However, accepting all allegations in the First Amended Complaint as true for purposes of this decision, the Court finds that ***Plaintiffs sufficiently plead circumstances that could lead a jury to conclude that such an agreement existed***. For example, throughout the Complaint, Plaintiffs repeat their allegation that various defendants "knowingly aided and abetted the breach of duties by Trustees while participating by committing overt acts, in an ongoing scheme, civil conspiracy, common course of conduct and joint enterprise" in concert with the KRS trustees by "acting and failing to act as alleged herein …." The Court will deny the Motion to the Dismiss to the extent they argue that Plaintiffs failed to sufficiently allege a claim for civil conspiracy and/or joint enterprise.
>
> The Court [also] finds that ***Plaintiffs sufficiently plead their aiding and abetting claim***. Plaintiffs also allege that the defendants knowingly provided assistance to the breaching parties by promoting or allowing the use of false or misleading information in an effort to conceal KRS's financial status.

Nov. 30, 2018 Opinion & Order at 22-28.

Any suggestion that the complaint fails to state claims against the Defendants is specious. Whether under KRS §61.645 or the common or trust law, this Court's opinion has covered the waterfront as to all Defendants' liability under multiple theories of direct, individual and group liability.

3. Statute of Limitations

This Court also considered and rejected Defendants' attempt to bar the claims by the statute of limitations at the pleadings stage:

> Plaintiffs … argue that (1) KRS § 413.160 applies and allows for ten years to file "an action for relief not provided for by statute" (*i.e.*, breach of trust) and (2) regardless, ***each violation constitutes a new cause of action*** under *Tibble v. Edison International*, 135 S. Ct. 1823 (2015); and (3) ***tolling doctrines***, ***such as the adverse domination theory and equitable tolling***, ***apply***.
>
> The Court finds that there are sufficient allegations to overcome the statute of limitations defenses for purposes of these Motions to Dismiss. For example, the plaintiffs allege that the compensation of the hedge fund sellers was grossly excessive and breached fiduciary duties to the members, and Plaintiffs further allege that the full compensation of some of the defendants has remained secret and sealed from public disclosure. To the extent that the defendants may have received excessive compensation in breach of fiduciary duties, and that compensation has not yet been fully disclosed, the statute of limitations may not have even started to run, since a ***limitations period cannot run before the plaintiffs were reasonably on notice of the nature and extent of the breach of duty***.

Nov. 30, 2018 Opinion & Order at 22-28. While Defendants may certainly pursue their limitation claims after discovery, as pleaded, all asserted claims were and are timely. The case was timely when filed and the claims asserted by the Tier 3 Plaintiffs remain timely. They are the same legal claims based on the same facts.

C. The Tier 3 Plaintiffs Have Pleaded Constitutional Standing

There is really only one key legal issue before the Court: the constitutional standing of the Tier 3 Plaintiffs. If they have it, *i.e.*, "the soccer ball" (*see* Main Brief at 18), their

ability to intervene by right or permission under CR 24.01-24.02 is really not in fair dispute. By raising the extraneous issues, Defendants make constitutional standing ***far "more complicated***" than it needs to be. *Boley v. Universal Health Servs., Inc.,* 2020 U.S. Dist. LEXIS 202565, at *14 (E.D. Pa. Oct. 30, 2020). They are attempting to elevate a "legal technicality" to a complete barrier to these meritorious claims.

Let's be clear on a key point about constitutional standing. The original *Mayberry* plaintiffs had whatever prudential and constitutional standing was required ***when this lawsuit was first filed***. There is no "gamesmanship" at work; there were no hidden Tier 3 Plaintiffs held in "reserve." They were not required as named plaintiffs then to meet the standing requirements ***in existence when the case was filed***. Kentucky did not have ***any*** constitutional standing requirement until *Sexton* was decided, changing the law. *See Commonwealth Cabinet for Health & Family Servs. v. Sexton*, 566 S.W.3d 185 (Ky. 2018).

Even after *Sexton,* this Court made a detailed analysis of the FAC and found that the *Mayberry* plaintiffs had pleaded constitutional standing under *Sexton*, as well as prudential standing under KRS §61.645 and common and trust law. Then ***after*** the Supreme Court argument in *Overstreet,* the *Thole* decision further changed constitutional standing rules — specifically, in pension fund cases — setting up a new rule: that ***members of solvent***, ***well-funded defined benefit pension plans***, ***backed up by Government financial guarantees***, have no constitutional standing to sue to recover plan losses because their guaranteed "defined benefit" pension ***faced no financial risk***. They have no "up" or no "down" — no matter how corrupt or dishonest the trustees or how badly the fund is plundered and looted by Wall Street bankers.

However, in *Overstreet,* the Kentucky Supreme Court, while embracing *Thole* and ERISA standing requirements for KRS's defined benefit plans that are all backed by the Commonwealth's inviolable contract guarantees, was careful to specifically ***reserve*** ruling on the constitutional standing of KRS Tier 3 members (none of whom were then in the case). Tier 3 Members' final pension benefits are variable, dependent on investment returns, plan expenses, and the quality of Trustee oversight, and have ***no inviolable contract protection*** for any of their benefits — even those which are "vested." Not only have their final pensions been adversely impacted by the Defendants' alleged wrongdoing, their vested account pensions are at increasing risk due to KRS's accelerating "death spiral."

In fact, we suggest this action, now led by the Tier 3 Plaintiffs with constitutional standing, appears to be the vehicle the Supreme Court signaled (in *Overstreet*, 603 S.W.3d at 254-61) it was looking for to remedy the "***significant misconduct***" it saw, but could not then permit be remedied in this case with the plaintiffs then before it, due to their personal, fatal failure to plead facts supporting their constitutional standing as named representative plaintiffs.

Other than that "technical" pleading defect, in all other respects this Court's Opinion & Order of November 30, 2018 — upholding Plaintiffs' prudential standing, the factual sufficiency of the pleading, the liability of the Defendants, the timeliness of the claims, and the lack of any need for pre-suit demand by Plaintiffs — was left undisturbed.

This case was properly filed in the first place by Plaintiffs with standing under existing law. In fact, the Mayberry Five have ***always had constitutional standing*** for the reasons detailed in their unsuccessful attempt to file a Third Amended Complaint. With great respect to the Court, the Mayberry Five's motion to amend pleading their

constitutional standing could have been granted. However, it was ***denied as a matter of discretion and not because of any specified failure to plead facts showing constitutional standing but, because the Mayberry Five's lawyers had failed to plead those standing facts at the outset of the case, even though they were not then required to be pleaded under existing law***. Such are the fortunes of litigation warfare.

What matters now is the Tier 3 Plaintiffs have pleaded their constitutional standing. The federal court ERISA authorities cited at pages 15 through 27 of the Tier 3 Plaintiffs' Main Brief lay out the "technical" standing requirements required of beneficiaries of hybrid balance contributory pension plans to sue on behalf of and recover for the pension plan, recovering "***plan-wide damages***" caused by "***plan-wide misconduct***" "***sweeping beyond their own injury***" caused by defaulting trustees and those who aided and abetted, conspired and pursued a common enterprise with them. *See* Main Brief at 16-17.

The reason we quoted those ERISA authorities in such length in our Main Brief is because their language, discussion and holdings regarding the constitutional standing of members of hybrid defined contribution plans are completely dispositive of the Tier 3 Plaintiffs' constitutional standing here. In fact, the Tier 3 Plaintiffs have pleaded and suffered far more concrete injury amid far more egregious fiduciary misconduct than ***in any of those cases***. We are not dealing here with negligent plan misadministration, like many of those cases, but with ***grotesque decade-long fiduciary failures and out-right plundering of the fund — all but destroying its finances — causing billions in damages*** — leaving the KRS funds in a death spiral.

The named plaintiff Tier 3 KRS members are in a hybrid cash balance defined-contribution plan where:

- Their pension benefits — even "vested" benefits — are guaranteed by no one.
- Their pension benefits are determined by the final financial balance in their individual retirement accounts within the overall common KRS investment pool.
- Their final account balance and pension benefit has already been, and continues to be, impacted up or down by investment returns, expense levels and the quality of KRS's stewardship, which have been lousy, excessive and terrible, respectively for years.
- The Tier 3 Plaintiffs have already suffered economic harm due to the excessive hedge fund fees and terrible hedge fund returns as a result of the alleged course of misconduct of the KRS Trustees and Defendants that all but destroyed the finances of the KRS pension plans and insurance trusts.
- Causation is clear. The Tier 3 Plaintiffs have suffered individual harm due to "plan-wide misconduct" which can only be redressed by the financial recovery they seek for KRS and its plans, while praying for the Court to direct a portion of that recovery to be allocated to Tier 3 Members' individual accounts, if KRS fails to behave properly to assure effective redressability.[5]

See, *e.g.*, Proposed. Verified Complaint in Intervention (the "Complaint") ¶¶ 14, 93-96.

There is no fair question of whether or not the Tier 3 pension plan structure provides "up" and "down" variance for their final benefits which depend upon the plan investments, the level of plan-wide expenses, and the quality of trustee supervision and operation of the fund. None of their benefits (even the "vested" ones) are protected by any inviolable contract obligations.

The Complaint in Intervention alleges these Tier 3 Plaintiffs have ***already suffered economic injury***: diminished returns due to bad plan-wide investments and

[5] Because KRS assets are held in a "single investment pool," not segregated accounts, as a practical matter the Tier 3 Plaintiffs can only be made whole through (1) a recovery for KRS as a whole, with (2) retroactive credits to their individual accounts based on such recovery, as the ERISA authorities cited later provide.

excessive plan-wide fees, including the "black box" hedge fund investments, due to the five-year look-back computation on the upside potential for the Tier 3 Plaintiffs. *Id.* ¶¶ 93-96. The Complaint also sets forth the ongoing harm they continue to suffer due to Defendants' misconduct. *Id.* Underfunded and in a "death spiral," KRS cannot invest the way a well-funded plan can. Rather, crippled by Defendants' misconduct, it is forced to restrict investments to conservative, short-term, safe investments which yield less, reduce returns and ***lower*** the final pension benefit of the Tier 3 Plaintiffs.

The Tier 3 Plaintiffs satisfy all requirements for constitutional standing. They allege they have suffered injury in fact – not legal damages, but injury in fact. There is a clear causation tie to the alleged misconduct of the Defendants. And the injury-in-fact can and will ***only*** be redressed by a plan-wide recovery of damages for KRS that KRS or the Court will ensure are allocated internally in a fair manner, including economic credits to Tier 3 Members' individual retirement accounts to make up for the injury and loss they have suffered to date. This is not a summary judgment motion on any damages of the Tier 3 Plaintiffs, ***who do not seek any recovery of any damages for themselves*** but rather only a recovery for the KRS funds from which they and all Plan Members will benefit.[6]

[6] Contrary to what Defendants suggest without any basis, the Tier 3 Plaintiffs do not seek individual damages or any individual recovery. Rather, the issue of "economic credits" has to do with an appropriate allocation of any ***recovery to KRS***, in such a way as to make the Tier 3 Plaintiffs as whole as the other Members of the plans, given the manner in which their pension benefit is computed (with the five-year look-back, *etc.*). Indeed, the "pooled asset" structure of the KRS trust funds precludes individual damages; the only practical way to remedy the wrong is through recovery to KRS, with the damages attributed to individual plan years and the Tier 3 upside-sharing interests adjusted to account for these recoveries.

A wealth of ERISA case law establishes that members in a defined-contribution plan, like the Tier 3 Plaintiffs, without guaranteed or fixed benefits, whose individual retirement account balances are impacted by excessive fees, bad investments, and trustee/advisor oversight failures, have standing to sue to recover damages for the overall plan, no matter that the named plaintiff has not ***yet*** suffered an actual loss or damages — ***diminished benefits suffice***. Main Brief at 21.

Once this technical requirement is met, ***the plaintiff may sue on behalf of the plan***, ***pursuing litigation challenging plan-wide conduct that*** "***sweeps beyond his individual claim***," ***including misconduct taking place before and/or after that plaintiff's membership in the plan***, ***to achieve a recovery that will make the plan whole***. *Id*. at 16, 25.

Plaintiffs' constitutional standing is a matter of pleading. Plaintiffs need only plead injury. They need not ***prove*** it. It is not necessary at the pleadings stage for the alleged harm to be set out in detail, much less quantified as the Tier 3 Plaintiffs have done here, alleging thousands of dollars of diminished individual pension accounts. *Boley*, 2020 U.S. Dist. LEXIS 202565, at *6 ("Standing allegations need not be crafted with precise detail nor must the plaintiff prove his allegations of injury."). The allegations of facts supporting constitutional standing must be accepted as true — particularly so where, as here, the Complaint is verified.

D. The Tier 3 Plaintiffs' Constitutional Standing, Their Vested Property Interests in KRS's Funds and Their Interest in This Litigation Justify Intervention

The Tier 3 Plaintiffs ("non-parties" as Defendants and even the Attorney General are wont to insultingly call them) are not insignificant figments. They are real people — citizens and public employees of the Commonwealth of Kentucky and KRS beneficiaries.

They are full-blown members of the KRS, a pension system they were forced to enroll in to get a job as a state employee. They cannot "sell" their "investment" and walk away with their "invested/earned" money. They are involuntary participants in a mandatory contributory pension plan required to contribute 10% of their pay. They are locked in, forced to hope for the best — *i.e.,* depending on the honesty and competence of the trustees and the advisors who work for, and sell investments to, the Fund. Not only have their final pension amounts been adversely impacted (*i.e.,* lowered), their past and ongoing individual cash contributions to the plan are at serious risk of loss upon any failure of the Plan, as even their vested benefits have no inviolable contract protection. They and the thousands of others have literally nowhere else to turn for redress than this Court in this very case. As public employees and members of the KRS Plans and citizens of Kentucky, they have statutory and common law rights to access the Kentucky justice systems to remedy the wrongs done to them and the pension plan in which they are ***involuntary*** participants.[7] This Court has already considered the status of KRS plan members and concluded:

> These public employees paid into the defined benefit pension program, as mandated by statute. They therefore have a vested financial interest in ensuring that the state retirement fund, which secures their retirement, is administered in compliance with the safety net of fiduciary duties designed to protect their financial interests, and those of all similarly

[7] It was recently reported that "Blackstone CEO Schwarzman took home $610.5 million in 2020." Chibuike Oguh, *Blackstone CEO Schwarzman Took Home $610.5 Million in 2020*, REUTERS, Mar. 1, 2021. Top officials at KKR also pocketed hundreds of millions. Hedge Fund Sellers executives took home $31 billion in 2020, when 500,000 Americans died of Covid (4,600 in Kentucky alone), the American economy has been decimated, and KRS's "death spiral" accelerated. Robert Frank, *25 Highest Paid Hedge Fund Managers Made $32 Billion in 2020, A record*, CNBC, Feb. 22, 2021. What kind of justice system shuts its doors to its ordinary citizens who keep the peace, care for the sick and keep the public offices and courthouses open, in the face of this kind of plunder by Wall Street titans? Only a rather Dickensian one: "suffer any wrongdoing that can be done you rather than come here."

> situated members. Again, the alleged misconduct of the defendants – the willful and reckless breach of duties, among other things – is alleged to be causally connected to the depletion of the retirement funds in which the plaintiffs have a property interest.
>
> Moreover, under controlling case law, the plaintiffs have a property interest in the funds administered by KRS. For example, the Kentucky Supreme Court has held that public employees have a protected property interest in the retirement funds administered by KRS by virtue of their personal contributions to those retirement funds through payroll deductions. *See Commonwealth ex. rel. Armstrong v. Collins*, 709 S.W.2d 437, 446-447 (Ky. 1986). As noted above, Plaintiffs are public employees who have paid into the pension program to secure their retirement, and they therefore have a vested financial interest in ensuring that the program is administered in compliance with the very fiduciary duties that are designed to protect the interests of KRS's members.

Nov. 30, 2018 Opinion & Order at 10.

This interest in the Plan's funds and in the outcome of this case (plus constitutional standing) surely entitle the Tier 3 Plaintiffs to intervene. To deny the Tier 3 Plaintiffs the ability to remedy the injury that they suffered by recovering the damage to KRS due to Defendants' illegal conduct would be an injustice. Constitutional standing is a technicality — a gatekeeper provision — to be determined at the outset of the case, ***based on the allegations of the Complaint, accepted as true.*** Once it is pleaded it is over; *i.e.,* once Plaintiffs are through the gate they can pursue "plan-wide relief" "sweeping beyond their own injury" based on conduct "pre-dating and post-dating" their membership in the Plan.

III. CONCLUSION

For the reasons set forth above and in the Tier 3 Plaintiffs' February 1, 2021 motion, the Court should permit them to intervene in this action.

Dated: March 8, 2021

Respectfully submitted,

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

James D. Baskin (*pro hac vice*)
Francis A. Bottini, Jr. (*pro hac vice*)
Albert Y. Chang (*pro hac vice*)
BOTTINI & BOTTINI, INC.
7817 Ivanhoe Avenue, Suite 102
La Jolla, CA 92037
Telephone: (858) 914-2001
Email: mlerach@bottinilaw.com
jbaskin@bottinilaw.com
fbottini@bottinilaw.com
achang@bottinilaw.com

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

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

CERTIFICATE OF SERVICE

The above signature certifies that, on March 8, 2021, the foregoing was served via email in accordance with any notice of electronic service or, in the absence of an electronic notification address, via email or mail as indicated below, to:

Abigail Noebels	anoebels@susmangodfrey.com
Barry Barnett	bbarnett@susmangodfrey.com
Steven Shepard	sshepard@susmangodfrey.com
Ryan Weiss	rweiss@susmangodfrey.com

Counsel for Defendants KKR & Co., L.P., Henry Kravis, and George Roberts

Peter E. Kazanoff	pkazanoff@stblaw.com
Paul C. Curnin	pcurnin@stblaw.com
David Elbaum	david.elbaum@stblaw.com
Michael J. Garvey	mgarvey@stblaw.com
Sara A. Ricciardi	sricciardi@stblaw.com
Michael Carnevale	michael.carnevale@stblaw.com

Counsel for Defendants Prisma Capital Partners, L.P., Girish Reddy, Pacific Alternative Asset Management Company, LLC, and Jane Buchan

Barbara B. Edelman	barbara.edelman@dinsmore.com
Grahmn N. Morgan	grahmn.morgan@dinsmore.com
John M. Spires	john.spires@dinsmore.com

Counsel for Defendants KKR & Co., L.P., Henry Kravis, George Roberts, Prisma Capital Partners, L.P., Girish Reddy, Pacific Alternative Asset Management Company, LLC, and Jane Buchan

Donald J. Kelly	dkelly@wyattfirm.com
Virginia H. Snell	vsnell@wyattfirm.com
Jordan M. White	jwhite@wyattfirm.com
Brad S. Karp	bkarp@paulweiss.com
Lorin L. Reisner	lreisner@paulweiss.com
Andrew J. Ehrlich	aehrlich@paulweiss.com
Brette Tannenbaum	btannenbaum@paulweiss.com

Counsel for Defendants The Blackstone Group L.P., Blackstone Alternative Asset Management, L.P., Stephen A. Schwarzman and J. Tomilson Hill

Philip Collier	pcollier@stites.com
Thad M. Barnes	tbarnes@stites.com
Jeffrey S. Moad	jmoad@stites.com

Counsel for Defendants R.V. Kuhns & Associates, Inc, Rebecca A. Gratsinger, and Jim Voytko

Margaret A. Keeley	mkeeley@wc.com
Ana C. Reyes	areyes@wc.com
Alexander Zolan	azolan@wc.com

Susan Pope spope@fbtlaw.com
Cory Skolnick cskolnick@fbtlaw.com
Counsel for Defendant Ice Miller, LLP

Charles E. English, Jr. benglish@elpolaw.com
E. Kenly Ames kames@elpolaw.com
Steven G. Hall shall@bakerdonelson.com
Sarah-Nell H. Walsh swalsh@bakerdonelson.com
Kristin S. Tucker ktucker@bakerdonelson.com
Robert G. Brazier rbrazier@bakerdonelson.com
Counsel for Defendants Cavanaugh Macdonald Consulting, LLC, Thomas Cavanaugh, Todd Green and Alisa Bennett

Dustin E. Meek dmeek@tachaulaw.com
Melissa M. Whitehead mwhitehead@tachaulaw.com
Counsel for Defendant Government Finance Officers Association

John W. Phillips jphillips@ppoalaw
Susan D. Phillips sphillips@ppoalaw.com
Sean Ragland sragland@ppoalaw.com
Counsel for Defendant Jennifer Elliott

Mark Guilfoyle mguilfoyle@dbllaw.com
Patrick Hughes phughes@dbllaw.com
Kent Wicker kwicker@dbllaw.com
Andrew D. Pellino apellino@dbllaw.com
Counsel for Defendant Thomas Elliott

Laurence J. Zielke lzielke@zielkefirm.com
John H. Dwyer, Jr. jdwyer@zielkefirm.com
Karen C. Jaracz kjaracz@zielkefirm.com
Counsel for Defendant Timothy Longmeyer

David J. Guarnieri dguarnieri@mmlk.com
Jason R. Hollon jhollon@mmlk.com
Kenton E. Knickmeyer kknickmeyer@thompsoncoburn.com
Mike Bartolacci mbartolacci@thompsoncoburn.com
Shaun Broeker sbroeker@thompsoncoburn.com
Counsel for Defendant David Peden

Michael L. Hawkins mhawkins@mlhlawky.com
Counsel for Defendant Brent Aldridge

Albert F. Grasch, Jr. al.grasch@rgcmlaw.com
J. Mel Camenisch, Jr. mel.camenisch@rgcmlaw.com
J. Wesley Harned wes.harned@rgcmlaw.com
Counsel for Defendant T.J. Carlson

Kevin P. Fox kfox@lgpllc.com
Stewart C. Burch sburch@lgpllc.com
Counsel for Defendant William A. Thielen

Glenn A. Cohen gcohen@derbycitylaw.com
Lynn M. Watson watson@derbycitylaw.com
Counsel for Defendant William Cook

Richard M. Guarnieri rguar@truelawky.com
Philip C. Lawson plawson@truelawky.com
Counsel for Defendants Bobbie Henson and Randy Overstreet

Brent L. Caldwell bcaldwell@caldwelllawyers.com
Noel Caldwell noelcaldwell@gmail.com
Counsel for Defendant Vince Lang

Perry M. Bentley perry.bentley@skofirm.com
Connor B. Egan connor.egan@skofirm.com
Christopher E. Schaefer christopher.schaefer@skofirm.com
Chadler M. Hardin chad.hardin@skofirm.com
Paul C. Harnice paul.harnice@skofirm.com
Sarah Jackson Bishop sarah.bishop@skofirm.com
Matthew D. Wingate matthew.wingate@skofirm.com
Counsel for Nominal Defendant Kentucky Retirement Systems

Anne B. Oldfather aoldfather@oldfather.com
tms@oldfather.com
mlc@oldfather.com
bag@oldfather.com
Counsel for Certain Plaintiffs

Vanessa B. Cantley vanessa@bccnlaw.com
Patrick E. Markey Patrick@bccnlaw.com
Counsel for Certain Plaintiffs

Casey L. Dobson cdobson@scottdoug.com
S. Abraham Kuczaj, III akuczaj@scottdoug.com
David D. Shank dshank@scottdoug.com
Sameer Hashmi shashmi@scottdoug.com
Paige Arnette Amstutz pamstutz@scottdoug.com
Jane Webre jwebre@scottdoug.com
jfulton@scottdoug.com
aespinoza@scottdoug.com
aneinast@scottdoug.com
agoldberg@scottdoug.com
Counsel for Certain Plaintiffs

Jonathan W. Cuneo jonc@cuneolaw.com
Monica Miller monica@cuneolaw.com
David Black dblack@cuneolaw.com
Mark Dubester mark@cuneolaw.com
dvillalobos@cuneolaw.com
Counsel for Plaintiffs

Victor B. Maddox victor.maddox@ky.gov
J. Christian Lewis Christian.lewis@ky.gov
Justin D. Clark justind.clark@ky.gov
Steve Humphress steve.humphress@ky.gov
Aaron Silletto aaron.silletto@ky.gov
Counsel for Intervenor Attorney General Daniel Cameron