COMMONWEALTH OF KENTUCKY
COUNTY OF FRANKLIN CIRCUIT COURT
DIVISION I
Case No. 22-CI-00723

TIA TAYLOR, *et al*., as Members and Beneficiaries of Trust Funds of the KENTUCKY RETIREMENT SYSTEMS, Its Pension and Insurance Trusts for the Benefit of Those Trusts — PLAINTIFFS

vs.

The Tier 3 Plaintiffs' Omnibus Opposition to Defendants' Motions to Dismiss the Complaint

CALCATERRA POLLACK LLP, REGINA M. CALCATERRA, JANINE L. POLLACK, JUSTIN K. TERES, and VICTORIA A. HALE, — DEFENDANTS

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Plaintiffs Tia Taylor, Ashley Hall-Nagy, Bobby Estes and Jacob Walson ("Plaintiffs" or the "Tier 3 Plaintiffs") respectfully submit this omnibus opposition to Defendants' motions to dismiss the complaint.[1]

I. INTRODUCTION AND OVERVIEW

A. This Breach-of-Trust Action

The Tier 3 Plaintiffs brought this breach-of-trust action asserting ***direct — not derivative — claims***. As trust beneficiaries, they seeking damages and equitable relief for the Trusts of the Kentucky Retirement Systems ("KRS").[2]

Defendants are Calcaterra Pollack LLP, a New York law firm, two of its partners Regina M. Calcaterra and Janine L. Pollack ("Pollack"), an associate Justin K. Torres (collectively, the "Calcaterra Defendants") and Victoria Hale ("Hale"), KRS's in-house General Counsel. As alleged, these Defendants and specified "Additional Actors" (¶¶ 48, 51, 52, 53), including David Eager ("Eager"), formerly a KRS Trustee and now KRS's CEO/ED, rigged the procurement of the Calcaterra Contract for an investigation into alleged investment wrongdoing at KRS and arranged for the scope of the investigation to be curtailed to produce a "cover up" report ("Calcaterra Report"). Plaintiffs allege Defendants' ***knowing participation*** with KRS (the "Culpable Trustee"), in breaches of trust or their own duties, aiding-and-abetting and participating in a conspiracy

[1] Allegations in the September 14, 2022 complaint in this breach-of-trust ("BoT") action, *Taylor v. Calcaterra Pollack, LLP*, No. 22-CI-00723 (the "Calcaterra BoT Action"), are cited as ¶ ___. Unless otherwise noted, all emphases in quoted text are added.

[2] KRS was renamed the Kentucky Public Pension Authority ("KPPA") in 2021. References to "KRS" mean and include, as context requires, Kentucky Retirement Systems, KPPA, CERS (County Employees Retirement System), KERS (Kentucky Employees Retirement System), SPRS (State Police Retirement System), and the several trust funds overseen and managed by KRS as Trustee. ¶ 1. The KRS Board was the legislatively-designated "Trustee" of the KRS trust funds. All funds received by KRS are "trust funds" held in KRS Trusts to be "solely" for the benefit of KRS members who are the beneficiaries of those Trusts which hold their pension accounts and benefits. KY. REV. STATS. §§ 61.515(2), 61.650(1)(a).

involving violations of Kentucky law, and damaging KRS's Trusts.[3] ¶¶ 1, 32.

Defendants wasted $1.6 million in Trust assets and caused the Trusts consequential damages, while delaying the related litigation for months. This was done to try to shield the Trustee, Eager and other wrongdoers from liability for their wrongdoing as pleaded in *Taylor v. KKR & Co. LLP*, No. 21-CI-00645 (the "Tier 3 BoT Action"), and was a continuation of the conspiracy and cover-up pleaded there. ¶¶ 3, 10, 155; Tier 3 BoT Action ¶¶ 79, 326–335. In short, Defendants and Additional Actors:

- induced the Culpable Trustee to breach trust, fiduciary and statutory duties by entering into the Calcaterra Contract in violation of their respective duties to the Trusts and the Trusts' beneficiaries, violating Kentucky's Procurement, Antitrust and Pension laws; and
- knowingly aided and abetted the Culpable Trustee and each other while pursuing a conspiracy and joint-enterprise for their selfish economic gains and personal benefit — at the expense of and damage to the KRS Trusts and their beneficiaries.

¶¶ 3, 122–147.

Defendants' Motions to Dismiss misconceive the nature and thrust of this case. Here, Defendants are alleged to have **knowingly participated** in the effort by the sole Trustee of the KRS trusts (*i.e.*, the KRS Board) to whitewash and cover up breaches of trust by the Trustee. In so doing, these Defendants joined an ongoing conspiracy and thus became liable as if they had participated all along. These allegations state a ***direct*** (***not derivative***) claim by Plaintiffs, as trust beneficiaries who have been harmed by the conduct alleged.

[3] The claims asserted are based on and involve violations of common law and trust law, as well as several Kentucky statutes, excerpts of which are in Appendix A. *See also* ¶ 20.

Rather than deal honestly with the Complaint's allegations, Defendants resort to *ad hominem* attacks, accusing Plaintiffs' counsel of "***concocting unsubstantiated***," "***baseless***," "***absurd***" allegations, filing a Complaint filled with "***highly sensationalized***" claims creating a "***shot gun pleading***" filled with "***vague and conclusory***" allegations, ***none of which are*** "***under oath***" or ***supported by "affidavits***" as if such affirmations were necessary at the pleadings stage.

Defendants' sanitized counter-narrative asserts that nothing untoward occurred, that they did nothing wrong, that nobody was harmed, that they are immune from suit and that all claims are time-barred. Defendants even claim that there is neither subject-matter jurisdiction (constitutional standing) over the action, nor personal jurisdiction over the Calcaterra Firm. According to Defendants, the Tier 3 Plaintiffs' claims are derivative and only the Kentucky Attorney General can bring these claims.

In truth, the Complaint is filled with specific factual allegations of ***recent and continuing*** wrongful conduct involving the performance of a contract involving the Commonwealth's employee surplus pension systems governed by Kentucky law, requiring "consent to Kentucky jurisdiction" and "registration to do business in Kentucky" asserting common law and statutory claims, many of which were previously upheld by this Court in its November 30, 2018 Opinion and Order (the "Nov. 30, 2018 Order"; attached as Appendix B) in *Mayberry v. KKR & Co., LP*, Case No. 17-CI-00645 (the "Mayberry 5 Action").

Plaintiffs are Tier 3 members of KRS hired after 2014. They are beneficiaries of the KRS Trusts which hold their retirement accounts and savings, and are the sole source from which their benefits will be paid. They have constitutional standing to sue. None of their benefits are guaranteed by the Commonwealth. Their individual pension accounts and ultimate benefits depend, and vary, based on Trust investment returns and expense levels. Bad investments,

excessive expense or wasted assets injure them. Their accounts and benefits have been reduced due to the damages, unjustified expenses and waste of Trust assets complained of. They will benefit if the alleged wrongdoing is remedied and any monies are paid into the Trusts of which they are beneficiaries, and ultimately credited to the trust beneficiaries' accounts as with other incoming funds. ¶¶ 2, 40(a)–(d), 63–66. *See* Section IV.B., *infra*.

The core claim is that the sole Trustee of the KRS Trusts committed a breach of trust and that Defendants knowingly participated in or assisted the Trustee's breach.[4] That is sufficient to state a claim against Defendants without regard to whether Defendants *themselves* owed fiduciary duties to the Trust beneficiaries. Fiduciaries and non-fiduciaries are equally liable knowing participants in another's breach of trust duty. *See* Section IV.A.1., *infra*.

Over a century of precedents support Plaintiffs' ability as trust beneficiaries to directly sue and assert causes of action against third parties who knowingly assisted or conspired with a culpable Trustee, to recover damages, wasted trust assets or excessive expenses, and to obtain equitable relief for the Trusts of which they are beneficiaries is supported by over a century of precedent. Where, as here, the trustee is guilty of breach of trust, the beneficiaries own the claims against the trustee and/or third persons who participated with the trustee in the breach of trust. That is because both the trustee and the third persons have acted adversely to the beneficiaries.

[4] The Supreme Court, writing specifically about KRS, observed that "public retirement systems are actually trusts created by statute." *Ky. Emps. Ret. Sys. v. Seven Cntys. Servs*., 580 S.W.3d 530, 544 (Ky. 2019) (citing RESTATEMENT (THIRD) OF TRUSTS , §§ 4 and 10.22 (2003)). The Court further explained that "[s]ome forms of trusts that are created by statute, especially public retirement systems or pension funds … are administered as express trusts, the terms of which are either set forth in the statute or are supplied by the default rules of general trust law." *Id*. at 544 n.22. Under the "default rules of general trust law," a trust is not a separate legal entity or person. Thus, when we use the "for the trusts" formulation, it does not mean or suggest the KRS trusts are separate entities; it means simply and only that the net recovery herein is intended to go into the trusts for the benefit of the beneficiaries, not otherwise.

The Restatement rule is that "[a] third person who … has notice that the trustee is committing a breach of trust and participates therein is liable to the beneficiary for any loss caused by the breach of trust." RESTATEMENT (SECOND) OF TRUSTS § 326 (1959). Actions brought under this rule are direct (*i.e.*, owned by the beneficiaries) — not derivative (*i.e.*, owned by the trustee) — because a trustee cannot hold in trust an action against himself or his dishonest confederates. ¶¶ 31–32; *see also* Section IV.B.2., *infra*.

The sole Trustee of the KRS trusts (the KRS Board) committed breaches of trust over a period of years. It sought to cover up its conduct when the lawyers for the "Mayberry 5" discovered and got too close to the 2015–16 aspects of the scheme involving KKR-KKR Prisma, David Peden, William Cook ***and*** (***critically***) ***KRS's then-Executive Director***, ***Eager***. After weeks of behind-the-scenes communications, on June 19, 2020, the Calcaterra Firm, a small law firm, formed just a few weeks earlier, the founder of which had close personal ties to KRS's in-house counsel Hale who had caused the Trustee to reach out to Calcaterra, secretly submitted a "proposal" to conduct an "investigation" of investment activities of KRS. There were no requests for proposal ("RFP"). The minutes of the KRS Board do not reflect any discussion of such an investigation. No other firm was contacted. This was a secret Eager-Hale-Calcaterra operation.

Having devised their plan, Defendants orchestrated a public bidding process to provide for "cover." That process was rigged so that the Calcaterra Firm would get the Contract to do the investigation as agreed to by Eager, Hale, Calcaterra and others. That firm was hired, apparently without any in-person interview. The Firm proceeded to "investigate" years of complex wrongdoing apparently without ever coming to Kentucky. They never contacted the Mayberry 5 despite the fact that their counsel knew more than anyone about the alleged wrongdoing, and the evidence underlying those allegations. They never contacted any of the former KRS trustees who

exposed the wrongdoing and condemned it in no uncertain terms, but are now departed. ¶¶ 76–77, 101–109.

This Court knows what happened. The Calcaterra Firm was not independent. It did not conduct a comprehensive investigation. The Report was a "cover up." The Attorney General ("AG") got the Report, but did not use it in drafting his Amended Intervening Complaint. That complaint, like the Report, barely mentioned the events of 2015–16, the Advisory Services Agreement or Eager at all. KRS hid the Report behind bogus claims of privilege. In theory this case is the same as if Eager and Hale misappropriated Trust assets with the acquiescence of the Trustee. Only the beneficiaries can bring claims to remedy that wrong.

B. History of KRS Litigations

This case has a history. It is one of several litigations alleging fiduciary and financial wrongdoing at KRS.[5] This all started in December 2017, with the Mayberry 5 derivative action

[5] The reason for these suits is not avaricious "contingency fee lawyers" or "overly litigious" Trust Beneficiaries, as the Hedge Fund Sellers have claimed. Rather, the reason is years of illegal conduct, laced with overt conflicts of interests, and violations of Kentucky laws by KRS officials, assisted by outside third parties who pocketed hundreds of millions of dollars in "exorbitant" fees, while contributing to the near destruction of the KRS Trusts. The cases pending before Judge Wingate include:

- The original Mayberry 5 derivative and taxpayer case ("Mayberry 5 Action") now styled *Commonwealth v. KKR & Co., LP*, No. 17-CI-01348. This Court's November 30, 2018 Order (Appendix B) sustained the adequacy of the factual allegations, personal jurisdiction over third parties located in New York, California and elsewhere, and upheld validity of the legal claims in that case. When that decision was reversed on technical pleading grounds, *i.e.*, lack of constitutional standing, the AG intervened and took over the case to assert claims for the Commonwealth. That case was recently stayed by Judge Wingate pending the outcome of Defendants' lack of subject-matter jurisdiction appeal which could take years.
- The Tier 3 BoT Action seeking damages and equitable relief for the KRS Trusts. Complaint attached as Appendix C.
- *Commonwealth v. KKR LLP Inc*., No. 21-CI-00348 (the "Indemnity Action"), transferred to Judge Wingate on July 22, 2022 after Your Honor upheld long-arm

on behalf of KRS, commenced by Tier 1 KRS members. That complaint alleged, and its "Companion Memo"[6] contained, extensive evidence of a decade-plus of misconduct at KRS, including falsified actuarial assumptions, inflated assumed rates of investment return, state employee/pension system member growth and inflation *etc*. which top Commonwealth officials have stated were "***manipulated***" to hide the true extent of the financial distress of the KRS Trusts and resulted in the sale of $1.8 billion in Black Box Hedge Funds to the KRS Trusts, as part of the Culpable Trustee's "***cover up/catch up***" strategy. ¶¶ 3, 10, 27, 155.

After this Court upheld the claims asserted in the Mayberry 5 Action, the Kentucky Supreme Court reversed on a pleading technicality. It ruled the Mayberry 5 lacked "constitutional standing" because their pension benefits were guaranteed via the "Inviolable Contract." *Overstreet*

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jurisdiction over KKR and voided the fee/expense indemnity clauses in the Hedge Fund investment contracts and blocked the Hedge Fund Sellers' retaliatory "slap back" suits against KRS in a March 24, 2022 opinion.

These cases were originally before Your Honor. Motions to dismiss the Tier 3 BoT Action were fully briefed and pending decision when KKR forced Your Honor out of those cases. *See* Plaintiffs' Omnibus Opposition ("Omnibus Opp.") and Plaintiffs' Separate Opposition to KKR Lack of Jurisdiction Motion ("Separate KKR Opp.") and their Summary of Plaintiffs' Opposition to Defendants' Motions to Dismiss ("Summary Opp.") filed in the Tier 3 BoT Action and attached as Appendices D, E and F.

The cases now pending before Your Honor are:

- *Cohen v. Ky. Pub. Pension Auth.*, Case No. 21-CI-00619, and *White v. Ky. Pub. Pension Auth.*, Case No. 22-CI-00016 ("*Cohen-White* actions"), where, on August 25, 2022, Your Honor ordered public disclosure of the Calcaterra Report then being concealed by Calcaterra, Hale, Eager, and KRS with the support of the AG, and exposed the questionable procurement process, constricted investigation and cover up central to this lawsuit.

- This lawsuit, the Calcaterra BoT Action, filed September 14, 2022 a few weeks after the Opinions and Orders in *Cohen-White* Actions were issued.

[6] Plaintiffs' Companion Memorandum in Opposition to Motion to Dismiss, filed April 26, 2018 in the Mayberry 5 Action.

v. Mayberry, 603 S.W.3d 244, 253–54 & n.22 (Ky. 2020). The Supreme Court concluded that, despite allegations of "significant misconduct," and KRS's huge investment losses resulting in life-threating funding deficits, those Tier 1 KRS members had suffered "no injury in fact." It was thus "constrained" to dismiss on constitutional standing grounds. *Id*. at 263, 266. Tier 3 Trust beneficiaries were explicitly excluded from this ruling. *Id*. at 253 & n.21; *see also* ¶ 28. The Supreme Court left undisturbed all other aspects of this Court's November 30, 2018 Order.

Upon remand of the Mayberry 5 Action, the AG intervened using a complaint copied from one of the Mayberry 5's Complaints. This Court stated (¶29):

> The intervening Complaint tendered by the Attorney General mirrors the original claims of the Plaintiffs that allege extremely serious violation of fiduciary and other common law duties on the part of certain KRS Board members and advisors and the defendant hedge fund managers engaged by the Board to manage these retirement investments. If those allegations are true, thousands of public employees have had their retirement savings depleted by investments that included self-dealing, exorbitant fees, conflicts of interest, and risky non-prudent investment strategies.
>
> Under the law, the hedge fund managers and officers, directors and advisors to the Kentucky Retirement Systems, who allegedly breached their fiduciary duties to the public, must be held accountable. Any party that breached its fiduciary duties and engaged in reckless conduct, conflicts of interest or self-dealing should be held accountable under the law.
>
> * * *
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> This Court does not believe that the Kentucky Supreme Court intended its ruling in *Overstreet* to be applied so as to provide a free pass, or "get out of jail free" card, for fiduciaries who breached their duties to the public and the taxpayers.
>
> * * *
>
> … [T]he Court notes that while the Original Plaintiffs lack standing to pursue their claims … ***each iteration of their Complaint contains allegations of severe misconduct and breaches of fiduciary duties of Defendants related to management of KRS assets***. ***The Kentucky Supreme Court observed as much in Overstreet***, ***recognizing that*** "***Plaintiffs allege significant misconduct***." *Overstreet*, 603 S.W.3d at 266.
>
> ***
>
> ***Serious breaches of fiduciary duties have been alleged in this case***, ***and the Court believes that statutes***, ***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.

These allegations are repeated and expanded upon in the Tier 3 BoT Action and Calcaterra BoT Action. The Tier 3 BoT Action, now before Judge Wingate, is attempting to remedy these wrongs. ***So is this suit*, *focusing specifically on the attempted cover up of the wrongs at KRS via the corrupt Calcaterra Report***.

C. *L'Affaire* Calcaterra — This Court's Prior Rulings

After allegations of Eager's participation in the 2015–16 wrongdoing arose, and it became clear KRS Trust Beneficiaries were going to continue to pursue claims against him, Eager, with the help and assistance of the Defendants and Additional Actors, caused the Culpable Trustee to commission the Calcaterra Contract for a purported "independent" investigation of investment wrongdoing. They rigged the procurement process so as to assure selection of the Calcaterra Firm headed by a lawyer who was Hale's close friend and a fixer — one with a record for corrupting "independent" investigations who they knew could be relied upon to write a report protecting Eager and his co-conspirators. *Id.*

The Calcaterra Report was commissioned in 2020 by KRS. It was completed in 2021 and then shared with the AG for him to use. Despite repeated representations that the Report would be made public and that the AG needed the Report to draft his long-promised — and repeatedly delayed — Amended Complaint in Intervention, the Report was concealed. The AG never used it. This gambit, involving repeated misrepresentations and broken promises to the Court, delayed the litigation by months. ¶ 13.

As these events were unfolding, in May 2022, the Tier 3 Plaintiffs unsuccessfully sought

an order to preserve evidence relating to the Calcaterra Report.[7] Their suspicions – fears – were insufficient to entitle them to judicial relief. However, on August 25, 2022 after ordering production of documents *in camera*, this Court issued Opinions and Orders in *Cohen-White* Actions ***requiring*** public disclosure of the Calcaterra Report. Based on these ***still non-public documents***, this Court concluded KRS awarded the contract through a "***questionable bid solicitation process***":

- the Calcaterra Firm secretly submitted a proposal for an "investigation" on June 19, 2020, months **before** KRS issued any public RFP for the work; and
- KRS's later-issued RFP was ***virtually identical*** to the secret Calcaterra proposal. ¶¶ 14–15.

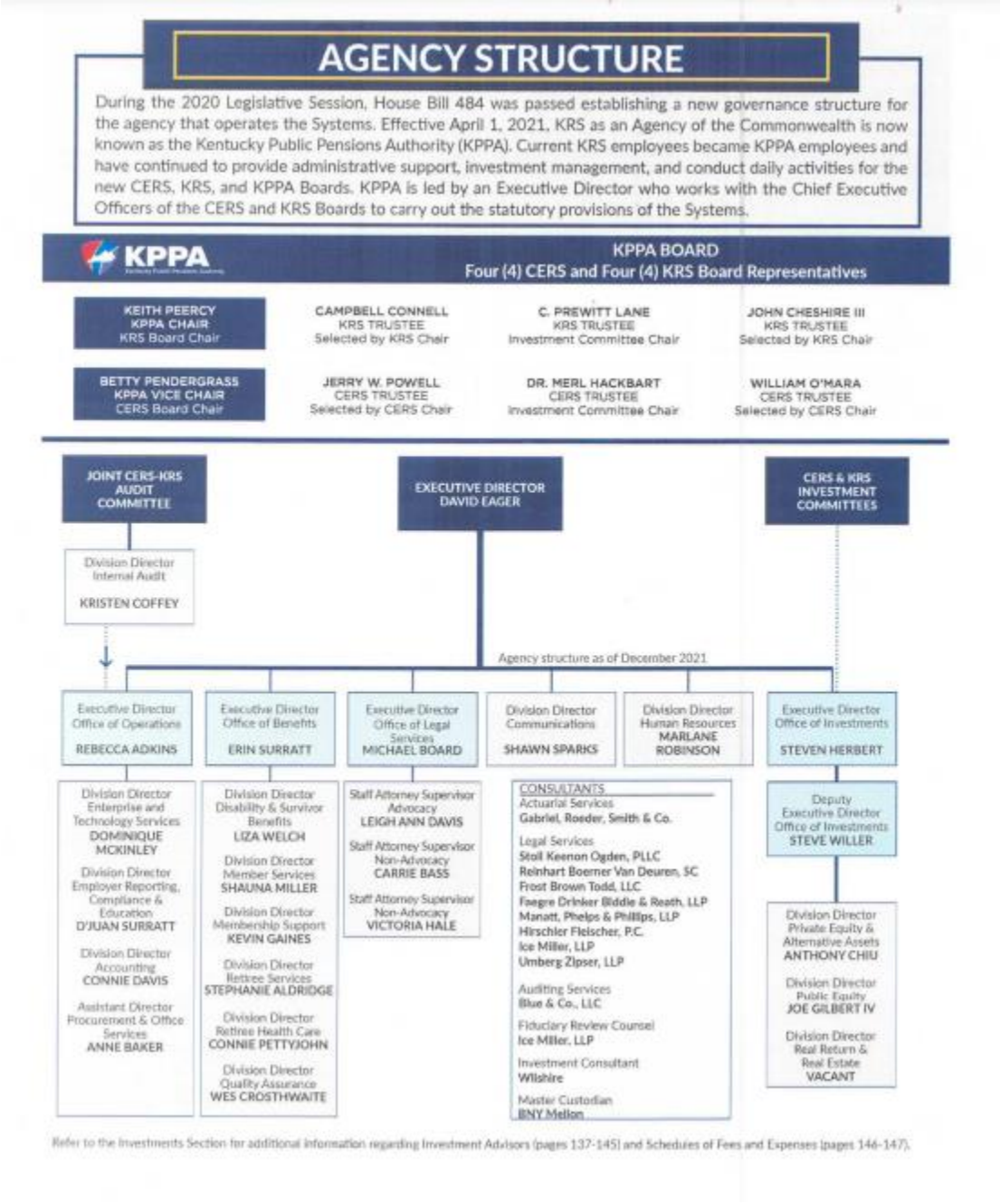
This Court also concluded that the investigation was constricted and the Calcaterra Report had been "***commissioned***" by KRS as a "***cover up***" (¶¶ 16–18):

> In short, a full review of the Calcaterra Report gives rise to questions as to whether the purpose and intent of the … Report was [to] fully expose all the relevant facts (and to determine if the KPPA and its employees made mistakes), or if the … ***Report was commissioned to cover up or minimize those mistakes in an effort to convince the*** [***AG***] ***to not pursue claims that could prove embarrassing to the current or former management of KPPA***.
>
> The Court is concerned that this reluctance to "pursue unfavorable information or legal theories" may have influenced the KPPA/KRS Investigation. Indeed, in reviewing the KPPA/KRS Investigation, ***the Court could see areas in which the report fell short of the comprehensive analysis of*** "***improper or illegal activities***" ***purportedly sought under the contract***. For example, an Advisory Services Agreement, which forms the basis for substantial, serious allegations by plaintiffs outside the Underlying Action [*i.e.*, ***the Taylor Tier 3 Plaintiffs***], is mentioned only once in the KPPA/KRS Investigation. The Advisory Services Agreement itself, any amendments, internally-referenced side agreements, and any termination notice were omitted from the exhibits. In addition, fundamental assumptions in the report

[7] *See* Tier 3 Plaintiffs' Memorandum in Support of Motion for Entry of an Order Requiring That Documents Regarding the Calcaterra Pollack "Investigation" Be Preserved and That the Calcaterra Report Be Provided to the Tier 3 Plaintiffs' Counsel, filed in the Mayberry 5 Action, on May 3, 2021, attached as Appendix G.

(*e.g.*, that certain KPPA/KRS employees report to the Executive Director [Eager] only on administrative matters) significantly narrow its focus and favor a limited investigation.

Consistent with the Court's finding, and as the chart below from KRS's 2021 Annual Report shows, everybody — including ***legal and investment — personnel report to Eager***.



The Court's concern about a "***cover up***" was because the Calcaterra Report ignored

"***substantial, serious allegations***" contained in the Tier 3 BoT Complaint, concerning the 2015-2016 KKR/KRS "Strategic Partnership" and the secret "Advisory Services Agreement" entered into by KRS and KKR/KKR Prisma in which Eager was intimately involved — first as a KRS Trustee and then as KRS CEO/ED. As set out at Tier 3 BoT ¶¶ 289–325, repeated and expanded upon in this Complaint (¶¶ 17–18, 53–54, 114–120), the thrust of these allegations is that:

- KKR's "Strategic Partnership" and the secret "Advisory Services Agreements" unlawfully allowed KKR/Prisma and its affiliates to ***self-deal with KRS trust assets*** in its role as gatekeeper to KRS's entire $1.2 billion hedge fund portfolio; and
- KKR in fact did engage in illegal self-dealing with Trust assets, with the approval of top KRS management, including Eager, benefiting KKR by millions of dollars while the KRS Trusts and Tier 3 beneficiaries were injured/damaged.

The Calcaterra Report is a waste of trust monies — assets (¶¶ 23–24, 32, 40(a)–(d), 155; Prayer ¶¶ 2–3, 6) misappropriated by insiders to protect Eager, the KRS CEO/ED, and others at the expense of the KRS Trusts and their beneficiaries. ***The Court was 100% correct about the cover up engineered by Eager***, ***Hale and Calcaterra***. ***Eager***, ***a Defendant in the Tier 3 BoT Action***, ***and identified*** "***Additional Actor***" ***in this case***, ***is deeply involved in the alleged wrongdoing and the attempted cover up***. ¶¶ 51–54, 56, 115–116, 121.

In May 2016, Eager mysteriously joined the KRS Investment Committee. In his ***very first act*** he moved for the approval of not only the $300+ million upsizing of the Daniel Boone Fund, but also hundreds of millions in additional new hedge fund investments presented by and benefitting KKR Prisma and its insiders. Days later at ***his first Board meeting*** on May 29, 2016 he moved for Board approval of these hundreds of millions of conflicted investments. Eager knew that these transactions were conflicted, favored the interests of KKR over the interests of KRS and

its Trusts and beneficiaries, were not done "solely" in the interests of KRS and its members/trust beneficiaries, and violated both KRS's Conflict of Interest Policy and Kentucky's Pension law. His participation and approval were an indispensable part of the success of the scheme and conspiracy alleged in the Tier 3 BoT Action, and the later attempted cover-up of that misconduct via the *L'Affaire* Calcaterra. *Id.*

After Eager as a Trustee had spearheaded the KKR takeover of KRS's entire hedge fund portfolio, he left the Board and became CEO/ED of KRS. Now in charge of KRS's day-to-day operations, Eager's ability to stage manage events was enhanced, and he did nothing to put a stop to the conflicted self-dealing. In fact, Eager permitted illegally inserting a KKR executive (Michael Rudzik) and other KKR officials inside KRS — ***while still on KKR's payroll*** — to "help" KRS with its investments. They took over management of KRS's entire $1.6 billion hedge fund portfolio and used KKR's fiduciary position and KRS's trust assets for their own self-dealing, in violation of Kentucky law and KRS's Conflict of Interest Policy. KRS put $300 million more into the KKR Prisma Daniel Boone Black Box (the biggest loser), resulting in at least $***585 million*** in self-interested investments benefiting KKR. These additional "investments," just like the original Black Box purchases in 2010–11, were a conflict-ridden disaster, losing some 2.3% over the next 2+ years versus a 30% gain for the S&P Total Return Index. ¶¶ 114–120. This was fraud and self-dealing of the first order in blatant violation of the KRS conflict of interest policies and the "sole interest" fiduciary standard required by KY. REV. STAT. §§ 61.650(1)(c); 61.655(1). *Id.*

Eager has been hostile to and criticized the Mayberry 5 Action (¶ 46), an action KRS stated **in a Court filing could be of "great value," and this Court said contains serious allegations of wrongdoing that should be pursued on the merits**. Eager disagrees. As his own involvement emerged, he caused KRS to withdraw its prior public strong support of the claims. And he used

his ED/CEO position to put his thumb on the scale of the Calcaterra Investigation. Despite Eager's alleged wrongdoing, apparent violations of the Procurement Code, evident conflicts of interest and attempts to hinder the vigorous prosecution of valid legal claims of potentially great value to the KRS Trusts, **the Culpable Trustee has continued to allow Eager to serve as its CEO/ED**, **and influence and dominate matters in which he is self-interested**. ¶¶ 55–56, 121.

D. Defendants' Meritless — Even Frivolous — Legal Arguments

All of Defendants' legal arguments are meritless. Some are frivolous. None justify dismissal at the pleadings stage. The controlling legal/pleading rules for the breach of fiduciary/statutory duties, aiding and abetting, conspiracy, immunity and personal jurisdiction issues were briefed in the original Mayberry 5 Action and decided in the November 30, 2018 Order. Under the straightforward legal rules applied there and applicable here, the Calcaterra BoT Complaint passes muster as to those issues. *See* Section IV., *infra*.

As to "new" issues, *i.e*., the Tier 3's constitutional standing and ability as trust beneficiaries to directly sue third parties who assist, abet or conspire with a culpable trustee, those issues were fully briefed in the Tier 3 BoT Action before Your Honor (Omnibus Opp. at 10–15, 28–58, Summary Opp. at 5–9) and under consideration when the Hedge Fund Sellers pushed you out of that case. Those briefs establish that constitutional standing of the Tier 3 Plaintiffs exists in this case as well as their ability as trust beneficiaries to state causes of action against third parties directly to recover damages and other relief payable to the Trusts. *Id.*; *see also* Section IV.B.1., *infra*.

Hale's claim of immunity is frivolous. Her intentional misconduct involves bad faith and even possible criminal violations of Kentucky's Procurement, Pension and Antitrust laws. That conduct is far beyond the kind of discretionary, good faith, negligent conduct protected by immunity. *See* Section IV.C., *infra*.

The Calcaterra Firm's personal jurisdiction defense is worse. It crosses the border of bad faith. Like New York-based KKR and Blackstone, the Calcaterra Firm contracted with KRS. Personal jurisdiction existed over those Firms and their Principals (Schwarzman, Kravis, Roberts *et al*.) even though they never "visited" Kentucky. Jurisdiction surely exists over a New York firm that entered into a $1.6 million contract[8] with the State's Public Employee Pension System ***and*** the Commonwealth, especially since the Contract includes consent to personal jurisdiction and required any out of Kentucky entity to be registered to do business in Kentucky. The Calcaterra Defendants cannot be allowed to sign this kind of million-dollar public-interest contract in Kentucky, consent to personal jurisdiction in that contract, while registering to do business in Kentucky, and then thumb their nose at Kentucky courts. *See* Nov. 30, 2018 Order at 17–19.

Defendants' limitations arguments are at best premature. They raise factual issues; and they are insufficient to bar all the claims as a matter of law based on misconduct occurring in 2020 and continuing to current. This case is about the abuse of the KRS's Trusts for Defendants' personal gain and advantage, conduct that violated a myriad of common law and statutory duties. However, because claims of innocent trust beneficiaries are involved, the applicable statute of limitations for knowing participation in breach of trust is 10 years. Omnibus Opp. at 61–77. There is no time bar. The core claim here is breach of fiduciary/trust duties by a Culpable Trustee who knowingly participated in, conspired in, and was aided and abetted by the Defendants. Because there is no express statute of limitations for breach of trust by the trustee of a public employee pension trust, the statute of limitations is 10 years. KY. REV. STAT. § 413.160.

[8] The Contract materials are attached as Appendix H. The consent to jurisdiction and registration to do business in Kentucky requirements in order to bid the contract are on pages 3–4.

Under Kentucky law, aiders and abettors are in the same position as the primary tortfeasor. *Anderson v. Pine S. Capital*, 177 F. Supp. 2d 591, 604 (W.D. Ky. 2001). *See Steelvest, Inc. v. Scansteel Serv. Ctr., Inc*., 807 S.W.2d 476, 486 (Ky. 1991); *cf. Miles Farm Supply, LLC v. Helena Chem. Co.,* 595 F.3d 663, 666 (6th Cir. 2010) (Kentucky follows § 876 of the RESTATEMENT (SECOND) OF TRUSTS, which imposes aiding and abetting liability on parties that knowingly assist in a tortfeasor's breach of fiduciary duties); *Osborn v. Griffin*, 865 F.3d 417, 447 (6th Cir. 2017).

No matter how short a time limit is applied, this case was timely filed. Plaintiffs filed this action within weeks of the issuance of the Opinions and Orders in the *Cohen-White* Actions and the release of the Report, which had been hidden for many months behind a bogus claim of privilege that was actually part of the ongoing conspiracy and cover-up. This Complaint with its specific, and incendiary, allegations of potential ***criminal misconduct*** — could not have been responsibly filed prior to these events. Not until ***this Court discovered and publicly disclosed*** the "smoking gun" secret June 19, 2020 proposal for the fixed investigation, did the starting gun for ***these specific claims against these specific Defendants go off***. This Court's Opinions and Orders in the *Cohen-White* Actions and the publication of the Report are the limitations "trigger."

Nor can Defendants hide behind the one-year limitations claim for professional legal services. KY. REV. STAT. § 413.245. That a person who knowingly participates in a breach of trust happens to be a lawyer does not immunize that defendant or change the character of the claim of the applicable limitations (or laches) analysis.[9] This case is not about legal malpractice. It does not arise from poorly performed legitimate legal services. Also, much of the alleged misconduct took place long before the Contract was awarded or any of the Calcaterra lawyers were admitted

[9] *See, e.g., Wolf v. Mitchell, Silberberg & Knupp*, 76 Cal. App. 4th 1030, 1038–39 (Cal. Ct. App. 1999).

to the Kentucky Bar, and thus before whatever they were doing could be considered legitimate professional services. No legitimate legal purpose was being served by the challenged conduct. These were not legitimate professional services.[10]

Any limitations period has also been tolled by Defendants' affirmative conduct — outside the courtroom. There the conspiracy and cover up continues. When the last overt act of an alleged conspiracy took place are fact issues that must await discovery. On September 13, 2022, without any reference to the Opinions and Orders in the *Cohen-White* Actions or this Court's findings in regard to the "questionable" procurement process and "less than comprehensive" investigation leading to a "cover up" Report, the Calcaterra Firm issued a press release[11] *which falsely assured the "retirees and beneficiaries"*[12] *of the "extreme trust placed in us" assuring them that "we prioritized thoroughness and impartiality," quoting Calcaterra, who stated that "we ensured that this comprehensive investigation be independent and free of undue influence."* ¶ 23.

When asked about the release, Calcaterra told *The Courier Journal* that the lawsuit is "***meritless and a waste of judicial resources***." "***This desperate lawsuit is pure harassment orchestrated by individuals who are unhappy with the results of my firm's thorough, independent investigation and have thus resorted to wild speculation to serve their own legal and financial interests***." Joe Sonka, *Lawsuit Alleges Bid-Rigging on Kentucky Pension System's $1.2M Investigative Contract*, COURIER JOURNAL (Sept. 20, 2022). These statements by Calcaterra to the press were lies to try to cover up that the contract procurement was fixed, the investigation

[10] Due to Eager's central role as KRS CEO/ED, the adverse domination theory applies to toll any limitations. To the extent these claims are equitable, laches requires a showing of prejudice, and has been shown. Omnibus Opp. at 61–77.

[11] The press release is attached as Appendix K.

[12] Note that Calcaterra's exculpatory assurances were not in a court filing but rather in a press release to members of the public including KRS members who are KRS Trust beneficiaries.

was not as thorough or comprehensive as required by the contract, and the Report was a cover-up.

The Antitrust claim is valid as well. It involves actors on ***both sides*** of a ***publicly-bid*** contract rigging of a procurement process to favor one bidder with special insider access who they were conspiring with to award the contract to, thus disadvantaging (if not eliminating) competent honest bidders, violating Kentucky's procurement and pension laws to protect themselves. This was a restraint on free trade, competition and/or commerce, costing the victims — the KRS Trusts and beneficiaries — $1.6 million of Trust assets. *See* Section IV.F., *infra*.

II. FACTS AS PLEADED IN THE COMPLAINT

A. Timeline of Key Events

We start with a timeline of key events (¶¶ 19, 133) in *L'Affaire* Calcaterra, to provide an overview of, and context for, the detailed allegations in the Complaint discussed below.

- **Prior to March 2019** – Calcaterra works for class action firms soliciting pension funds to be the plaintiffs in securities class action lawsuits, including the Denver Pension Fund where Hale was ***General Counsel***. Hale steers business to Calcaterra. Hale and Calcaterra became personal friends who travel and party together.

- Hale contributes to Calcaterra's political campaigns. Calcaterra attends Hale's wedding in Las Vegas.

- **March 2019** – Hale leaves Denver Pension Fund and joins KRS as an ***entry level staff attorney***, taking large pay cut to $70,000 per year.

- **November 2019** – Hale writes to Calcaterra "***Great job Regina***" – Calcaterra replies "***Miss you Lady V***."

- **May 2020** – Calcaterra Pollack LLC formed in NYC. Firm has no clients or business in Kentucky and has never before conducted an internal pension fund or corporate investigation.

- **May 15, 2020 –** Hale introduces Calcaterra to KRS.

- **June 1, 2020** – KRS and Calcaterra begin working on "Mayberry Litigation" - "telephone only communications."

- **June 4, 2020** – KRS/Calcaterra phone conversation "as discussed we will provide a proposal."

- **June 12, 2020** – Hale sends Calcaterra Kentucky Bar Association admission information.

- **June 2020** – Hale "***likes***" New York Law Journal article on new Calcaterra Firm.

- **June 19, 2020** – Calcaterra **secretly submits proposal** for "independent" investigation of allegations of KRS investment wrongdoing to Hale, Eager and Additional Actors at KRS.

- **June 2020** – Calcaterra and Teres register for Kentucky Bar Exam and Bar Admission.

- **August 20, 2020** – Calcaterra Firm ***registers to do business*** in Kentucky.

- **August 24, 2020** – KRS/Commonwealth RFP issued for "independent investigation" into past investment wrongdoing. It mirrors the Calcaterra Firm's secret June suggestion. Proposals due in three weeks -- September 14, 2020.

- **August 2020** – Hale sends "***congratulations***" to Calcaterra — "***You deserve this honor***."

- **September 10, 2020** – Calcaterra Firm submits proposal for investigation, ***four days early***.

- **September 14, 2020** – RFP period closes. ***No other law firm submits a proposal***.

- **October 2020** – Hale "***likes***" a Calcaterra post.

- **November 2020** – KRS awards Calcaterra Firm the Contract.

- **December 2020** – Commonwealth approves award of Calcaterra Contract - Hale sends Calcaterra "***congratulations***."

- **Early 2021** – ***Eager preserves*** "***in house***" ***General Counsel position from elimination and promotes Hale to in house General Counsel with 84% raise to*** $***119,000*** as reward for her participation in the conspiracy.

- **February 2021** – Eager/Hale and Additional Actors began to review and rewrite drafts of Calcaterra Report.

- **March 2021** – Hale "***likes***" posting of article/interview about Calcaterra.

- **March-June 2021** – Calcaterra/Hale/Eager and Additional Actors review drafts of Calcaterra Report. Calcaterra attends April 2, 2021 KRS Board meeting by Zoom. Final Report delivered to AG to use in drafting the Amended Complaint in Intervention. Report concealed from the public. Tier 3 BoT case delayed. AG does not use Report.

B. Detailed Allegations of the Complaint

Here are the details of what the Complaint actually alleges. Calcaterra — a New York political operator — was a known "fixer." Before getting the KRS investigation contract, Calcaterra's only prior investigatory experience was New York's 2013 Moreland Commission to Investigate Public Corruption, where Calcaterra was Executive Director, but acted as lawyer/investigator/evaluator. That investigation was terminated prematurely and "attracted heavy criticism" amid charges of political influence and cronyism. Federal prosecutors seized the "investigations" files. ***Both*** **THE NEW YORK TIMES** ("**NYT**") ***and*** **THE NEW YORKER** ***detailed this scandal***.[13] ¶¶ 122–124. According to public reports, Calcaterra (¶ 126):

- interfered with and obstructed the investigation to protect a subject of the investigation;
- improperly communicated and cooperated with the subject while the investigation was ongoing;
- blocked subpoenas the subject objected to;
- edited draft reports to eliminate material the subject objected to;
- vetoed an independent author for the "preliminary" report, arranging for an employee of the subject of the investigation to draft it; and
- altered the report by deleting the language objected to by the subject.

[13] Other media outlets and public-corruption watchdog groups also published investigative stories critical of the Moreland Commission and, in particular, Calcaterra, largely focused on charges that ***improper influence deprived the Commission of real independence and resulted in a whitewash***. One such story, subtitled "*Regina Calcaterra's Dubious Past in Politics Made Her a Questionable Choice to Lead Cuomo's Doomed Ethics Commission*," reported that "in her role serving on that first Moreland Commission, Calcaterra showed that she could do what it would take to ensure a good outcome for the governor's office" and that (according to sources connected to the erstwhile ethics commission) "her primary motivation was to protect the governor and to display her loyalty to the executive branch." ***Calcaterra's main qualification for leading an ethics investigation — installed by Cuomo but nevertheless meant to act entirely independent of him — was that she had proved to be Cuomo's loyal subject while leading a previous investigation***, ***taking orders from the governor's office, and providing information to it***. ¶ 127.

The NYT investigation[14] concluded that Calcaterra had placed her thumb on the scales in service of the governor who had appointed her. Calcaterra worked to ensure that neither the investigation nor its preliminary report (no final report was ever issued) contained negative information about then-Governor Cuomo or his allies. Calcaterra's alleged misconduct in helping quash the Moreland investigation was reexamined and affirmed by *The New Yorker*. *See* Ronan Farrow, *Andrew Cuomo's War Against a Federal Prosecutor*, THE NEW YORKER (Aug. 10, 2021). ¶¶ 123–125.

Calcaterra had also been repeatedly sued by the New York Board of Elections for violations of campaign-finance laws, *i.e.*, failing to file required financial disclosures. She was disqualified from running for public office for not being truthful regarding her residency. And she has long been associated with dubious pension fund "pay-to-play" activities and key players — some of whom faced criminal investigations. ¶¶ 5, 128.

The facts concerning the serious criticisms leveled as to Calcaterra's performance and loyalties in connection with the Moreland Commission investigation and her other New York misconduct were known to Eager, Hale, the Additional Actors and KRS. ¶¶ 6, 9, 130. Despite Calcaterra's "checkered past" they corruptly and illegally arranged for the unqualified and conflicted Calcaterra Firm to be awarded the contract.

The RFP and Contract contained the following provisions (¶ 135):

- The Contract is with the Commonwealth not just KPPA/KRS;
- The Solicitation required a ***"qualified***" law firm be hired;

[14] The NYT conducted a three-month examination according to the NYT Article, where investigative journalists "examin[ed] … hundreds of emails, subpoenas and internal documents and interview[ed] … more than three dozen commission members, employees, legislative staff members and other officials. Few of those interviewed agreed to be quoted by name for fear of antagonizing the governor or his aides." ¶ 123.

- Prior experience with public pension plans and prior "***significant investigation***" experience were ***the two most important factors to be "scored" to "evaluate'" any proposed law firm***;

- A current resumé and extensive disclosures of both types of past activities were required — including a "***detailed narrative" of past experience and any "grievances" in connection therewith***;

- Non-lawyer Cassandra Weiss at KRS was mandated to be the "***sole point" of contact during the procurement process. Any law firm bidding on the work "shall not communicate with any other Commonwealth staff concerning [the] RFP"***; and

- Bidders were forbidden to disclose any portion of the proposed work prior to the contract award.

Defendants violated these prohibitions. Hale and Calcaterra were in contact throughout the procurement process. ¶¶ 19, 133. Calcaterra made forbidden disclosures — touting this new important "feather in her cap," ***even though her firm had not yet been awarded any contract***. In September 2020, while the KRS solicitation process was ***still open***, in a submission seeking work from Nassau County, Calcaterra was asked to:

> "Provide names and addresses for no fewer than three references for whom the Proposer ***has provided similar services*** or who are ***qualified to evaluate the Proposer's capability to perform this work***."

Ms. Calcaterra's answer included:

> Kentucky Retirement System
> Vicky Hale, Counsel
> 1260 Louisville Rd.
> Frankfort, KY US
> (502) 696-8800
> Victoria.hale@kyret.gov

The Calcaterra Firm knew it was going to get the KRS contract. **Hale was listed as a "reference" who was "qualified" to evaluate Calcaterra, when Hale was not identified in the KRS Solicitation**. ¶¶ 138–139.

Calcaterra and Hale had known each other for years, taken personal trips and partied together. They met when Hale was the General Counsel at the Denver Pension Fund. Calcaterra was trying to get pension funds to be plaintiffs for class action lawyers. Hale helped her get business. Here is a picture of Calcaterra and Hale partying together at a rock concert in Las Vegas (¶ 7):[15]

By 2019, Calcaterra enjoyed a long-time personal relationship with Hale, now a brand-new junior member of KRS's legal staff. Hale had recently been hired by Eager as an entry level lawyer. She worked under him and did his bidding. Hale needed a job as she gave up being General Counsel at the Denver Fund to accept an entry-level job at KRS at a substantial pay cut.[16]

[15] Hale contributed to Calcaterra's failed political campaigns. Calcaterra attended Hale's Las Vegas wedding. What she paid for is unknown although the rock concert tickets appear to have cost about $2,200. Discovery will provide the details of the financial transactions and exchanges between these two.

[16] The circumstances of Hale's departure from the top legal position at the Denver Fund are unclear but suspicious. Her departure followed disclosure of a multi-million-dollar scandal at that fund involving events that she was involved in as the General Counsel including an embarrassing lawsuit exposing fund misconduct. *Denver Health Retirees Ordered to Report $11 Million in Pension Benefits*, CBS COLORADO (May 4, 2020); Joshua Sharf, *Sharfe: Denver's*

She was loyal to Eager who hired her. She wanted to please him, since he would control her compensation and advancement. Hired as a entry-level attorney in 2019 at $70,000 per year, Hale was quickly promoted by Eager to be General Counsel at $119,000 per year — ***an 84% pay increase as a reward for her participation in the wrongdoing***. ¶¶ 9, 49, 131, 133.

Hale, Eager, the Calcaterra Firm and Additional Actors fixed the procurement process to assure the Calcaterra Firm got the contract, knowing it would do their bidding. The Calcaterra Firm was brand new. It had just been formed in New York[17] ***just a few weeks before it secretly submitted a proposal for the investigation to KRS.*** Calcaterra needed business. The Firm did not have a real physical office in a midtown Manhattan office tower as it proclaimed. Getting hired for a high-profile investigation was a huge "get" — especially since the Firm was brand-new and neither the Firm nor its principals had ever done an investigation into pension-fund investment activities, or any "internal" corporate investigation for that matter.[18] ¶ 8.

Public Pension Plan Still Has Problems, COMPLETE COLORADO (Sept. 22, 2021); *Albert v. Retirement Board of the Denver Employee Retirement Plan*, No. 2021-CV-30658 (Colo. Dist. Ct. City & Cnty. Denver) (filed Feb. 23, 2021); ¶ 11. In any event, she left a top-level, high-paying position in Denver for an entry-level, much lower paying job at KRS. Discovery will provide the details.

[17] It appears the Calcaterra Firm was not only a brand-new entity, but hardly even existed as a functioning "law firm" with a physical presence. It appears it did not have a real physical office in NYC on the 9th floor of 1140 Avenue of the Americas/Sixth Avenue as claimed, but rather operated virtually. *See* https://www.matchoffice.com/us/lease/virtual-office/new-york-midtown-west-ny/avenue-of-the-americas-116467 ("Verified lease $95) ("virtual services give benefits of a world class office location — premium address — without cost or commitment"). When service of process was attempted on the Calcaterra Firm the process server was told "no firm of that name was in the building registry" and there was no outside physical access to the 9th Floor where the Firm claimed it had an office. Thus, no service. It appears the Firm's midtown Manhattan office is nothing more than a mail drop, a "pretend" office. Discovery will provide the details.

[18] The choice of a tiny ***New York*** firm seems strange to conduct an independent investigation of investment wrongdoing at a Kentucky-located pension fund, especially where the top deep-pocket litigation targets are powerful ***New York*** hedge fund sellers and their principals, *e.g.,* Blackstone, Schwarzman, KKR, Kravis. Their influence and power among the New York elite is legendary. Schwarzman and Blackstone were contributors to an organization in which

Calcaterra's past was riddled with allegations of misconduct. Yet KRS — the Culpable Trustee — awarded her new firm a purported "independent" investigation contract. It was not in spite of her background that Calcaterra was hired ***but because of it, and of her long association and close personal friendship with Hale and the conspiracy pursued by these actors***. ¶¶ 9, 130.

Calcaterra, Hale, Eager and Additional Actors put the plan together and executed it. Before any publicity concerning any possible RFP or investigation, and within days of the formation of this new law firm, secret communications between Hale and KRS officials began. ***Calcaterra secretly submitted a proposal on June 19***, ***2020 to Hale and Eager for the investigation to be proposed so they could agree on how to go forward***. They decided to go forward with a public procurement process to provide "cover." They agreed that KRS would issue an RFP for an "independent investigation" of investment improprieties at KRS which the Calcaterra Firm would get, with its "inside track" giving it improper preference and advantage. ¶¶ 12, 143.

The RFP was not issued until August 24, 2020. ¶¶ 10, 19, 133, 141. ***The Calcaterra Firm had no clients or business prospects in Kentucky***. Nevertheless, the Calcaterra Firm registered with the Secretary of State as a "foreign limited partnership" to conduct business in Kentucky on August 20, 2020 — ***four days before the Solicitation for the Contract was issued.*** The timing of the Calcaterra Firm's business registration was key to getting the contract because proof of registration to do business in Kentucky is a condition of bidding for the Contract (Appendix H at 3–4), ***which had not yet been put out for bid, but which Calcaterra knew was coming.*** Calcaterra and Teres also registered for the Kentucky Bar between May and July 2020,

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Calcaterra served on its Board of Directors, the Children's Council. Newsletter, *Children First*, NEW YORK SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN (Winter 2015). Calcaterra stressed her fundraising powers as part of her success, telling how she helped raise more money for an event than her organization ever raised in its history. ¶ 130 n.20.

because the plan envisioned more KRS legal business going forward.

The formal RFP for the Contract was issued on August 24, 2020 with a "close" date of September 14, 2020 — just a three-week period to submit a bid for a complex investigation covering over 10 years of misconduct involving extensive lawsuits, millions of documents and many third parties. This would require substantial work, research, and economic evaluation by any prospective bidder. These are tasks that could not reasonably be done in that timeframe. By contrast, Calcaterra, Eager and Hale had been secretly scheming about these matters for months. This gave the Calcaterra Firm an unfair inside advantage — fixing the process. Other qualified, honest bidders would be disadvantaged and in practical effect excluded — eliminating competition and restraining trade. ***Tipped off and given a head start***, ***the Calcaterra Firm's proposal was submitted early on September 10***, ***2020***. ***There were no other bidders***. ¶ 12.

In addition to the "questionable" procurement process, the "investigation" was improperly constricted. Eager — who was personally implicated in the KKR/Prisma 2015–2016 self-dealing and related wrongdoing first as a trustee and then as KRS's CEO/ED — was actively and improperly involved in the "investigation" and actual writing/preparation of the Calcaterra Report. ¶ 23.

- The investigation's efforts to discover the long-concealed and obscene fees charged by the hedge funds are facially inadequate because they ignore the fees charged by the sub-funds of the parent "Black Box" hedge funds, *i.e.*, the "Black Boxes" themselves. Everybody knows these sub-fund fees were very large and likely larger than fees charged by the top-level funds. Thus, the Report understates the actual fees paid to the Hedge Funds — likely by 100%. ***Our ongoing investigation seems to show the total fees were $300+-million while the net returns were just $85 million***. ***This seems***

unbelievable but appears to be the case. ***No wonder the new***, ***honest***, ***and now long-gone Board Chair***, ***who came in 2016 and put an end to this corrupt***, ***conflicted misadventure and fired involved staff***, ***called the Hedge Fund fees*** "***exorbitant***." *See* Tier 3 Plaintiffs' Statement of Interest in Defendants' Motions Concerning Calcaterra Report, submitted in the Mayberry 5 Action now captioned *Commonwealth v. KKR & Co., LP*, No. 17-CI-01348, on October 27, 2022, at 18–20, attached as Appendix I.

- The Calcaterra Firm ***never contacted the people who were most knowledgeable about the alleged wrongdoing*** — the people who uncovered it, investigated it and pleaded it in the first place, which exposed "significant misconduct," and this Court said alleged "breaches of fiduciary obligations which depleted the Trust beneficiaries retirement savings by investments that included self-dealing, exorbitant fees, conflicts of interest and risky non-prudent investment strategies," the hedge fund managers and officers and directors and advisers must be held accountable under the law and that those factual allegations "***should be adjudicated on the merits***."
- The investigators never contacted the new KRS Trustees who came in 2016 and with the help of knowledgeable, experienced, and financially sophisticated state officials did a "deep dive" into what had occurred. They condemned the wrongdoing they found in no uncertain terms and terminated the hedge fund involvement.
- ***None*** of the information obtained by the Calcaterra Firm during the so-called investigation was under oath. ***The Firm had no subpoena power***. Many knowledgeable parties refused to speak with the "investigators." What the Firm got from third parties was only what third parties would ***voluntarily*** provide them. And

any information they got from third parties that is in the Report is ***information third parties consented to be placed in the Report***.

- The Report admits that there were several instances of suspected payoffs or kickbacks to KRS insiders or others as part of the conflicted investments in 2010–11 and 2015–16, but absent subpoena power they were powerless to pursue these matters because of the lack of court compulsion.
- In addition to covering up the true amount of the fees and not being able to pursue suspected payoffs and kickbacks, the Report is riddled with substantive errors. For instance, the Report completely ignores documentary evidence that was available of the corrupt influence of Buchan/PAAMCO on Tosh (KRS's outgoing Chief Investment Officer ("CIO")) fired for his connection to the placement agent "kickback" scandal and the new KRS incoming CIO Carlson that led to the original $400 million investment in PAAMCO's Hedge Fund as part of the $1.5 billion Black Box plunge.
- Despite extolling the Firm's experience and qualifications, the Calcaterra Firm did not have adequately trained and experienced personnel to do this work. ***The Firm used eight part-time contract attorneys***, ***none of whom who had any known experience in internal corporate or pension fund investigations***.

Defendants violated not only their common and trust law duties and Kentucky's pension law, but violated other legal obligations as well *i.e.*, Kentucky Procurement Code. Ky. Rev. Stat. § 45A.0010 ("***Purposes/Policies***"); § 45A.015 ("***Obligation of Good Faith***"); § 45A.340 ("***Conflicts of Interest***"); § 45A.455 ("***Conflict of Interest – Use of Confidential Information***"); and § 45A.450 which states "public employment is ***a public trust*** … ***employees must discharge their duties and responsibilities fairly and impartially*** [***and***] ***maintain a standard of conduct that***

will inspire public confidence in the integrity of government of all local public agencies by the following actions (¶¶ 21–26):

- Eager, Hale and other actors knowingly used ***confidential*** KRS information for their actual or anticipated personal gain of themselves and ***other persons***, ***including the Calcaterra Firm***. Their actions concerning the award of and administration and performance of the Calcaterra Contract was neither honest nor in good faith.
- Hale and Eager were interested in the Calcaterra Contract. They represented and advanced the Calcaterra Firm's interests in the fixed/rigged bidding process. They and others also directly or indirectly received value and/or benefit in so acting, *i.e.*, ***promotions***, ***salary increases and a cover up of wrongful conduct exposing them to personal liability***. The Calcaterra Contract is and was void. ¶ 22.
- Defendants' conduct restrained trade and open and fair competition resulting in unfair and inequitable treatment of (in fact the exclusion of) other qualified honest persons who could have bid on the contract, and performed it properly and in good faith instead of wasting $1.6 million in KRS trust funds while undercutting public confidence in, and the integrity and quality of, Kentucky's procurement system.
- Defendants did not discharge their duties honestly, fairly and impartially or maintain a standard of conduct that would inspire public confidence and the integrity of government procurement. They acted to advance their own personal interests, violating reasonable commercial standards of fair dealing, and violating the public trust.

Under KY. REV. STAT. § 45A.990 ***"Penalties***," the actions of Defendants and the Additional Actors who assisted and/or conspired with them was criminal *i.e.*, Class A and B misdemeanors, and a Class C felony, and require Hale and Eager to be fired and forfeit any and all

"compensation" they received while employed by KRS and the Calcaterra Firm, and to forfeit any fees or expenses received from KRS, in addition to their liabilities for other damages alleged. ¶ 26. Under KY. REV. STAT. § 446.070 ***any person injured by violation of any statute may seek damages from the offender regardless of criminal penalties and other remedies***.[19]

Hale and the Calcaterra Firm helped to draft, write, review, and approve the pleadings and participated in the hearings before this Court in the Tier 3 BoT Action and *Cohen* and *White* Actions, ***where they made misrepresentations and concealed the truth***. They knew that the Calcaterra procurement violated Kentucky law, the investigation and drafting of the Report involved Eager, and the process was being orchestrated as a cover-up. Yet they made arguments

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[19] KRS § 466.070 creates a private right of action for the violation of any statute so long as the plaintiff belongs to the class intended to be protected by the statute. *State Farm Mut. Auto. Ins. Co. v. Reeder*, 763 S.W.2d 116, 117–18 (Ky. 1988) (discussing history of and circumstances under which KRS § 446.070 provides a private right of action where one might not otherwise exist). *Ezell v. Christian Cnty. Ky*., 245 F.3d 853 (6th Cir. 2001).

KRS § 446.070 has been interpreted by Kentucky courts to provide a civil remedy for violation of certain other Commonwealth statutory provisions, including KRS § 304.12-230, which themselves include no specific remedy for statutory breaches, so long as the person seeking the remedy is one for whose protection the statute was passed. *Hackney v. Fordson Coal Co*., 19 S.W.2d 989 (Ky. Ct. App. 1929).

Generally, "civil remedies for violations of state criminal statutes are … available in Kentucky through … [KRS] 446.070 …" *Graham v. City of Hopkinsville*, 2013 WL 2120847, at *11 (W.D. Ky. May 15, 2013). That statute provides that "[a] person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation." KRS § 446.070. The Kentucky Supreme Court has interpreted that statute as providing "a right of action 'only to persons suffering an injury as a direct and proximate result [of a violation]; and then only for such damages as they may actually sustain.'" *Graham*, 2013 WL 2120847, at *11 (alteration in original) (*quoting Stringer v. Wal-Mart Stores, Inc*., 151 S.W.3d 781, 800 (Ky. 2004)).

[KRS § 446.070] … has been part of the statutory law of Kentucky for at least 88 years … There is no reason why it should not be applied to third party claims. It creates a private right of action for the violation of any statute so long as the plaintiff belongs to the class intended to be protected by the statute. *State Farm*, 763 S.W.2d at 118. The court also noted that the act, which was designed to prevent unfair practices and fraud, should be "liberally construed so as to effectuate its purpose. *Id*. (citing KRS § 446.080 and *De Hart v. Gray*, 245 S.W.2d 434 (Ky. Ct. App. 1952)).

and representations to this Court to try to keep the Report secret, knowing its disclosure would expose the "***questionable***" procurement process, the "***inadequacy***" of the investigation and its "***cover up***" nature, meant to further the conspiracy. The conduct of lawyers Hale, the Calcaterra Firm and the Additional Actors who were lawyers involved in those litigations violated Kentucky Rules of Professional Conduct 3.130 (1.2(d)) (assisting client in criminal or fraudulent conduct), and 3.130(3.3) (duty of candor toward the Tribunal) and their duty to report observed misconduct to the Kentucky Bar Association as required by 3.130(8.3) (reporting professional misconduct).[20] ¶¶ 49–50.

This Complaint caps a decade-long, conflict-laden course of misconduct by the Culpable Trustee and its assistors, some inside the Trusts and some outside, all highly paid or pocketed huge fees. The conflicts in the original 2010–11 sale of very high risk and obscenely expensive Black Box Hedge Funds (¶¶ 93–94), continuing conflicts of interest in 2015–16 Strategic Partnership/Advisory Services Agreements (¶¶ 114–119) and more conflicts in the 2020–22 Calcaterra Report cover-up will support huge verdicts — including punitive damages — payable to the KRS Trusts these Defendants betrayed and plundered, benefiting the trust beneficiaries including the Tier 3 Plaintiffs.

III. LEGAL STANDARD

"All pleadings shall be so construed as to do substantial justice." CR 8.06. As the Kentucky Supreme Court reaffirmed in *Russell v. Johnson & Johnson, Inc*., courts "no longer approach pleadings searching for a flaw, a technicality upon which to strike down a claim or defense, as was formerly the case at common law." 610 S.W.3d 233, 241 (Ky. 2020) (quoting *Smith v. Isaacs*, 777 S.W.2d 912, 915 (Ky. 1989)). When reviewing a complaint to determine

[20] These provisions are attached as Appendix J.

whether it states a cause of action, it "should be liberally construed." *Id*. (quoting *Morgan v. O'Neil*, 652 S.W.2d 83, 85 (Ky. 1983)). Under Kentucky's "liberal pleading standard," CR 8.01(1)'s "short and plain statement" is satisfied even if "a complaint [is] 'couched in general and conclusory terms.'"[21] *Id*. (quoting *KentuckyOne Health, Inc. v. Reid*, 522 S.W.3d 193, 197 (Ky. 2017)). Under Kentucky law, a plaintiff asserting breach-of-fiduciary-duty claims is required to plead only four basic elements: "(1) the existence of a fiduciary duty, (2) the breach of that duty, (3) injury, and (4) causation." *Baptist Physicians Lexington, Inc. v. New Lexington Clinic, P.S.C*., 436 S.W.3d 189, 193 (Ky. 2013).

Even though the Defendants' misconduct may give rise to potential criminal liability,[22] this breach-of-trust case sounds in negligence and not fraud.[23] Allegations of breaching trust or fiduciary duties are not "fraud" allegations for CR 9 pleading purposes. *See Pixler v. Huff*, 2012 WL 310949, at **8–9, 11 (W.D. Ky. July 30, 2012); *see also Shirk v. Fifth Third Bancorp*, 2008 WL 4449024, at *7 (S.D. Ohio Sept. 26, 2008) ("Courts have found that the heightened pleading

[21] While federal courts impose a heightened "plausibility" pleading standard, that is not the case in Kentucky. Kentucky follows a liberal construction rule for pleadings. *See Grand Aerie Fraternal Order of Eagles v. Carneyhan*, 169 S.W.3d 840, 844 (Ky. 2005). "Notably, unlike the federal courts, Kentucky still lives with a notice pleading regime." *In re Gen. Motors LLC Ignition Switch Litig*., 2015 WL 3776385, at *2 (S.D.N.Y. June 17, 2015)); *see also Combs v. ICG Hazard, LLC,* 934 F. Supp. 2d 915, 923 (E.D. Ky. 2013) ("Kentucky pleading rules apply, and Defendants' reliance on [the heightened federal pleading standard] … is therefore misplaced."). In Kentucky's notice pleading regime — unlike federal court — "much leniency should be shown in construing whether a complaint states a cause of action." *Smith*, 777 S.W.2d at 915.

[22] All are presumed innocent until proven guilty. *See Taylor v. Kentucky*, 436 U.S. 478, 479 (1978) ("'presumption of innocence … is a basic component of a fair trial under our system of criminal justice'").

[23] And even where "particularity of pleading" is required for fraud allegations under CR 9, "malice, intent [and] knowledge" may nevertheless be pleaded generally. But even were Rule 9 to apply (it does not), compliance with the particularity required by CR 9.02 merely requires that the claimant set forth facts with sufficient particularity to apprise the defendant fairly of the charges against him or her. *See Scott v. Farmers State Bank*, 410 S.W.2d 717, 722 (Ky. 1966).

standard of [Rule] 9(b) generally does not apply to claims based on a breach of fiduciary duty under ERISA," which governs pension plans related to private employment.). Here the Complaint is very detailed and would satisfy any "particularity of pleading" requirement.

IV. SUMMARY OF ARGUMENTS

While this case is newly filed, it ties to both the Mayberry 5 and Tier 3 BoT Actions as it alleges a continuation of and extension of the core wrongdoing, aiding and abetting, conspiracy and cover up alleged in those actions. Alternatively, it also pleads narrower conspiracy and aiding and abetting claims focused on the fixed procurement, constricted investigation and cover up Report. But in any and all events, regardless of the length and scope of the conspiracy as it proves out, this action raises similar legal issues as those two cases, and because ***knowing participation*** and assistance of the Culpable Trustee's wrongdoing are pleaded. Thus, no independent fiduciary or other duties of the Defendants is necessary for liability – although the existence and breach of those trust/fiduciary duties is pleaded.

Defendants offer up a hodge podge of legal arguments, many of which were previously decided by or fully briefed before this Court. This Court's November 30, 2018 Order denied the motions to dismiss and upheld the viability of the conspiracy/aiding-and-abetting claims and the direct breach-of-fiduciary-duty allegation theories and the adequacy of the factual allegations (now expanded) to support them, including those made as to several of KRS's officers and its outside "fiduciary counsel" Ice Miller as well. *Id*. at 19–20, 26–29. Upheld also were (1) the detailed personal jurisdiction allegations as to the New York Hedge Fund Sellers and the individual liability of their principals based on allegations of their control of that firm and involvement in and personal profiting from the wrongdoing just ***as with the Calcaterra Firm***; (2) the adequacy of the allegations to overcome any claimed immunity of Trust officials/employees who, like Hale here, were sued there (*Id.* at 12–15); and (3) the punitive damages allegations as to all Defendants. *Id.*

at 32. Plaintiffs have plowed no new ground here in pleading those claims, here as a direct action by Trust beneficiaries.

Because this action, like the Tier 3 BoT Action is brought by ***Tier 3 KRS members who are trust beneficiaries,*** the same constitutional standing issue is present ***in both cases.*** So is the issue of their ability to assert direct causes of action against third parties to get damages paid to the Trusts, recover wasted Trust assets and obtain equitable relief. Because these issues have already been fully-briefed in the Tier 3 BoT case when the motions to dismiss that case were pending before Your Honor, none of these issues should be unfamiliar to this Court. There is no good reason to re-brief these twice-briefed and once before-decided issues, and respectfully Plaintiffs decline to do so. As to those issues we rely on the November 30, 2018 Order, Plaintiffs' prior briefing on the motions to dismiss the Mayberry 5 Complaint and their Omnibus Opposition and Summary KKR Opposition in the Tier 3 BoT Action.

Nevertheless, for ease of reference we briefly address these issues below, incorporating by reference the Omnibus and Summary Oppos., which detailed that constitutional standing exists for the Tier 3 Plaintiffs, who as trust beneficiaries are entitled to directly assert causes of action against third parties who conspired with or knowingly assisted the Culpable Trustee in breaching its duties to recover any damages to, or wasted asserts of the Trusts.

V. ARGUMENT

A. Defendants Are Liable for Knowingly Participating in, Conspiring and Aiding and Abetting the Culpable Trustee's Violations of Its Fiduciary Duties, as well as Duties of Their Own

1. Defendants Knowingly Participated in the Trustee's Breaches of Its Duties

The issue of how and when fiduciary duties can arise under Kentucky laws was set forth in the November 30, 2018 Order at 21–27. It was also briefed in the Tier 3 BoT case. *See* Omnibus Opp. at 4, 78. While Defendants who are officers, employees or agents of KRS owed and violated

their own fiduciary, trust and statutory duties to the KRS Trusts and their beneficiaries, ***the existence of those separate duties is not necessary for liability as Defendants knowingly conspired to advance***, ***and aided and abetted the Culpable Trustee's breaches of its fiduciary duties***. That knowing participation, standing alone, creates liability.[24]

The core claim here is *knowing participation in a trustee's breach of trust*. Suits were filed, events evolved and began to close in on Eager. The Culpable Trustee, through Eager and Hale, sought out and hired Calcaterra — Hale's close friend and a known "fixer" — to help cover up the wrongdoing so Eager would be able to obstruct or even take control of the hedge fund litigation, and steer it away from his own personal involvement.

The Calcaterra Firm was in essence hired to drive the getaway car. They argue that the only thing they did was *drive*, which (they say) is perfectly legal and harmless. We say the *getaway*, is a key part of the *robbery*, not just an isolated random incident – like jumping in a taxi.[25] The getaway driver chooses to connect as an accessory to the wrongdoing, just as Defendants here chose to participate themselves to the Culpable Trustee's wrongdoing *i.e. knowing participation*. That is the context in which Defendants' liability and the constitutional standing of victims of their

[24] Where a conspiracy is charged, "These offenses may take place in one or more locations, multiple persons may enter and leave the conspiracy at various times, and the agreement may continue over a long period of time, all without becoming more than one agreement or conspiracy. *Braverman v. United States*, 317 U.S. 49, 53 (1942). In other words, those who help cover up a conspiracy become part of it, extending the statute of limitations and becoming subject to joint and several liability. *See*, *e.g*., *United States v. Sophie*, 900 F.2d 1064 (7th Cir. 1990) (discussing the elements of conspiracy); *United States v. Manotas-Mejia*, 824 F.2d 360 (5th Cir. 1987) (same).

[25] In criminal law, the getaway driver is culpable as an "accessory after the fact," which generally includes a person who "assists the [primary] offender in order to hinder or prevent his apprehension, trial or punishment." 18 U.S.C. § 3. The basis for civil liability in a "knowing participation" case is similar: "Culpable participation in another actor's wrongful conduct is an independent basis for liability, that of an accessory." Deborah A. DeMott, *Accessory Disloyalty: Comparative Perspectives on Substantial Assistance to Fiduciary Breach*, EQUITY, TRUSTS AND COMMERCE, at 1 (Hart Publ'g 2017).

misconduct should be analyzed.

"Knowing participation" is an intentional tort. "Like other intentional torts, culpable participation requires a volitional act. … [W]e have a right 'good against the world' not to be the subject of another's action that constitutes an intentional tort."[26] Put another way, a "trust beneficiary has an equitable property right that is enforceable against 'every person in the world' because 'every person in the world' is obligated not to collude with the trustee in a breach of trust."[27] Defendants breached that duty, which is separate from and does not depend on any other fiduciary duty they themselves may have had.

No one is allowed to violate Kentucky's statutes and conspire, or aid and abet, a Trustee's breach — or to cover up such a breach by a public pension fund trustee — while putting millions of dollars of fees in their own pockets. Any person who does so is liable in the same manner as the fiduciary. *See Steelvest*, 807 S.W.2d at 485; *see also Abbott v. Chesley*, 413 S.W.3d 589, 602–05 (2013); *Osborn*, 865 F.3d at 440 ("Kentucky law places persons and entities that aid and abet a tort in the same position of the primary tortfeasor"). Such an actor is subject to the same statutes of limitations (and tolling doctrines) as govern the core breach of trust/fiduciary claim.[28]

2. In Any Event, Defendants Owe Statutory and Common Law Trust Fiduciary Duties

The claim that the in-house general counsel of KRS and lawyers retained by KRS (the

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[26] DeMott, at 18.

[27] Charles E. Rounds, Jr. *et al*., LORING AND ROUNDS: A TRUSTEE'S HANDBOOK, § 7.2.9 (2020).

[28] *See*, *e.g*., *Steelvest,* 807 S.W.2d at 485 ("a person who knowingly joins with or aids and abets a fiduciary in an enterprise constituting a breach of the fiduciary relationship becomes jointly and severally liable with the fiduciary"); *Osborn*, 865 F.3d at 440 (same); *Insight Ky. Partners II, L.P. v. Preferred Auto Servs.*, 514 S.W.3d 537, 546 (Ky. Ct. App. 2016) (same); *James v. Wilson*, 95 S.W.3d 875, 897 (Ky. Ct. App. 2002); *see also* RESTATEMENT (SECOND) OF TORTS § 876 (1979).

Trustee) did not owe fiduciary, trust and statutory duties to the KRS Trusts is wrong. A fiduciary duty may arise from several different sources. It may be rooted in the common law or in statutory law. It may arise from the status of the party to be charged — *e.g.*, attorney/client or trustee — or from the peculiar facts of and surrounding a particular relationship.[29] The fiduciary relationship "'may exist under a variety of circumstances; it exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence.'" *Steelvest*, 807 S.W.2d at 485 (quoting *Security Trust Co. v. Wilson*, 210 S.W.2d 336, 338 (Ky. Ct. App. 1948)); *see also Henkin, Inc. v. Berea Bank & Trust Co.*, 566 S.W.2d 420, 423–24 (Ky. Ct. App. 1978) (finding fiduciary duty of bank to customer where bank used confidential customer information to customer's detriment). As the Kentucky Supreme Court explained,

> [T]he circumstances which may create a fiduciary relationship are so varied, it is extremely difficult, if not impossible, to formulate a comprehensive definition of it that would fully and adequately embrace all cases. Nevertheless, as a general rule, we can conclude that such a relationship is one founded on trust or confidence reposed by one person in the integrity and fidelity of another and which also necessarily involves an undertaking in which a duty is created in one person to act primarily for another's benefit in matters connected with such undertaking.

Steelvest, 807 S.W.2d at 485.

Accordingly, "the circumstances which may create a fiduciary relationship are so varied that it would be unwise to attempt the formulation of any comprehensive definition that could be uniformly applied in every case." *Henkin*, 566 S.W.2d at 423. There is no rigid formula; rather, the court must consider the particular facts and circumstances of each case.

The Complaint alleges that all Defendants owed common law fiduciary duties to KRS

[29] *See also Insight Kentucky Partners II*, 514 S.W.3d at 546 ("The scope of the fiduciary duty has been variously defined as one requiring utter good faith or honesty, loyalty or obedience, as well as candor, due care, and fair dealing.") (internal citations omitted).

members/trust beneficiaries. Under Kentucky law, lawyers are fiduciaries to their clients. *Brown v. Commonwealth*, 226 S.W.3d 74 (Ky. 2007) (citing "fiduciary nature of the attorney-client relationship"); *Goodman v. Goldberg & Simpson, P.S.C.,* 323 S.W.3d 740 (Ky. Ct. App. 2009) ("the relationship of attorney-client is one fiduciary in nature").

Unless specifically displaced by statute, the common law of trusts applies to public pension funds.[30] *Seven Cntys. Servs*., 580 S.W.3d at 544; *see also* RESTATEMENT (THIRD) OF TRUSTS, §§ 4 and 10.22 (2003). KY. REV. STAT. § 386B.10-020 provides that "[a] trustee who commits a breach of trust is liable to the beneficiaries affected for ... the amount required to restore the value of the trust property to what they would have been had the breach not occurred," while KY. REV. STAT. § 446.070 provides a private right of action for any person injured by the violation of any Kentucky statute including criminal statutes providing separate penalties.

KY. REV. STAT. § 61.650(1)(c) provides, in relevant part:

> c) ***A trustee***, ***officer***, ***or employee of the Kentucky Public Pensions Authority***, ***or other fiduciary*** shall discharge duties with respect to the retirement system:
>
> 1) ***Solely*** in the interest of the members and beneficiaries;
>
> 2) For the ***exclusive purpose*** of providing benefits to members and beneficiaries and paying reasonable expenses of administering the system;
>
> 3) With the care, skill and caution under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with those matters would use in the conduct of an activity of like character and purpose.

KY. REV. STAT. § 61.655(1) states, "No trustee or employee of the Kentucky Retirement System

[30] *See*, *e.g.*, *Petition of Barney*, 710 A.2d 408, 409 (N.H. 1998) (under the common law of trusts, the board of trustees of the New Hampshire Retirement System owes members and beneficiaries a fiduciary duty to manage the system for the benefit of the members and beneficiaries); *Ass'n of State Prosecutors v. Milwaukee Cnty.*, 544 N.W.2d 888, 894 (Wis. 1996) (public pension fund is a trust); *See also City of Sacramento v. Pub. Emps. Ret. Sys.*, 229 Cal. App. 3d 1470, 1494 (Cal. Ct. App. 1991) (holding that under "well-established rules of the law of trusts," the trustees of the pension system owed undivided loyalty to the beneficiaries); *Hansen v. Utah State Ret. Bd.*, 652 P.2d 1332, 1338 (Utah 1982) (various retirement funds "administered as a common trust fund").

… shall: (f) Use confidential information acquired during his or her tenure with the retirement system to further his or her own economic interests ***or that of another person***."

Hale and the Calcaterra Firm owed statutory duties to the entity and its Trusts' beneficiaries. Hale is an officer of KRS and thus owed statutory duties. The Calcaterra Firm retained by KRS owed fiduciary duties "with respect to the retirement system" *i.e.*, KRS, its members and the beneficiaries of its Trusts. The allegations of intentional misconduct and bad faith actions by Hale and the Calcaterra Firm violate KY. REV. STAT. §§ 61.655/61.650 and Kentucky's Procurement and antitrust laws.

B. The Tier 3 Trust Plaintiffs Have Constitutional Standing to Assert Direct Claims as Trust Beneficiaries Against Third Parties to Recover Damages and Obtain Equitable Relief for KRS's Trusts

Defendants claim the Court lacks subject-matter jurisdiction because Plaintiffs lack constitutional standing. They are wrong; Plaintiffs *do* have constitutional standing and this Court *does* have subject-matter jurisdiction.

1. Constitutional Standing

Whatever technical standing defect that existed for the Mayberry 5 Plaintiffs does not exist for the Tier 3 BoT Plaintiffs. Plaintiffs' constitutional standing to sue and their ability to sue directly (not derivatively) asserting a breach of fiduciary/trust action which the AG cannot bring, was briefed in detail in the Omnibus Opposition at 15–17, and the Summary Opposition at 5–7, 46–58. The long and short of it is that the Tier 3 KRS members and trust beneficiaries' benefits are not guaranteed by the Commonwealth, and their individual pension accounts and final pension benefits vary due to investment returns and expenses. Here bad investments, lousy returns, and wasted or excessive expenses damaged the Trusts and injured the beneficiaries. Constitutional standing is alleged in detail. *Id.* ¶¶ 2, 40–41, 63–66. The wasted Trust assets and excessive expenses of the *L'Affaire* Calcaterra, and the consequential and unnecessary expenses that continue

to flow from Defendants' unlawful conduct damage the KRS Trusts and the accounts of the beneficiaries held by the trusts. That is concrete injury, it yields standing. The Tier 3 Plaintiffs also have constitutional standing because the *L'Affaire* Calcaterra is alleged to be a continuation and extension of the core conspiracy pleaded in detail in the Tier 3 BoT Complaint, thus giving them standing to pursue any claim to recover damages to or waste of Trust assets arising out of or related to that conspiracy.

Defendants do not really contest Plaintiffs' constitutional standing based on the lack of any guarantee of their benefits and the variation of the value of their pension accounts and financial benefits due to investment results and expense levels. Instead, they made other claims regarding why constitutional standing is absent. These claims are wrong. In *Sexton*[31], the Kentucky Supreme Court "formally adopt[ed]" the federal *Lujan* test for constitutional standing, requiring "plaintiff ***allege*** that 1) he or she has suffered or imminently will suffer an injury; 2) the injury is fairly traceable to the defendant's conduct; and 3) a favorable … decision is likely to redress the injury." *Sexton*, 566 S.W.3d at 193. Plaintiffs plead all three of the requirements.

a. Plaintiffs Have Suffered Injury in Fact

Defendants put forward essentially four arguments as to why Plaintiffs cannot show the requisite "injury in fact": (1) Defendants' conduct did not affect the Tier 3 Plaintiffs (the "disconnect" argument), (2) Plaintiffs admitted they were not injured (the "disclaimer" argument), (3) any harm is not "actual or imminent" (the "backstop" argument), and (4) that the KRS Trusts did not bear the $1.6 million cost of the Calcaterra "investigation" (the "taxpayer" argument), or other damages flowing from *L'Affaire* Calcaterra.

The waste of at least $1.6 million in Trust Funds, and other fees or costs and consequential

[31] *Cabinet for Health & Family Servs. v. Sexton*, 566 S.W.3d 185, 195 (Ky. 2018).

damages to the Trusts, also represent concrete harm to the Tier 3 KRS members, who have "equitable interests" in the trust corpus of which they are beneficiaries. Beyond the $1.6 million the KRS Trusts will end up spending, who knows what will be spent on the resulting litigations flowing from *L'Affaire* Calcaterra. And, an injury that supports constitutional standing need not be monetary. *See*, *e.g.*, *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 802 (2021) (nominal damages are sufficient). Defendants have undoubtedly caused significant delay (and attendant expenses) to the Tier 3 Plaintiffs and their quest for justice. That delay and any damage to those valuable claims constitute a concrete injury as well.

The "disconnect" argument also ignores that Defendants' conduct was not undertaken in a vacuum; it was accessory to the Culpable Trustee's ongoing breaches, including but not limited to the events of 2015–16, all of which did cause very substantial concrete harm for which Defendants are jointly and severally liable.[32] That Defendants were "accessories after the fact," involved directly in the cover-up as opposed to the earlier conduct, does not absolve them from the knowing participation claim. The getaway driver, having chosen to associate with and advance the crime, is not absolved because she wasn't inside the bank when the bags were filled with cash.

The "disclaimer" argument is nonsense. This case clearly seeks to remedy harm suffered by the Tier 3 Plaintiffs by replenishing (funneling funds back into) the KRS trusts and by having the individual beneficiaries' accounts credited. In other words, this action is seeking to recover

[32] "It is well-settled law that upon joining a conspiracy, a defendant becomes a party to every act previously or subsequently committed by any of the other conspirators in pursuit of the conspiracy." *Greenberg Traurig of New York, P.C. v. Moody*, 161 S.W.3d 56, 101 (Tex. Ct. App. 2004); *see also Rasmussen v. Dublin Rarities*, 2015 WL 1133189, at *9 (N.D. Cal. Feb. 27, 2015) ("One who enters a conspiracy late, with knowledge of what has gone before, and with the intent to pursue the same objective, may be charged with preceding acts in furtherance of the conspiracy.").

for the Tier 3 Plaintiffs *within — not outside of — the KRS trusts*.

The "backstop" argument is also nonsense. Tier 3 KRS members are not protected by any inviolable contract protection. Their benefits will be paid (if at all) only from trust assets. Their pension accounts and later benefits vary with investment returns and expenses. The *Overstreet* rationale thus does not cover the Tier 3s and does not say or in any way suggest that Tier 3 KRS members lack standing. To the contrary, it expressly exempted them from its holding.

Defendants' "taxpayer" argument is the most nonsensical. The claim that the Tier 3's lack constitutional standing because this Court said the public or taxpayers paid for the Report is wrong. First, the Complaint alleges that KRS, the Culpable Trustee, "wasted" trust assets by paying for the Report using Trust Funds. ¶¶ 23–24, 32, 40(a)–(d), 63; *see also* Prayer ¶¶ 3, 6, 7. Note that Defendants do not say the Commonwealth paid the $1.6 million — only that this Court said the public taxpayers paid. When this Court made the reference to the public/taxpayers paying for the Report, it was in the context of the dispute over whether the then- concealed Report would be made public — the Court's point being the public was entitled to see it because KRS is partially funded by the state *i.e.,* public funds. At a November 21, 2022 hearing before Judge Wingate in the Mayberry 5 Action, the AG *made* clear that the Commonwealth did not contract or pay for the Report. The cover sheet of the Contract states that KPPA is the entity to be "***billed***."

b. Plaintiffs' Injury Is Fairly Traceable to Defendants' Conduct

Since *Lujan* in 1992, the Court has often reiterated the requirement that the injury be "fairly traceable" to the challenged conduct. But this is not to be confused with strict "causation" requirements for the recovery of damages; the two are significantly different. The Court has described the "fairly traceable" burden at the pleadings stage as "relatively modest." *Bennett v. Spear*, 117 S. Ct. 1154, 1165 (1997). As the Second Circuit explained:

> The requirement that a complaint allege an injury that is fairly traceable to defendants' conduct for purposes of constitutional standing is a lesser burden than the requirement that it show proximate cause. Thus, the fact that there is an intervening cause of the plaintiff's injury may foreclose a finding of proximate cause but is not necessarily a basis for finding that the injury is not fairly traceable to the acts of the defendant.
>
> Accordingly, we, like other courts, have noted that, particularly at the pleading stage, the fairly traceable standard is not equivalent to a requirement of tort causation and that for purposes of satisfying Article III's causation requirement, we are concerned with something less than the concept of proximate cause. Even harms that flow indirectly from the action in question can be said to be fairly traceable to that action for standing purposes.

Rothstein v. UBS A.G., 708 F.3d 82, 91–92 (2d Cir. 2013) (cleaned up). A plaintiff who sought *only* nominal — not compensatory — damages had satisfied all legs of the *Lujan* analysis, including the "fairly traceable" and "redressability" legs. *See Uzuegbunam*, 141 S. Ct. at 802.

Plaintiffs easily meet the "modest" requirement of pleading the "fairly traceable" element. Defendants' conduct was aimed squarely at the Tier 3 Plaintiffs and the claims they were asserting for the KRS Trusts. The Complaint alleges a scheme in breach of trust by the Trustee (and its agents Eager and Hale), *i.e.*, knowing participation by these Defendants in that breach of trust, the twin objectives of which were to cover up the Culpable Trustee's prior wrongdoing, including but not limited to the events of 2015–16, and to keep control of the KRS hedge fund litigation away from the only lawyers who had shown the ability and willingness to pursue the litigation where the facts took them, even if they implicated Eager.

c. Plaintiffs Have Sufficiently Alleged Redressability

Defendants claim a recovery in this case could not "redress the injury." This demonstrates a misunderstanding of the distinction between a recovery for the Tier 3 members *within the KRS trusts* as opposed to a recovery that would go straight to them *outside the trusts*. This case seeks recovery ***for the Tier 3 Trusts*** to benefit the Plaintiffs as Trust beneficiaries within the Trusts: in other words, the recovery will be paid into the Trusts and in normal course be allocated to the

individual pension accounts of the KRS member beneficiaries.

The redressability requirement is itself "modest." In *Uzuegbunam*, the Court recently noted, in finding Art. III standing in a case seeking only "nominal damages," that "a single dollar often cannot provide full redress, but the ability 'to effectuate a partial remedy' satisfies the redressability requirement." *See* 141 S. Ct. at 801. Thus, the possibility of even a modest recovery — or none other than nominal damages — is sufficient for constitutional purposes; "[d]espite being small, nominal damages are certainly concrete." *Id*. Moreover, as the Court observed, "[t]he law tolerates no farther inquiry than whether there has been the violation of a right. When a right is violated, that violation imports damage in the nature of it and the party injured is entitled to a verdict for nominal damages." *Id*. at 800 (cleaned up).[33]

The Complaint in this case alleges the violation of a right — the "right 'good against the world' not to be the subject of another's action that constitutes an intentional tort."[34] Put another way, a "trust beneficiary has an equitable property right that is enforceable against 'every person in the world' because 'every person in the world' is obligated not to collude with the trustee in a breach of trust."[35] At bottom, Defendants posit that this is a wrong without a remedy. The maxim "*ubi jus ibi remedium*" — "for every wrong the law provides a remedy" — is the short answer, and as shown in *Uzuegbunam*, that answer is sufficient for constitutional standing.

2. Plaintiffs Have the Right to Assert Direct Claims as Trust Beneficiaries

Plaintiffs' ability as Trust beneficiaries to directly assert causes of action against third

[33] Even if the plaintiff's individual injury is tiny, standing and redressability exists. *Uzuegbunam*, 141 S. Ct. at 809 (A "farthing" of constitutional harm is sufficient.). Here, the impact on Plaintiffs' pension accounts/benefits triggers the "penny more" and/or "penny less" test of *Thole v. U.S. Bank N.A*., 140 S. Ct. 1615 (2020).

[34] DeMott, at 18.

[35] Loring and Rounds, *A Trustee's Handbook*, § 7.2.9.

parties like these Defendants is detailed in the Omnibus Opp. at 10–15, 28–46 and the Summary Opp. at 5–7. The entirety of Defendants' argument that this is a derivative case can be reduced to this statement in Hale's brief: "Plaintiffs can slice this argument every which way they please, but claiming 'damages for KRS's trusts' is at bottom a derivative action." They are wrong.

For the umpteenth time, the theory underlying this case is that the KRS Board, acting as sole Trustee of the KRS Trusts and Eager, Hale, the Calcaterra Firm, and Additional Actors committed breaches of trust, and that each knowingly participated in those breaches. This direct cause of action for Trust beneficiaries is deeply rooted in the common law of trusts, supported by the Restatement, as well as case law. *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc*., 68 Cal. App. 4th 445 (Cal. Ct. App. 1998); *Prather v. Weissiger*, 73 Ky. 117 (Ky. Ct. App. 1873).

A derivative case is brought in the right of another. Necessarily, that means that the "other" owns and has the right to pursue the claim in its own name but, for whatever reason, has not done so. The paradigmatic case is a shareholder derivative case, in which a shareholder brings suit "in the right of" the corporation. A corporation, of course, is a separate entity with the right to sue in its own right and name. In contrast, a trust is not a separate entity or legal person. A trust cannot own property, hire lawyers or sue anyone in its own name or right. *Only* the trustee (or someone acting on his behalf) or a beneficiary may bring an action for conduct that affects the trust property, *i.e.,* to recover "trust damages." Omnibus Opp. at 28–41; Summary Opp. at 5–12.

The trustee is generally the proper party to sue third persons when such third persons are, in the words of the RESTATEMENT, "*acting adversely to the trustee*." The trustee owns such claims ("**Innocent Trustee Claims**"). Far different, however, are the direct "**Culpable Trustee Claims**" the Tier 3 trust beneficiaries assert in this action.

These Culpable Trustee Claims are brought under a long-standing branch of the common law of trusts separately discussed in the RESTATEMENT[36] as "*liability of third persons for participation with a culpable trustee in breach of trust*." In this circumstance, the third persons are *not* acting adversely to the trustee; **they are culpably participating with the trustee**; both the trustee and the third parties are acting adversely to the beneficiaries. Here, the trustee is a **perpetrator** — not a victim — and as such he cannot hold such a claim in trust for beneficiaries, or prosecute it. Rather, the beneficiaries directly own and may prosecute such a claim. The RESTATEMENT rule is that "[a] third person who, although not a transferee of trust property, has notice that the trustee is committing a breach of trust and participates therein is **liable to the beneficiary** for any loss caused by the breach of trust." RESTATEMENT (SECOND) OF TORTS § 326 (1965). This action, brought under the rule expressed in § 326, is owned by the beneficiaries — not the Culpable Trustee — and therefore is a direct, not derivative, cause of action. The rule undoubtedly applies to public pension trusts.

Since the Trustee allegedly conspired with the third parties who assisted it and are to be sued, **that culpable Trustee cannot be relied upon to solely, if at all, pursue the wrongdoers and maximize any recovery from defendants it was in a conspiracy with.** The danger of a culpable trustee influencing a vigorous, unconflicted prosecution of the trust's claims is an obvious reason why the beneficiary can sue independently. In this case, the ***current CEO/ED of the Trustee*** (Eager) is deeply involved. So is the current in-house General Counsel of the Trustee. They influence and control the KRS corporate Board. They allegedly played a critical role in the wrongdoing. The prosecution of the case should not be subject to their influence.

[36] RESTATEMENT (SECOND) OF TRUSTS, Ch. 9 (Liabilities of Third Persons), Topic 3 (Participation in Breach of Trust Other Than By Receiving Transfer).

C. Hale's Claim of Official Immunity Is Frivolous

"Official" immunity is a doctrine limiting the liability of certain government officials. Kentucky government officials are protected by the defense of official immunity which "is immunity from tort liability afforded to public officers and employees for acts performed in the exercise of their discretionary functions[.]" *Yanero v. Davis*, 65 S.W.3d 510, 521 (Ky. 2001). If a public officer "is acting in a discretionary manner, in good faith, and within the scope of his employment," then he or she is entitled to the protections of qualified official immunity. *Nelson Cnty. Bd. of Educ. v. Forte*, 337 S.W.3d 617, 621 (Ky. 2011). But public officers may still be liable for performing discretionary acts in a manner other than in good faith. In *Rowan Cnty. v. Sloas*, 201 S.W.3d 469, 475–76 (Ky. 2006), the Court found that allegations, if accepted as true, are more than sufficient to state claims that are not subject to the immunity defense. Assuming that Hale's conduct falls within the scope of "discretionary" acts, Plaintiffs have more than sufficiently pleaded bad faith.

D. The Calcaterra Firm's Purported Defense of Lack of Personal Jurisdiction Is Made in Bad Faith

This Court has previously considered the reach of the Kentucky "long-arm" statute in denying motions to dismiss by the New York hedge fund sellers and their principals in the November 30, 2018 Order at 17–19. The Court did so again in *Commonwealth v. KKR & Co., Inc.*, Case No. 21-CI-00348, slip op. at 38–47 (Mar. 24, 2022). Kentucky law or jurisdiction over New York actors was extensively briefed in the Tier 3 BoT Separate Opposition. In light of these rulings, the specific allegations of this Complaint, the consent to jurisdiction and registration to do business in Kentucky requirement of the Calcaterra Contract, these rulings and well-established Kentucky law show that the Calcaterra Firm's lack of personal jurisdiction claim is not only frivolous — it is made in bad faith.

The Complaint alleges personal jurisdiction. ¶ 34. Defendants targeted Kentucky for commercial purposes and, regardless of whether they ever set foot on Kentucky soil, they were personally involved in the investigation. Kentucky courts have routinely exercised personal jurisdiction over foreign residents and corporations that contracted with, and provided services to, Kentucky entities. *See*, *e.g.*, *Commonwealth Dep't of Educ. v. Gravitt*, 673 S.W.2d 428, 432 (Ky. Ct. App. 1984) (contracting with a Kentucky entity is sufficient); *Carmichael-Lynch-Nolan Advertising Agency, Inc. v. Bennett & Assocs., Inc*., 561 S.W.2d 99, 101 (Ky. Ct. App. 1977) (exercising personal jurisdiction over a foreign corporation that contracted with a Kentucky corporation, even though defendant performed "a good deal of the [contracted work] outside of the Commonwealth").

A party does not need to physically enter Kentucky to be subject to personal jurisdiction. Conduct outside Kentucky having an impact in Kentucky triggers specific personal jurisdiction. KY. REV. STAT. § 454.210(2). When a party contracts with a Kentucky entity to provide services in Kentucky personal jurisdiction exists. *Id*. Here, the Contract (Appendix H at 3–4) provides:

> **Controlling Law; Jurisdiction and Venue; Waiver**. All questions as to the execution, validity, interpretation, construction, and performance of this agreement shall be construed in accordance with the laws of the Commonwealth of Kentucky, without regard to conflict of laws principles thereof. Contractor hereby consents to the jurisdiction of the courts of the Commonwealth of Kentucky and further consents that venue shall lie in Franklin Circuit Court located in Franklin County, Kentucky.

The consent is unqualified, ***not limited to a suit to enforce the Contract or a suit by the Commonwealth***[37] ***or KRS***. In addition, the Contract required the Calcaterra Firm to register to do business in Kentucky, which it did and two of its lawyers became members of the Kentucky Bar

[37] In any event, the Tier 3 Plaintiffs would be third party beneficiaries of the consent to jurisdiction.

so they could practice law in Kentucky.

The Calcaterra Defendants' affidavits are carefully and deceptively worded, continuing the practice of other New York-based participants in the KRS fiasco attempts to evade the jurisdiction of Kentucky Courts, like the false submissions of KKR in *Commonwealth v. KKR*, over the Tier 3 BoT case. The Calcaterra Defendants' affidavits attack strawmen — denying conduct that is neither alleged nor necessary for specific personal jurisdiction to exist *i.e.*, they do not "conduct a business" or "own property" in Kentucky and never "visited" Kentucky. What is actually alleged is that the Calcaterra Firm "***conducted***" business in Kentucky, including registering to do business in Kentucky and entering into and performing a contract that was to be governed by Kentucky law, consenting to personal jurisdiction in Kentucky and venue in Franklin County, as well as becoming licensed to practice law in Kentucky.[38] Just as New York-based Blackstone and KKR and their top officers and principals are subject to personal jurisdiction in Kentucky, so is the Calcaterra Firm and its owners/principals/partners.

Even if the claims of Calcaterra, Pollack and Teres that "I never ***visited*** Kentucky in connection with the Kentucky Retirement System retention of KRS generally … all worked (*sic*) related to the investigation and preparation of the May 2021 investigatory Report was conducted from New York [Calcaterra Aff. ¶ 8; Pollack Aff. ¶ 8; Teres Aff. ¶ 8] are true, that does not block the exercise of specific personal jurisdiction any more than the lack of "visits" of Schwarzman, Kravis and Roberts to Kentucky prevented the exercise of specific personal jurisdiction over them. Out of state actors who enter into a Kentucky personal services contract and take action outside of Kentucky having impact inside Kentucky are subject to personal jurisdiction.

[38] Calcaterra participated by "Zoom" in at least one KRS Board meeting concerning the investigation and the Report held on April 2, 2021. *See* https://kyopengov.org/blog/april-2-joint-special-meeting-kentucky-public-pension-authority-and-county-employees.

But stop for one minute and think of the implications of the "zero physical contact" claim if it is true. These claims by the Calcaterra Firm that none of them ever visited Kentucky are very damaging to Defendants. How could you be retained to conduct and conduct this extensive investigation into years of misconduct at KRS and never physically visit KRS — to be interviewed before being hired or and talk to witnesses, *etc*. How did KRS hire these people without personally interviewing them in Kentucky? Where was the due diligence? There was none, because this was rigged front to end — all a prearranged, fixed, rigged deal — not an open, fair, competitive process to hire a competent experienced, independent firm to conduct a vigorous, honest investigation.

E. Defendants' Statute-of-Limitations Arguments Are Meritless and, in Any Event, Unsuitable for Resolution at the Pleadings Stage, Because They Raise Factual Issues

Defendants claim that a suit filed in 2022 alleging misconduct taking place in 2020–22 is time-barred as a matter of law. But limitation defenses are ***affirmative defenses*** involving factual disputes. *See* Nov. 30, 2018 Order at 11–12.

Because there is no express statute of limitations covering a breach of trust claim against the trustee of a public employee trust, the ten-year limit of KY. REV. STAT. § 413.160 applies. Thus, the filing was well within that period. And because the claims are equitable, laches should govern. That requires an affirmative showing of prejudice and none has been shown. Omnibus Opp. at 61–77.

The Calcaterra Defendants assert that the one-year limitation period in KY. REV. STAT. § 413.245 applies as their conduct arose from the rendition of professional legal services, relying on *Seiller Waterman, LLC v. RLB Props., Ltd.,* 610 S.W.3d 188 (Ky. 2020). But *Seiller Waterman* is inapposite. There, as the Kentucky Supreme Court noted, "[t]he parties in [*Seiller Waterman*] do not dispute that [the law firm defendant] was practicing law when the attorneys at that law firm prepared and filed the mechanic's lien, the action on which [plaintiff] premis[ed] its claims[.]" *See*

id. at 203. In contrast, Plaintiffs here dispute that Defendants were "practicing law" in the course of their misconduct — knowing participation in the Trustee's breaches of trust — alleged in the Complaint. Whether Defendants were rendering legal services or aiding and abetting breaches of trust is a merits issue that requires a factual inquiry — and thus unsuitable for resolution at the pleadings stage. In any event, it is impossible for the Calcaterra Defendants to claim that they were "practicing law" during the rigged procurement process. After all, none of the Calcaterra Defendants was admitted to practice law in Kentucky during the RFP process. Defendants' reliance on *Seiller Waterman* is thus misplaced.

Moreover, interpreting § 413.245's text, as instructed by the Supreme Court in *Seiller Waterman*, § 413.245 is not as broad as Defendants want it to be. The General Assembly could have used the familiar "arising from or related to" formulation, but chose not to do so. Instead, the General Assembly limited the scope of the section to claims "***arising out of***" professional services performed for others. As explained by the U.S. Supreme Court in *Ford Motor Co. v. Montana Eighth Judicial District Court*, the phrase "arising out of" denotes a causal link, while the phrase "relating to" does not. *See* 141 S. Ct. 1017, 1028–29 (2021); *see also id.* at 1033–34 (Alito, J., concurring). It cannot be said that § 413.245 can be applied to any claim against lawyers for any alleged misconduct that happens to relate to their professional services, but does not "arise from" them. Here, there is no causal link between Defendants' misconduct and their purported legal services.

In any event, KY. REV. STAT. § 413.245 is limited to the "rendering … [of] professional services." While Defendants are lawyers, they were not performing ***legitimate*** professional legal services when they schemed, conspired, and assisted the Culpable Trustee in violating its duties. The statute does not go so far as to cover *anything* done by an attorney. In other words, it looks to

the nature of the conduct — services, not the status of the actor. Fleshing out precisely what Hale and Calcaterra did, and whether it fits within the statutory language, is a factual dispute, and must await discovery. Calcaterra and Teres were not licensed to practice law in Kentucky until March of 2021, months into the scheme and long after the "investigation" and Report drafting were underway.

Even if KY. REV. STAT. § 413.245 does apply, Defendants have not shown on the pleadings as a matter of law that the claims are barred. KY. REV. STAT. § 413.245 contains a discovery rule. The claims in this action could not have been brought prior to the public disclosure of the Calcaterra Report and this Court's Opinions and Orders in the *Cohen-White* Actions. Nor have the Calcaterra Defendants conclusively shown that the limitations period for the conspiracy claim (Count II) had run; the date of the last overt act taken or contemplated is a fact issue that must await discovery.

There are other reasons § 413.245 does not call for dismissal on the pleadings. The key question in any statute of limitations defense involves the trigger date, *i.e.*, the "date when the cause of action was, or reasonably should have been, discovered by the party injured." Defendants argue that our (reasonable) *suspicion* that the retention of a political fixer with a close personal relationship to a KRS executive would result in a made-to-order whitewash is the same as "discovery" of a cause of action charging Defendants with a cover up. But one need hardly wonder how they would have responded if we had actually filed a lawsuit against these lawyers based solely on our suspicions, which would not actually be confirmed until the Opinions and Order in the *Cohen-White* Actions were issued, and the Calcaterra Report was released.

In fact, when Plaintiffs sought judicial relief based only on their suspicions, they were denied relief. ***They did not have the secret documents the Court would later obtain and then***

disclose regarding the illegal, ***secret proposal of June 2020***. The discovery rule contained in KRS § 413.245 is applicable to Counts I, III and IV, and these counts may not be dismissed on limitations grounds because critical facts and documents, including the Report itself and facts concerning the procurement process that first appeared in the Opinions and Orders in the *Cohen-White* Actions, were not available until just weeks before this case was filed.

Hale asserts she was rendering "professional services" by connecting Eager and Calcaterra. But non-professionals make introductions all the time, ***including introductions for nefarious purposes***. Unless and until it is proved by Hale that she was in fact rendering professional services, the claims against her should be measured by the limitations periods for the underlying claims. *Anderson*, 177 F. Supp. 2d at 604. This claim for breach of trust is governed by KY. REV. STAT. § 413.160 and that ten-year period has not yet run.

KY. REV. STAT. § 413.245 also creates an exception for claims covered by KY. REV. STAT. § 413.140, including conspiracy. KY. REV. STAT. 413.140(1)(c). This statute thus governs Count II.[39] The limitations clock does not begin to run on civil conspiracy claims until the last overt act "or the last of a contemplated series of overt acts" has taken place. *N. Ky. Tel. Co. v. S. Bell Tel. & Tel. Co*., 73 F.2d 333, 335 (6th Cir. 1934).

The Calcaterra Firm has continued making false public statements directed at KRS Trust

[39] Defendants' attempts to conflate conspiracy and the other counts are not well-taken. As the court in *Anderson* explained, "the allegations in this case of aiding and abetting a breach of fiduciary duty [do not] amount to a claim of conspiracy." 177 F. Supp. 2d at 604. "Civil conspiracy is a distinct cause of action recognized by the courts of Kentucky. … Liability for aiding and abetting is separately recognized by the courts and puts the defendant in the same shoes as the original tortfeasor." *Id*. Thus, "the statute of limitations for a charge of aiding and abetting should fall under the section reserved for the underlying cause of action which, in the present case, has not yet expired." *Id.* "Knowing participation" is not an agreement-based wrong; it is more akin to aiding and abetting, and thus is not covered by the limitations period for conspiracy. *See id.*

beneficiaries asserting it had faithfully discharged the trust placed in it and performed an independent, comprehensive, honest investigation — while concealing this Court's contrary findings. On September 13, 2022, after the Opinions and Orders in the *Cohen-White* Actions were handed down, the Calcaterra Firm issued a press release that made no reference to those rulings, falsely claiming that "we prioritized thoroughness and impartiality," "we ensured that this comprehensive investigation be independent and free of undue influence."

When asked about the release, Calcaterra told *The Courier Journal* that the lawsuit is "***meritless and a waste of judicial resources***." "***This desperate lawsuit is pure harassment orchestrated by individuals who are unhappy with the results of my firm's thorough, independent investigation and have thus resorted to wild speculation to serve their own legal and financial interests***." Joe Sonka, *Lawsuit Alleges Bid-Rigging on Kentucky Pension System's $1.2M Investigative Contract*, Courier Journal (Sept. 20, 2022).

These statements by Calcaterra to the press were to try to cover up that the contract procurement was fixed, the investigation was not as thorough or comprehensive as required by the contract, and the Report was a cover up.

F. Valid Antitrust Claims Are Pleaded

KY. REV. STAT. § 367.175 – Other unlawful acts, provides:

> (1) Every contract, combination in the form of trust and otherwise, or conspiracy, in restraint of trade or commerce in this Commonwealth shall be unlawful.
> (2) It shall be unlawful for any person or persons … or attempt to monopolize or … conspire with any other person or persons to monopolize any part of the trade or commerce in this Commonwealth.
>
> ***
>
> (4) In addition to any other penalties, violations of this section shall also be a Class C felony.

KY. REV. STAT. § 446.070 – Penalty No Bar to Civil Recovery, states:

> A person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation.

Here, people on ***both sides*** of a public contract bid process colluded to fix and rig the bidding/procurement process. One bidder alone was given inside access and advantage — secretly submitting its own proposal to be turned into the formal RFP which permitted an artificially short time period to bid, giving the tipped off bidder a head start and advantage, resulting in it being the sole bidder, restraining free and open competition. During this process those people on ***both sides*** of the public bid process violated Kentucky's Procurement laws — including its criminal provisions which were intended to prevent just this kind of insider/tainted public procurement misconduct. It clearly restrained trade, commerce and competition by disadvantaging and creating barriers to open competition.

Plaintiffs must prove antitrust injury, injury of the type the antitrust laws were intended to prevent. *Brunswick Corp. v. Pueblo Bowl-O-Mat*, *Inc.*, 429 U.S. 477 (1977). The allegations show injury to the KRS Trusts by reason of a violation of the type the antitrust laws were meant to prevent — losses from competition reducing aspects of their behavior. Here, Defendants conspired and aided and abetted each other to obtain $1.6 million from KRS Trusts by a fixed/ rigged bidding process, eliminating honest free market competition. That is direct economic injury/damage due to the type of anti-competitive behavior the antitrust laws are intended to prevent.

VI. CONCLUSION

For all the foregoing reasons, the Court should deny the motions to dismiss and allow the Tier 3 Plaintiffs to pursue their meritorious claims.

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Respectfully submitted,

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APPENDICES

No.	Document Title	Case No.	Date
A.	Excerpts from Kentucky Pension, Procurement and Antitrust Statutes	N/A	N/A
B.	Opinion and Order	17-CI-01348	Nov. 30, 2018
C.	Complaint by Tier 3 Members of the Kentucky Retirement Systems Pleading Breach of Trust/Fiduciary Duty Claims to Recover Damages for the Trust Funds of the Kentucky Retirement Systems	21-CI-00645	Aug. 19, 2021
D.	Plaintiffs' Omnibus Opposition to Defendants' Motions to Dismiss the Complaint	21-CI-00645	Dec. 29, 2021
E.	Plaintiffs' Separate Opposition to KKR Parties' Motion to Dismiss for Lack of Personal Jurisdiction and on Other Grounds	21-CI-00645	Dec. 29, 2021
F.	The Tier 3 Trust Beneficiary Plaintiffs' Summary of Their Opposition to Defendants' Motions to Dismiss	21-CI-00645	Aug. 8, 2022
G.	The Tier 3 Plaintiffs' Memorandum in Support of Motion for Entry of an Order Requiring That Documents Regarding the Calcaterra Pollack "Investigation" Be Preserved and That the Calcaterra Report Be Provided to the Tier 3 Plaintiffs' Counsel	17-CI-01348	May 3, 2021
H.	Personal Services Contract for Legal Investigative Services Between the Commonwealth of Kentucky Retirement Systems and Calcaterra Pollack LLP	N/A	Nov. 25, 2020
I.	The Tier 3 Plaintiffs' Statement of Interest in Defendants' Motions Concerning the Calcaterra Report	17-CI-01348	Oct. 27, 2022
J.	Kentucky Rules of Professional Conduct	N/A	N/A
K.	Calcaterra Pollack LLP's Investigative Report on Kentucky Retirement Systems' Investment Activities	N/A	Sept. 13, 2022