

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. NO. 17-CI-1348

JEFFREY C. MAYBERRY, et al.,

PLAINTIFFS

v.

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

DEFENDANTS

**NOMINAL DEFENDANT KENTUCKY RETIREMENT SYSTEMS' RESPONSE TO
THE TIER 3 INDIVIDUALS' MOTION TO INTERVENE**

Nominal Defendant Kentucky Retirement Systems ("Kentucky Retirement"), by counsel, submits the following response in opposition to the Motion to Intervene filed by Tia Taylor, Ashley Hall-Nagy and Bobby Estes (collectively, the "Tier 3 Individuals").

INTRODUCTION

This issue arises out of the Tier 3 Individuals' request to intervene in this action ("Action") on a derivative basis purportedly on behalf of Kentucky Retirement. However, the Tier 3 Individuals failed to make a demand upon Kentucky Retirement's Board and have failed to show why such demand would have been futile. Before the Tier 3 Individuals sought intervention here, Kentucky Retirement hired an independent third-party law firm to investigate the allegations contained in the proposed intervening complaint. Thus, intervention is not appropriate at this time; Kentucky Retirement is investigating the allegations and will rely on the results of that investigation in choosing a path forward. As shown in more detail below, the Tier 3 Individuals' Motion should, therefore, be denied.

FACTUAL BACKGROUND

This Action (“Action”) possesses a long and complicated history involving dozens of parties, ranging from hedge funds and investment firms to actuarial consultants, law firms, and various associated individuals, and has been appealed all the way to Kentucky’s Supreme Court.¹ *See Overstreet v. Mayberry*, 603 S.W.3d 244 (Ky. 2020). Upon remand to this Court, the Court issued a December 28, 2020 Memorandum Opinion and Order dismissing the claims of the original plaintiffs (“Original Plaintiffs”) for lack of standing; denying the Original Plaintiffs’ motion to file a second amended complaint; denying, without prejudice, the Tier 3 Individuals’ motion to file second amended complaint to the extent that it seeks to add new claims; and, of particular import to the instant motion, granting the Kentucky Attorney General’s motion to file an intervening complaint on behalf of the Commonwealth. (See Circuit Court Order, at 17-18.)

The Tier 3 Individuals, who are not parties to this Action, consist of three people who are enrolled in the “Tier 3” beneficiary level at Kentucky Retirement. Generally speaking, such status is conferred upon Kentucky Retirement members who were hired after January 1, 2014 and who, as a result, receive Tier 3 benefits.

On February 1, 2021, the Tier 3 Individuals filed a Motion to Intervene in this Action, ostensibly to continue the pursuit of claims for Kentucky Retirement on a derivative basis. For the reasons set forth below, their Motion should be denied. The Tier 3 Individuals did not make a demand upon Kentucky Retirement’s Board and have not demonstrated that such a demand would have been futile. Their Motion to Intervene is premature because the investigation into

¹ For simplicity’s sake, Kentucky Retirement will not, herein, provide a detailed summary or discussion of the Action’s long history and the underlying events which gave rise to this Action in the first place. Instead, Kentucky Retirement will make reference to the facts throughout this Response as they become relevant to its argument.

the allegations is ongoing and, at a minimum, no intervention should be permitted until such investigation is completed.

ARGUMENT

The Tier 3 Individuals failed to make a demand upon Kentucky Retirement's Board, and their Motion to Intervene should, therefore, be denied. Likewise, Kentucky Retirement has engaged the services of an independent third party law firm, Calcaterra Pollack LLP, to provide Kentucky Retirement "with legal investigative services related to investment activities conducts by [Kentucky Retirement] to determine if there [we]re any improper or illegal activities on the part of the parties involved." (See Investigation Contract, attached hereto as Exhibit A.) Finally, any reliance by the Tier 3 Individuals on the April 2018 Joint Notice is unfounded. The Joint Notice did not involve the Tier 3 Individuals and, upon the dismissal of the Original Plaintiffs' claims, it is no longer operable. Accordingly, the Court should deny the Tier 3 Individuals' Motion to Intervene.

1. The Court should Deny the Tier 3 Individuals' Motion to Intervene as Improper.

Foremost, the Tier 3 Individuals failed to make any kind of demand on Kentucky Retirement's Board prior to seeking leave to intervene in this Action, nor have they taken any other action consistent with statute or relevant case law to properly become parties to the case. Such failures are fatal to the Tier 3 Individuals' Motion to Intervene and, accordingly, this Court should deny it.

a. The Tier 3 Individuals made no demand on Kentucky Retirement's Board, nor have they sufficiently alleged that such demand would have been futile.

It has long been the law in Kentucky that the "decision whether to bring a lawsuit or refrain from litigation on behalf of a corporation is a decision concerning the management of a

corporation” and, therefore, “[s]uch decisions are a part of the responsibility of a board of directors.” *Allied Ready Mix Co. v. Allen*, 994 S.W.2d 4, 8 (Ky. App. 1998) (citations omitted). Further, while “[a] shareholder may file a derivative action to redress an alleged harm to the corporation . . . [i]n most cases, the shareholder must first make a demand upon the directors.” *Id.* (citation omitted). This is because “an individual ***has no standing to institute an action on behalf of those whose primary duty it is to bring [suit] until demand is made and refused***” unless the individual in question “clearly show[s] that such demand would have been futile.” *Farler v. Perry Cnty. Bd. of Educ.*, 355 S.W.2d 659, 661 (Ky. 1961) (citation omitted) (emphasis added).

Here, the Tier 3 Individuals do not allege that they made such a demand on Kentucky Retirement’s Board before moving to intervene in this Action, nor do they engage in an analysis of why, in the absence of such action, a demand on the Board would have been futile. (See generally Tier 3 Individuals’ Mot. to Intervene.) These failures by the Tier 3 Individuals are fatal to their Motion to Intervene. See KRS 271B.7-400(2) (“A complaint in a proceeding brought in the right of a corporation shall be verified and allege with particularity the demand made, if any, to obtain action by the board . . . and either that the demand was refused or ignored or why he did not make a demand.”).

In their filings with the Court, the Tier 3 Individuals simply contend that they were not required to make a demand or to show why such demand would have been futile. In their Motion for Pre-Trial Order, the Tier 3 Individuals allege that “demand on the current Board of [Kentucky Retirement] is ***not*** required under KRS § 16.645(15).” (Mot. for Pre-Trial Order, at 10 n.8.) As support, the Tier 3 Individuals cite to the Court’s November 30, 2018 Opinion & Order wherein it denied most of the Defendants’ Motions to Dismiss. (See MTD Opinion, attached hereto as

Exhibit B.) In its Opinion, the Court ruled, *inter alia*, that the Original Plaintiffs “may sue derivatively as members and beneficiaries of KRS and its trust.” (*Id.* at 8.) In so ruling, the Court did note some differences between this case and a traditional corporate derivative action. However, the Court went on to explain as follows: “if this Court presumed that a demand requirement existed for these plaintiffs, **that requirement was essentially met** when the KRS Board expressly declined to bring suit” and filed the Joint Notice. (*Id.* at 9) (emphasis added). No such facts exist with respect to these Tier 3 Individuals.

The Tier 3 Individuals were not parties to the now-inoperable Joint Notice. Rather, the Joint Notice involved only the Original Plaintiffs and Kentucky Retirement, and it was predicated on Kentucky Retirement’s belief that the Original Plaintiffs had standing to pursue their claims. The Joint Notice itself makes clear that the agreement was never intended to be irrevocable, unquestioningly permanent, or applicable to other, unnamed individuals. Since April 2018, there have been numerous procedural developments in this action, the most significant of which was the Kentucky Supreme Court’s decision that the Original Plaintiffs lacked standing to pursue their claims on Kentucky Retirement’s behalf. Thereafter, the Kentucky Attorney General sought, and was granted, leave to intervene in the Action on behalf of the Commonwealth. With the Kentucky Supreme Court’s decision concerning standing (an issue specifically addressed in the Joint Notice) given permanency by virtue of this Court’s Order of dismissal, the Joint Notice is no longer operable. Any reliance on the Joint Notice by the Tier 3 Individuals is misplaced, and the Joint Notice cannot reasonably be used to argue that Kentucky Retirement has somehow implicitly consented to the Tier 3 Individuals’ intervention or involvement in this Action. Simply put, the

Joint Notice is of no avail to the Tier 3 Individuals, and this Court's prior application of it to other individuals should not be interpreted otherwise.

b. Even if a pre-litigation demand was not required, the Tier 3 Individuals' Motion to Intervene is premature and should be denied on those grounds as well.

Next, even if the Tier 3 Individuals were not required by law to issue a pre-litigation demand to Kentucky Retirement (and they were), their Motion to Intervene remains fundamentally premature due to Kentucky Retirement's ongoing investigation into the facts surrounding these allegations. This, too, provides the Court grounds upon which to deny the Tier 3 Individuals' Motion to Intervene.

Under KRS 271B.7-400(2), "[w]hether or not a demand for action was made, if the corporation commences an investigation of the charges made in the demand or complaint, the court may stay any proceeding until the investigation is completed." Here, an investigation into the issues complained of by the Tier 3 Individuals has begun, rendering the Tier 3 Individuals' Motion to Intervene premature. To wit, effective November 23, 2020, Kentucky Retirement entered into a service contract with the law firm of Calcaterra Pollack LLP to conduct the investigation. Under the contract ("Investigation Contract"),

Calcaterra Pollack will investigate specific investment activities conducted by the Kentucky Retirement Systems to determine if there are any improper or illegal activities on the part of the parties involved and produce a detailed report documenting their investigation and findings. The Kentucky Retirement Systems may ask [Calcaterra Pollack] to produce a summary report that would be suitable to publish to the public without waiving attorney/client privilege.

The report shall document how [Calcaterra Pollack] arrived at their conclusion. If improper or illegal activity is uncovered, [Calcaterra Pollack] shall also provide a complete analysis of potential legal remedies available to [Kentucky Retirement], including pros and cons of undertaking legal action, a cost/benefit analysis of such action, and any possible legal impediments to the legal action, and legal recommendations regarding best practices for investment activities. **It is expected**

that the investigation and report be concluded within four (4) months of the commencement of the investigation.

(Investigation Contract, at 2) (emphasis added). The product of the investigation is expected to be received in late March or early April. Accordingly, intervention by the Tier 3 Individuals at this time, with the investigation ongoing, would be premature and would run contrary to the procedures in place for derivative actions. *See* KRS 271B.7-400(2).

In their Motion for Pre-Trial Order, the Tier 3 Individuals contend that “[t]here is no need to wait for the results of an ‘outside’ investigation” (Mot. for Pre-Trial Order, at 10.) However, that statement is expressly contradicted by statute and by principles of equity. As noted above, KRS 271B.7-400(2) expressly contemplates that such investigations, undertaken by the “corporation” at issue, should be permitted to run their course before the “shareholders” can proceed with a derivative action on its behalf, if the circumstances warrant such action. This makes sense, because the demand requirement (which the Tier 3 Individuals have not satisfied) presupposes that, in response, the entity at issue will undertake an investigation to determine whether there is merit to the individuals’ demands and complaints. Here, Kentucky Retirement has retained the services of a neutral third-party law firm to do just that. It would be premature for the Tier 3 Individuals to intervene during the pendency of that investigation.

CONCLUSION

For the reasons stated herein, Kentucky Retirement respectfully requests that this Court deny the Tier 3 Individuals’ Motion to Intervene.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was electronically filed on this 2d day of March 2021, and thereby served via the Court's ECF system upon the following:

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