

COMMONWEALTH OF KENTUCKY  
FRANKLIN CIRCUIT COURT  
DIVISION ONE

CASE NO. 17-CI-1348  
*Electronically Filed*

JEFFREY C. MAYBERRY, *et al.*

PLAINTIFFS

v.

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

DEFENDANTS

**SUPPLEMENTAL SUBMISSION IN OPPOSITION TO THE  
TIER 3 MOVANTS' MOTION TO INTERVENE**

Defendants The Blackstone Group Inc., Blackstone Alternative Asset Management L.P., Stephen A. Schwarzman, J. Tomilson Hill, R.V. Kuhns & Associates, Inc., James Voytko, Rebecca Gratsinger, Cavanaugh Macdonald Consulting, LLC, Thomas Cavanaugh, Todd Green, and Alisa Bennett file this supplemental submission in opposition to the Tier 3 Movants' Motion to Intervene dated February 1, 2021.<sup>1</sup>

Defendants' March 2, 2021 responses to the motion demonstrate why intervention should be denied. This supplemental submission addresses developments subsequent to the completion of briefing that further show why the motion should be denied.

*First*, with the filing of the Attorney General's broad-ranging Amended Intervening Complaint, any open questions about the scope of the claims and damages that the Attorney General intends to assert have been answered. As the Court previously observed, "I

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<sup>1</sup> Defendants make this filing without waiver of, and expressly preserve, all defenses, including those based on lack of subject matter and personal jurisdiction, and reserve all rights to seek dismissal of the Tier 3 Movants' complaint in intervention, should its filing be permitted.

don't really see how we can have an intelligent discussion of [the Tier 3 Movants' Motion to Intervene] until we know what the Attorney General's decision is going to be" about "the contents of the intervening complaint." Apr. 21, 2021 Hr'g Tr. at 11. We now know the Attorney General's decision: As the Commonwealth's chief legal officer, he intends to "fully 'occupy the field,'" representing completely the interests of the Commonwealth *and* KRS<sup>2</sup> in this litigation by asserting effectively the same claims that were originally asserted by the *Mayberry* Plaintiffs. Am. Intervening Compl. ¶¶ 1–4, 45. In the words of the Amended Intervening Complaint, "[i]t is the intent of the Commonwealth to assume complete control of this action and to prosecute it to recover all damages" that were allegedly "incurred by the Commonwealth or KRS, including any and all damages for any claims that might otherwise be brought derivatively." *Id.* ¶ 3 (footnote omitted). The Attorney General has also stated that the "pursuit of any other action" on KRS's behalf in this litigation is "unnecessary and unauthorized." *Id.*

While Defendants strongly deny the Attorney General's allegations, his Amended Intervening Complaint rebuts any contention by the Tier 3 Movants that the Attorney General does not adequately represent KRS's interests. Although the Tier 3 Movants have argued that the Attorney General "seeks relief only for the Commonwealth, not KRS," Tier 3 Movants' Mar. 8, 2021 Reply to Defs.' Opp'n at 5–6 (emphases omitted), that is plainly not so: In the Amended Intervening Complaint, the Attorney General makes clear that he brings suit for the benefit of "all [of the Commonwealth's] departments, . . . agencies, [and] political subdivisions" by seeking "damages for the losses incurred by the Commonwealth, *including KRS.*" Am. Intervening Compl. ¶¶ 1, 4 (emphasis added). And while the Tier 3 Movants have asserted that the Attorney

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<sup>2</sup> On April 1, 2021, the Kentucky Retirement Systems ("KRS") were restructured as the Kentucky Public Pensions Authority ("KPPA"). For simplicity, Defendants continue to use the term "KRS" in this filing when referring to KPPA.

General does not represent the interests of KRS's Tier 3 beneficiaries, Tier 3 Movants' Mar. 8, 2021 Reply to Att'y Gen. & KRS Opp'n at 2–3, 5–7, in the Amended Intervening Complaint, the Attorney General explicitly states that he sues for the benefit of the Commonwealth's "pension plan beneficiaries of any and all tiers and classifications" and seeks redress for their alleged "financial injury," Am. Intervening Compl. ¶ 1.

The Attorney General, in his capacity as the Commonwealth's chief legal officer, frequently represents the interests of the Commonwealth *and* its agencies in litigation—including KRS. *See* Blackstone Defs.' Mar. 2, 2021 Obj. to Tier 3 Movants' Mot. to Intervene at 20 & n.10. And where a government party is already representing the interests of its citizens, a "very compelling" showing that the government party's representation is inadequate is required to justify intervention by a private party. *See id.* at 21. The Tier 3 Movants have made no such showing. *Id.* at 22. The Attorney General has elected to pursue claims originally asserted in the *Mayberry* complaint. And the Attorney General seeks all damages resulting from those claims on behalf of any and all allegedly injured persons, including the Tier 3 Movants.

Defendants steadfastly dispute that the claims have any merit or that any damages have resulted, and will continue to defend them vigorously. But the breadth and nature of the purported claims asserted by the Attorney General and his cadre of supporting counsel against Defendants belies the vague conspiracy theories of collusion—bereft of any evidence—that the Tier 3 Movants have asserted. In short, the Amended Intervening Complaint confirms that there is no room or need for the Tier 3 Movants or their counsel in this litigation.

**Second**, the Attorney General's decision to pursue these claims means that granting the Tier 3 Movants' motion would create *two* distinct separation-of-powers violations: Allowing the Tier 3 Movants to intervene would usurp the authority of both the Executive and

the Legislative branches. *See* KY Const. §§ 27, 28; *Sibert v. Garrett*, 246 S.W. 455, 458 (Ky. 1922) (Sections 27 and 28 were adopted to ensure that the three branches “so operate in their respective spheres as to create checks to the operations of the others and to prevent the formation by one department of an oligarchy through the absorption of powers belonging to the others”).

The Tier 3 Movants have previously argued that their presence in this case is “necessary” to assure adequate representation because the Attorney General “cannot seek or recover damages for, or deliver any recovery to, KRS,” and “is not in a position to make the Tier 3 members whole or provide ‘plan-wide relief’ benefiting KRS.” Tier 3 Movants’ Feb. 1, 2021 Br. in Support of Mot. to Intervene at 35. But the decision about how and if the Attorney General should exercise his functions does not belong to the Tier 3 Movants. As the Commonwealth’s chief legal officer, the Attorney General has decided to bring amended claims specifically for the benefit of KRS and its beneficiaries of all tiers. Am. Intervening Compl. ¶ 1. There is no basis for this Court to substitute the judgment of the Commonwealth’s Executive Branch with that of private contingency-fee counsel. *See* KY Const. §§ 27, 28; *see also Prater v. Commonwealth*, 82 S.W.3d 898, 909 (Ky. 2002) (statute permitting “the judiciary to exercise the purely executive function of granting parole” was unconstitutional). That is especially true when doing so would intrude upon a core executive function. *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 816 (1987) (Scalia, J., concurring) (prosecution of alleged law violators is part of the implementation of laws, and thus constitutes an exercise of “executive power”); *Legis. Rsch. Comm’n ex rel. Prather v. Brown*, 664 S.W.2d 907, 912 (Ky. 1984) (Section 28 “specifically prohibit[s] incursion of one branch of government into the powers and functions of the others”). Both the Attorney General and the KRS Board have announced their opposition to the Tier 3 Movants’ intervention. The Court should not let three Tier 3 beneficiaries and their

counsel, accountable to no one, override the judgment of these Executive officials, who are accountable to the citizens of the Commonwealth and the beneficiaries of KRS.

Absent specific statutory authorization, permitting the Tier 3 Movants to intrude upon the field that the Attorney General occupies would also interfere with the General Assembly's core powers. The Court cannot imply a private right of action that the Kentucky legislature has not expressly provided. *See Grzyb v. Evans*, 700 S.W.2d 399, 401 (Ky. 1985) (“Where the statute both declares the unlawful act and specifies the civil remedy available to the aggrieved party, the aggrieved party is limited to the remedy provided by the statute.”); *Virgin Mobile U.S.A., L.P v. Commonwealth ex rel. Commonwealth Mobile Radio Serv. Telecomms. Bd.*, 448 S.W.3d 241, 249 (Ky. 2014), *as modified on denial of reh’g* (Dec. 18, 2014) (“It is neither the duty nor the prerogative of the judiciary to breathe into the statute that which the Legislature has not put there.” (citation omitted)). Doing so in the face of legislative silence would create an independent separation-of-powers violation. *See Wilder v. Va. Hosp. Ass’n*, 496 U.S. 498, 508 n.9 (1990) (the test of legislative intent to create an implied private remedy for statutory violations “reflects a concern, grounded in separation of powers, that [the legislative department] rather than the courts controls the availability of remedies for violations of statutes”).

In its November 2018 Opinion & Order, this Court invoked Ky. Rev. Stat. § 61.645(15)(e)–(f) as the source of the *Mayberry* Plaintiffs’ purported derivative standing to sue. *See* Nov. 30, 2018 Opinion & Order at 8–9. Defendants continue to respectfully disagree with that conclusion because Section 61.645(15) does not create a derivative cause of action.<sup>3</sup>

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<sup>3</sup> It is also clear that the Tier 3 Movants lack constitutional standing to sue, for all the reasons Defendants have previously submitted to the Court. *See, e.g.*, Blackstone Defs.’ Mar. 2, 2021 Obj. to Tier 3 Movants’ Mot. to Intervene at 35–43. Defendants will not

And, indeed, an intervening Supreme Court ruling has underscored that allowing individual derivative plaintiffs represented by contingency-fee counsel to sue on behalf of state agencies would render the oversight policies of the Model Procurement Code futile. *See Landrum v. Commonwealth ex rel. Beshear*, 599 S.W.3d 781, 790 (Ky. 2019); *see also* Blackstone Defs.’ Mar. 2, 2021 Obj. to Tier 3 Movants’ Mot. to Intervene at 44–45.

And, even if Section 61.645(15) *were* to create a derivative cause of action, that cause of action would, by the statute’s plain terms, encompass only suits against trustees in which the plaintiff asserts that a “trustee has breached or failed to perform the duties of the trustee’s office” and can prove so by “clear and convincing evidence.” Ky. Rev. Stat. § 61.645(15)(e)(1), (f). As they explain in their Proposed Complaint in Intervention, and unlike the Attorney General, *the Tier 3 Movants no longer seek to assert claims against trustees. See* Tier 3 Movants’ Feb. 1, 2021 Proposed Compl. in Intervention ¶ 2 n.5. There is no reading of Section 61.645(15) that can possibly provide a basis for the Tier 3 Movants’ proposed derivative claims against *only* third parties and *no* trustees. And as for the alternative “trust” theory of derivative standing cited in the November 2018 Opinion & Order, that theory has been rejected by the Kentucky Supreme Court for beneficiaries of defined-benefit plans such as the Tier 3 plan. *See Overstreet v. Mayberry*, 603 S.W.3d 244, 261–63 (Ky. 2020) (holding that members of KRS’s Tier 1 and Tier 2 plans had no standing to sue as “trust beneficiaries” because, among other things, they had “identified nothing giving them an interest in the general pool of KRS assets”); *see also* Blackstone Defs.’ Mar. 2, 2021 Obj. to Tier 3 Movants’ Mot. to Intervene at

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revisit constitutional standing again here, except to say the Tier 3 Movants’ April 1, 2021 Notice of Recent Authority discussing *Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021), is entirely irrelevant. By its terms, *Uzuegbunam*’s “holding concerns only redressability.” 141 S. Ct. at 802. It does nothing to help the Tier 3 Movants establish injury in fact—which, as Defendants have explained, they cannot do.

36–39 (explaining that KRS’s Tier 3 plan, like its Tier 1 and Tier 2 plans, is a defined-benefit plan in which the members have no individual property interest in KRS’s general pool of assets).

Finally, even if a derivative cause of action were available to the Tier 3 Movants, they have not met the requirements to bring such a cause of action. KRS is entrusted by statute with the power “[t]o sue and be sued in its corporate name.” Ky. Rev. Stat. § 61.645(2)(a). Private litigants seeking to stand in the shoes of KRS would have to establish either that they made a demand on KRS to assert their claims or that a majority of the KRS Board is conflicted and therefore cannot impartially act, as is its duty under KRS’s organic statute, in the best interests of KRS. *See White v. Lunsford*, No. 2005-CA-001775, 2006 WL 2787469, at \*4 (Ky. App. Sept. 29, 2006) (citing *Rales v. Blasband*, 634 A.2d 927, 934 (Del. 1993)); *see also McElrath v. Kalanick*, 224 A.3d 982, 990–91 (Del. 2020). The Tier 3 Movants have made no demand on the KRS Board. They have asserted no facts suggesting that any member of the current KRS Board is interested or partial to any degree. The KRS Board has been completely transformed since August 2011, when KRS decided to invest in the funds at issue. Indeed, the Tier 3 Movants have commended the “house-cleaning” conducted by the previous Governor, which substantially remade the KRS Board in 2016. Tier 3 Movants’ Apr. 6, 2021 Response to Att’y Gen.’s Mot. for Further Extension of Time at 5. The Tier 3 Movants have not remotely met their burden to establish that the KRS Board is conflicted, and should not be allowed to intervene for that reason alone.

Respectfully submitted,

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