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

JEFFREY C. MAYBERRY, *et al.* PLAINTIFFS

v.

PLAINTIFFS' RESPONSE TO THE OFFICE OF THE ATTORNEY GENERAL'S MOTION TO INTERVENE ON BEHALF OF THE COMMONWEALTH OF KENTUCKY

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

ELECTRONICALLY FILED

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Plaintiffs Jeffrey C. Mayberry, Hon. Brandy O. Brown, Martha M. Miller, Steve Roberts, Teresa M. Stewart, Ashley Hall-Nagy, Tia Taylor and Bobby Estes (the "Mayberry Plaintiffs")[1] respectfully respond to the Attorney General's motion to intervene, as well as defendants' meritless oppositions to the motion, as follows:

I. INTRODUCTION AND OVERVIEW

The Mayberry Plaintiffs support intervention by the Attorney General. Not surprisingly, defendants do not. Their arguments are grounded, however, on a series of misconceptions about what the Supreme Court decided and the nature of its mandate.

First, the Supreme Court held that the allegations contained in the FAC did not support constitutional standing. ***That is all***. The case was before the Supreme Court on an interlocutory appeal of this Court's ruling on defendants' Rule 12 motions to dismiss;

[1] Mayberry, Brown, Miller, Roberts and Stewart (the "*Mayberry* Five") are plaintiffs who brought this action in December 2017 and the named plaintiffs in the January 17, 2018 first amended verified complaint ("FAC"), and the proposed amended complaint submitted a year ago, now replaced by the Mayberry Plaintiffs' July 29, 2020 proposed second amended verified complaint ("SAC").

that, and the Trustees and Officers' immunity arguments, were the only issues presented for appellate review. No merits issue was before the Supreme Court, and there was no holding on any such issue. The Supreme Court did not decide that the underlying subject matter of the case was not justiciable, *i.e.*, capable of judicial resolution. That the case took a "nearly three-year journey through every level of the Kentucky courts" does not transmute the nature of the limited threshold issue presented and decided.

Second, the Supreme Court did not render judgment, or order this Court to dismiss the case with prejudice, as defendants suggest. The mandate was to remand "with direction to dismiss the complaint." The mandate does not go on to say "with prejudice." Given the procedural posture of the case — appellate review of this Court's ruling on initial pleading challenges — dismissal with prejudice would be appropriate only if the pleading defect identified by the Supreme Court is not curable. That the pleading defect concerns constitutional standing does not change this result. Nor does it mean that amendment is foreclosed or disfavored — especially where, as here, the law on the central issue changed after the case was pleaded and the motions to dismiss argued. Indeed, the pleading defect regarding constitutional standing is curable: the Mayberry Plaintiffs have in fact moved for leave to amend the complaint for just that purpose. Claims of the death of the *Mayberry* case are premature; there is a live controversy in which the Attorney General should be allowed to intervene.

Third, contrary to the suggestion of some defendants, the writ issued by the Court of Appeals does not prevent this Court from acting at this point. The Supreme Court dismissed the writ proceeding as moot.

Finally, because of the obvious interplay of issues, this Court should decide the Attorney General's motion and the Mayberry Plaintiffs' motion together.

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II. ARGUMENT

A. The Court Should Grant the Attorney General's Motion to Intervene and Allow the Attorney General to Prosecute, Alongside the Mayberry Plaintiffs, the Related Claims on Behalf of the Commonwealth

As stated in their July 29, 2020 motion for leave to file an SAC, the Mayberry Plaintiffs welcome the Attorney General's participation in this action. The Attorney General's timely motion to intervene satisfies all requirements of Rules 24.01 and 24.02 of the Kentucky Rules of Civil Procedure. And the claims asserted by the Attorney General on behalf of the Commonwealth's taxpayers arise out of the same set of facts and involve overlapping legal theories as the claims asserted by the Mayberry Plaintiffs derivatively on behalf of the Kentucky Retirement Systems ("KRS"). In fact, the Attorney General's proposed complaint in intervention recognizes — as did the Kentucky Supreme Court in its July 9, 2020 opinion in this case[2] — that the FAC had pleaded "significant misconduct" by defendants in impairing KRS's financial condition. Indeed, the Attorney General has utilized large portions of the FAC, which was drafted by the Mayberry Plaintiffs' counsel in consultation with experts and consultants. And in its November 30, 2018 Opinion & Order,[3] this Court has already upheld the FAC against all substantive defenses asserted by all but one of the defendants. Accordingly, the Court should permit the Attorney General to intervene and prosecute, alongside the Mayberry Plaintiffs, these related claims on behalf of the Commonwealth.

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[2] *Overstreet v. Mayberry*, Nos. 2019-SC-000041-TG, *et al.*, slip op., at 36, 2020 Ky. LEXIS 225 (Ky. July 9, 2020) (cited as "*Mayberry* Opinion").

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

As the Mayberry Plaintiffs hope that their motion for leave to file an SAC is granted,[4] they look forward to working with the Attorney General in prosecuting this action. They are prepared to propose and help implement a plan for coordinated pretrial procedures, consolidated discovery and the like, so as to simplify these proceedings, to prevent duplication of work and to allow this matter to proceed in an efficient and speedy manner for the benefit of the Commonwealth's public employees and taxpayers.

B. The Court Should Reject Defendants' Meritless Challenges to Its Jurisdiction

On July 30, 2020, four groups of defendants filed oppositions to the Attorney General's motion to intervene: the Trustees and Officers; the RVK Defendants; the Blackstone Defendants; and the PAAMCO/Prisma Defendants and the KKR Defendants. They argue — erroneously — that the Court lacks subject-matter jurisdiction to decide the pending motions, and that the Court should deny the Attorney General's motion to intervene on the merits. As discussed below, in challenging this Court's jurisdiction, defendants misstate the facts and misinterpret the law.

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[4] As explained in Plaintiffs' motion for leave to amend, the SAC cures all pleading defects identified in the Supreme Court's July 9, 2020 opinion and pleads injury in fact with respect to the *Mayberry* Five (Tier 1 and Tier 2 members) and three additional plaintiffs (Tier 3 members) because, as a result of defendants' misconduct, (1) Plaintiffs' Cost of Living Allowance (COLA) was eliminated in 2013; (2) their insurance benefits are unprotected (*i.e.*, not part of an "inviolable contract" provision) and at increased risk; and (3) all Tier 3 benefits are unprotected and their promised upside sharing has been and is being diminished. Accordingly, the Mayberry Plaintiffs have standing to assert the claims derivatively on KRS's behalf.

The proposed SAC also extends and refines the substantive allegations of the FAC, based largely on evidence gathered through discovery, as well as through cooperation with KRS itself. In addition, the SAC contains detailed new allegations that only came to light as a result of this formal and informal discovery, concerning self-dealing and other breaches of duties by defendants Prisma Capital Partners, L.P., KKR & Co., L.P. and related persons during 2015–18.

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1. This Court Has Jurisdiction Because the Supreme Court Has Remanded This Action

As provided in the Section 112(5) of the Kentucky Constitution and repeatedly upheld by the Supreme Court, "circuit courts 'shall have original jurisdiction of all justiciable causes not vested in some other court.'" *Commonwealth v. Wingate*, 460 S.W.3d 843, 848 (Ky. 2015) (quoting *Davis v. Wingate*, 437 S.W.3d 720, 725 (Ky. 2014)). Here, jurisdiction over this action is vested in neither the Supreme Court nor the Court of Appeals because all three appeals arising from this action have concluded. On July 9, 2020, the Supreme Court resolved the Trustees' Appeal and the Officers' Appeal on constitutional standing grounds, and dismissed the Writ Appeal as moot.[5] *Mayberry* Opinion at 8 & n.6. The Supreme Court ***remanded*** the case to this Court with "direction to dismiss the complaint." *Id.* at 5. Accordingly, this Court is now the only court vested with jurisdiction over this case. *See* KY. CONST. § 112(5).

On remand, the Supreme Court's direction cannot be clearer: this Court is to dismiss "***the complaint***" — the FAC that the Supreme Court has found to be deficient in alleging injury in fact to meet Section 112(5)'s "justiciable cause" requirement. *See Mayberry* Opinion at 5. Under the Kentucky Rules of Civil Procedure, the circuit court retains jurisdiction over an action for at least ten days after dismissing a complaint. *See Commonwealth v. Sowell*, 157 S.W.3d 616, 618 (Ky. 2005) (the circuit court loses jurisdiction over an action after entry of judgment and expiration of ten-day period during which a motion for new trial may be made); *see also* KY. R. CIV. P. 59.02; *accord Firchau v. Diamond Nat'l Corp.*, 345 F.2d 269, 270 (9th Cir. 1965) ("[a]n order … dismiss[ing] a

[5] Before the Supreme Court were three appeals: Case No. 2019-SC-000041 (the "Trustees' Appeal"), Case No. 2019-SC-000042 (the "Officers' Appeal"), and Case No. 2019-SC-000232 (the "Writ Appeal").

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complaint without expressly dismissing the action is not, except under special circumstances, an appealable order"). Thus, this Court has not only the authority to dismiss the FAC, as directed by the Supreme Court, but also the authority to render any post-judgment relief as necessary. *See Sowell*, 157 S.W.3d at 618; *see also* KY. CONST. § 112(5).

2. Conducting the Pending Proceedings — the Attorney General's Motion to Intervene, as Well as the Mayberry Plaintiffs' Motion for Leave to Amend — Is Consistent with the Supreme Court's Instruction to *Dismiss the Complaint*

A dismissal on standing grounds — as ordered by the Supreme Court — is inherently non-substantive and without prejudice. *See*, *e.g.*, *Media Techs. Licensing, LLC v. Upper Deck Co.*, 334 F.3d 1366, 1370 (Fed. Cir. 2003) ("Because standing is jurisdictional, lack of standing precludes a ruling on the merits."); *Stalley ex rel. United States v. Orlando Reg'l Healthcare Sys., Inc.*, 524 F.3d 1229, 1234–35 (11th Cir. 2008) (same); *Fleck & Assocs. v. City of Phoenix*, 471 F.3d 1100, 1106–07 (9th Cir. 2006) (same). Here, a dismissal without prejudice of the FAC is proper especially because, under Kentucky law, "a dismissal of litigation [is] of a serious nature." *See Hertz Commercial Leasing Corp. v. Joseph*, 641 S.W.2d 753, 755 (Ky. Ct. App. 1982) (rejecting "the proposition that the effect of [a dismissal] order entered pursuant to a 'housekeeping' rule is one that is to be automatically considered 'with prejudice'"). In fact, it is all but routine for trial courts to grant leave to amend after dismissing complaints for failure to plead injury in fact. *See*, *e.g.*, *In re Adobe Sys. Privacy Litig.*, 66 F. Supp. 3d 1197, 1218 (N.D. Cal. 2014) ("[T]he Court GRANTS [dismissal of Plaintiffs' claim] for lack of Article III standing. Because Plaintiffs may be able to cure this deficiency in an amended complaint, this dismissal is without prejudice."); *S. Ill. Laborers' & Emp'rs. Health & Welfare Fund*

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v. Pfizer Inc., No. 08 Civ. 5175 (KMW), 2009 U.S. Dist. LEXIS 91414, at *26 (S.D.N.Y. Sept. 30, 2009) (granting leave to amend *sua sponte* after finding that plaintiff failed to allege Article III standing).

On the issue of plaintiffs' right to cure any pleading defects regarding standing and subject-matter jurisdiction, decisions interpreting Federal Rule of Civil Procedure 15 — CR 15.01's counterpart — is instructive, because the Kentucky courts have recognized that these two rules are "identical." *See State Contracting & Stone Co. v. Walker*, 294 S.W.2d 931, 932 (Ky. Ct. App. 1956). In *Scahill v. District of Columbia*, the D.C. Circuit reversed the trial court's denial of leave to amend to cure defects in pleading Article III standing. *See* 909 F.3d 1177, 1183 (D.C. Cir. 2018). Citing cases from other federal courts of appeals, the D.C. Circuit held that "***a plaintiff may cure a standing defect under Article III through an amended pleading alleging facts that arose after filing the original complaint***." *Id.* at 1183–84 (emphases added).[6] *Scahill*'s holding applies here — with greater force — because, as demonstrated in their July 29, 2020 motion for leave to file an SAC, the Mayberry Plaintiffs are seeking to allege facts to show injury in fact that existed ***prior*** to the commencement of their action. And they did not plead those facts only because the then-existing law did not require them to do so.

It is axiomatic that "[o]ne of the circumstances under which courts have granted ... leave to amend a complaint is an intervening change in applicable law." *Boarhead Farm Agreement Grp. v. Advanced Envtl. Tech. Corp.*, 381 F. Supp. 2d 427, 431 (E.D. Pa.

[6] Citing *Northstar Fin. Advisors Inc. v. Schwab Invs.*, 779 F.3d 1036, 1044–48 (9th Cir. 2015) (permitting plaintiff to file a supplemental pleading to establish standing based on post-complaint facts"); *United States ex rel. Gadbois v. PharMerica Corp.*, 809 F.3d 1, 6 (1st Cir. 2015) (same); *Daniels v. Arcade, L.P.*, 477 F. App'x 125, 131 (4th Cir. 2012) (same); *Prasco, LLC v. Medicis Pharm. Corp.*, 537 F.3d 1329, 1337 (Fed. Cir. 2008) (same); *Travelers Ins. Co. v. 633 Third Assocs.*, 973 F.2d 82, 87–88 (2d Cir. 1992) (same).

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2005); *see also, e.g., Wilcox v. First Interstate Bank, N.A.*, 815 F.2d 522, 530 (9th Cir. 1987) (allowing plaintiffs "the opportunity to amend their pleadings to conform with [the court's] recent decisions"). The same rule applies where, as here, the change in law pertains to the court's subject-matter jurisdiction. *See Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 71 (2d Cir. 2012). Accordingly, this Court squarely retains jurisdiction, after dismissing the FAC, to decide the Mayberry Plaintiffs' motion to file an SAC, which cures any defects in standing allegations. The Court also has jurisdiction to decide the motion to intervene by the Attorney General, whose standing to pursue claims on the Commonwealth's behalf has been expressly endorsed by the Supreme Court (*see Mayberry* Opinion at 34–35).

At bottom, this Court's jurisdiction to conduct the pending proceedings here finds support in its inherent authority "to determine its own jurisdiction." *See City of Greenup v. Publ. Serv. Comm'n*, 182 S.W.3d 535, 538 (Ky. Ct. App. 2005). In the words of Justice Oliver Wendell Holmes, Jr., "[***the court and the court***] ***alone necessarily ha***[***s***] ***jurisdiction to decide whether the case*** [***is***] ***properly before it***." *United States v. Shipp*, 203 U.S. 563, 573 (1906) (Holmes, J.). Under this settled rule, courts routinely entertain motions to ascertain their subject-matter jurisdiction. *See, e.g.*, *GBForefront, L.P., v. Forefront Mgmt. Grp., LLC*, 888 F.3d 29, 32 (3d Cir. 2018) ("instruct[ing] the [d]istrict [c]ourt to give leave to further amend the complaint … to cure defective jurisdictional allegations"); *Woods v. Ind. Univ.-Purdue Univ. at Indianapolis*, 996 F.2d 880, 884 (7th Cir. 1993) ("Rule 15(c) has uniformly been applied to relate back [filings] that cure defective statements of jurisdiction"); *Boyce v. Anderson*, 405 F.2d 605, 607 (9th Cir. 1968) (allowing amendment to cure jurisdictional defect in complaint). This Court should do the same here.

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Arguing the contrary, defendants resort to distorting the Supreme Court's order and case law. The Trustees and Offers erroneously assert that the writ of prohibition issued by the Court of Appeals "remains in force and effect." Trustees and Officers' Op. at 2. But the Supreme Court has expressly dismissed the Writ Appeal as moot and, consequently, discharged the writ. *See Mayberry* Opinion at 8 & n.6.

Worse, every defendant misrepresents what the Supreme Court's July 9, 2020 opinion says — arguing that "the Supreme Court instructs this Court to dismiss ***this case***."[7] But the Supreme Court instructs no such thing. Rather, the Supreme Court orders only dismissal of "***the complaint***," consistent with settled law, as discussed above, that a dismissal on standing grounds is necessarily without prejudice, and that leave to amend shall be freely granted to plaintiffs to cure any pleading defects. *Mayberry* Opinion at 5 (emphasis added).

On this point, none of the cases cited by defendants is apposite. For example, *Kumat v. Lohe* holds only that the circuit court lacks the authority to accept pleadings relating to the issues pending on appeal. *See* Nos. 2006-CA-002624-MR, *et al.*, 2008 Ky. App. Unpub. LEXIS 959 (Ky. Ct. App. May 30, 2008). And *Public Service Commission v. Shepherd* stands for the unremarkable proposition that, absent subject-matter jurisdiction, the court lacks authority to issue orders on the merits of the action. *See* No. 2018-CA-001859, 2019 Ky. App. LEXIS 31 (Ky. Ct. App. Mar. 6, 2019). None of the defendants' cases addresses the Court's inherent authority to ascertain its own jurisdiction and to rule on motions seeking to cure jurisdictional defects.

No law — defendants have cited none — precludes the Court from deciding the

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[7] Trustees and Officers' Opp. at 2 (emphasis added); RVK's Opp. at 8 n.3; Blackstone's Opp. at 1 n.1, 2; PAAMCO's Opp. at 1 n.1, 7.

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Attorney General's motion to intervene. Indeed, the Supreme Court has expressly stated that the Attorney General's participation in this action cures the Mayberry Plaintiffs' standing to assert claims on behalf the Commonwealth's taxpayers:

> Under Kentucky law, the Attorney General, as a constitutionally elected official, is empowered to represent the Commonwealth in cases in which the Commonwealth is the real party in interest. … As a constitutionally elected officer, the Attorney General is entrusted with broad discretion in the performance of his duties, which includes evaluating the evidence and other facts to determine whether a particular claim should be brought.

Mayberry Opinion at 34–35. As such, the Attorney General's motion to intervene, as well as Plaintiff's motion for leave to file an SAC, squarely fall within the Court's authority "to determine its own jurisdiction." *See City of Greenup*, 182 S.W.3d at 538; *see also Shipp*, 203 U.S. at 573. The Court should reject defendants' challenges to its jurisdiction.

III. CONCLUSION

For the reasons set forth above, the Court has the power to decide the Attorney General's motion to intervene. The Court should grant this motion and permit the Attorney General to prosecute, alongside the Mayberry Plaintiffs, the related meritorious claims on behalf of the Commonwealth.

Dated: July 31, 2020

Respectfully submitted,

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