

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CASE NO. 17-CI-01348
Electronically filed

JEFFREY C. MAYBERRY, *et al.*

Plaintiffs

v.

KKR & CO. LLP, *et al.*

Defendants

**COMMONWEALTH’S RESPONSE IN OPPOSITION TO
THE TIER 3 GROUP’S MOTION TO INTERVENE**

The Commonwealth of Kentucky, through its Attorney General, opposes the Tier 3 Group’s motion to intervene. This Court has already determined that the Attorney General has a public interest in ensuring that KRS assets are managed in a prudent fashion. Order, December 28, 2020 at 13. And it is for the protection of that public interest—the assets of the KRS pension funds—that this Court determined that the Attorney General has standing to pursue the claims in this action. Recognizing the Attorney General’s interest in protecting those assets and recognizing that the Supreme Court in *Overstreet v. Mayberry* did not intend “to provide a free pass, or ‘get out of jail free’ card” for the Defendants, the Court allowed the Attorney General to intervene. *Id.* at 16. And that intervention by its terms

provided for the Attorney General “to take over this case and pursue these claims on their merits.” *Id.* at 17.

With this background and for the reasons that follow, this Court should deny the Tier 3 Group’s motion to intervene.

I. The Attorney General alone has control of the public interest claims concerning KRS assets.

As this Court has already noted, KRS 15.020 grants broad authority to the Attorney General. Under that statute, the Attorney General “shall exercise all common law duties and authority pertaining to the office of the Attorney General under the common law.” *Id.* Further, the Attorney General shall “attend to all litigation and legal business in or out of the state required of him by law, or in which the Commonwealth has an interest, and any litigation or legal business that any state officer, department, commission, or agency may have in connection with, or growing out of, his or its official duties.” *Id.*

At common law, the Attorney General has the power to bring any action which he thinks necessary to protect the public interest. *Commonwealth ex rel. Conway v. Thompson*, 300 S.W.3d 152, 173 (Ky. 2009). This is “a broad grant of authority,” *id.*, and includes “the power to institute, conduct and maintain suits and proceedings for the enforcement of the laws of the state, the preservation of order, and the protection of public rights.” *Commonwealth ex rel. Hancock v. Paxton*, 516 S.W.2d 865, 867 (Ky. 1974). “[I]n the exercise of his common-law powers, an attorney general may not only control and manage all litigation in behalf of the state, but he may also intervene in all suits or proceedings *which are of concern to the general public.*” *Hancock v. Terry*

Elkhorn Mining Co., 503 S.W.2d 710, 715 (Ky. 1973) (emphasis added; internal citation omitted). And in addition to initiating, maintaining, and controlling litigation on behalf of the Commonwealth, it is also within the Attorney General’s power to determine not to bring an action: “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.” *Overstreet v. Mayberry*, 603 S.W.3d 244, 265 (Ky. 2020).

The Attorney General has discretion to determine “what matters may, or may not, be of interest to *the people generally*.” *Commonwealth ex rel. Beshear v. Commonwealth, Office of the Governor ex rel. Bevin*, 498 S.W.3d 355, 366 (Ky. 2016) (citing *Mundy v. McDonald*, 185 N.W. 877, 880 (Mich. 1921)) (emphasis added). In attending to all litigation in which “the Commonwealth has an interest” under KRS 15.020, the Attorney General serves as lawyer for *the people* of the Commonwealth. Because in this Commonwealth, “the people are king, . . . the Attorney General’s duties are to that sovereign rather than to the machinery of government.” *Paxton*, 516 S.W.2d at 867; *accord*, *Thompson*, 300 S.W.3d at 173. Thus, whether or not a specific state agency, such as the Kentucky Retirement Systems, is a party to an action, the Attorney General’s fealty is to the people of the Commonwealth of Kentucky, including the beneficiaries of the Kentucky Retirement Systems—whether those beneficiaries find themselves in Tier 1, Tier 2, or Tier 3.

This Court also has recognized the role that the Attorney General is to play in this case. In its order granting the Attorney General’s motion to intervene, the Court

found that the Attorney General has “a strong interest in the subject matter of this case.” Order, Dec. 28, 2020, at 13. That interest is the “public interest in ensuring that [Kentucky Retirement Systems] assets—funded in part by taxpayer dollars—are managed in a prudent fashion.” *Id.* That “public interest” is the same, regardless of whether the assets are to be used to pay retirement benefits to Tier 1, Tier 2, or Tier 3 beneficiaries. “It is for that reason,” the Court said, “that the Attorney General has an interest in this action, and in light of *Overstreet* this interest would *no longer be adequately pursued without the Attorney General* being permitted to intervene.” *Id.* (emphasis added). The Court later observed that “the Kentucky Supreme Court went to great pains [in *Overstreet*] to specifically point out that the Attorney General has standing to pursue such claims.” *Id.* at 16.

Thus, the Supreme Court ruled in *Overstreet* that no individual has standing to pursue claims stemming from the KRS investment portfolio insofar as those claims relate to Tier 1 or Tier 2 benefits subject to the inviolable contract doctrine. And this Court ruled in December that the Attorney General has standing to pursue those same claims on behalf of the public interest, claims that the Court noted “mirror” those the original plaintiffs could not pursue. Order, Dec. 28, 2020, at 15. Not only does the Attorney General have standing, but he is entitled to *take over this case and pursue those same claims*. And because he has done so, the Attorney General has occupied the field. He has assumed control of the case and is pursuing the public interest in ensuring that KRS assets are managed in a prudent fashion, *id.* at 13, and

there is no room for the same claims to be somehow controlled or directed by a group of fund beneficiaries, their California consultant, and his legal assistants.¹

And there can be no doubt that the Tier 3 Group seeks to intervene in this case to advance the same claims by the original plaintiffs the Court has already dismissed, the same interests the Court has already acknowledged the Attorney General has standing to take over and pursue. “The Tier 3 Plaintiffs want to intervene to carry forward the prosecution of the previously sustained derivative claims on behalf of KRS” Memorandum in Support of Tier 3 Motion to Intervene (“Mem.”) at 4. They admit that “the Tier 3 claims asserted in their Complaint are the same claims asserted in the original *Mayberry* action.” *Id.* at 30 (emphasis removed). Thus, the Tier 3 Group seeks to “carry forward” the “same claims,” and serve the same “purpose and goal,” as the original plaintiffs in this case. But the Tier 3 Group cannot intervene just by adding a cost-of-living-adjustment (COLA) claim.

The basis of the Tier 3 Group’s claims—and the basis of the original *Mayberry* Plaintiffs’ claims before them—is the alleged mismanagement by the Defendants of the assets of the Kentucky Retirement Systems trust funds, and the breach of duties by those who aided them. As the Court has recognized, that is the same interest the Attorney General seeks to protect. Now that the Attorney General has assumed

¹ The Attorney General will not address here the challenges to his or his staff’s competence, the baseless claims of some conflict of interest, or the charges of collusion (or worse) offered to one degree or another now in filings by the Tier 3 Group on December 31, 2020, on January 11, and on February 15, 2021, each more offensive than the previous one. Nor will the Attorney General address here the Tier 3 Group’s charge that corruption “has infested this state’s government for decades” (Tier 3 Group’s Motion for Pre-Trial Order No. 1, at 20 n.15), “not only in the executive and legislative branches but also in the judicial branch.”

control of this case, has filed a complaint that includes claims that would otherwise have been lost but for his intervention, and is exercising the broad authority the Supreme Court has articulated is his alone to exercise when the interest of the Commonwealth, its agencies, and the public is involved, the Tier 3 Group's intervention in this case as derivative plaintiffs on behalf of the Kentucky Retirement Systems is simply foreclosed. Even the Tier 3 Group suggests that they have "conflicting interests" vis-à-vis the interest the Court already found the Attorney General has in this action.² Their intervention in this action would be an affront to the Attorney General's common-law authority³ to "control and manage *all litigation* in behalf of the state." *Hancock*, 503 S.W.2d at 715 (emphasis added). It therefore must be denied by this Court.

Overstreet further buttresses the conclusion that the Tier 3 Group's motion to intervene must be denied. The Attorney General has a duty to retain "full control over the course of the litigation" in which the Commonwealth has an interest. *Merck Sharp & Dohme Corp. v. Conway*, 947 F. Supp. 2d 733, 739 (E.D. Ky. 2013) (citation omitted). The Supreme Court in *Overstreet* recognized this responsibility: "[I]mportantly, when the Attorney General turns to outside counsel to assert claims belonging to the Commonwealth, their relationship is governed by strict statutory

² See Tier 3 Group's memorandum in support of their motion for entry of a pretrial order, filed on February 15, 2021, at 13. The Attorney General does not concede any such conflict. Further, the Attorney General endorses completely the Supreme Court's recognition of his authority and obligation to oversee any representation of the Commonwealth or its interests in litigation by outside counsel. See *Overstreet*, 603 S.W. 3d at 265.

³ See, e.g., *Brown v. Barkley*, 628 S.W.2d 616, 621 (Ky. 1982) (recognizing that the Attorney General "has been held to possess by implication the powers inhering in the office as it existed at common law").

procurement and oversight requirements.” *Overstreet*, 603 S.W.3d at 265-66 (citing *Landrum v. Commonwealth ex rel. Beshear*, 599 S.W.3d 781, 787-90 (Ky. 2019)). Thus, in addition to all the other reasons their case was ordered dismissed, the *Mayberry* Plaintiffs could not sue in a derivative or representative capacity on behalf of the Kentucky Retirement Systems because the Attorney General previously had elected not to pursue this case, was wholly uninvolved with it, and had not authorized it. *Id.* at 266. Further, the Attorney General had not assigned a portion of the recovery to the *Mayberry* Plaintiffs, who were proceeding “entirely independent[ly] of the Office of the Attorney General,” without the Attorney General’s oversight. *Id.* “[T]aking into consideration the stringent oversight requirements otherwise imposed on outside counsel hired by the Attorney General,” the Supreme Court concluded that the *Mayberry* Plaintiffs lacked standing. *Id.*

The Tier 3 Group has not remedied any of these defects that plagued the *Mayberry* Plaintiffs. The Attorney General, by intervening in this case, has decided to pursue the case against the Defendants. The Attorney General has not authorized the Tier 3 Group to pursue any claims, and given their adversarial posture against the Attorney General and efforts to seize control of this litigation, that would be an unlikely development. Despite this, the Tier 3 Group still proposes to proceed outside the Attorney General’s oversight and to litigate claims on behalf of KRS, entirely independent of statutory procurement laws (including KRS 45A.717(3) and (4)). Their motion to intervene, and their proposal to assume control of this litigation in the event the motion were granted, disregards not only the Attorney General’s duty to

exercise “full control” over this litigation on behalf of the Commonwealth, but also the Kentucky Model Procurement Code and *Overstreet*.⁴

The Tier 3 Group also seeks support for their intervention in this case from KRS 61.645(11). Under that statute, the Attorney General “may” serve as counsel for the Kentucky Retirement Systems board. As well, the Kentucky Retirement Systems board “may contract for legal services” from private counsel. *Id.* The Tier 3 Group argues that, because the Kentucky Retirement Systems board has not directly retained the Attorney General to represent it in this case under KRS 61.645(11), the Attorney General cannot possibly seek to recover any damages that may be owed to the Kentucky Retirement Systems trust funds in this action, and that they must be permitted to intervene to do so. *See, e.g.*, Mem. at 38.

But the Supreme Court has already rejected that argument. In *Beshear*, the Supreme Court recognized that the General Assembly may “divest some of the powers of the Attorney General (*i.e.*, serving as legal counsel to a given state entity) and invest them in another (*i.e.*, private counsel of the entity’s choosing).” 498 S.W.3d at 364 (citing *Johnson v. Commonwealth ex rel. Meredith*, 291 Ky. 829, 165 S.W.2d 820, 829 (1942)). However, the Court rejected the further argument that “when a state

⁴ The Tier 3 Group also claims—erroneously—that if it were allowed to pursue claims on behalf of the Kentucky Retirement Systems, it would be permitted to bypass KRS 48.005. *See, e.g.*, Mem. at 36-37. To the contrary, any recovery by KRS—and, presumably, by any person on behalf of KRS—is governed by the statute. Once the Attorney General “is a party or has entered his appearance in a legal action on behalf of the Commonwealth of Kentucky, including ex rel. or other type actions,” the statute applies, and it controls the disposition of any “recovery of funds or assets to be held in trust by . . . [an] entity created by . . . the Commonwealth,” including the Kentucky Retirement Systems. KRS 48.005(3). The statute is designed to provide for oversight by the General Assembly and for “[p]ublic accountability” for any public funds or assets recovered in litigation. KRS 48.005(1). To the extent it applies to this case, it applies whether the Attorney General or anyone else to whom the General Assembly has granted authority recovers funds or assets on behalf of KRS.

agency hires, *or can hire*, its own attorneys pursuant to statutory authority, the Attorney General no longer has authority to unilaterally decide to act for that agency.” *Beshear*, 498 S.W.3d at 364 (emphasis added). Rather, the Court held, the delegation of “day-to-day operational powers,” including to a state agency’s private counsel, “does not preclude a need for the Attorney General to protect *the interest of all the people* when . . . unlawful conduct is claimed . . . toward” that state agency. *Id.* (emphasis added). Thus, the permissive “may” used in KRS 61.645(11), when it discusses the Attorney General’s acting as “legal adviser and attorney for the board,” confers discretion *upon the Attorney General* to protect the public interest that the Court has already found the Attorney General has in ensuring that the assets of the Kentucky Retirement Systems are prudently managed.

There is no daylight between the Attorney General’s authority under KRS 15.020 to represent the interests of the Commonwealth and his authority to seek a remedy in this case. The Attorney General occupies the field in representing the public interests of the Commonwealth and its agencies in this litigation insofar as those assets are concerned. There is no room for any derivative involvement by the Tier 3 Group at this point and the motion to intervene should be denied.

II. The Kentucky Retirement Systems does not need representation separate from the Commonwealth.

The Tier 3 Group claims that the Kentucky Retirement Systems “is a separate legal entity, which is distinct from the Commonwealth.” Mem. at 37. This separateness, they claim, entitles them to litigate derivatively on behalf of the Kentucky Retirement Systems, even as the Court has already permitted the Attorney

General to intervene on behalf of the Commonwealth to represent the public interest and ensure that the KRS assets are prudently managed. For this proposition, the Tier 3 Group purports to rely on *Commonwealth v. Kentucky Retirement Systems*, 396 S.W.3d 833 (Ky. 2013), but they misrepresent its holding.

Rather, the Supreme Court acknowledged that the Kentucky Retirement Systems “is a statutorily created agency of state government.” *Id.* at 837 (citing KRS 61.645(1)). The Kentucky Employees Retirement System, which is administered by the Kentucky Retirement Systems board under KRS 61.645(1), is attached to the Kentucky Finance and Administration Cabinet for administrative purposes. KRS 12.020(II)(9)(m). “Due to its management and disbursement of state, county and police employee retirement benefits, [Kentucky] Retirement Systems itself is clearly an integral part of state government.” *Ky. Ret. Sys.*, 396 S.W.3d at 837. The Court refers to Kentucky Retirement Systems as “an ‘arm, branch, or alter ego’ of the state.” *Id.* For this reason, the Kentucky Retirement Systems is afforded the same sovereign immunity as the Commonwealth itself. *Id.* And for this reason, it is simply untrue, as the Tier 3 Group claims, that Kentucky Retirement Systems is so separate from the Commonwealth that it requires separate representation by a private citizen or group of citizens in this litigation.

III. The Tier 3 Group does not have derivative standing to represent the Kentucky Retirement Systems.

The Tier 3 Group proposes to intervene as plaintiffs in this action to assert claims derivatively on behalf of the Kentucky Retirement Systems, to “grab the baton from the initiating plaintiffs and press on.” Mem. at 4. Notwithstanding *Overstreet*

and this Court's order of December 28, 2020, the Tier 3 Group would act as if nothing of substance happened, and they may simply pursue all of the original *Mayberry* Plaintiffs' claims, despite that the Supreme Court said that no individual may do so, and despite that this Court has allowed the Attorney General to intervene for that very purpose. However, there is no right in Kentucky for a private person to litigate a case on behalf of a state agency such as the Kentucky Retirement Systems.

The Tier 3 Group does not cite a single case that authorizes a private person to litigate a civil action, derivatively or otherwise, *on behalf of an agency of the Commonwealth*. Every case cited in the memorandum filed by the Tier 3 Group in support of their motion to intervene, *see* Mem. at 15-26, involved suit by a private person on behalf of a corporation or other non-governmental entity.⁵ Not one of those cases involved a public employee pension system established by a state government. And not one involved a suit in which a state Attorney General was present as a party already authorized by the court to represent the interests of the state and its citizens in ensuring the prudent management of pension assets. Because each case cited by the Tier 3 Group is distinguishable on these grounds, none is of value to this Court.

Beyond that, the availability of derivative actions in Kentucky is severely limited. By statute, the General Assembly has authorized derivative actions in certain specific situations. The legislature has authorized derivative actions by

⁵ Neither KRS nor the Kentucky Employees Retirement System is registered as a corporation with the Kentucky Secretary of State. Compare this with, *e.g.*, the Kentucky Lottery Corporation, which the General Assembly created as "an independent, *de jure* municipal corporation," KRS 154A.020(1), is registered as a corporation with the Secretary of State, and observes all the usual corporate formalities.

shareholders of for-profit corporations, KRS 271B.7-400; by members of limited cooperative associations, KRS 272A.13-010; by members of limited liability companies, KRS 275.337; by partners in a limited partnership, KRS 362.2-932; and by beneficial owners of a statutory trust, KRS 386A.6-110. But the General Assembly has not authorized derivative actions by current or future retirees of state government against third parties. As important, the courts of the Commonwealth have not permitted derivative actions where not specifically authorized by statute. *See Porter v. Shelbyville Cemetery Co.*, No. 2007-CA-002545-MR, 2009 WL 722995, at *5 (Ky. App. Mar. 20, 2009) (derivative suit not permitted on behalf of a non-profit corporation because the General Assembly has not “exercised its plenary power over the issue” to permit such claims). Therefore, even if the Attorney General had not already intervened in this action and occupied the field, absent statutory authorization, the Tier 3 Group is not authorized to represent the public interests of the Kentucky Retirement Systems or its beneficiaries—derivatively, or in any other capacity.

The Tier 3 Group claims such authorization is found in KRS 61.645(15)(e)-(f). *See Mem.* at 28, 30, 37. However, that statute permits only suits against a “trustee” of the Kentucky Retirement Systems for “[a]ny action taken as a trustee, or any failure to take any action as a trustee.” KRS 61.645(15)(e). The statute clearly does not permit a derivative action *on behalf of Kentucky Retirement Systems*⁶ or against

⁶ The Commonwealth takes no position here on whether the individuals who have moved to intervene collectively have standing to assert claims on their own behalf—i.e., not derivatively on behalf of the Kentucky Retirement Systems—to “ameliorat[e] the harm the Tier 3 [Group’s] individual retirement accounts have already suffered.” *See Mem.* at 4. However, the Tier 3 Group’s proposed

any person not a trustee.⁷ Because they can cite to no other statute that permits them to sue derivatively on behalf of a state agency, they do not have standing to bring their claims against the Defendants on behalf of the Kentucky Retirement Systems.

The Tier 3 Group also claims that, unlike the original *Mayberry* Plaintiffs, because they are not defined-benefit beneficiaries of the Kentucky Retirement Systems, “they have standing under the rationale of *Overstreet*. . .” Mem. at 9. But that just is not so, and distorts *Overstreet*’s holding.

When this case was before the Supreme Court in *Overstreet*, the Court held that the original *Mayberry* Plaintiffs, as members of a defined-benefit retirement plan, had not sustained an injury in fact that would give them standing because any increased risk of default by the Commonwealth under its inviolable contract was too speculative. *Overstreet*, 603 S.W.3d at 253-257. Further, without an injury in fact, the *Mayberry* Plaintiffs also did not have standing in a representational or derivative capacity “on behalf of [Kentucky Retirement Systems] and the Commonwealth.” *Id.* at 257-261. Trust law principles also did not confer standing upon the *Mayberry* Plaintiffs. *Id.* at 261-263.

Most relevant to the Tier 3 Group’s motion to intervene, the Supreme Court also held that the *Mayberry* Plaintiffs did not have standing as taxpayers, either in their personal capacity as taxpayers or derivatively on behalf of the state government.

intervening complaint does not include any claims asserted on their own behalf, but only on behalf of Kentucky Retirement Systems. This Court, therefore, need not decide the scope of the claims the Tier 3 Group may have standing to assert—only that they do not have standing to assert *these* claims.

⁷ Presumably to avoid the qualified immunity issue that would permit another interlocutory appeal in this case, the Tier 3 Group’s proposed intervening complaint omits any claims against the former officers and trustees of the Kentucky Retirement Systems.

Overstreet, 603 S.W.3d at 263-266. Though taxpayer standing has existed in Kentucky for many years as a matter of equity, the Supreme Court stated that it “ha[s] never allowed a suit like this.” *Id.* at 263. The *Mayberry* Plaintiffs sought “damages from private third parties . . . for tort damages allegedly sustained to all Kentucky taxpayers. Plaintiffs do not cite, and we cannot find, any Kentucky cases permitting such a novel theory of standing.” *Id.* at 264. The Court could find “no authority” to support the plaintiffs’ “ability to bring claims in a derivative capacity on behalf of the Commonwealth.” *Id.* at 265. Thus, the *Mayberry* Plaintiffs could not sue derivatively on behalf of the Kentucky Retirement Systems because they “lack[ed] standing under this theory.” *Id.* at 266.

Overstreet very clearly holds that, without constitutional standing, the *Mayberry* Plaintiffs did not have derivative, trust beneficiary, or taxpayer standing to represent the Kentucky Retirement Systems. However, it did *not* hold that the inverse also is true, *i.e.*, that if the Tier 3 Group has constitutional standing to assert their personal claims, they then also must have derivative, trust beneficiary, or taxpayer standing to sue on behalf of a state agency.⁸ In its discussion in *Overstreet* of the role of the Attorney General in representing the interests of the Commonwealth, the Supreme Court cited with approval the same cases the Attorney General relies upon in this response. *See Overstreet*, 603 S.W.3d at 265 (citing *Beshear*, *Paxton*, and *Thompson*). The Supreme Court clearly avoided any ruling on

⁸ In determining the *Mayberry* Plaintiffs lacked standing to bring claims in a derivative capacity, the Court did *not* rely upon its earlier reasoning concerning standing in that case that they had not suffered an injury in fact and therefore lacked constitutional standing. *See Overstreet*, 603 S.W.3d at 263-66.

whether KRS 61.645(15) conferred standing on any beneficiaries of the Kentucky Retirement Systems. *See id.* at 261 n.71 (“[W]e express no opinion on whether KRS 61.645 provides to KRS beneficiaries a statutory right—expressly or implicitly—to bring claims on behalf of the plan.”). But it did note that “[n]owhere in [KRS 61.645] is a beneficiary given the right to collect proceeds from a lawsuit on behalf of KRS. . .” *Id.* n.75. Whatever else *Overstreet* says, it clearly does *not* say that the Tier 3 Group has standing to sue on behalf of the Kentucky Retirement Systems under any of their proffered theories.

Kentucky law does not permit a system of private attorneys general who may file lawsuits on behalf of the Commonwealth or any of its agencies. To permit a derivative action on behalf of a state agency, especially when actively opposed by the Attorney General, would erode the “supremacy of the Attorney General as the chief law officer of the Commonwealth.” *Beshear*, 498 S.W.3d at 364. Allowing the Tier 3 Group to intervene in this case on behalf of the Kentucky Retirement Systems would undermine the powers and responsibilities of the Attorney General to coordinate and control litigation on behalf of the Commonwealth and the public interest and to speak with a unified voice on behalf of the government and the people of the Commonwealth. This the Court cannot do. Just like the *Mayberry* Plaintiffs, the Tier 3 Group also lacks any authority to pursue a derivative claim on behalf of KRS, and their motion to intervene must be denied.

IV. Conclusion

For the foregoing reasons, the Tier 3 Group’s motion to intervene should be denied.

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I certify that on March 2, 2021, a copy of the above was filed electronically with the Court and served through the Court's electronic filing system upon the following:

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