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 OBJECTION TO FURTHER PROCEEDINGS AND MOTION TO ENFORCE AND VACATE

The Commonwealth of Kentucky, by and through its Attorney General, hereby tenders its response in opposition to the objection to further proceedings and motion to enforce mandate and vacate consolidation order (the "Objection") filed by the PAAMCO/Prisma Parties and joined by other defendants.

As explained in the Commonwealth's reply in support of its motion to intervene, and as additionally set forth in this response, this Court has jurisdiction over the Commonwealth's motion to intervene. That is, the Court can both obey the command of *Overstreet* to "dismiss the complaint" and allow the Commonwealth to intervene in this action. And because it has jurisdiction to decide the motion to intervene, the Court similarly had authority to enter the consolidation order. Accordingly, there is no risk that further proceedings will be "taint[ed] with

jurisdictional error," and the Court should grant the Commonwealth's motion to intervene.

II. The Court has jurisdiction to hear and decide the Commonwealth's motion to intervene.

First and foremost, this Court has jurisdiction to consider the Commonwealth's motion. Nothing about the writ action in the Court of Appeals and Supreme Court, nor the interlocutory appeal, nor the instructions contained in *Overstreet* divested this Court of jurisdiction to hear and rule on the Commonwealth's motion.

As for the writ, the Kentucky Supreme Court has explained, "[a] trial court retains jurisdiction over the case and its discovery methodology *despite a pending writ*."[1] Thus, the pendency of the writ did not strip this Court of jurisdiction to entertain and decide any motions, including a motion to intervene. Furthermore, the writ that was issued by the Court of Appeals never took effect. By virtue of the appeal of the writ action to the Supreme Court, the writ was deprived of finality. And the Kentucky Supreme Court did not otherwise revive the writ action. *See Overstreet*, 2020 WL 4047469, at *2 n.6 ("Our dismissal of this case [on constitutional standing grounds] renders the Writ Case moot.").

As for the interlocutory appeal, it too did not rob this Court of jurisdiction to hear the motion to intervene. As the Supreme Court has confirmed time and time again, interlocutory appeals do not totally divest a court from all jurisdiction. The

[1] *Norton Hosps., Inc. v. Willett*, 483 S.W.3d 842, 847 (Ky. 2016) (emphasis added).

divestiture is limited solely to the issue of the appeal.[2] Here, the appeal was limited to the issue of qualified official immunity; therefore, immunity was the only issue over which this Court lost jurisdiction while that appeal was pending. The remainder of the case, and all other issues within it, remained pending before this Court until the decision of the Supreme Court became final. This Court therefore retained jurisdiction over other issues in the case, including the Commonwealth's motion to intervene.

As for *Overstreet*, nothing within the opinion forbids this Court from ruling on the Commonwealth's motion. At the time *Overstreet* was decided, the propriety of intervention was not before the Supreme Court. Indeed, as the Court made explicit, its review was limited: "The only issues before this Court are whether the Plaintiffs have an injury in fact sufficient to support constitutional standing… and whether the trustee and officer defendants are entitled to immunity." Therefore, the Supreme Court's command to "dismiss the complaint," or even "dismiss this case," could not have possibly been intended to preclude this Court from ruling on intervention.

Nothing in the cases cited in footnote 3 of the Objection suggests otherwise. None of those cases involved a motion to intervene filed after a remand by a higher court; therefore, they shed no light on the unique circumstances of this case. In fact, from all of those cases cited, only one case involved a motion to intervene at all, and

[2] *See Garnett v. Oliver*, 45 S.W.2d 815, 817 (1931) ("if the appeal from the particular order or judgment does not bring the entire cause into the appellate court ... further proceedings in the conduct of the cause may properly be had in the lower court."); *Commonwealth v. Bailey*, 71 S.W.3d 73, 84 (Ky. 2002) ("An interlocutory appeal, however, generally only deprives the trial court of the authority to act further in the matter that is subject of the appeal, and the trial court is not divested of the authority to act in matters unrelated to the appeal.").

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there the Supreme Court arguably *approved of* intervention of a new plaintiff when the original plaintiff lacked standing to sue. *See United Bhd. of Carpenters v. Birchwood Conservancy*, 454 S.W.3d 837, 841–42 (Ky. 2014) ("Therefore, when the new plaintiffs (who did possess the authority to file suit) intervened and were allowed to substitute themselves for Birchwood Conservation Center, adding several new damages claims, it was as if an entirely new complaint had been filed.").

No matter what meaning is ascribed to the terms "dismiss this case" or "dismiss the complaint," the fact remains that the Commonwealth filed its motion to intervene before *Overstreet* became final. As a result, it is within the discretion of this Court whether to permit the Commonwealth to intervene. *Arnold v. Commonwealth ex rel. Chandler*, 62 S.W.3d 366, 369 (Ky. 2001) (holding that even *after* entry of a final judgment, it is within the discretion of the court to permit an intervention).

II. The Court's consolidation of this action and the Commonwealth's separate action against the same defendants was proper.

The primary objection to the Court's order consolidating the two actions is that the Court is without any jurisdiction to do so. As just explained, however, this Court undoubtedly does have jurisdiction to decide the Commonwealth's motion, so the defendants' argument on this point fails. The second part of the defendants' objection to consolidation – that combining the two cases is somehow imprudent – is also meritless. For it is "well settled" that if multiple civil actions are filed involving the same claims and the same parties, the first action filed should proceed and the later-filed action should be held in abeyance. *See Brooks Erection Co. v. William R.*

Montgomery & Assocs., Inc., 576 S.W.2d 273, 275 (Ky. App. 1979) ("[T]he law is well settled that a second action based on the same cause will generally be abated where there is a prior action pending in a court of competent jurisdiction [w]ithin the same state, between the same parties, involving the same or substantially the same subject matter and cause of action, and in which prior action the rights of the parties may be determined and adjudged."). Here, there is no compelling reason to depart from this long-standing rule.

For all of the reasons articulated in this response, the Court should grant the Commonwealth's timely[3] motion to intervene.

Respectfully submitted,

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[3] The Commonwealth hereby expressly incorporates into this response all of the timeliness arguments it made in the reply in support of the motion to intervene.

CERTIFICATE OF SERVICE

I certify that on August 23, 2020, 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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