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

OBJECTION BY THE BLACKSTONE DEFENDANTS TO THE OFFICE OF THE ATTORNEY GENERAL'S MOTION TO INTERVENE

The Blackstone Defendants submit this Objection to the Attorney General's improper and untimely motion to intervene in a case that the Kentucky Supreme Court has expressly directed be dismissed.[1] The Circuit Court lacks authority to consider this motion, and the Attorney General's supposed interest in pursuing baseless claims challenging investments that produced KRS several hundreds of millions of dollars in profits, net of fees, does not excuse his nearly 31-month delay. For the foregoing reasons, the Blackstone Defendants request that the Circuit Court deny the motion.

PRELIMINARY STATEMENT

This Court lacks jurisdiction to hear the Kentucky Attorney General's untimely and unsupportable motion to intervene. After a nearly three-year journey through every level of the Kentucky courts, on July 9, 2020, the Kentucky Supreme Court ruled that this case is not justiciable. *Overstreet* v. *Mayberry*, No. 2019-SC-000041-TG, 2020 WL 4047469, at *14 (Ky. 2020). Accordingly, this action was remanded "to the circuit court with direction to dismiss the

[1] The Blackstone Defendants respond to the motion to intervene without prejudice to, and while expressly preserving, their argument that this Court lacks jurisdiction to hear the motion or take any other action other than dismissing this case as directed by the Supreme Court, and further reserving all rights to seek dismissal of the Attorney General's complaint in intervention, should its filing be permitted.

complaint." *Id.* The direction of the Supreme Court was clear and unambiguous: This Court lacks lawful authority to take any further action in this case other than to dismiss the complaint as directed by the Supreme Court.

As this Court recognized in September 2019 when it declined to rule on the *Mayberry* Plaintiffs' motions, including a motion to amend the complaint, while the case was on appeal, "there is a substantial question as to whether [the circuit court] retains jurisdiction to adjudicate . . . pending motions while this case is on appeal to the Kentucky Supreme Court." Sept. 25, 2019 Order at 1. We are now one step further—the Supreme Court unambiguously has directed this Court to dismiss the case. Under Kentucky's well-established mandate rule, this Court's jurisdiction is limited to one single act: dismissing the case. It lacks jurisdiction to hear the Attorney General's motion.

Even if this Court had jurisdiction over this case, the Attorney General's motion to intervene should be denied because it is blatantly untimely. Nearly 31 months since the original complaint was filed in December 2017, and after expressly declining to participate, the Attorney General now seeks to intervene in an action that has been pronounced dead. The law does not permit the Attorney General to lie in the weeds during almost three years of costly litigation before electing to intervene. All five factors that Kentucky courts evaluate in considering timeliness weigh against intervention here: (1) the suit has progressed far beyond the point of intervention because the Supreme Court ordered it dismissed; (2) the rights the Attorney General purportedly seeks to vindicate belong to KRS, not to the Commonwealth; (3) the Attorney General knew about this case *before the Defendants did* and declined to participate almost 31 months ago; (4) the prejudice to the 28 Defendants named in the Intervening Complaint and to the judicial system would be enormous given the significant resources devoted

to this case both in this Court and on appeal; and (5) the fact that the Attorney General has filed a separate, identical action in Franklin Circuit Court eliminates any possible prejudice to the Attorney General from denying the motion.

The Attorney General's motion devotes *one paragraph* to timeliness and does not discuss *any* of the relevant factors. Mot. at 4. The Attorney General's stated interest in "recovering several hundred million dollars [in] damages" on behalf of the Commonwealth does not in any way excuse his waiting for years to intervene in this action. *Id.* at 3. Moreover, that supposed interest is based on a false premise: The investments challenged in this litigation produced *several hundred million dollars in profits* for KRS, net of fees. The Attorney General's newfound desire to adopt a baseless and nonsensical complaint should not be afforded any weight.

For all of these reasons, and those set forth below, the Attorney General's motion should be denied.

BACKGROUND

This lawsuit has been vigorously litigated for approximately 31 months at every level of the Kentucky court system. It was commenced in December 2017 by the *Mayberry* Plaintiffs, who specifically alleged that, prior to filing suit, they had "made demand in writing upon the Attorney General of Kentucky . . . and that demand was declined." Am. Compl. ¶ 24.

Defendants filed 24 separate motions to dismiss, totaling well over 1,000 pages, including a consolidated motion to dismiss on the grounds that the *Mayberry* Plaintiffs lacked standing to bring this suit on behalf of KRS and the Commonwealth. Over the next nine months, in addition to voluminous briefing on the motions to dismiss, the parties engaged in substantial

additional motion practice, including motions to stay discovery, motions to strike, motions for open proceedings, and applications for various other relief.

On April 19, 2018, nominal defendant KRS informed the Circuit Court in a "Joint Notice" that, while it supported the claims asserted by the *Mayberry* Plaintiffs, KRS would not bring them because "there would be significant risk to KRS . . . especially in the form of costs of litigation and devotion of limited KRS time and resources." Joint Notice at 2. The Joint Notice further stated that "KRS has considered the possibility that Named Plaintiffs' action could be dismissed on standing grounds" and that "KRS reserves all rights . . . to step into the shoes of the Named Plaintiffs and directly pursue such claims should the Named Plaintiffs' claims be dismissed on standing grounds and should KRS then determine that it is in its best interests to do so." *Id.* at 4. Notably, three individuals who were present at the March 2018 meeting between KRS and the *Mayberry* Plaintiffs' counsel that resulted in the filing of the Joint Notice attended on behalf of the then-Governor and joined the Attorney General's office last December.[2]

Also, in February through April 2018, Defendants made initial discovery productions, totaling many thousands of pages, in response to the *Mayberry* Plaintiffs' document requests and the Court's March 6, 2018 scheduling order, and served responses and objections to the *Mayberry* Plaintiffs' requests.

On August 23, 2018, this Court held several hours of oral argument on the motions to dismiss. The parties then engaged in additional briefing on whether the *Mayberry* Plaintiffs had standing after the Kentucky Supreme Court issued its decision in *Commonwealth*

[2] *See* Defs.' Response to Pl.'s Mot. for Summ. J. at 5 & n.3, *KRS* v. *Morgan*, CA No. 18-CI-1243 (Franklin Cir. Ct. Mar. 12, 2019) (quoting KRS Visitor Sign-in Log, Ex. C to Defs.' Mot. for Summ. J., *Morgan*, CA No. 18-CI-1243 (Franklin Cir. Ct. Feb. 14, 2019)).

Cabinet for Health & Family Services v. *Sexton*, 566 S.W.3d 185 (Ky. 2018). On November 30, 2018, this Court issued a 33-page opinion denying the motions to dismiss.

On December 31, 2018, the Trustees and Officers appealed from the Court's denial of their immunity defenses. Certain other Defendants—including the Blackstone Defendants—filed two separate petitions for writs of prohibition challenging this Court's jurisdiction. After a full round of briefing, on April 23, 2019, the Court of Appeals consolidated the petitions and ruled that the *Mayberry* Plaintiffs lacked standing and vacated the Court's order denying the motions to dismiss. The *Mayberry* Plaintiffs appealed that decision to the Supreme Court. On a parallel track, the parties also briefed the Trustees' and Officers' interlocutory appeals, which, following additional motion practice, were transferred to the Supreme Court and consolidated for argument with the writ appeal. Before the Court of Appeals and Kentucky Supreme Court, the parties filed a combined 47 submissions, totaling over 4,400 pages.

On October 24, 2019, the Supreme Court held over two hours of oral argument on the consolidated appeals. Approximately nine months later, after additional motion practice, on July 9, 2020, the Court issued a 33-page decision ruling that the *Mayberry* Plaintiffs lacked standing and directing this Court to dismiss the complaint. *Overstreet*, 2020 WL 4047469, at *14. The Court further dismissed the *Mayberry* Plaintiffs' appeal of the writ of prohibition as moot, *id.* at *2, thereby leaving in place the Court of Appeals' decision granting the writ and further confirming that the Circuit Court lacks jurisdiction. Eleven days after the Supreme Court's decision—and almost 31 months after this case was filed—the Attorney General filed his motion to intervene and first sought to become involved in this case.

ARGUMENT

I. The Circuit Court Lacks Jurisdiction Over the Motion to Intervene As a Result of the Supreme Court's Ruling Directing It to Dismiss the Complaint.

On July 9, 2020, the Supreme Court ruled that the *Mayberry* Plaintiffs lack standing and that this case is not justiciable. *Overstreet*, 2020 WL 4047469, at *14. The Court's mandate, which became final today, is unambiguous: "We remand this case to the circuit court with direction to dismiss the complaint." *Id.*

It is black letter law in Kentucky that "a trial court must strictly follow the mandate given by an appellate court in that case. The court to which the case is remanded is without power to entertain objections or make modifications in the appellate court decision." *Buckley* v. *Wilson*, 177 S.W.3d 778, 781 (Ky. 2005) (internal quotation marks omitted) (citation omitted); *see Dunn* v. *Maze*, 485 S.W.3d 735, 742 (Ky. 2016) ("[A] trial court is bound by an appellate court's mandate on remand and has no power to act in a manner inconsistent with it."). The "mandate" is the "official directive" of the Supreme Court, as "explained by the opinion of the court." *Begley* v. *Vogler*, 612 S.W.2d 339, 341 (Ky. 1981). The "mandate rule . . . provides that on remand from a higher court a lower court must obey and give effect to the higher court's express or necessarily implied holdings and instructions." *Brown* v. *Commonwealth*, 313 S.W.3d 577, 610 (Ky. 2010); *see Hutson* v. *Commonwealth*, 215 S.W.3d 708, 714 (Ky. App. 2006) ("An appellate court might direct a trial court, such as by ordering a new trial or the dismissal of charges. With such a mandate, the trial court's authority is only broad enough to carry out that specific direction."). Now that the Supreme Court's decision is final, this Court's authority is limited to dismissing the complaint as directed by the Supreme Court.

Indeed, under the Supreme Court's ruling on standing, this Court has *never* had jurisdiction over this action because the action was never justiciable. Ky. Const. § 112. The

Attorney General cannot "intervene" in an action over which the Kentucky Supreme Court has expressly held this Court lacks jurisdiction. *See Casino Magic Corp.* v. *Ladner*, 666 So. 2d 452, 460 (Miss. 1995) ("[H]aving found that the trial court lacked jurisdiction to hear the merits of the case, it was also without jurisdiction to hear the motion to intervene."). Indeed, allowing the Attorney General to intervene "in order to revive claims that were dismissed . . . for want of jurisdiction" would violate "the long recognized rule that if jurisdiction is lacking at the commencement of a suit, it cannot be aided by the intervention of a plaintiff." *Police & Fire Ret. Sys. of City of Detroit* v. *IndyMac MBS, Inc.*, 721 F.3d 95, 110–11 (2d Cir. 2013) (internal quotation marks omitted) (citation omitted).

Put simply, the highest court in the Commonwealth has held that the Circuit Court has no jurisdiction over this case. As such, this Court lacks any authority to do anything other than effectuate final dismissal of this action as mandated by the Kentucky Supreme Court.

II. The Attorney General's Motion to Intervene is Untimely.

Even if this Court had jurisdiction to hear the Attorney General's motion to intervene—and it does not—that motion should be denied under CR 24 because it is blatantly untimely.

The Attorney General moves for intervention "as of right" under KRS 15.020, but that statute does not provide the Attorney General with a general right to intervene. *Compare, e.g.*, KRS 15.240 (providing Attorney General with right to intervene in certain actions brought under listed environmental chapters); KRS 418.075 (authorizing the Attorney General to intervene in an action involving the validity of a statute or the constitutionality of an ordinance or franchise). But whether considered as a motion for intervention as of right or not, each of the

five factors that Kentucky courts evaluate in determining the timeliness of a motion to intervene weighs heavily against granting this motion. Those factors are:

> (1) [T]he point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervenor knew or reasonably should have known of his interest in the case; (4) the prejudice to the original parties due to the proposed intervenor's failure, after he or she knew or reasonably should have known of his or her interest in the case, to apply promptly for intervention; and (5) the existence of unusual circumstances militating against or in favor of intervention.

Carter v. *Smith*, 170 S.W.3d 402, 408 (Ky. App. 2004) (internal quotation marks omitted).

Notably, a "party wishing to intervene after final judgment has a 'special burden' to justify the untimeliness." *Arnold* v. *Commonwealth*, 62 S.W.3d 366, 369 (Ky. 2001) (quoting *Monticello Elec. Plant Bd.* v. *Bd. of Educ. of Wayne Cnty.*, 310 S.W.2d 272, 274 (Ky. 1958)). As Justice VanMeter, then sitting on the Court of Appeals, wrote in words equally applicable here, where it is "difficult to believe" that a proposed intervenor was not aware of the proceedings earlier, "[t]o permit intervention at this late date would only serve to encourage parties to wait to see what the circuit court ruling might be and then seek to intervene only after an unfavorable ruling." *Louisville Metro Police Dep't* v. *Baker*, 2016 WL 837366, at *4 (Ky. App. Mar. 4, 2016). Accordingly, in the few cases in which Kentucky courts have granted such post-judgment motions, the movant lacked notice of the underlying cause of action. *See, e.g.*, *Polis* v. *Unknown Heirs of Jessie C. Blair*, 487 S.W.3d 901, 907 (Ky. App. 2016); *Rosenbalm* v. *Commonwealth Bank of Middlesboro*, 838 S.W.2d 423, 429 (Ky. App. 1992). That is not the case here. The Attorney General cannot possibly sustain his "special burden."

A. <u>The Point to Which the Suit Has Progressed (Factor 1)</u>

In the one paragraph devoted to the issue of timeliness, the Attorney General claims that his motion is timely because the "Supreme Court's mandate [directing this Court to dismiss the case] has not issued, and this matter has not yet been remanded for further

proceedings." Mot. at 4. He further claims that "the only action taken thus far has been the disposition of the Defendants' motions to dismiss[,]" and "there has been no discovery." *Id.*

This is false. This action has progressed for nearly three years before this Court, the Court of Appeals, and the Supreme Court. Along the way, there have been dozens of motions, thousands of pages of briefing, thousands of documents produced by dozens of Defendants during initial discovery, and multiple trial and appellate court rulings. *See supra* Background. The parties have litigated numerous discovery issues, including the scope of a protective order to govern discovery and the privilege, if any, that should apply to KRS's communications with its advisors on the investments at issue. The parties also have litigated two writ petitions and two interlocutory appeals, resulting in a lengthy Supreme Court opinion holding that the *Mayberry* Plaintiffs lacked standing. Now, only after the Supreme Court ordered dismissal, and after watching from the sidelines for almost 31 months, the Attorney General has lobbed in his belated request to intervene. *See CE Design Ltd.* v. *King Supply Co.*, 791 F.3d 722, 726 (7th Cir. 2015) (denying motion to intervene where the case "had dragged on for [3] years and would be doomed to drag on for additional years were the motion to be granted"); *Katebian* v. *Missaghi*, No. 18-13379, 2019 WL 6210691, at *5 (E.D. Mich. Nov. 21, 2019 (denying motion to intervene where party waited less than a year to intervene and the court had "already adjudicated a motion to dismiss, and the parties have filed their witness lists and numerous discovery motions"). It is far too late for such a request under the governing standards.[3]

[3] To the extent the Attorney General argues that this motion is timely because he filed it nine days before the Supreme Court's decision became final, that is unavailing because prior to the decision becoming final, this Court had no jurisdiction over this case whatsoever. *Johnson* v. *Commonwealth*, 17 S.W.3d 109, 113 (Ky. 2000) ("[T]he filing of a notice of appeal divests the trial court of jurisdiction to rule on any issues while the appeal is pending."); *see Taylor* v. *KeyCorp*, 680 F.3d 609, 617 (6th Cir. 2012) (Once the notice of appeal was filed "the district court was without jurisdiction to

B. The Purpose For Which Intervention is Sought (Factor 2)

The Attorney General seeks to intervene because he claims that the Commonwealth has an interest in "recovering several hundred million dollars [in] damages." Mot. at 3. As an initial matter, that purpose does not explain or excuse the Attorney General's failure to timely seek intervention. If anything, it makes the Attorney General's delay even more inexcusable, given the resources expended by all parties, including KRS, to litigate a case brought by improper plaintiffs who lack standing. And, in any event, the purported rights the Attorney General belatedly seeks to vindicate belong to KRS, not to the Commonwealth. KRS, not the Commonwealth, entered into the investment agreements at issue. Those investment contracts set forth the parties' respective obligations, including KRS's obligation to indemnify the Blackstone Defendants in the event that KRS breached its representations and warranties relating to the investments. The Commonwealth was not a party to those contracts, each of which expressly prohibited third-party beneficiaries. Indeed, although the Attorney General now alleges that the Blackstone Defendants breached duties owed to the Commonwealth, the Intervening Complaint does not allege *any facts* about a relationship between the Blackstone Defendants and the Commonwealth that could give rise to any duty owed by the Blackstone Defendants to the Commonwealth writ large.[4]

address the motion [to intervene]."); *Rolle* v. *New York City Hous. Auth.*, 294 F. Supp. 574, 576 (S.D.N.Y. 1969) ("[A] valid and timely appeal having been taken, this Court is without jurisdiction to grant applicant's motion [to intervene] in the absence of a remand of the question from the Court of Appeals.").

[4] Moreover, as discussed *infra*, denying the motion to intervene will not preclude the Attorney General from pursuing the interests it purports to have in this litigation. The fact that the Attorney General filed a separate, but identical, lawsuit in the Franklin Circuit Court less than 24 hours after filing this motion moots the motion. It further demonstrates that the Attorney General understands that this Court lacks jurisdiction over a case that the Supreme Court has directed be dismissed.

The Attorney General's stated interest in recovering several hundred million dollars in damages should thus be afforded no weight. Indeed, and putting aside that these claims belong to KRS, the three investments at issue in this case provided KRS with over $400 million in profits, net of fees—there are no "damages" for the Attorney General to recover.

C. The Length of Time Preceding the Application During Which the Proposed Intervenor Knew or Should Have Known of Its Interest (Factor 3)

The Attorney General's delay is particularly inexcusable given that he knew about this action ***before any of the Defendants did***. The Attorney General was offered the opportunity to bring this suit before the *Mayberry* Plaintiffs did, and expressly declined. *See* Am. Compl. ¶ 24.[5]

The Attorney General was aware from the outset of this case almost three years ago that Defendants challenged the standing of the *Mayberry* Plaintiffs to bring this suit. Yet, at *no point* between December 2017 and now did the Attorney General seek to intervene. He did not do so in February 2018, when Defendants filed a motion to dismiss on the grounds that the *Mayberry* Plaintiffs lacked standing to sue on behalf of KRS or the Commonwealth; not in April 2018, when KRS filed a Joint Notice acknowledging the standing issue but declined to assert the *Mayberry* Plaintiffs' claims due to lack of resources; not after the Supreme Court's September 27, 2018 decision in *Sexton*, when Defendants demonstrated in filings that constitutional standing constituted an insurmountable hurdle for the *Mayberry* Plaintiffs to bring suit; not in April 2019, when the Court of Appeals held that the *Mayberry* Plaintiffs lacked standing; not in

[5] The Attorney General was also served with the original and amended complaint. And once the case began, it did not proceed in secret. It received front-page media attention in multiple Kentucky newspapers. *See Arnold*, 62 S.W.3d at 369 (it is "difficult to overlook that significant media coverage occurred prior to and following the settlement. The terms were widely known and parties who believed themselves to be prejudiced thereby were under a duty to make timely application for relief. Accordingly, we affirm the trial court's order . . . den[ying] Appellants' motion to intervene.").

October 2019, during the highly publicized oral argument before the Kentucky Supreme Court; and not in the nine months that elapsed between oral argument and the Court's ruling confirming the absence of standing.

Under Kentucky law, and the law of every jurisdiction in the United States, the Attorney General's inexcusable, multi-year delay disqualifies this motion. *See Pearman* v. *Schlaak*, 575 S.W.2d 462, 463 (Ky. 1978) (motion to intervene filed nine days after judgment was untimely as intervenors did not explain why they had been "content to sit under their own 'vine' and let the [defendants] carry the burden" for them); *S. Cent. Bank of Barren Cty., Inc.* v. *Commonwealth Bank & Tr. Co.*, 2013 WL 462267, at *2 (Ky. App. Feb. 8, 2013) ("CR 24.01 does not function as a means for interested parties to idly await a lawsuit's conclusion in an attempt to predetermine the advantages of intervention."); *see also Powell* v. *Tosh*, 2012 WL 289905, at *3 (W.D. Ky. Jan. 31, 2012) (denying motion where potential intervenors knew about the action "from its inception or shortly thereafter" but "only sought to intervene . . . more than 30 months after the Complaint was filed"). This Court should not reward a nearly three-year delay to seek intervention in a suit that was well-publicized, but that the Supreme Court has now ordered be dismissed.[6]

D. The Prejudice to the Original Parties Due to the Delay (Factor 4)

Granting intervention would also cause enormous and unfair prejudice to the 28 Defendants—corporations and individuals—named in the Intervening Complaint. Each of those Defendants expended substantial resources over nearly three years litigating this action up to the Supreme Court. In addition, Kentucky courts have expended significant resources, poring

[6] To the extent that Attorney General Cameron argues that his untimeliness is excused by his election, he does not explain how the interests of the Commonwealth in this action changed between December 2017 and now. Moreover, Attorney General Cameron has been in office since December 2019—nearly eight months—and still did not act until *after* the Supreme Court ordered dismissal.

through thousands of pages of briefs, hearing hours of oral argument, and writing lengthy decisions, all to have the Attorney General seek to revive this case at the 13th hour. *See Amalgamated Transit Union Int'l, AFL-CIO* v. *Donovan*, 771 F.2d 1551, 1553 (D.C. Cir. 1985) ("It would be entirely unfair, and an inexcusable waste of judicial resources, to allow a potential intervenor to lay in wait until after the parties and the trial and appellate courts have incurred the full burden of litigation before deciding whether to participate in the judicial proceedings.").

E. The Existence of Unusual Circumstances Militating Against Intervention (Factor 5)

Nothing in the motion explains why intervention in an action that the Supreme Court has directed be dismissed is necessary to achieve the Attorney General's stated objectives. The Attorney General seems to agree, having filed a separate and identical action in Franklin Circuit Court last week. Where a potential intervenor has the ability to bring his own suit—and *especially where he has done just that*—there can be no prejudice from the denial of a motion to intervene. *Powell*, 2012 WL 289905, at *3 (no prejudice because "participation in this action is not their only available means for seeking relief, as they can pursue their claims in a separate declaratory judgment action"); *see In re Holocaust Victim Assets Litig.*, 225 F.3d 191, 199 (2d Cir. 2000) ("Because [proposed intervenors] remain free to file a separate action, they have not established that they will be prejudiced if their motion to intervene is denied."). Moreover, any "perceived hardship" from having to proceed by separate action would not exist had the Attorney General acted with diligence and sought to intervene during the first 31 months of this action. Any supposed prejudice "amounts to a self-imposed wound." *R & G Mortg. Corp.* v. *Fed. Home Loan Mortg. Corp.*, 584 F.3d 1, 9 (1st Cir. 2009).

III. The Attorney General Should Not Be Granted Permissive Intervention.

This Court should also reject the Attorney General's motion to intervene on a conditional basis under CR 24.02(b). As with intervention as of right, this Court does not have jurisdiction to grant permissive intervention where the Supreme Court has held that there is no jurisdiction over the action, and expressly directed that this case be dismissed. Moreover, courts analyze the timeliness element for permissive intervention even *more* strictly than they do for intervention as of right. *League of United Latin Am. Citizens* v. *Wilson*, 131 F.3d 1297, 1308 (9th Cir. 1997). As described above, the Attorney General's motion comes far too late, is unsupportable under the applicable standards, and granting permissive intervention would cause significant and unfair prejudice to the Defendants.

Respectfully submitted,

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