

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

JEFFREY C. MAYBERRY, *et al.*

PLAINTIFFS

v. **PLAINTIFFS' OPPOSITION TO LERACH GROUP'S
MOTION FOR LEAD/LIAISON COUNSEL AND SUPPORT OF
THE ATTORNEY GENERAL'S MOTION TO INTERVENE**

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

DEFENDANTS

* * * * *

Plaintiffs Ben Wyman, Jason Lainhart and Don Coomer (the “Wyman Plaintiffs”) file this response (i) in opposition to the Lerach Group’s Motion for Appointment of Lead Plaintiff, Lead Counsel, and Liaison Counsel (the “Motion for Lead Counsel”) to the extent that the Court chooses to hear that motion, and (ii) in full support of the Office of the Attorney General’s Motion to Intervene on Behalf of the Commonwealth of Kentucky (the “Motion to Intervene”).

The Motion for Lead Counsel should be denied because there is no authority under Kentucky law for the appointment of such “lead” or “liaison” roles. Even if such roles were recognized under Kentucky law, there would be no basis for such appointment before the Court determines if any individual plaintiffs have standing on grounds not precluded by the Supreme Court’s recent ruling in this matter. As an initial comment on the merits of the request, the Lerach Group makes no mention of any commitment to the best interests of the Commonwealth as its overarching goal in the litigation. Indeed, the advancement of its Motion and its

proposed order, which would supplant even the Attorney General in case determinations, reveal the goal of the Lerach Group to solidify its complete control of this litigation to its own advantage *vis-à-vis* other lawyers and parties.

The Attorney General's Motion to Intervene should be granted because it will allow the Attorney General to advance for the benefit of the Commonwealth the same well-pled claim of the Wyman Plaintiffs that had survived Defendants' motions to dismiss, and intervention by the Attorney General should obviate any question of the "need" for Lead Counsel.

THE MAYBERRY PLAINTIFFS' MOTION FOR LEAD COUNSEL IS BOTH PREMATURE AND UNSUPPORTED BY KENTUCKY LAW

In its July 27, 2020 Order, this Court set the Kentucky Attorney General's Motion to Intervene for hearing on August 17, 2020. Two days later, the Mayberry Plaintiffs filed their Motion for Leave to File a Second Amended Complaint, followed by the Motion for Lead Plaintiff on August 4, 2020. Attempting to take advantage of the Court's direction to hear the Kentucky Attorney General's Motion to Intervene on August 17, 2020, and without seeking the Court's permission, the Lerach Group set the two new motions on August 17, 2020.

The Wyman Plaintiffs do not dispute that a Second Amended Complaint may be appropriate (and indeed they may seek leave to file one of their own in due course); however, there can be no dispute that the Lerach Group's ill-advised Motion for Lead Counsel is premature and unfounded even if the relief it seeks were supported by Kentucky law, which it is not. It establishes that the Lerach Group's focus is not on what is best for the Commonwealth, but rather on claiming a court-

ordered role that includes leadership and control over other lawyers (their former colleagues), over their former clients (the Wyman Three, who terminated the Lerach Group's representation of them due in part to ethical concerns), and also the Attorney General, who is, after all, the Commonwealth's chief legal officer.

This suit was filed by eight current and former members of the Kentucky Retirement System ("KRS"), derivatively on behalf of KRS. The eight named Plaintiffs were formerly represented by four groups of lawyers, including: (1) Michelle Lerach and Jamie Baskin (who, with William Lerach, their non-lawyer consultant, are referred to herein as the "Lerach Group"); (2) Scott, Douglass & McConnico, LLP ("SDM"); (3) the Oldfather Law Firm and Bahe Cook Cantley & Nefzger, PLC (the "Kentucky Counsel"); and (4) Cuneo, Gilbert & LaDuca ("Cuneo").¹ Due to significant differences about case direction and what was and was not in the best interest of the Kentucky Employees Retirement System ("KRS"), the Lerach Group and those plaintiffs aligned with them severed relationships with the remaining counsel and the Wyman Plaintiffs. The Court entered withdrawal orders to effectuate the split.

On September 9, 2019, the Lerach Group filed a Motion for Appointment of Lead Plaintiff, Lead Counsel, and Liaison Counsel ("Prior Motion") where, as here, they asked this Court to designate the Mayberry Five as lead plaintiffs and the Lerach Group as lead counsel for the entire litigation, with sole authority to

¹ Cuneo has stated its intention to withdraw from representing all plaintiffs and is not included in the subsequent discussion.

“implement and manage the prosecution of this litigation.”² The subsequent Supreme Court opinion and the now-pending and welcomed intervention of the Attorney General change none of their ambition. The only difference between the two motions is that the Lerach Group has abandoned its 244 pages of gratuitously *ad hominem* declarations lodged in support of the prior Motion and in this motion instead depend on self-aggrandizing and often inaccurate hyperbole in hopes of convincing the Court that only Michelle Lerach and Jamie Baskin and William Lerach had anything to do with the development, investigation, pleading, argument and overall prosecution of the claims, a fallacious claim readily contradicted by what the Court was able, in significant measure, to observe for itself.³ Further, Kentucky counsel and SDM have no reservations in stating that any review of the

² On September 25, 2019, this Court held the Prior Motion in abeyance, along with the Mayberry Five’s motion to file a different second amended complaint. The Lerach Group formally withdrew the latter motion (for leave to file a second amended complaint) in its Memorandum In Support of Leave to File [the new] Second Amended Complaint, at p. 2. It has never withdrawn the Prior Motion, or the 244 pages of declarations lodged in support of it and filed *in camera*.

³ For example, it is not true that only the Lerach Group has financed the litigation to date; nor is it true that only the Lerach Group has the resources to finance it through to conclusion. It is not true that Michelle Lerach “created and drafted the Complaint” (Motion for Lead Counsel at 24), since the only lawyer who actively worked on the Complaint through the dozens of drafts before its filing was the undersigned. It is not true that only the Lerach Group has “any experience” in derivative litigation. As for hyperbole, the Lerach Group’s claim that “their team has done virtually all of the substantive work in this case” (Motion for Lead Counsel at 5) is unsupported. The Wyman Plaintiffs need only point to the record before the Court, rather than rely on a revisionist history drafted by those now trying to claim sole credit, to show who it actually was on the plaintiffs’ team that initiated, executed and submitted discovery requests, pursued that discovery, opposed confidentiality, filed pleadings advancing the plaintiffs’ claims, conducted meet and confer conferences, presented motions and argued in opposition to defense motions.

actions, debates and ultimate collapse of the plaintiffs' legal team would conclude that *at all times* they and the Wyman Three held the interests of KRS paramount, and such review would belie any claim by the Lerach Group that its requested appointments might "minimi[ze] same-side friction." Motion for Lead Counsel at 2.

It is telling that the Lerach Group submits a Proposed Order that solidifies *by name* their positions as Lead Counsel and Liaison Counsel, despite the Attorney General's pending request to intervene. The Order is a real window into what the Lerach Group is up to. Once the Lerach Group's role is entrenched by an "Order" that confirms it as "Lead Counsel," its position in the litigation is preserved and protected whatever the fate of the Second Amended Complaint or change of heart by their clients. This case is about rectifying the enormous losses of the citizens of the Commonwealth, not the fortunes of the Lerach Group.

Kentucky law does not in any event provide for a Court to give control of a case to one group of plaintiffs or their counsel in a straightforward multi-plaintiff case like this one, while denying the remaining plaintiffs the right to fully litigate their case with their counsel of choice. The Motion for Lead Counsel cites no Kentucky authority that allows this relief in derivative litigation. The Wyman Plaintiffs' research has identified no Kentucky jurisprudence authorizing the Court to appoint a lead plaintiff or lead counsel in derivative litigation. Nor has the Wyman Plaintiffs' research identified any Kentucky law that would allow this Court to order the Attorney General's prosecution of the direct claims of the Commonwealth to be subordinated to the direction of "lead counsel" representing

derivative plaintiffs. In short, the Motion for Lead Counsel seeks a remedy that simply does not exist under Kentucky law in derivative litigation, and thus the Motion should be denied.

That is particularly true where, as here, the very parties filing the Motion for Lead Counsel have yet to establish they have constitutional standing to bring the derivative claims they seek sole authority to prosecute. In the event any individual plaintiffs were to establish that they have constitutional standing to assert claims in this matter, it may then become ripe for the Court to establish roles and procedures to promote efficient communication with the Court and coordination among the parties – although not on terms remotely resembling the power grab proposed by the Lerach Group and its clients. Until such time, any order on the Motion for Lead Counsel is as premature as it is unwarranted.

THE KENTUCKY ATTORNEY GENERAL SHOULD BE ALLOWED TO INTERVENE ON BEHALF OF THE COMMONWEALTH

On July 9, 2020, the Kentucky Supreme Court issued its Opinion in consolidated interlocutory appeals *Overstreet v. Mayberry*, 2019-SC-000041 and *Aldridge v. Mayberry*, 2019-SC-000042 (“Opinion”). The Kentucky Supreme Court held that under its recent *Sexton* ruling, which issued long after this case was filed, neither the Mayberry Five nor the Wyman Plaintiffs had constitutional standing to bring the derivative claims asserted in their First Amended Complaint (the “Complaint”) on behalf of KRS and the taxpayers of the Commonwealth. Consequently, eleven days later, on July 20, 2020, the Kentucky Attorney General filed a Motion to Intervene in this case in order to assert, as direct claims, the same

well-pled claims that each of the plaintiffs had asserted in the Complaint as derivative claims on behalf of the Commonwealth. The Attorney General also filed a separate action in Franklin County Circuit Court asserting the same claims, which has since been transferred and consolidated into this action.

The Motion to Intervene is timely, having been filed before any meaningful discovery has been conducted in this case. Moreover, the Kentucky Attorney General's complaint simply seeks to assert, directly on behalf of the Commonwealth, claims and allegations that have already survived Defendants' myriad motions to dismiss. Defendants clearly were on notice of those claims, and their opposition to those claims now being spearheaded by dedicated public servants directly on behalf of the Commonwealth is disingenuous as best. Effectively, Defendants are trying to create a gambit so that the valid claims cannot be prosecuted derivatively on standing grounds but also cannot be prosecuted by the Attorney General through this case on purported jurisdictional grounds. Defendants' position is that no one can bring claims against them. There is no basis for such a stratagem. The Wyman Plaintiffs fully support the Kentucky Attorney General's intervention to redress the devastating harm that Defendants have wrongfully inflicted on the Commonwealth.

Some Defendants oppose the Motion to Intervene by arguing that the writ appeal and the interlocutory appeals divested this Court of jurisdiction to even consider the filing. That is not Kentucky law. The Kentucky Supreme Court held in *Commonwealth Fin. & Admin. Cabinet v. Wingate* that "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.” 460 S.W.3d 843, 849 (Ky. 2015) (citing *Garnett v. Oliver*, 45 S.W.2d 815, 817 (Ky. 1931)); see also *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.”).

Here, the only issue on appeal was whether the derivative plaintiffs (*i.e.*, the Wyman Plaintiffs and the Mayberry Five) had constitutional standing to assert the claims set forth in the Complaint. The crossclaim filed by certain hedge fund defendants against KRS in this matter was never part of the appeal, so there cannot be any credible argument that the “entire cause” was before any appellate court. For that reason, the Kentucky Supreme Court did not (as wrongly suggested by more than one Defendant) mandate that the entire case should be dismissed, but rather remanded the case and directed the Court to “dismiss the complaint.”⁴ Opinion at 36. Importantly, none of the appeals implicated the substantive merits of the claims alleged in the Complaint. The only issues on appeal were immunity of the trustees and officers (not addressed) and whether the derivative plaintiffs had constitutional standing to bring the claims. The standing of the Kentucky Attorney General to bring those same claims was not challenged in any of the appeals, nor

⁴ The Kentucky Supreme Court also dismissed the writ appeals “as moot.” Opinion at 8 n. 4 and 6.

could it be, and this Court is fully authorized to consider, and grant, the Commonwealth's Motion to Intervene.

CONCLUSION

The Wyman Plaintiffs oppose the Mayberry Plaintiffs' ill-advised, unauthorized, and premature Motion for Lead Counsel, and ask that that it be denied outright or, alternatively, that consideration of such motion be deferred until such time that the constitutional standing of individual plaintiffs is established by the Court. The Wyman Plaintiffs fully support the Kentucky Attorney General's Motion to Intervene and applaud the Attorney General's decision to seek recovery directly for the Commonwealth based on the well-pleaded claims that had been asserted as derivative claims in the First Amended Complaint.

Respectfully submitted,

/s/ Ann B. Oldfather

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CERTIFICATE OF SERVICE

The above signature certifies that, on August 7, 2020, the foregoing has been filed with the Clerk of the Court and was served via email in accordance with any notice of electronic service or, in the absence of an electronic notification address, via email or mail as indicated below, to:

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